STATE OF MICHIGAN

COURT OF APPEALS

RICHARD J. DICKSHOTT, MANFRED KAWAELDE, ANN R. KAWAELDE, and DOROTHY CARLSON,

Plaintiffs-Appellants,

v

RON E. ANGELOCCI, d/b/a PROFIT CENTERS GROUP,

Defendant-Appellee.

UNPUBLISHED
June 17, 2004

No. 241722
Oakland Circuit Court
LC No. 00-024814-CK

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Plaintiffs Richard Dickshott, Manfred Kawaelde, Ann Kawaelde and Dorothy Ann Carlson appeal as of right from the circuit court order granting summary disposition to defendant Ron E. Angelocci, d/b/a Profit Centers Group, pursuant to MCR 2.116(C)(7), (8) and (10). We affirm.

I. FACTS

Plaintiff Richard Dickshott is a certified public accountant and was the trustee of the Dorothy Ann Kawaelde Trust Agreement ("the Trust") during the time period in which the present litigation arose. Plaintiffs Manfred Kawaelde and his wife Ann are the parents of plaintiff Dorothy Carlson, who was formerly known as Dorothy Ann Kawaelde. The Kawaeldes are the settlers of the Dorothy Ann Kawaelde Trust Agreement. Defendant Ronald E. Angelocci, an investment advisor, certified financial planner, registered securities broker, and licensed life insurance agent with over twenty years experience, is the sole proprietor of Profit Centers Group, which is engaged in financial planning, selling insurance products, and placing insurance and securities.

In 1990, plaintiff Manfred Kawaelde ("Kawaelde"), who was then sixty years old, was approached about selling his successful tool and die business. The possibility of an impending and profitable sale of his business caused Kawalde and his wife to ponder the tax consequences associated with such a sale and how to minimize future estate tax liability given their desire to pass a substantial portion of their assets to their daughter upon their death.

In the fall of 1990, Kawaelde met Angelocci, who indicated that he provided estate-planning services. At the time, Kawaelde did not know that Angelocci was an insurance agent. Over the course of several weeks, Kawaelde and Angelocci discussed estate planning concepts. After considering various options, Kawaelde agreed with Angelocci to set up trusts to "get money out of the estate so it could grow on its own without adding to the amount of the estate...when we die." The trusts were then put into a partnership. Kawaelde's attorney, Mr. Pavlock, drew up the trust agreements. Dickshott, Kawaelde's accountant, was named trustee of the Dorothy Ann Kawaelde Trust Agreement.

Subsequently, during the fall of 1991, Kawaelde continued to receive financial planning advice from Angelocci, who recommended that he purchase from Connecticut General Life Insurance Company (CGLIC or CIGNA) a "second-to-die" whole life insurance policy, also called an interest sensitive vanishing premium policy, with a death benefit of $4,278,865. Under a vanishing premium policy, the reserves are invested and, if the investments are successful, sufficient money is earned to continue to pay the premiums. Specifically, Angelocci proposed the following plan to Kawaelde:

> We could take out some insurance that at least the bulk of the money you have to pay the IRS will be covered by a last to die type of insurance because when you die, after the estate plan is in place, your wife will get, she don't have to pay any estate tax but your children will. So when both of you die that insurance will kick in and it will save a fire sale.

According to Kawaelde, Angelocci said that he could get approximately $4.2 million in insurance "for $300,000, one-time-paid-off insurance" and that "Cigna can do it." Kawaelde then referred Angelocci to Dickshott, his accountant, who was assured by Angelocci that "it will work out that way."

Kawaelde testified that "[his daughter's] tax liability was estimated by Mr. Angelocci to be around $4,000,000 based on the growth of the estate." According to Kawaelde, he purchased the insurance policy to pay for the taxes once he and his wife had died. Angelocci assured him that it "would be a good way [to protect his family]" and "would cost [him] a known amount of money" to insure that his daughter would be protected. Kawaelde testified that he "was very specific" that there would be only "one payment" because "I did not want the burden of every year to have to pay an insurance premium which would have to be paid then by my daughter or I would have to pay it into a certain account so it's part of her exemption."

