STATE OF MICHIGAN

COURT OF APPEALS

ERIC P. FONSTAD,

Plaintiff-Appellant,

v

KAREN TEAL, f/k/a KAREN B. VOLLMER, RUSSELL COOK, ANNETTE J. BENSON, and ANNETTE J. BENSON, P.C.,

Defendants-Appellees.

UNPUBLISHED
July 21, 2005

No. 254051
Oakland Circuit Court
LC No. 2003-048287-CZ

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders granting summary disposition in favor of defendants, and awarding defendant Cook attorney fees and costs of $2,918.05 under MCR 2.114 and MCL 600.2591 for filing a frivolous claim. We hold that the trial court properly granted summary disposition of all claims, except plaintiff's claim for fraud against defendant Teal, but vacate the trial court's award of attorney fees and costs to defendant Cook.

I. Summary Disposition

Defendant Cook moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court did not specify under which subrule it granted the motion. The trial court granted summary disposition in favor of defendants Teal and Benson[1] on counts I (fraudulent misrepresentation) and II (innocent misrepresentation) under MCR 2.116(C)(10), on count III (exemplary damages) under MCR 2.116(C)(7), on count IV (intentional infliction of emotional distress) under MCR 2.116(C)(8) and (10), and on count V (concert of action) under MCR 2.116(C)(8).

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[1] Unless otherwise stated, reference to "defendant Benson" includes defendant Annette J. Benson, individually, and defendant Annette J. Benson, P.C.

A. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Summary disposition under MCR 2.116(C)(7) is properly granted when the claim is barred as a matter of law. This Court must consider the pleadings, affidavits, depositions, admissions and documentary evidence submitted by the parties. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint based on the pleadings alone. *Corley, supra* at 277. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and this Court considers the pleadings, and all other documentary evidence submitted in the light most favorable to the nonmoving party, to determine if there is a genuine issue of fact for trial *Id*. at 278.

B. Defendant Cook

Plaintiff argues that the trial court erred in dismissing his claim of unjust enrichment. We disagree. The trial court determined that summary disposition was appropriate because any benefit defendant Cook received was acquired involuntarily.

The elements of unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). When a party is unjustly enriched, the law will imply a contract and require that the enriched party pay restitution for the benefit received. *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 198; 504 NW2d 635 (1993).

Plaintiff asserts that defendant Cook benefited when plaintiff paid child support for Ryan, who was actually Cook's child, for more than eleven years. There is no dispute that plaintiff financially supported Ryan before November 2002, because he believed Ryan to be his natural child. There is also no dispute that Ryan is the biological child of defendant Cook and that, had this been known at Ryan's birth, defendant Cook would have been legally obligated to provide for Ryan's support. MCL 722.712. Thus, defendant Cook did benefit from plaintiff's support of Ryan.

However, the mere receipt of a benefit is not sufficient to require restitution. *Kammer Asphalt Paving Co, Inc, supra* at 198. A party is not unjustly enriched "by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution." *Buell v Orion State Bank*, 327 Mich 43, 56; 41 NW2d 472 (1950), quoting 46 Am Jur, pp 99-100. In *Buell*, the plaintiff's decedent was a former majority stockholder in the defendant, which was in danger of closing because it did not have enough capital. *Buell, supra* at 46-50. The plaintiff's decedent raised $20,000 and gave it to the defendant as a contribution to replenish its capital. *Id*. at 51. The Court determined that the transfer of money by the plaintiff's decedent was a valid contribution or, alternatively, a valid gift. *Id*. at 54-55. The Court also held that the defendant was not unjustly enriched by retaining the money that was given to it. *Id.* at 56. Unlike this case, in *Buell* the plaintiff's decedent voluntarily gave the benefit (i.e., money), to the defendant. Here, plaintiff did not know his actions were benefiting defendant Cook.

