COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1117 **Cir. Ct. No. 2006CV245**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ROBERT J. VAN EPPS, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF JOSEPHINE OSGOOD, ROSEMARY VAN EPPS, JAMES P. VAN EPPS AND PATRICIA A. LOOKER,

PLAINTIFFS-APPELLANTS,

V.

KRISTA MENDYKE, NORTH HAVEN OF STEVENS POINT, INC. AND NATIONAL SPECIALITY INSURANCE, A DIVISION OF WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Portage County: JON M. COUNSELL, Judge. *Affirmed*.

Before Dykman, P.J., Higginbotham and Bridge, JJ.

¶1 HIGGINBOTHAM, J. Robert J. Van Epps, both individually and as special administrator for the Estate of his mother, Josephine Osgood, and his siblings, Rosemary Van Epps, James P. Van Epps and Patricia Looker, appeal a summary judgment order dismissing their claims of assault and battery, conspiracy, negligence, false imprisonment, fraud and misrepresentation against Krista Mendyke, North Haven of Stevens Point, Inc. and National Speciality Insurance ("Mendyke")[1] for alleged damages resulting from Osgood's 2005 stay at North Haven, a community-based residential facility (CBRF). We conclude that summary judgment was appropriately granted to Mendyke and therefore affirm.

BACKGROUND

¶2 The following facts are taken from the parties' summary judgment submissions viewed in the light most favorable to the Estate.[2] In October 2004, Josephine Osgood was admitted to North Haven. Osgood's daughter, Rosemary Van Epps, met with the facility's owner, Krista Mendyke, prior to Osgood's admission. At the meeting, Mendyke provided Van Epps with a brochure about

[1] The defendants filed two sets of responsive briefs in this case, one from Mendyke, the other from North Haven, National Speciality Insurance and Mendyke, jointly. We refer to the defendants collectively as "Mendyke" except where noted.

[2] Mendyke argues that portions of an affidavit of the Estate's attorney were not made on personal knowledge or do not set forth facts that would be admissible as evidence and therefore may not be considered on summary judgment pursuant to WIS. STAT. § 802.08(3). These portions include: signed statements of North Haven employees Mark Jaggar, Charlene Cummings, Paula Lyle and Julia Spielman; a letter from a State agency to Cummings; and a police report. The Estate has not attempted to rebut this assertion in their reply brief. We treat the Estate's silence as a concession, and we therefore do not consider the above-listed submissions on summary judgment. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may take as a concession an appellant's failure to address in a reply brief a proposition asserted in a response brief).

North Haven that made certain representations concerning the quality of the facility.

¶3 Soon after being admitted, Osgood got behind in payments to North Haven and applied for community care. Multiple North Haven employees testified in deposition that Mendyke wanted to remove Osgood from the facility and replace her with a private-pay resident.

¶4 On January 16, 2005, Osgood reportedly fell and was found on the floor of her room. She was taken to a nearby hospital, where she received treatment for minor injuries, and was returned to North Haven two days later. On January 21, Mendyke called the hospital and reported that Osgood required medical assistance, and Osgood was taken to the hospital again. Multiple North Haven employees testified that Osgood did not appear to have any immediate need for medical attention on January 21, and seemed to be at least as healthy as she had been when she got back from the hospital three days earlier. Staff member Carlene Cummings testified that Mendyke instructed her not to allow Osgood back into the facility that night. However, upon her discharge from the emergency room, Osgood was readmitted to North Haven. Staff member Mark Jaggar testified that when Osgood returned, Cummings said, in front of Osgood, that Mendyke did not want Osgood in the facility any more. Jaggar testified that Osgood became very upset upon hearing this.

¶5 Cummings informed Mendyke later that night that Osgood had been readmitted. Cummings testified that Mendyke said that she wanted Osgood out of the facility that night, and told her that she would pay a bonus to any staff member who caused Osgood's removal from North Haven. According to Cummings, Mendyke suggested actions that might cause Osgood's removal from the facility,

including walking her until she fell. Mark Jaggar testified that Cummings told him about the bonus, and said that she had decided to walk Osgood until she fell. Jaggar testified that he followed Cummings to Osgood's room and saw Cummings tell the elderly woman to get up from her bed. Jaggar said that when Osgood complained that she was too weak from the recent hospital trip to get up, Cummings told Osgood that she had no choice and started to pull on the elderly woman's arms. Jaggar testified that he assured Osgood that she did not have to do anything she did not want to do, and Cummings left the room in frustration. Additional facts from the summary judgment submissions are provided in the discussion section.