Kawaelde testified that when he asked Angelocci whether there was any possibility of any payments beyond the initial $300,000 payment, Angelocci repeatedly assured Kawaelde that "the insurance is guaranteed at [$4.2 million]," but that it "maybe fluctuate a hundred thousand or so, no matter what interest rates." Kawaelde admitted that he never read the insurance policy before it was purchased and that he trusted Angelocci.

Kawaelde admitted that, at the time that the insurance policy was purchased, he did not know that the amount of insurance available in the future would be dependent upon interest rates. Kawaelde also admitted that he did not read the approximately five hundred pages of documents that Angelocci gave him describing how the policy worked, claiming that he did not have the time to read them since he was working fourteen hours a day in his business.

Dickshott, as trustee of the Dorothy Ann Kawaelde Trust Agreement, purchased the insurance policy for the Trust. Dickshott, a CPA, had been an accountant for Kawaelde's company since the early 1980s. However, Dickshott did not have any experience with estate planning, except for providing tax advice regarding estate plans and "the tax impact of particular actions." Dickshott did not give advice to Kawaelde about the latter's life insurance matters until the CIGNA policy was presented to him. According to Dickshott, he advised Kawaelde not to buy the insurance policy because "I didn't think there was an insurance company that could make . . . ten and a quarter percent return for forty years," which was "contained in that CIGNA proposal," and "because I didn't think it would perform the way he wanted it to, the way he expected it would." Dickshott was also concerned that the insurance policy would not perform as expected "[b]ecause [Kawaelde] was making a commitment of $300,000 which was half of his lifetime exemption for estate tax purposes, and once that's gone, it's gone. You can't recover it." In Dickshott's opinion, "I wasn't sure that buying that policy was the best use of [the lifetime exemption]" Dickshott also questioned whether Kawaelde would have to pay any more premiums because "if you buy an insurance policy, you have to make premium payments." Dickshott thought that "the cost of that insurance would not be paid by the earnings of his $300,000 because they were not going to hit that ten percent target."

Dickshott testified that, before the insurance policy was purchased, Kawaelde instructed Angelocci to send him the "projections" or "illustrations" of the policy because Dickshott was to be the trustee of the life insurance policy, with Mr. and Mrs. Kawaelde as the insureds. Dickshott also was sent an unsigned copy of the trust agreement and asked to apply for a tax identification number because Kawaelde was contemplating buying the life insurance policy. According to Dickshott, the documents regarding the premium payments and the projected value of the life insurance "did not agree with what [Kawaelde] told me" because they showed "five premium payments on the illustration" and not just one premium payment. Dickshott brought this information to the attention of Kawaelde in a phone conversation and a fax, stating to him that "based on the investigatory work that I had done, it didn't look like the policy was going to work out; it looked like it was going to blow up, and I thought he was being sold a bill of goods." Dickshott testified that Kawaelde "told me one premium payment, $300,000, and it was done, single premium policy," yet "[t]he illustration showed a series of payments." Dickshott testified that he "wasn't absolutely sure that Angelocci wasn't giving good information," but acknowledged that, based upon the documents, Kawaelde would have to pay more than one single premium and that a ten percent return on $300,000 was not even sufficient to pay the annual premium on the policy of $71,058.

Dickshott met with Christopher Fisher, an acquaintance who was an insurance agent in Ann Arbor, Michigan because what Kawaelde told him did not square with the illustrations provided by Angelocci. Dickshott asked Fisher "to look at the policy and to look at the illustration and tell me what's wrong with it." Dickshott testified that he contacted Fisher because "I was concerned about whether or not it was, in fact, a single premium contract . . . whether Angelocci was making true representations [and] Mr. Angelocci's performance assumptions." According to Dickshott, "[Fisher's] the one that told me the policy was going to blow up in five to seven years, and that's what I tried to warn Fred about." In a letter to Dickshott, dated October 15, 1991, Fisher stated: "Unfortunately, these proposals that are being showed are not going to become true because mortality expenses, investment experience and

general overhead expenses are all going to change, and some of these factors will change very dramatically."