Despite this difference, we believe that the rule from *Buell* is still applicable. There is no dispute that plaintiff supported Ryan voluntarily and that he did not expect reimbursement. At the pertinent time, plaintiff's actions are analogous to a gift that directly benefited Ryan and incidentally benefited defendant Cook. Because defendant Cook involuntarily derived a benefit from plaintiff's action, he is not required to make restitution under *Buell*. Plaintiff provides no authority for invalidating his voluntary intent because he subsequently learned that Ryan was not his biological child. Additionally, to the extent that plaintiff's concert of action claim pertained to defendant Cook, summary disposition was appropriate because there was no evidence to suggest that defendant Cook learned of Ryan's existence before November 2002, and thus could not have been part of a concerted effort to conceal Ryan's paternity from plaintiff.

C. Defendants Benson and Teal

To prove fraudulent misrepresentation (count I), plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). Because plaintiff's claim against defendant Benson concerns her alleged concealment of her knowledge of Ryan's questionable paternity, the claim is properly characterized as "silent fraud."

The "touchstone of liability" for "silent fraud" is that "*some* form of representation has been made and that it was or proved to be false." *M & D, Inc v McConkey*, 231 Mich App 22, 30; 585 NW2d 33 (1998) (emphasis in original). Defendant Benson argues that there is no evidence that she made any representations to plaintiff. Plaintiff testified in his deposition that he never had a conversation with defendant Benson and that she never made any representations to him. But plaintiff argues, and we agree, that defendant Benson's conduct of continuing to negotiate the custody issues in the underlying custody case, including child support involving Ryan, represented that plaintiff was legally responsible for Ryan, i.e., that Ryan was plaintiff's biological son.

Nonetheless, plaintiff cannot prove reliance on this representation. In his complaint, plaintiff alleged that he relied on defendant Benson's silence "in taking care of (emotionally and financially) and developing a deep psychological bond" with Ryan. But plaintiff testified that his bond with Ryan occurred years before defendant Benson began representing defendant Teal and that, despite finding out that Ryan was not his natural child, plaintiff desired to maintain a father/son relationship and continue to support Ryan financially and emotionally. Therefore, the trial court properly granted summary disposition of this claim with respect to defendant Benson.

However, the trial court erred in dismissing plaintiff's fraudulent misrepresentation claim against defendant Teal. There is no dispute that defendant Teal told plaintiff when Ryan was born that he was Ryan's father and never indicated otherwise to him until 2002. The evidence of defendant Teal's sexual encounter with defendant Cook, viewed most favorably to plaintiff, supports an inference that defendant Teal knew of the possibility that plaintiff might not be Ryan's father. Yet, plaintiff was listed as Ryan's father on his birth certificate, and plaintiff and defendant Teal filed an affidavit of parentage. Further, in her custody complaint and verified

statement in the related action, defendant Teal averred that plaintiff was Ryan's father. Plaintiff alleges that, based on defendant Teal's representations, he loved and took care of Ryan as if he were his biological child. From these facts, there is sufficient evidence to allow this claim to survive summary disposition with respect to defendant Teal.

A claim of innocent misrepresentation (count II) is shown if a party to a contract detrimentally relied upon a false representation in such a matter that the injury suffered inured to the benefit of the party who made the representation. *M & D, Inc*, *supra* at 27. The plaintiff must show that the representation was made in connection with a contract and that the parties were in privity of contract. *Id.* at 28. We disagree with plaintiff's contention that a contract existed in this case. Plaintiff asserts that the contract was the affidavit of parentage, but does not provide any basis to support this assertion, and we fail to see how an affidavit constitutes a contract. An affidavit is a document in which the affiant avers the truth of certain facts as it is known to him or her. Black's Law Dictionary, p 58 (6th ed). A contract is an agreement between parties for consideration. See *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Plaintiff's reliance on the settlement agreement in the related custody case is also misplaced because no agreement was ever reached regarding Ryan. Summary disposition of the innocent misrepresentation claim in favor of defendants Teal and Benson was therefore proper under MCR 2.116(C)(8) and (10).

Turning to count IV, to establish a claim for intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004) (citation omitted).

> The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." It is for the trial court to initially determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery. [*Id.* (citations omitted).]

