STATE OF MICHIGAN

COURT OF APPEALS

FRANCIS LEMIEUX, JR., and ELAINE LEMIEUX,

Plaintiffs-Appellants,

v

DAVID DOWLING, PAT BUCKLEY, DOWLING BUILDING & RESTORATION,

Defendants-Appellees,

and

CHUCK MCMARTIN,

Defendant.

UNPUBLISHED
July 15, 2014

No. 309780
Midland Circuit Court
LC No. 10-007275-NO

Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM.

This appeal arises out defendants-appellees' restoration work on plaintiffs' house after it was partially destroyed by a fire in December 2007. After a ten-day trial, a jury ultimately found in defendants-appellees' favor and a judgment of no cause of action was entered dismissing plaintiffs' claims of breach of contract and negligence. Plaintiffs now appeal as of right from this judgment, and additionally challenge the trial court's order dismissing their claims of nuisance, tortious interference with a contract or business relationship, and fraud on directed verdict. We affirm.

I. BACKGROUND

On the night of December 1, 2007, plaintiffs, Francis Lemieux, Jr., and Elaine Lemieux, his wife, returned home to find their garage and part of their home destroyed by a fire. Plaintiffs took up residence in a nearby hotel, and two days later, received a restoration estimate from Hammer Restoration. Based on the advice of defendant, Chuck McMartin, who was conducting an inventory of the house, plaintiffs sought a second restoration estimate from defendant Dowling Building and Restoration ("Dowling Restoration") a short time later.

Among other items not included in Hammer's bid was Dowling Restoration's proposed use of an ozone generator to deodorize the residual smoke smell in the house, in the attic and on

plaintiffs' salvageable personal property. Plaintiffs ultimately accepted Dowling Restoration's bid over Hammer's because of McMartin's recommendation and because they wanted to hire a local company. Dowling Restoration's work on the house commenced December 17, 2007.

From the date of the fire until February 27, 2008, plaintiffs lived in a hotel, but visited their house nearly every day because, among other things, they maintained an office for their fencing company there. Among the key disputes in this case are whether plaintiffs, and in particular, Mrs. Lemieux, were exposed to ozone during several of these visits and also whether plaintiffs ever permitted Dowling Restoration to use an ozone generator in the first place. Ozone is a potential respiratory irritant.

Plaintiffs claim their first exposure to ozone occurred on Saturday, December 22, 2007. Mrs. Lemieux testified that while working in the home office, she noticed the smell of bleach and chlorine – scents consistent with ozone. She alerted Mr. Lemieux, who was outside, and the two subsequently discovered a machine operating in an upstairs bedroom which they claim was an ozone generator. Mr. Lemieux unplugged the generator and plaintiffs left the home. Mr. Lemieux claimed that defendant Pat Buckley, the project manager, later indicated that although defendant David Dowling (Dowling Restoration's owner) had told him to unplug the ozone generator over the weekend of December 22, "we forgot to come and take care of it [the ozone generator]." In total, Mrs. Lemieux estimated that on December 22, 2007, she was in the house for 30 to 45 minutes while the generator was running, and that she was in the bedroom for two to three minutes while the generator was running.

Besides this alleged exposure, plaintiffs also claim that Mrs. Lemieux was exposed to ozone on three other occasions in February 2008 based on the testimony of a subcontractor for Dowling Restoration. It is unclear, however, if these exposures occurred on the same day. Mrs. Lemieux was in the house for about one to one and half hours during the time of these alleged exposures in February 2008.

Although plaintiffs apparently did not learn of these ozone exposures until sometime after they occurred, they maintained that they had never approved the use of an ozone generator. According to plaintiffs, defendants were not to operate an ozone generator until providing them with the Material Safety Data Sheet ("MSDS") containing warnings about potential health risks related to ozone exposure. Plaintiffs claimed they needed this MSDS in order to make a "logical" decision about whether to allow the use of ozone. Despite numerous requests both from plaintiffs and their health provider, plaintiffs asserted Dowling did not provide the MSDS until February 19, 2008. Mrs. Lemieux testified that had plaintiffs reviewed the MSDS before that date, they would not have permitted the use of ozone in their home.