In a letter to Kawaelde, dated November 6, 1991, Dickshott, using the figures provided by Fisher and attaching a schedule showing the relationship between premium to benefit, stated, "The contract payment cannot generate enough value to pay $2,496,364 of premium unless the deposit earns over 24 four percent per year for 28 years or more. It appears the contract self-destructs between seven and 20, and attached is a document containing some calculations." Dickshott acknowledged that by November 6, 1991, he was satisfied that the insurance policy would not perform as represented to Kawaelde by Angelocci and that the information provided by Angelocci was not correct. Dickshott conveyed his concerns to Kawaelde about Angelocci's representations that there would only be one premium payment and tried to convince Kawaelde that the insurance policy would not work because Dickshott did not believe that the policy deposit would earn twenty-four percent a year for twenty-eight years since it was not realistic.

Dickshott also met with Charles Person, who was then a trust officer in the former Manufacturer's Bank trust department. Person, who was familiar with insurance, concurred with Dickshott "that the CIGNA contract was at the far end of the range of probability." According to Dickshott, the underlying assumptions that were contained in the projections presented a risk of the policy not performing as expected.

During his discussions with Angelocci before the insurance policy was purchased, Dickshott asked him to prepare an illustration based upon a seven percent interest rate calculated upon the premium deposit because Dickshott believed that rate that Mr. Angelocci espoused was unrealistic based upon the prime rate at the time. Specifically, Dickshott "thought Mr. Angelocci was lying" when he stated that only one premium payment was going to be necessary. According to Dickshott, "Fisher's comments [that the policy would have to make a twenty-four percent return on the premium deposit] added to the credibility of my concern that Angelocci's representations were not accurate."

In his deposition, Kawaelde testified that Dickshott questioned Angelocci whether there would only be a one-time payment of $300,000 and that Dickshott told him that Angelocci assured Dickshott that there would be only one payment. Kawaelde testified that Dickshott, however, expressed doubts to Kawaelde about whether the policy would pay $4 million and whether $300,000 was a one-time payment. In response, Kawaelde told Dickshott to talk to Angelocci because he "didn't have time to listen to that" and that Angelocci is "the man who knows the answers." Kawaelde testified that he could not remember whether Dickshott told him that more payments might be necessary to keep the policy in force because the policy was dependent upon interest rates in the future, but that "[if] he did, I didn't listen to him." According to Kawaelde and Dickshott, Kawaelde was convinced that Angelocci knew what he was talking about and that the proposal as presented would work. According to Dickshott, a letter from CIGNA did not guarantee that there would only be one payment of $300,000 for the policy. In late October 1991, before the insurance policy was purchased, Dickshott also met with Mr. Manley, who worked for CIGNA. Manley also represented that only a single premium was necessary to continue the policy over its expected life.

Although Dickshott questioned whether $300,000 would be enough to cover the cost of the policy, Kawaelde directed Dickshott to purchase the policy on behalf of the Trust on

November 4, 1991. After Kawaelde deposited $300,000 into the Trust's account, Dickshott, the trustee, issued checks totaling $300,000 to purchase the policy. The Policy Specifications section of the policy stated that the insureds were Manfred Kawaelde and Ann R. Kawaelde and that the amount of insurance was $4,278,865. It also stated that the premiums were "payable annually," that the first premium was $71,058, and that the "automatic premium loan" was selected. The owner and beneficiary of the policy was "Richard Dickshott, Trustee under an Agreement of Trust with Dorothy Ann Kawaelde, Dated September 23, 1991, or the Successor(s) in Said Trust."

In Dickshott's view, the representations made by Angelocci in the illustrations "were not accurate" and Angelocci misrepresented the performance of the policy "at the initial purchase time" that there would only be one premium payment of $300,000. Dickshott acknowledged that he never believed Angelocci's representation that there would only be one premium payment of $300,000 on the policy and that he purchased the policy because Kawaelde told him to do so, despite his objections.

