STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM SLOBIN, Personal Representative of the ESTATE of MARTIN SLOBIN, Plaintiff-Appellant, v HENRY FORD HEALTH CARE, Defendant-Appellee.	UNPUBLISHED July 9, 2002 No. 216196 Wayne Circuit Court LC No. 97-720935-CP

Before: White, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

In this dispute regarding the reasonableness of the fees charged for copies of plaintiff Martin Slobin's[1] medical records, plaintiff appeals as of right from an order granting summary disposition pursuant to MCR 2.116(C)(8) and (10) in favor of defendant and from an order denying summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff. We affirm in part and reverse in part.

I. Facts and Proceedings

A. The Contract Between Defendant and Smart

In July 1992, defendant entered into a contract with Smart Corporation (Smart) for Smart to respond to patient and other entity requests for copies of medical records. Under the contract, all requests for copies of medical records are directed to defendant, and defendant's employees collect the records for Smart; defendant then provides Smart with the request and pertinent pages of the medical record, and Smart is responsible for copying and mailing the medical record, along with an invoice for retrieval and copying charges, to the requesting party. Smart is responsible for paying all shipping costs associated with the request for records and for collecting all charges from the requesting party. All fees received in connection with the copying of the records are retained by Smart. The contract also provides that in the event the request for medical records comes from an attorney or insurance company, Smart will pay a $5

[1] Plaintiff died on December 6, 2000. As a result, this Court, in an order dated April 20, 2001, substituted plaintiff's personal representative, William Slobin, as plaintiff of record. For the purposes of this appeal, "plaintiff" will refer to Martin Slobin.

retrieval fee to defendant (later increased to $7) prior to receiving payment from the requesting party, and that Smart will provide five hundred free copies per month to defendant's billing office. In order to assist Smart with its duties, defendant allowed Smart to place one of its copying machines at defendant's medical facility. This copying machine was then operated, thirty hours a week, by a Smart employee.

According to Mary Theobold, defendant's supervisor of medical records, defendant entered into the service contract with Smart because it was having difficulty keeping up with all the requests it received for medical records. Theobold testified in her deposition that Smart was the only company defendant considered when it decided to outsource its copying needs, that before contracting with Smart defendant charged attorneys and their clients the same rate for requested records, that defendant never charged anyone more than $103 for a complete record, and that no one was charged sales tax. Theobold also testified that before contracting with Smart defendant had provided other health care providers, government agencies, armed forces, and social service agencies (select entities) requested records at no charge, a practice that continued under Smart.[2] Theobold further stated that while there was no contract language to limit the rates Smart could charge for record copying, defendant hoped Smart would charge patients who requested their records a discounted rate. Theobold also acknowledged that defendant did not have any control over Smart's profit margin.

B. The Instant Action

Plaintiff, through his attorney, requested a copy of his medical record from defendant. In compliance with plaintiff's request, defendant provided Smart with the necessary pages of plaintiff's medical record, and Smart, in turn, provided plaintiff's attorney with twenty-two pages of his medical record at a cost of $44.26. This charge included a $7 retrieval fee, a flat fee of $15 for the first five pages, an $.85 per page fee for each additional page, a $5.30 fee for shipping and handling, and sales tax.

As a result of these charges, plaintiff filed the instant four count action against defendant. In his first amended complaint, plaintiff alleged that defendant, by contracting with Smart, (1) violated its common law duty to provide copies of medical records at a reasonable cost, (2) committed an unfair trade practice in violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., by charging prices grossly in excess of copy prices available elsewhere, (3) breached its fiduciary duty to plaintiff by allowing Smart to charge rates in excess of the marginal costs of copying records, and (4) tortiously acted in concert with Smart to require patients to pay unreasonable fees for copies of their medical records. In his summary disposition motion, plaintiff also argued that defendant's arrangement with Smart amounted to an illegal subsidy because it allowed Smart to recoup the losses it accrued by providing free medical records to select entities and that both case law and public policy established a clear, bright-line "no subsidy" rule.

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[2] While the contract did not contain any provision requiring Smart to provide medical records free of charge to other health care providers, government agencies, armed forces, and social service agencies, it is undisputed that Smart provided these entities with requests free of charge.