¶6 Osgood was discharged from North Haven the following month. The Estate sued Mendyke, North Haven and National Speciality Insurance, bringing claims of intentional conduct, fraud, assault, conspiracy, negligent misrepresentation, false imprisonment and negligence. Mendyke moved for summary judgment, and North Haven and National Speciality Insurance filed a separate motion for summary judgment. The court granted the defendants' motions. The court then issued findings of fact and conclusions of law, and entered a judgment dismissing the Estate's action.[3] The Estate appeals.

[3] We discourage the practice of issuing factual findings on summary judgment because it increases the possibility that the court may erroneously issue a finding as to a disputed fact. ***Bank of New Glarus v. Swartwood***, 2006 WI App 224, ¶11 n.5, 297 Wis. 2d 458, 725 N.W.2d 944. We note that the court did not make such an error in this case, however. Its "findings" did not resolve factual disputes; they merely stated the court's conclusions that the Estate failed to produce evidence of damages, and that the case presented no triable issues of fact. Thus, to the extent that the Estate's contention that the circuit court made credibility determinations in its decision granting Mendyke summary judgment rests on the Findings of Fact, we reject this argument.

DISCUSSION

¶7 We review de novo a grant of summary judgment, employing the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). This methodology requires that we begin by examining the complaint to determine whether a claim for relief has been stated. ***Id.*** at 315. Construing the complaint liberally, we will dismiss a claim only if it is clear that under no conditions can the plaintiff recover. ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 635, 517 N.W.2d 432 (1994) (citation omitted).

¶8 If the complaint states a claim for relief, we then examine the summary judgment submissions to determine whether material issues of fact exist. ***Id.*** Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2007-08).[4]

I. Complaint fails to state a claim upon which Osgood's children may personally recover damages

¶9 The complaint alleges that Josephine Osgood's children, James Van Epps, Patricia Looker, Rosemary Van Epps, and Robert Van Epps, each suffered "emotional[], financial[] and/or physical[]" damages as a result of Mendyke's alleged mistreatment of Van Epps. For the reasons that follow, we

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

conclude that the complaint fails to state a claim upon which Osgood's children may personally recover for alleged damages arising from these circumstances.

¶10 On appeal, Osgood's children no longer maintain that they personally suffered direct physical or financial damages, and our review of the summary judgment submissions reveals no evidence of physical or financial injury to them. Rather, the children maintain only that they personally suffered emotional damages as a result of Mendyke's alleged conduct. The children variously allege that they have suffered trouble sleeping, nightmares, frequent crying, intestinal ailments, nose bleeds, problems at work, guilt and depression.

¶11 However, Wisconsin case law does not permit recovery for the Osgood children's alleged emotional damages. To recover damages for emotional injuries caused by a defendant's negligence, a plaintiff must observe an "extraordinary event" or its aftermath resulting in the severe injury or death of an immediate family member. *See* ***Bowen***, 183 Wis. 2d at 656-58; ***Rosin v. Fort Howard Corp.***, 222 Wis. 2d 365, 369-70, 588 N.W.2d 58 (Ct. App. 1998). To recover damages for emotional injuries caused by the defendant's intentional conduct, the plaintiff must show that the conduct complained of was extreme and outrageous, was intended to cause emotional distress, and was the cause of the distress, which itself must be severe and disabling. ***La Fleur v. Mosher***, 109 Wis. 2d 112, 116, 325 N.W.2d 314 (1982); ***Alsteen v. Gehl***, 21 Wis. 2d 349, 358, 124 N.W.2d 312 (1963). Osgood's children present no evidence that they observed an "extraordinary event" resulting in severe injury or death to their mother. In addition, their submissions fail to show that Mendyke's alleged conduct was intended to cause Osgood's children emotional distress. No damages for emotional distress are therefore available to the children.