In contrast, defendants claimed the ozone generator was not even used at plaintiffs' house until sometime in late January or February 2008, and that plaintiffs were warned to stay out of the house when the machine would be used. The insurance claims adjustor added that all parties knew as of mid-January 2008 that the generator would be used, and Buckley further noted that the ozone generator was used only once, and that was between late January or February 2008.

Although Mrs. Lemieux had a host of prior health problems and had smoked one to one and a half packs of cigarettes daily for 40 years until 2004, she began seeking periodic medical

treatment in late December 2007 for certain respiratory problems she had allegedly not experienced before December 22, 2007. While a test conducted on February 5, 2008, revealed no respiratory complications, a medical report dated February 13, 2008, noted her exposure to ozone.

In addition to issues related to ozone exposure, the parties also disputed the scope and quality of Dowling Restoration's work on plaintiffs' garage. Although Mr. Lemieux claimed Dowling Restoration was supposed to build an entirely new garage, evidence was presented that Mr. Lemieux accepted the work Dowling Restoration eventually performed. In any event, Dowling Restoration finished its work on the house by late February 2008, and plaintiffs moved home on February 27, 2008. It is undisputed that plaintiffs have had no exposure to ozone since their return.

II. PROCEEDINGS

On December 1, 2010, plaintiffs initiated this lawsuit. Their complaint, as amended, alleged: breach of contract against Dowling Restoration (Count I); negligence against all defendants (Count II); violation of the Michigan Consumer Protection Act ("MCPA"), MCL 445.901 *et seq*. against all defendants (Count III); nuisance against all defendants (Count IV); intentional interference with a contract or advantageous relationship against Dowling and Dowling Restoration (Count V); conspiracy against all defendants (Count VI); breach of fiduciary duty against Dowling and Dowling Restoration (Count VII); gross negligence against Dowling and Buckley (Count VIII); and fraud against Dowling and Dowling Restoration (Count IX).[1] Of these, only the breach of contract, negligence, nuisance, tortious interference and fraud claims survived for trial.[2]

At the close of proofs, defendants moved for a directed verdict on plaintiffs' claims of tortious interference, nuisance, and fraud. Defendants argued that plaintiffs never had a contract with Hammer and in any event ended their relationship with that company, defendants did not cause the smoke in plaintiffs' home or cause any residual ozone problems that kept plaintiffs out of their home, and that plaintiffs' fraud claim sounded in contract. Plaintiffs countered that they were denied the benefit of Hammer's restoration work which would have excluded ozone, that defendants concealed the hazards related to ozone usage and continued to expose plaintiffs to smoke, and that fraud was properly pleaded in the alternative.

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[1] Although plaintiffs asserted several of these claims against McMartin in their original complaint, he is no longer involved in this case as his motion for summary disposition was granted below and plaintiffs stipulated to the order dismissing him from this appeal. See *Lemieux, Jr v Dowling*, unpublished order of the Court of Appeals, entered March 19, 2013 (Docket No. 309780).

[2] Plaintiffs voluntarily dismissed their conspiracy and MCPA claims, while the claims for breach of fiduciary duty and gross negligence were dismissed by an order granting defendants' motions in limine.

The trial court agreed with defendants and held that plaintiffs could not maintain their tortious interference claims where they were not denied any economic advantage, defendants could not be liable for nuisance where they did not cause the smoke and the ozone had abated by the time plaintiffs moved back into their home, and that defendants' representations pertained to the contract and were not fraudulent. An order was subsequently entered dismissing the claims of tortious interference, nuisance, and fraud.

Following this ruling, the jury was instructed on plaintiffs' remaining claims for breach of contract and negligence. The jury ultimately returned a verdict in favor of defendants, and a judgment on the jury verdict of no cause of action was entered on March 26, 2012.