After writing the checks to purchase the insurance policy, Dickshott sent a fax to Kawaelde, dated November 6, 1991, seeking to convince him to cancel the policy within the ten-day grace period given to reject the policy.[1] In the fax, Dickshott stated:

> I think we have been led down the rosy path! See arrows. The contract payment cannot generate enough value to pay $2,496,364 of premium unless the deposit earns over 24% per year for 28 years or more. It appears that the contract self destructs between years 7 and 20.

Dickshott acknowledged that he tried to tell Kawaelde that he should not believe Angelocci, that Angelocci was misrepresenting what was going to happen to the policy, and that the policy was not going to work.

Dickshott testified that after the insurance policy was purchased, Angelocci called to convince him of the correctness of the projections or illustrations of the policy because there was a "thirty-day window, and he wanted to make sure I didn't get my foot in that door to be able to reject the policy to get my money back." Theoretically, Dickshott had the authority as trustee of the Trust to terminate the policy because the trust was the purchaser, but "[r]realistically it was Fred Kawaelde's responsibility." According to Dickshott, "I was probably more than fifty percent convinced it would not perform," but was not sure because he had met with Angelocci and "a representative of CIGNA" and "as late as November 13th [1991] Angelocci sent me a nine percent projection and said it was more realistic." Although Dickshott recommended to Kawaelde that the policy not be continued, "Mr. Kawaelde was insistent that the policy be

[1] According to the policy, "it will be deemed void" if returned "within 10 days after its receipt" and "the Company will refund the premium paid." Although the policy provides a ten-day period for returning the policy, there was deposition testimony that it could be cancelled within a thirty-day period.

continued." In Dickshott's opinion, the insurance policy "was not in the best interest of the beneficiaries" of the Trust, who were Dorothy Carlson and her children. However, Dickshott also testified that "[t]he trust was the beneficiary of the policy." Neither Kawaelde nor his wife is a beneficiary of the policy.

Dickshott understood that at the time the insurance policy was purchased, Angelocci was acting as an insurance agent for CIGNA and that Profit Centers Group was his company. Dickshott assumed that Angelocci would earn a commission from the sale of the policy.

Dickshott acknowledged that shortly after the policy was issued, he received a letter on November 26, 1991, indicating that the payment made by Kawaelde covered the premium for only four years. Specifically, on November 29, 1991, Dickshott received a letter indicating that CIGNA had received a deposit in the amount of $228,942, which prepaid the premium on this policy for four years. Dickshott could not recall whether he told Kawaelde that he had received a premium payment notice from CIGNA. Dickshott acknowledged that the letter reflected what the annual premium payments had to be in order to maintain the policy and that "[t]hey were going to be paid out of the deposit premium." Dickshott acknowledged that because of the interest rates, the annual return on the initial deposit of $300,000 was not sufficient to make $71,050 to cover the annual premium. Dickshott admitted that while he knew that there would have to be annual premiums paid after the $300,000 was paid by Kawaelde, he believed, based upon the representations of Angelocci and CIGNA's projections, that the funds for those premium payments would be generated internally through CIGNA's investment of the $300,000. Dickshott admitted that when he read the policy, there were no statements made that only one payment of $300,000 was sufficient to make all the premium payments. According to Dickshott, Angelocci said that "Mr. Kawaelde and the trust would not have to make any more premium payments."

Kawaelde acknowledged that after the insurance was purchased, he and Angelocci became friends and that "Angelocci won my trust." Thereafter, in 1992, Kawaelde sold both his tool and die business and the property on which the manufacturing plant was located. Kawaelde's net gain from the sale was $4 million.