¶12 Accordingly, we conclude that summary judgment was properly granted against Osgood's children in their personal capacity.

II. Mendyke and North Haven are entitled to summary judgment on all claims brought on behalf of the Estate

A. Negligence Claim Against North Haven

¶13 The Estate contends that North Haven was negligent in supervising its employees and that its negligence caused harm to Osgood. The Estate's negligence claims are based in large part on alleged violations of the community-based residential facilities regulations set forth in Chapter 83 of the Department of Health Services (DHS) Code.[5] The Estate argues that North Haven violated certain rights provided to CBRF residents under the code, including, among others, the right to be free from physical abuse, *see* WIS. ADMIN. CODE § DHS 83.21(4)(m) renumbered § DHS 83.32(3)(d) effective April 1, 2009. To the extent that it argues that the alleged code violations give rise to a negligence claim, the Estate is mistaken. We explained in ***Farr v. Alternative Living Services, Inc.***, 2002 WI App 88, ¶¶13-18, 253 Wis. 2d 790, 643 N.W.2d 841, that neither the administrative code nor relevant portions of Chapter 50 of the Wisconsin Statutes creates a private cause of action for such violations.

B. Assault and Battery and Conspiracy

¶14 The Estate contends summary judgment is inappropriate because material facts remain in dispute. The Estate argues that it has submitted sufficient

[5] The complaint also alleges North Haven was negligent "[i]n failing to properly supervise Jo Osgood allowing her to fall" and for allowing "an employee to improperly call 911 and having Jo Osgood removed when not medically necessary." We address these allegations later in this decision.

facts to support a claim for assault and battery based on the following incidents: (1) Mendyke offered a bonus to staff members to remove Osgood from the facility, which led to Osgood's fall on January 16, 2005, and subsequent trip to the local hospital emergency room; (2) a staff member, Charlene Cummings, in an attempt to collect on Mendyke's offer of a bonus, attempted to drag Osgood out of her bed by pulling on her arms with the intention of walking Osgood until she fell; and (3) staff members over-sedated Osgood, causing her physical distress.[6] We address each contention in turn.

¶15 Regarding the January 16, 2005 fall, the Estate contends that Donna (Henke) Erickson's and Charlene Cummings' testimony that Mendyke had offered them a bonus for causing Osgood to be removed from the facility is sufficient to support a reasonable inference that Mendyke or her staff, as a part of an alleged scheme to remove Osgood from the facility, caused the fall. It is true that the affidavits contain evidence supporting the Estate's allegation that Mendyke offered a bonus to certain employees to remove Osgood from the facility. It is also true that the undisputed facts show that Osgood was found on the floor on January 16 and was subsequently taken to the hospital, where she was treated.

[6] The Estate also argues that Mendyke committed assault and battery on Osgood by having Osgood transported to the hospital on January 21, 2005, "where a doctor would poke and prod her" even though she did not need medical attention. However, reading the pleadings liberally, the Estate's complaint does not allege assault and battery on this ground. We therefore address Osgood's transport to the hospital only in the context of the Estate's claim of false imprisonment.

We observe that the Estate alleged in the assault and battery section of the complaint that Mendyke gave Osgood medication that caused Osgood pain. However, the Estate does not address this allegation in its appellate brief in the assault and battery section. Instead, the Estate raises this issue in its section alleging negligence on the part of North Haven based in part on violations of the community-based residential facilities regulations set forth in Ch. 83 of the Wisconsin Department of Health Services Code. Nonetheless, we address the over-sedation issue here because it was alleged as an assault and battery.

However, the Estate fails to produce any evidence that Mendyke or any member of her staff caused Osgood to fall. Moreover, the testimony suggests that Mendyke offered the bonus *after* January 16. Additionally, the record shows that Osgood had a history of falling, which was the product of syncope (fainting), and had experienced recurrent syncope at the hospital on January 16 when emergency room personnel attempted to walk her. We therefore conclude that allegations that Mendyke or her staff caused the January 16 fall as part of a scheme to remove Osgood from North Haven are not supported by the record.