In response to plaintiff's motion, defendant filed its own summary disposition motion, arguing that there is no private, common law right to receive medical records at a reasonable cost.[3] In addition, defendant maintained that the Public Health Code provides an adequate and exclusive remedy for challenging a hospital's copying charges and that, as such, no private cause of action exists. Defendant also argued that assuming a private cause of action exists, plaintiff failed to provide any evidence establishing that the fees charged by Smart were unreasonable, and that, because Michigan law did not recognize a fiduciary duty between a hospital as a provider of medical records and a former patient, plaintiff had failed to state a claim of breach of fiduciary duty. Defendant further contended that, assuming the MCPA applied, plaintiff failed to show that the copying charges violated the MCPA, that plaintiff's concert of action allegation must be dismissed because it was not an independent theory of liability, and that plaintiff's payment for the records precluded any claims he may have had under the voluntary payment doctrine. Following a hearing on the parties cross-motions for summary disposition, the circuit court entered an order granting defendant's motion for summary disposition and denying plaintiff's motion for summary disposition. The orders entered by the trial court stated that the motions were granted and denied respectively based on briefs and oral arguments of the parties.

II. Standard of Review

We review a trial court's determination regarding summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In deciding whether summary disposition is appropriate, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it in the light most favorable to the nonmoving party. *Id.* If the nonmoving party fails to present documentary evidence establishing a material factual dispute, the motion is properly granted. *Id.* at 455.

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001), citing *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) may be granted only when the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possible justify recovery.'" *Maiden*, *supra* at 119, quoting *Wade*, *supra* at 163.

III. Analysis

A. Plaintiff's Common law Challenge

Plaintiff first contends that he has a common law right to obtain copies of his medical records for a reasonable fee, that this common law right is derived from *Graham v Thompson*, 167 Mich App 371; 421 NW2d 694 (1988), and *In re Document Fees*, 224 Mich App 665; 569

[3] Defendant had previously filed a motion for summary disposition pursuant to MCR 2.116(C)(8) on December 4, 1997; however, this motion was denied by the trial court and that decision has not been appealed. Accordingly, the December 4, 1997 motion is a subject of this appeal.

NW2d 898 (1997), and that this common law right has been codified in MCL 333.20201(2)(b) of the Public Health Code, MCL 333.1101 *et seq*. Assuming, without deciding, that there is a common law right to access and copy medical records, and that incident to that right is a common law right to obtain a copy of the records at a reasonable cost, we conclude that plaintiff has failed to establish a genuine issue of material fact that defendant violated such a right.

Here, it is undisputed that defendant provided plaintiff with a copy of his medical record for $44.26. Because the right to meaningful access to one's medical records is the essence of any common law right to obtain copies of the records at a reasonable fee, and because the $44.26 charge did not realistically impede plaintiff's access to his records, plaintiff's common law claim was properly dismissed, even though the charge may have been excessive.

B. Plaintiff's Michigan Consumer Protection Act Challenge

Plaintiff argues that the circuit court erred in dismissing his claim that defendant violated § 903(1)(z) of the MCPA, MCL 445.901 *et seq*., by charging an excessive price for copies of his medical records, through Smart.

Section 903(1)(z) of the MCPA provides, in pertinent part:

> (1) Unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce are unlawful and are defined as follows:
>
> * * *
>
> (z) Charging the consumer a price which is grossly in excess of the price at which similar property or services are sold.

In the instant case, plaintiff provided documentary evidence that defendant's charge of $.85 per page was almost double the amount charged by seventeen other hospitals in the Detroit Metropolitan area. Plaintiff further established that the aggregate charge of $44.26 was almost double what plaintiff would have been charged by the other hospitals. The evidence presented by defendant did not explain why its charge was higher than other hospitals in the area cited by plaintiff, or establish that defendant charged less than other hospitals or medical facilities in the area. Viewed in the light most favorable to plaintiff, *Smith*, *supra* at 454, reasonable minds may differ regarding whether plaintiff was charged a grossly excessive fee for his twenty-two page medical record. See *Pratt v Smart Corp*, 968 SW2d 868, 874 (Tenn App, 1997). We thus conclude that the trier of fact should determine whether defendant's charges were grossly in excess of its competitors' charges, and that the circuit court erred in summarily dismissing plaintiff's MCPA claim. Cf. *Pratt*, *supra* at 873-874. Further, although the records were requested by plaintiff's attorney, it does not follow that they were not for personal use. See *Mermer v Medical Correspondence Servs*, 115 Ohio App 3d 717; 686 NE2d 296 (1996).