In the meantime, Dickshott received a premium due notice from CIGNA, dated November 1, 1994, indicating that the insurance policy was paid from the deposit money. Specifically, the letter stated, "Premium due November 1st, 1994, and this policy was paid from the premium deposit fund. As you know, the remaining fund is sufficient to pay premiums to November 1st, 1996." According to Dickshott, he understood the notice to mean that "we have enough money on deposit to pay the premium * * * [until] November 1st, 1996" and that "[w]e would have made all the payments required out of the prepaid deposit and we were finished." Dickshott testified that he did not worry about it "[b]ecause my understanding was we had a single premium policy. It was done. I was finished with my responsibility. I didn't have to write any more checks, I didn't have to do anything." Dickshott testified that he then filed the notice and "may have sent a copy to Kawaelde." Dickshott was not concerned about making any additional premium payments in November 1996, because Angelocci had represented that the policy only required one premium payment at the inception of the policy.

On November 1, 1996, the Trust received an invoice for a premium due on the policy in the amount of $71,058. According to Dickshott, that was the first time he realized that

Angelocci's statement that there would only be one payment of $300,000 was not accurate and that the policy was not performing as expected. Dickshott called Kawaelde to tell him that there was a problem with the policy. Kawaelde directed Dickshott not to pay the bill because he had a "paid-up premium" and to check into the matter. Dickshott then met with Angelocci, who told him that "the policy wasn't performing the way it was illustrated." According to Kawaelde, "shortly thereafter there was a class action suit."

Dickshott received notice of two class action lawsuits against CGLIC/CIGNA which had been instituted by its policyholders based upon misrepresentations regarding the performance of the individual interest sensitive whole life and universal life policies and the maintenance of life benefits. One class action suit, *Spitz v CGLIC*, Case No. CV 95-356 HLH, was filed in federal court in California. The other class action suit, *Novacheck v CGLIC*, Case No. CV 95-356 HLH, was filed in federal court in Pennsylvania. Eventually, these two cases were consolidated in the United States District Court for the Central District of California as a class action, *In re: Connecticut General Life Ins Co Premium Litigation*, MDL Docket No. MDL-1136. Dickshott, the trustee of the Dorothy Ann Kawaelde Trust Agreement, was the owner of the policy on behalf of the insureds, Mr. and Mrs. Kawaelde, and thus became a member of the settlement class in the consolidated action, which became known as the *Spitz/Novacheck* litigation.[2]

After consultations with Dickshott, Kawaelde directed Dickshott to opt out of the class action suit and to pursue alternative dispute resolution or arbitration against CIGNA on behalf of the Trust. Kawaelde testified that in the fall of 1996, he hired a law firm to represent the Trust after the class action suit was instituted, and that he invited Angelocci to have lunch with him, his daughter and two of the firm's lawyers to discuss the suit. According to Kawaelde, Angelocci said that he sold Kawaelde a "paid-up one-premium policy" and that he wished that Kawaelde would sue him so that "I can sue CIGNA." According to Dickshott, Angelocci repeatedly told Kawaelde that "the premium payment request from CIGNA was an accounting mistake that would be corrected" and that "the accounting mistake would be cleaned up internally."

Subsequently, in November 1997, Dickshott received a letter from CIGNA that the annual premium amount of $71,058 had been applied against the policy, that the policy authorized the "automatic premium loan provision" and that "[y]our policy now has an indebtedness of $147,630.10 on which interest will accrue during the current policy year at the current adjustable loan interest rate of seven point six percent." Each year thereafter, Dickshott received a similar letter stating that he was being charged premiums of $71,058.

Ultimately, the *Spitz/Novacheck* litigation was settled under the terms of a settlement agreement entered on February 11, 1997. The settlement agreement established a remedy process for class members with misrepresentation claims against CGLIC or its agents. The settlement agreement provided for the establishment of a review team in a three-step process of

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[2] While defendant asserts that "Dickshott and the Kawaeldes were members of the settlement class in the consolidated action . . .", the record suggests that, as a matter of law, only Dickshott was actually a member of the settlement class.