III. ANALYSIS

A. DIRECTED VERDICT

On appeal, plaintiffs initially challenge the order granting defendants' motion for a directed verdict on their claims of nuisance, intentional interference, and fraud. We review a trial court's decision on a motion for directed verdict de novo and consider all evidence in the light most favorable to the nonmoving party. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 220-221; 716 NW2d 220 (2006). A trial court properly grants a motion for a directed verdict "if the evidence viewed in this light fails to establish a claim as a matter of law." *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

1. NUISANCE

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992), citing 302, citing 4 Restatement Torts, 2d, § 821D, p 100. Liability for a private nuisance attaches if:

> (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 429; 770 NW2d 105 (2009) (citation omitted).]

Plaintiffs challenge the dismissal of their nuisance claim on three grounds. None is sufficient to establish a private nuisance.

First, plaintiffs claim that defendants' use of the ozone generator created a private nuisance. However, it is undisputed that plaintiffs did not *occupy* their house from the time of the fire until February 27, 2008. This is significant since "[t]he essence of private nuisance is the protection of a property owner's or occupier's reasonable comfort in *occupation* of the land in question." *Adkins*, 440 Mich at 303 (emphasis added, citation omitted). Notably, Dowling Restoration did not even commence work until nearly two weeks after plaintiffs took up residence in a hotel, and no evidence was presented that it was the use of the ozone generator

which prevented plaintiffs' ability to move home. To the contrary, plaintiffs claim they did not even realize an ozone generator was being used in February 2008 until this litigation commenced. Thus, it was not the use of the generator that prevented plaintiffs' occupation of their home.

In any event, while the law permits recovery for a continuing nuisance that is temporary under certain circumstances,[3] *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 347; 568 NW2d 847 (1997), we are hard pressed to conclude that the operation of the ozone generator was a nuisance where it was undisputed that ozone "degrades very rapidly" and dissipates within one hour of its emission. Indeed, "nuisance normally requires some degree of permanence. If the asserted interference was 'temporary and evanescent,' there was no actionable nuisance. This requirement is normally subsumed in the question whether the interference with the use and enjoyment of the property is substantial." *Adkins*, 440 Mich at 308. Use of the ozone generator simply cannot establish a private nuisance on this record.[4]

Second, plaintiffs assert that defendants' "concealing" the residual smell of smoke through the operation of an ozone generator and the use of a sealant constituted a private nuisance. Fundamentally, this argument is nothing more than a recycling of plaintiffs' breach of contract claim. To be sure, restoration of the house from the effects of the fire – including the smell of smoke – was the essence of plaintiffs' contract with Dowling Restoration. But plaintiffs do not challenge the dismissal of their breach of contract claim on appeal. Thus, plaintiffs' theory on this ground is misplaced, and it is not our role to otherwise fashion plaintiffs' arguments. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Regardless, defendants did not cause the smell of smoke or otherwise have anything to do with the smoky smell in plaintiffs' house in the first place. They cannot be liable for a private nuisance under this theory. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 191; 540 NW2d 297 (1995) (liability for private nuisance cannot attach unless a defendant creates the nuisance, owns or controls the land from which nuisance arises, or employs another to do work from which the defendant knows a nuisance will arise).

Third, plaintiffs argue that Dowling Restoration's failure to comply with local ordinances – apparently by failing to obtain a zoning permit and to provide plaintiffs an occupancy permit – constitutes a nuisance. In support, plaintiffs cite MCL 125.3407[5] and an unpublished decision of

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[3] Plaintiffs did not specifically allege a continuing nuisance.

[4] Defendants correctly point out that to the extent plaintiffs base their nuisance claim on negligence, that challenge is meritless since the jury found for defendants on that issue. Moreover, as addressed later, plaintiffs' have waived their challenge to the instructions on the issue of negligence.

[5] MCL 125.3407 provides in relevant part: "Except as otherwise provided by law, a use of land or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered, razed, or converted in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se."

this Court[6] for the general proposition that violation of a zoning ordinance is a nuisance per se. However, even setting aside that plaintiffs did not allege a nuisance per se let alone a zoning violation, plaintiffs have not cited the specific ordinance defendants allegedly violated and no evidence was presented that plaintiffs did not, in fact, receive an occupancy permit.[7] Again, plaintiffs have failed to establish their nuisance claim. The trial court did not err.