According to plaintiff's own allegations, defendant Benson kept quiet for three months during which she allegedly knew there was a question of Ryan's paternity. We agree with the trial court that reasonable minds could not differ in that defendant Benson's alleged conduct did not rise to the level necessary to permit recovery for this tort. Thus, summary disposition in favor of defendant Benson was properly granted.

With respect to defendant Teal, however, the evidence supported an inference that she knew there was a question concerning plaintiff's paternity of Ryan's since conception, but said nothing for more than eleven years. We believe that reasonable minds could differ whether this conduct is sufficiently outrageous. Nevertheless, plaintiff presented no evidence that he suffered from emotional distress or its severity. Liability for intentional infliction of emotional distress arises only when the distress inflicted is so severe that no reasonable man could be expected to endure it. A plaintiff is not required to have sought medical treatment to establish sufficient distress, but the intensity and duration of the distress are relevant to its severity. *Haverbush v Powelson*, 217 Mich App 228, 235; 551 NW2d 206 (1996). Plaintiff did not testify that the

revelation about Ryan's paternity caused him to miss work, become ill, or adversely affected him in any other way. He only stated that, had he known sooner, he perhaps could have worked things out better with Ryan. Plaintiff also stated that the fact that he was not Ryan's biological father did not make him feel any less of a father to Ryan and he was still willing to financially and emotionally support Ryan. We conclude that the trial court properly granted summary disposition of this claim in favor of defendant Teal.

Count V of plaintiff's complaint alleged concert of action. To prove such a claim, plaintiff must establish that the defendants acted tortiously pursuant to a common design. *Cousineau v Ford Motor Co*, 140 Mich App 19, 32; 363 NW2d 721 (1985). In the present case, the only potentially tortious conduct remaining to support this claim is the fraudulent misrepresentation by defendant Teal. Because we determined that the misrepresentation relied upon by plaintiff occurred before defendant Benson began representing defendant Teal, they could not have been jointly engaged in the tortious conduct. Likewise, by definition, one cannot act in concert with oneself. Therefore, summary disposition on this count was proper.

Lastly, we address plaintiff's count III, requesting exemplary damages. Summary disposition of this "claim" was proper because exemplary damages are simply a form of actual damages. *Ray v Detroit, Dep't of Street Railways*, 67 Mich App 702, 704; 242 NW2d 494 (1976). It does not constitute a separate claim. Because we affirm the trial court's rulings with respect to defendant Benson, plaintiff is not entitled to recover any damages against her. However, because plaintiff's claim for fraudulent misrepresentation against defendant Teal survives, plaintiff may still seek exemplary damages against defendant Teal for this claim.

Defendant Benson raises several alternative bases for affirming the trial court's summary disposition ruling, which if valid would necessitate dismissing the remaining claim against defendant Teal. Defendant Benson first argues that plaintiff's claims are barred by res judicata. Under this doctrine, a second action is barred when (1) the first action was decided on the merits, (2) the matter in the second action was, or could have been, resolved in the first action, and (3) both actions involve the same parties or their privies. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). Res judicata does not bar this suit because the parties are different. Privity, for res judicata purposes, exists when the interests of a non-party are presented and protected by the party to the litigation in the first suit. *Peterson Novelties, Inc, v City of Berkley*, 259 Mich App 1, 13; 672 NW2d 351 (2003). Here, the custody suit involved only plaintiff and defendant Teal. Defendant Cook's and defendant Benson's interests were not protected by this litigation, which involved solely custody issues.

We also reject defendant Benson's argument that plaintiff's claims are barred because they should have been raised in the custody case. Defendant Benson's reliance on *Daoud v DeLeau*, 455 Mich 181; 565 NW2d 639 (1997), is misplaced. In *Daoud*, the Court held that a second suit for fraud, based on intrinsic fraud in the first suit, "may not be filed against a person involved in a first suit, if the statutes and court rules provide an avenue for bringing the fraud to the attention of the first court and asking for relief there." *Id*. at 203. Even if the alleged fraud in this case were considered intrinsic, plaintiff did not have an effective means to litigate the fraud in the first case. The concept behind the rule in *Daoud* is to have finality of judgments and require that fraud issues be raised in the first suit "if the statutes and court rules provide an avenue" for asking for relief from the first court. *Id*. The trial court was aware of the question of Ryan's paternity. After a DNA test confirmed that defendant Cook was Ryan's biological father,

the default judgment was entered with respect to Alexander only. Because the judgment did not involve Ryan, there was no basis for relief for that judgment had plaintiff raised the fraud issue, which pertained solely to Ryan. Thus, *Daoud* is not a bar to this suit.