review, culminating in a limited arbitration right, along with an evaluation system for awarding damages. The review team made an initial assessment of misrepresentation and an award based upon an established scoring system. If the claimant was dissatisfied with the review team's decision, he or she could choose to participate in an alternative dispute resolution process. The first step in that process was for a policy owner referee to determine whether the decision of the review team was in accordance with the scoring system. If the claimant was still dissatisfied with the policy owner's review, the claimant could proceed to a limited form of arbitration. The settlement order specified that the alternative dispute resolution process would be "final and binding on CGLIC and the policy owner." The final order and judgment provided that the class members would enter a general settlement release of all claims other than those being processed through the ADR process, which "will be to bar future claims of the policy owners for DAC related and other claims not involving alleged misrepresentations." Under the settlement order, a policy holder who used the resolution process was releasing from liability both CIGNA and its agents.

On July 10, 1997, Dickshott submitted a claim form under the procedures set forth in the settlement order. On the Policy Owner Referee Evaluation Form, dated April 27, 1998, the review team gave the claim filed by Dickshott on behalf of the insureds Mr. and Mrs. Kawaelde a score of "1," which would have resulted in a settlement of $500. However, the Policy Owner Referee disagreed and gave the claim a score of "2," which resulted in a settlement of $3,000. In May 1998, Dickshott then submitted the ADR form to have the Policy Owner Referee's score reviewed. In their arbitration brief, Dickshott and the Kawaeldes asserted that Angelocci was CGLIC/CIGNA's agent and also owed fiduciary duties to the Kawaeldes on the ground that he provided a broad spectrum of business, financial and estate planning advice to them. After de novo review, an arbitrator agreed to score the claim a "2" and thus award the policy owner $3,000 for the damages resulting from the misrepresentation of the policy.

During the arbitration proceedings, Kawaelde received a letter from Angelocci, dated February 1, 2000, in which Angelocci admitted that his representation to Kawaelde that "his $300,000 single lump sum premium purchased for him a 'paid-up' policy . . . was untrue." According to Kawaelde, it was his understanding that "Mr. Angelocci was working for this Profit Center, and he working for me getting me a policy to protect my estate." Kawaelde testified that he did not know that Angelocci was a CIGNA agent until the arbitration agreement was signed.

On July 26, 2000, plaintiffs commenced this action against Angelocci and his company, Profit Centers Group, alleging negligence (Count I), negligent misrepresentation (Count II), breach of contract (Count III), intentional misrepresentation (Count IV), fraudulent concealment (Count V), and intentional interference with an expected inheritance (Count VI).

In December 2001, defendant filed a motion for summary disposition, asserting that Dorothy Carlson, Manfred Kawaelde and Ann Kawaelde had no standing to bring the claims because they did not purchase or own the policy in question, that they are not beneficiaries of the policy, and that they did not have any professional contract with defendant. Defendant also contended that Carlson and the Kawaeldes failed to state a claim because they were improper plaintiffs. Defendant further asserted that Dickshott was not a proper party because he had resigned as trustee of the trust before the complaint was filed. Defendant also asserted that plaintiffs' claims were released and barred by the final judgment and release in the *Spitz/Novacheck* litigation, and that the applicable statutes of limitation barred their claims. In

addition, defendant contended that plaintiffs' claim for "intentional interference with an expected inheritance" failed to state a claim under Michigan law.

Following a hearing on March 20, 1992, the trial court issued an opinion and order, dated May 9, 2002, granting defendants Angelocci and Profit Centers Group's motion for summary disposition, concluding that Carlson and the Kawaeldes were improper plaintiffs, that plaintiffs' claims were released and barred by the final judgment and release in the *Spitz/Novacheck* litigation, that the applicable statutes of limitation barred plaintiffs' claims, and that plaintiffs failed to state a claim for intentional interference with an expected inheritance.