2. INTENTIONAL INTERFERENCE

We next reject plaintiffs' claims of intentional interference with their contract or business relationship with Hammer Restoration. "The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Knight Enterprises v RPF Oil Co*, 299 Mich App 275, 280; 829 NW2d 345 (2013) (citations omitted). "The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996).

Although they are separate torts, "[o]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 382; 689 NW2d 145 (2004) (quotation marks and citation omitted). "To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *BPS Clinical Laboratories*, 217 Mich App at 698-699 (citations omitted). As even a cursory review of the evidence reveals, plaintiffs' intentional interference claims do not even get off the ground.

For starters, it is undisputed that plaintiffs had no contract with Hammer; they had only a bid. Thus, their intentional interference with a contract claim fails on this basis alone.

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[6] Plaintiffs cite *Gerrish Twp v Doering*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2000 (Docket No. 216584), for its reliance on MCL 125.294 (regarding nuisance per se). That section, however, was repealed by 2006 PA 110. MCL 125.3407 now contains the relevant provisions regarding nuisance per se.

[7] Defendants' claim that the violation of an ordinance alone is insufficient to constitute a nuisance is inapposite to MCL 125.3407's plain language, and their reliance on *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 276-277; 761 NW2d 761 (2008), is misplaced since that analysis pertained to a public nuisance.

Equally damning to both claims is that it was plaintiffs, and not defendants, who inserted Dowling Restoration into the bidding process. Indeed, it was based on a third party's recommendation that plaintiffs engaged Dowling Restoration in the first place. Mrs. Lemieux further testified that plaintiffs' hired Dowling Restoration based on this recommendation coupled with the fact that Dowling Restoration was a local company. Plaintiffs therefore cannot maintain their claims where it was their own decision to forego Hammer's services. See *Northern Plumbing & Heating, Inc v Henderson Bros, Inc*, 83 Mich App 84, 93; 268 NW2d 296 (1978) ("One is liable for [intentional interference with a business relationship] who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another.")

But even if defendants did promise to install a new garage and refrain from using ozone until providing the MSDS as plaintiffs argue, neither act was wrongful per se, and there is no evidence of affirmative acts corroborating the supposed improper intent. In fact, it appears the opposite is the case since both alleged promises were offered as part of the normal bidding process initiated by plaintiffs, and there is zero indication that defendants otherwise induced Hammer to cease its business relationship with plaintiffs.[8] Any claim of intentional interference is therefore wholly meritless.

3. FRAUD

We complete our analysis of the trial court's directed verdict ruling by affirming its dismissal of plaintiffs' fraud claim. To establish fraudulent misrepresentation or fraud in the inducement, a plaintiff must show the following:

> (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).]

[8] Plaintiffs make much of the trial court's inquiry below into whether the intentional interference claims were Hammer's rather than plaintiffs to bring. Plaintiffs claim this line of inquiry was improper since an interference can be with either party to a contract. This argument is a red herring, however, since it was plaintiffs rather than Hammer who inserted Dowling Restoration into the bidding process and ultimately elected to terminate the relationship with Hammer. Plaintiffs also claim the trial court erred in holding that noneconomic damages are not recoverable for claims based on intentional interference. See *Stack v Marcum*,147 Mich App 756, 758, 760; 382 NW2d 743 (1985). It is not clear from the record that his was a basis of the court's holding. Regardless, plaintiffs have otherwise failed to establish the requisite elements of either intentional interference claim.

Here, plaintiffs premise their fraud claim on defendants' alleged representation that ozone would not be used unless plaintiffs gave authorization following their review of the MSDS, which Dowling promised to provide.[9] Plaintiffs assert that but for this alleged representation, they would not have engaged Dowling Restoration's services.