¶16 Turning to the Estate's contention that Cummings' attempt to remove Osgood from her bed by pulling on her arms supports its claim for assault and battery, we conclude that the complaint fails to state a claim for assault and battery on this ground.[7]

¶17 In determining whether a complaint states a claim, we accept as true the facts pleaded and all reasonable inferences arising from those facts. ***Farr***, 253 Wis. 2d 790, ¶8. In addition, we construe the allegations in the complaint liberally. ***Id***.

¶18 The elements of a civil assault and battery claim are intentional bodily harm to the plaintiff without the plaintiff's consent. *See* WIS JI—CIVIL 2005. We assess the sufficiency of the Estate's complaint in light of these elements. The complaint must "contain a statement of the general factual

[7] We acknowledge that Mendyke does not argue that the complaint fails to state a claim for civil assault and battery based on the allegation that Cummings pulled on Osgood's arms. However, the first step in the summary judgment methodology requires an examination of the complaint to determine whether it states a claim. *See* ***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325.

circumstances in support of the claim presented." ***Ziemann v. Village of North Hudson***, 102 Wis. 2d 705, 713, 307 N.W.2d 236 (1981) (internal quotes omitted). Whether a complaint states a claim upon which relief can be granted is a question of law that we review de novo. *See* ***John Doe 67C v. Archdiocese of Milwaukee***, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180.

¶19 The complaint makes the following allegations in support of the claim for assault and battery:

> 22. That the defendant [Krista Mendyke] was unauthorized, forceful and offensive to Josephine Osgood when she intentionally:
>
> A. Told her employee to walk Mrs. Osgood until she dropped.
>
> B. Told her employee to push Mrs. Osgood to the floor and leave her there.
>
> C. Gave Mrs. Osgood improper medications that caused her physical pain.
>
> D. Told her staff that she wanted Mrs. Osgood out of her facility, even offering a reward, to anyone that could rid her, and North Haven, of Mrs. Osgood by whatever means necessary.
>
> E. Calling and having Ms. Osgood transported to the hospital when it was not medically necessary.
>
> 23 That as a result of the defendant's assault and battery Mrs. Osgood and the plaintiffs, who are her children, suffered emotionally, financially and/or physically.
>
> 24. That the assault and battery of the defendant was the proximate cause of the plaintiffs' injuries and damages, therefor, the defendant is responsible to plaintiffs for all of plaintiffs' injuries and damages.

¶20 Assuming all of the Estate's allegations of assault and battery are true, we conclude that the complaint fails to set forth sufficient facts to state a claim for assault and battery based on Cummings' alleged conduct. First, the complaint contains no factual allegations that Cummings pulled on Osgood's arms with the intent to remove her from the bed and to cause her harm. Indeed, the complaint makes no mention of Cummings at all or this alleged incident. Although the complaint alleges that Mendyke told an employee to walk Osgood until she fell, the complaint does not allege that any employee did in fact walk or attempt to walk Osgood until she fell. In addition, the complaint contains no factual allegations from which it could be reasonably inferred that Cummings harmed or attempted to harm Osgood. In short, the complaint contains no "statement of the general factual circumstances" in support of the Estate's contention that Cummings committed assault and battery on Osgood by pulling on her arms. *See* ***Ziemann***, 102 Wis. 2d at 713.[8]

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[8] There is one theory of battery that the record may support if sufficiently pled: assault and battery: offensive bodily contact. However, even reading the complaint liberally, we conclude that the complaint fails to state any facts in support of this claim.

> The elements of assault and battery, offensive bodily contact, are:
>
> > [T]he infliction of a bodily contact; an intention to inflict such contact; the making of bodily contact in an angry, revengeful, rude, or insolent manner; a contact which was offensive to a reasonable sense of personal dignity and which was unwarranted by the social usages prevalent at the time and place at which it was inflicted.

See WIS JI—CIVIL 2010. The lack of authorization or consent to the contact may, under proper circumstances, constitute a fifth element.