II. Frivolous Action

MCL 600.2591(1) mandates that sanctions be imposed for filing a frivolous claim or defense. A claim or defense is frivolous when: (1) the party's primary purpose was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe that the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3)(a). The determination whether a claim was frivolous must be based upon the particular circumstances of each case, *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002), at the time they were asserted, *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

A. Standard of Review

A trial court's finding that a claim was frivolous will not be reversed on appeal unless clearly erroneous. *Kitchen, supra* at 661. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* at 661-662.

B. Analysis

In his complaint, plaintiff alleged that he was entitled to restitution from defendant Cook and that "several or all defendants" engaged in concerted activity to conceal Ryan's paternity from plaintiff. There is no indication that plaintiff filed his claims against defendant Cook solely to harass, embarrass, or injure him. Thus, in the context of this case, the pertinent question is whether plaintiff's claims against defendant Cook were "devoid of *arguable* legal merit." MCL 600.2951(3)(a) (emphasis added). If plaintiff could factually establish that defendant Cook was complicit in concealing Ryan's paternity, then defendant Cook would have knowingly allowed plaintiff to believe that plaintiff had a duty to support Ryan and plaintiff could possibly recover for discharging defendant Cook's duty for him. See Restatement Restitution, § 54 (performance of another's duty) and § 55 (benefit obtained by fraud or misrepresentation). Given the circumstances, it was not unreasonable for plaintiff to believe that discovery would reveal that defendant Cook had been aware of Ryan's existence before 2002. Therefore, plaintiff's initial claim against defendant Cook was not frivolous. However, by the time defendant Cook's motion for summary disposition had been granted, plaintiff knew that his claim against defendant Cook had no reasonable basis under the facts. MCL 600.2591(3)(a)(ii). Consequently, plaintiff's continued litigation against defendant Cook after the grant of summary disposition in Cook's favor was frivolous and defendant Cook is entitled to reimbursement for all costs and fees

incurred from that point, including the cost and fees associated with plaintiff's appeal of the trial court's grant of summary disposition on the unjust enrichment claim.[2]

III. Escrowed Proceeds

Plaintiff also challenges the trial court's disbursement of monies that were held in escrow. This issue is not properly before this Court. This issue involves the court's decision in the separate custody action, LC No. 01-657981-DC. Although this case and the custody case were consolidated below, plaintiff did not separately file an appeal from the custody case. In order for this issue to be properly before this Court, plaintiff needed to appeal from the final order in the custody case. MCR 7.203(A); MCR 7.204(A). Therefore, we decline to consider this issue.

IV. Conclusion

The trial court properly granted summary disposition in favor of defendants Benson and Cook with respect to all claims against them. The trial court erred in granting summary disposition in favor of defendant Teal with respect to count I (fraudulent misrepresentation), but properly granted summary disposition of all other claims against her. The trial court also erred in finding that plaintiff's initial complaint against defendant Cook was frivolous. However, plaintiff's continued litigation against defendant Cook after the grant of summary disposition in defendant Cook's favor was frivolous. Therefore, we vacate the trial court's order imposing sanctions to the extent that it awarded defendant Cook reasonable costs and attorney fees incurred up to and including his motion for summary disposition, and remand this case to the trial court for a determination of the proper amount of costs and fees incurred after the grant of summary disposition.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

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[2] In addition, we do not foreclose the possibility that the trial court may grant defendant Cook the costs incurred up to the point where the trial court granted his motion for summary disposition as a prevailing party under MCR 2.625(A)(1).