II. STANDARDS OF REVIEW

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 557 (2003). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776, reh den 459 Mich 1204 (1998); *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School Dist*, 255 Mich App 60, 67; 661 NW2d 586 (2003). When deciding the motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists to warrant a trial. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

A motion brought under MCR 2.116(C)(7) requires the court to accept as true the plaintiff's well-pleaded allegations and construe them in favor of the plaintiff, unless specifically contradicted by affidavits or other appropriate documentation submitted by the movant. *Horace v Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998); *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 476 NW2d 153 (1998); *Baks v Moroun*, 227 Mich App 472, 477 n 2; 576 NW2d 413 (1998). If the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if the affidavits or other documentary evidence show that there is no genuine issue of material fact, judgment must rendered without delay. *Baks*, *supra*, at 477 n 2; *In re Belinger Trust*, 221 Mich App 273, 275-276; 561 NW2d 130 (1997). If no facts are in dispute, then whether the movant is entitled to summary disposition is a question of law. *Baks*, *supra* at 477 n 2. Statutory interpretation is also a question of law subject to de novo review. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997); *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). Summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). All factual allegations in support of the claim are accepted as true, as well as

any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817; *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden, supra*.

III. ANALYSIS

The trial court granted defendant's motion for summary disposition as to plaintiffs' claims on the ground that there was no genuine issue of material fact that plaintiffs Manfred Kawaelde, Ann Kawaelde and Dorothy Carson were improper plaintiffs because they were not real parties in interest. The trial court was erroneous in its finding that only Dickshott was a proper plaintiff in this case. For purposes of clarity, this opinion will address each cause of action separately. Within each cause of action, we will first determine which of the four plaintiffs are real parties in interest. We will then determine if the cause of action is barred by a statute of limitations. Next, we will address whether the cause of action is precluded by the release contained in the final order and judgment of the *Spitz/Novacheck* litigation. Finally, we will determine whether plaintiffs have established a genuine issue of material fact regarding each claim.

A. Negligence

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). In this case, plaintiffs' negligence claims essentially involve claims of professional negligence against defendant in his capacity as a qualified financial planner and qualified insurance agent. "The key to a malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship." *Bronson v Sisters of Mercy*, 175 Mich App 647, 652-653; 438 NW2d 276 (1989), citing *Becker v Meyer Rexall Drug Co*, 141 Mich App 841, 485; 367 NW2d 424 (1985).

Proper Plaintiffs

Legal actions must be prosecuted in the name of the real party in interest. MCL 600.2041; MCR 2.201(B). A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may rest with another. *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 311; 561 NW2d 488 (1997)[3]

[3] The issue of being the real party at interest is closely related to the idea of standing. To have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected. *Allstate Ins Co v Hayes*, 442 Mich 56, 58; 499 NW2d 743 (1993). As the Court noted (continued…)

Mr. and Mrs. Kawaelde (but not Dickshott and Carlson) are the proper plaintiffs to bring a negligence action against defendant because defendant had a professional relationship with Mr. and Mrs. Kawaelde, to whom he gave estate planning advice. We are not persuaded by defendant's argument that Mr. and Mrs. Kawaelde were not proper plaintiffs as to the negligence claim because "they did not have a contract for professional services with Angelocci." The absence of a contract or agreement stating the terms of the professional services being rendered is not fatal to their claim.[4] While it is true that Mr. and Mrs. Kawaelde did not have a written contract with defendant, defendant incorrectly asserts that professional relationships are established only by (written) contract. Notwithstanding the absence of a written contract, the record shows that defendant had a professional relationship with them, thus giving rise to the existence of a legal duty.

Statute of Limitations[5]

The trial court properly granted summary disposition to defendant under MCR 2.116(C)(7) on the basis that the Kawaeldes' negligence claim was barred by the statute of limitations. Negligence is governed by the three-year period of limitation set forth in MCL 600.5805(9). See *Adkins v Annapolis Hospital*, 420 Mich 87, 89; 360 NW2d 150 (1984).

A cause of action accrues "when all of the elements of the cause of action have occurred and can be alleged in a proper complaint." *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 150; 200 NW2d 70 (1972); see also *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 479; 586 NW2d 760 (1998). Moreover, the Court noted in *Stephens v C J Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995), that a cause of action in negligence accrues on "the date on which the plaintiff was harmed by the defendant's negligent act, not the date on which the defendant acted negligently." See also *Ohio Farmer Ins Co v Shamie*, 462 Mich 852; 611 NW2d 800 (2000) (noting that "accrual requires that the plaintiff have suffered damages").