In determining whether this representation constitutes fraud, we are mindful that "[f]raud in the procurement of a contract may be grounds for monetary damages . . . ." *Titan Ins Co v Hyten*, 491 Mich 547, 557-558; 817 NW2d 562 (2012). It is equally well established, however, that misrepresentations related to the fulfillment of a contractual duty may not give rise to an independent action in tort. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 410; 751 NW2d 443 (2008). Accordingly, to maintain their fraud claim, the law required plaintiffs to establish the "violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). This plaintiffs failed to do.

At trial, Mr. Lemieux testified unequivocally that he added to the contract that ozone was not to be used absent his reviewing the MSDS Dowling promised to give him and his providing authorization. Consistent with this, plaintiffs' counsel elaborated during opening statement that "both written and oral agreements" underlay plaintiffs' breach of contract claim and that Dowling "never provided what he told my clients he would provide, which we claim is the first breach of the contract. He never gave them the MSDS sheet until after his - - my client's wife was injured by ozone exposure." It is difficult to conceive of clearer admissions that the basis of plaintiffs' fraud claim is *identical* to the contractual duty they claim was breached. The law prohibits plaintiffs from pursuing fraud under these circumstances.[10]

B. INSTRUCTIONAL ERROR

Plaintiffs next raise two challenges to the jury charge, claiming that the trial court erred in failing to provide special instructions regarding special duties owed by contractors and the voluntary assumption of duty. Although plaintiffs initially requested these special instructions below, they subsequently answered, "No, your Honor," when the trial court asked if there were any objections to the instructions as read to the jury. Accordingly, this issue is waived and appellate review is precluded. *Landin v HealthSource Saginaw, Inc*, __ Mich App __, __; __ NW2d __ (2014); slip op at 13 ("A party is deemed to have waived a challenge to the jury instructions when a party has expressed satisfaction with, or denied having any objection to, the

[9] Because this representation forms the basis of plaintiffs' fraud claim, their brief reference to silent fraud is without merit since that tort pertains to a nondisclosure or incomplete representation. See *Alfieri v Bertorelli*, 295 Mich App 189, 193-194; 813 NW2d 772 (2012) (explaining that silent fraud is essentially the same as fraudulent misrepresentation "except that it is based on a defendant suppressing a material fact that he or she was legally obligated to disclose, rather than making an affirmative misrepresentation.").

[10] Because Mr. Lemieux also testified that he added to the contract that plaintiffs would receive a new garage, that alleged representation likewise cannot support a claim of fraud.

instructions as given. A waiver extinguishes instructional error and appellate review is precluded"); see also *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002) (finding waiver of an instructional challenge where defense counsel replied, "No, Your Honor," after the trial court asked if there were any objections to the jury instructions as read).

In any event, the premise for each special instruction is that defendants used ozone absent plaintiffs' review of the MSDS and their providing authorization. As already explained, however, this duty is inextricably linked to the contract. Indeed, the disagreement between the parties arises out of whether the contractual conditions triggering the use of ozone were satisfied, and it is from the alleged breach of this duty that plaintiffs claim harm. In light of this, the use of ozone under these circumstances cannot show that a duty separate and distinct from the contract existed, *Fultz v Union-Commerce Assoc*, 470 Mich 460, 468; 683 NW2d 587 (2004), let alone establish that by using ozone, defendants committed an affirmative act independent of their contractual duties that worsened the situation, *Dumka v Quaderer*, 151 Mich App 68, 75; 390 NW2d 200 (1986), or otherwise voluntarily assumed a duty not incumbent upon them, *Sponkowski v Ingham Co Road Comm*, 152 Mich App 123, 127; 393 NW2d 579 (1986). "[I]t is error to instruct a jury with regard to a matter not sustained by the evidence or the pleadings." *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591 NW2d 422 (1998). Consequently, where the special instructions bear directly on issues not supported by the evidence, the trial court did not err in declining to provide them.

Affirmed.

Defendants may tax costs having prevailed in full. MCR 7.219.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Stephen L. Borrello