The complaint fails to state a claim for assault and battery, offensive bodily contact, in at least two ways. First, the complaint does not allege "the infliction of bodily contact." Certainly, the record supports a possible claim for assault and battery, offensive bodily contact based on evidence that Cummings pulled on her arms. However, the complaint does not make this (continued)

¶21 Even assuming for the sake of argument that the complaint states a claim for civil assault and battery based on Cummings' alleged misconduct, the Estate has not produced any evidence that Osgood suffered any injuries and that those injuries were caused by Cummings when she pulled on Osgood's arms. *See* WIS JI—CIVIL 2005 (proof that a defendant intentionally caused bodily harm to the plaintiff is an element of civil battery).

¶22 Regarding the allegation of over-sedation, the January 16 emergency room discharge report indicates that Osgood appeared to be over-sedated because of a "long acting scheduled narcotic pain medication" she had been prescribed. However, the Estate presents no evidence from which a reasonable inference could be drawn that Mendyke or North Haven employees at Mendyke's direction did anything other than administer Osgood's several prescribed medications (twenty-one in all, according to the hospital report from the January 16 emergency room visit) in the prescribed doses.

¶23 We first examine evidence submitted by Mendyke to determine whether she has established a prima facie defense. Mendyke introduced the depositions of numerous employees, including Charlene Cummings, Mark Jagger, Donna Henke, and Julia Spielman. Questions were posed to each person regarding whether they knew of anyone at North Haven who may have given the wrong medication to Osgood or administered the wrong dose, or whether they had

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allegation. Second, assuming the complaint sufficiently alleges bodily contact, it does not allege that the contact was done "in an angry, revengeful, rude, or insolent manner," or make any other allegation from which a reasonable inference could arise that this part of the element has been sufficiently pled. We need not consider the last two elements because the result of our analysis is apparent. Even giving the complaint the most liberal reading entitled by law, we cannot discern any factual allegations from which we can infer that the complaint states a claim for assault and battery by offensive bodily contact.

done so themselves. None of the employees indicated that Osgood was given the wrong medication or administered the wrong dose of any medication. We conclude that Mendyke has made a prima facie case for summary judgment.

¶24 We now turn to the Estate's submissions to determine whether a material dispute of fact exists on the over-sedation issue. The Estate relies heavily on hospital medical records to support its claim that Mendyke intentionally administered improper medication to Osgood. These records were created when Osgood was taken to the emergency room on January 16, 2005, after she fell. The records indicate that Osgood presented with syncope, which was likely caused by a number of factors, including the likelihood of being over-sedated by pain medication prescribed for back pain. The records also indicate that the emergency room physicians immediately discontinued the pain medicine.

¶25 We conclude that the Estate has failed to submit any evidence creating a material dispute of fact concerning the over-sedation issue. With respect to the medical records, standing alone, these records do not support the Estate's claim that Mendyke, or anyone else at her direction, over-sedated Osgood. There is no evidence in the record from which a reasonable inference could be drawn that any North Haven employee caused Osgood to be over-sedated. Indeed, answers provided by Osgood's children to interrogatories posed by Mendyke and North Haven fall short of showing that Mendyke or her employees were responsible for Osgood being over-sedated on January 16. In general, the answers either say that various witnesses will testify about the dates and events concerning over-sedation, or simply refer to answers in the interrogatories that are not included in the record. In sum, the Estate has failed to rebut Mendyke's evidence that neither she nor her employees caused Osgood to be over-sedated when she was taken to the hospital on January 16. If Osgood was over-sedated, the Estate

has not shown that it was Mendyke, as opposed to the prescribing physician, who caused the over-sedation.

¶26 Turning to the Estate's conspiracy claim, the Estate argues that there are sufficient facts supporting its allegation that Mendyke conspired with members of her staff, including Cummings, to remove Osgood from the facility and that Cummings acted on the conspiracy. However, we have concluded that the assault and battery claim concerning Cummings fails to state a claim. Thus, because the conspiracy claim relates to a claim we have rejected, we must reject the conspiracy claim as well.[9]

C. False Imprisonment

¶27 This cause of action stems from allegations that Mendyke, as part of an alleged effort to have Osgood removed from North Haven, had Osgood transported to the emergency room on the afternoon of January 21 when Osgood allegedly had no urgent medical needs. We reject this argument.