C. Plaintiff's Breach of Fiduciary Duty Claim

Plaintiff contends that defendant had a fiduciary duty to look out for the best interests of its patients, and that defendant violated that fiduciary duty when it entered into the contract with Smart under which Smart provides free copies to a favored few at the expense of plaintiff and

other similarly situated patients. We disagree. A fiduciary duty exists when one party reposes faith, confidence, and trust in reliance upon the judgment and advice of another. *Teadt v Lutheran Church*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999); *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). A person who is in a fiduciary relationship with another is under a duty to act for the benefit of the other person regarding matter within the scope of the relationship. *Teadt*, *supra* at 581. Relief is granted for breach of a fiduciary relationship when a position of influence has been acquired and abused or when a confidence has been reposed and betrayed. *Id*; *Vicencio*, *supra*.

Here, plaintiff does not allege or produce evidence to show that a confidence was betrayed by defendant or that there was any abuse of a position of influence. Therefore, the trial court property granted defendant's motion for summary disposition regarding this claim.

D. Plaintiff's Concert of Action Claim

Plaintiff contends that he properly stated a concert of action claim against defendant and therefore the trial court erred when it granted defendant summary disposition pursuant to MCR 2.116(C)(8). We agree.

Concert of action, or civil conspiracy, is a combination of two or more persons, engaged in some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992); *Feaheny v Caldwell*, 175 Mich App 291, 307; 437 NW2d 358 (1989). To establish concert of action claim, a plaintiff must prove that the defendants acted tortiously, pursuant to a common design. *Jodway v Kennametal, Inc*, 207 Mich App 622, 631; 525 NW2d 883 (1994); *Cousineau v Ford Motor Co*, 140 Mich App 19, 32; 363 NW2d 721 (1985). If a plaintiff fails to establish that any tortious action occurred, then a concert of action claim must fail. *Detroit Bd of Ed v Celotex Corp (On Remand)*, 196 Mich App 694, 713-714; 493 NW2d 513 (1992).

Here, because the MCPA claim survives summary disposition, that aspect of the concert of action claim survives as well. The trier of fact must determine whether defendant's contract with Smart evidences a conspiracy to violate the MCPA. Thus, to the extent the concert of action claim rested on the common law claim, it was properly dismissed; to the extent it rested on the claimed MCPA violation, dismissal was improper.

E. Defendant's Voluntary Payment Doctrine Claim

Defendant contends that because plaintiff's attorney voluntarily paid the fee charged by Smart for the medical record sought, the voluntary payment doctrine barred his claims. We disagree.

Michigan law holds that a voluntary payment cannot be recovered when it is made with "full knowledge of all the circumstances upon which it is demanded, and without artifice, fraud, or deception on the part of the payer. . . ." *Montgomery Ward & Co v Williams*, 330 Mich 275, 284; 47 NW2d 607 (1951), quoting *Pingree v Mutual Gas Co*, 170 Mich 156, 157; 65 NW 6 (1895). However, a voluntary payment made as a result of a mistake of material fact may be recovered. See *Montgomery Ward*, *supra*, and *Couper v Metropolitan Life Ins Co*, 250 Mich

540, 544; 230 NW 929 (1930) (payment may be recovered even if the mistake is "due to a lack of investigation"). In the instant case, defendant failed to establish that plaintiff had full knowledge of all the circumstances relating to the charges he agreed to pay, *Montgomery Ward*, *supra* at 254, including that the charge was in excess of what other hospitals would charge for the record.[4]

IV. Conclusion

We affirm the dismissal of plaintiff's common law and breach of fiduciary duty claims, and the concert of action claim to the extent it is based on the common law claim; we reverse the dismissal of the MCPA claim, and the concert of action claim to the extent it is based on a concert of action respecting the alleged MCPA violation. We remand for further proceedings consistent with this opinion. We affirm the denial of plaintiff's motion for summary disposition. We do not retain jurisdiction.

/s/ Helene N. White

[4] We note that on very similar facts, the Tennessee Court of Appeals in *Pratt*, *supra*, rejected Smart's claim that the voluntary payment doctrine precluded the plaintiff's recovery for excess charges.