¶28 False imprisonment is "[t]he unlawful restraint by one person of the physical liberty of another." ***Strong v. City of Milwaukee***, 38 Wis. 2d 564, 566, 157 N.W.2d 619 (1968) (citation omitted). "An unlawful restraint is an intentional

[9] "To state a cause of action for civil conspiracy, the complaint must allege: (1) The formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts." ***Onderdonk v. Lamb***, 79 Wis. 2d 241, 247, 255 N.W.2d 507 (1976) (citation omitted). "The complaint must state what was done in the execution of the conspiracy and that the purpose of the combination was accomplished." ***Id.*** As we explained with respect to the assault and battery claim involving Cummings, the complaint does not contain any facts alleging that Cummings assaulted Osgood in response to Mendyke's offer of a bonus. Thus, under ***Onderdonk***, the complaint fails to state whether the conspiracy was in fact accomplished.

restraint that is without legal excuse or just cause, without authority, a restraint which the person charged therewith had no right to create." WIS JI—CIVIL 2100.

¶29 The Estate contends that Osgood's January 21 transport to the hospital constituted false imprisonment because it was not medically necessary for her to go to the hospital. It notes that Cummings and Jaggar testified that they believed that Osgood did not require emergency medical treatment on that day.

¶30 Regardless of Mendyke's reasons for having Osgood transported to the hospital, the submissions show that Osgood had medical needs on January 21. The report from the emergency responders states that Osgood complained of "p[ai]n all over" and nausea. At the hospital, Osgood said she was "feeling all done in," and complained of nausea and chest pain when coughing. The emergency room physician diagnosed Osgood with a "viral syndrome," directed her to take Tylenol and discussed with Osgood "close follow-up with [her] primary care physician early next week." Further, the record contains no evidence that Osgood was transported to the emergency room against her will; the emergency responders' report states that Osgood "walked to the cot" to be carried into the ambulance. On these undisputed facts, we conclude that Osgood's January 21 transport to the hospital was not without just cause and therefore does not provide a basis for an action for false imprisonment. Accordingly, we conclude that Mendyke is entitled to summary judgment on this claim.

D. Fraud and Negligent Misrepresentation

¶31 The Estate's claims of fraud and negligent misrepresentation stem from allegations that Rosemary Van Epps, acting as Osgood's representative, placed Osgood in North Haven based on Mendyke's false assurances that North

Haven was a safe place, and by providing Van Epps with a North Haven brochure that made similar assurances about the facility.

¶32 An action for fraud, sometimes called fraudulent misrepresentation or intentional misrepresentation,[10] and an action for negligent misrepresentation share the following elements: "1) the defendant must have made a representation of fact to the plaintiff; 2) the representation of fact must be false; and 3) the plaintiff must have believed and relied on the misrepresentation to his [or her] detriment or damage." ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶13, 270 Wis. 2d 146, 677 N.W.2d 233. To prevail on a fraud claim, the plaintiff must also prove that the defendant made the misrepresentation (1) "with knowledge that it was false or recklessly without caring whether it was true or false," and (2) "with intent to deceive and to induce the plaintiff to act on it to his [or her] detriment or damage." ***Id.***

¶33 We conclude that the submissions fail to support claims of fraud or negligent misrepresentation because the Estate failed to provide evidence that Rosemary Van Epps, as Osgood's representative, relied upon the alleged misrepresentations to Osgood's detriment. The Estate's brief asserts—without citation to the record—that Mendyke personally stated to Rosemary Van Epps, as Osgood's representative, that North Haven would offer "a life enriching supportive environment, warmth and compassion of concerned caregivers, with personalized care and safety as top priorities." We find nothing in the submissions to substantiate these assertions. Moreover, the submissions contain no evidence

[10] *See* ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶12, 283 Wis. 2d 555, 699 N.W.2d 205.

that Van Epps or other family members relied upon the alleged misrepresentations made in the North Haven brochure in deciding to place Osgood at North Haven. Accordingly, we conclude that the defendants are entitled to summary judgment on the Estate's claims of fraud and negligent misrepresentation.

CONCLUSION

¶34 In sum, we conclude that the circuit court properly granted Mendyke's motion for summary judgment. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.