In this case, viewing the facts in the light most favorable to the nonmoving parties, the Kawaeldes' claim of negligence began accruing on November 1, 1996 when Dickshott received

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(…continued)

in *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992), quoting 59 Am Jur 2d, Parties, § 30, p 414:

> One cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. This interest is generally spoken of as "standing."

[4]Defendant, while arguing that plaintiffs Mr. and Mrs. Kawaelde were not proper plaintiffs, actually seems to claim that they failed to raise a question of material fact under MCR 2.116(C)(10) sufficient to withstand a motion for summary disposition on their negligence claim.

[5] Plaintiffs have failed to introduce competent evidence supporting their argument that the limitation periods were tolled because of fraudulent concealment.

notice that an additional premium of $71,058 was due in order to maintain the policy. As plaintiffs maintain, it was not until that date that plaintiffs' suffered damages arising from defendant's alleged misconduct. However, plaintiffs' complaint was filed on July 26, 2000 and the Kawaeldes' negligence claim was barred by the three-year statute of limitations.

Conclusion

Mr. and Mrs. Kawaelde were the only proper plaintiffs to bring a negligence claim. However, the trial court correctly granted summary disposition of this claim pursuant to MCR 2.116(C)(7) because the claim was barred by the three-year statute of limitations. We need not address the *Spitz/Novacheck* litigation or whether genuine issues of material fact exist with regard to this claim.

B. Negligent Misrepresentation

A showing of negligent misrepresentation requires "proof that a party justifiably relied to his detriment on information provided without reasonable care by one who owed the relying party a duty of care." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989).

Proper Plaintiff

Plaintiffs assert, and we agree, that under the circumstances of this case the *only* proper plaintiff with respect to the misrepresentation claims is Mr. Kawaelde. We find persuasive the argument that it was only Mr. Kawaelde whom Mr. Angelocci attempted to influence with his misrepresentation concerning the policy; it was only Mr. Kawaelde who relied upon Mr. Angelocci's misrepresentations since it was solely Mr. Kawaelde's decision to purchase that policy; and it was Mr. Kawaelde, who paid the $300,000.00 to purchase the policy, and who was injured by Mr. Angelocci's misrepresentations.

Statute of Limitations

As noted, Mr. Kawaelde's claim of negligent misrepresentation began accruing on November 1, 1996 and plaintiffs' complaint was filed on July 26, 2000. Claims of negligent misrepresentation are governed by the six-year period of limitation found at MCL 600.5813. The trial court erred in granting summary disposition of the negligent misrepresentation claim where the claim was timely filed.

Spitz/Novacheck Litigation

The trial court erred by granting summary disposition under MCR 2.116(C)(7) on the basis that the final order and judgment in the *Spitz/Novacheck* litigation barred Mr. Kawaelde's negligent misrepresentation claims.

We note that Dickshott, as the policy owner of the insurance policy in question, participated in the dispute resolution mechanism called for by the *Spitz/Novacheck* settlement on behalf of the insureds Mr. and Mrs. Kawaelde. As defined by the final judgment and order in the *Spitz/Novacheck* litigation:

> A. The Settlement Class (excluding persons choosing to Opt-out or excluded under II.E below) shall consist of the current or former owners of CGLIC individual interest sensitive whole life and universal life, and participating life insurance policies purchased between the dates of August 1, 1983 and March 26, 1996 . . .

Pursuant to this definition, Dickshott, but not the insureds Mr. and Mrs. Kawaelde, was a member of the settlement class. Although it is undisputed that Dickshott was the policy owner, not the Kawaeldes, defendant argues that "Dickshott and the Kawaeldes were members of the settlement class." However, according to the terms of the final judgment and order in the *Spitz/Novacheck* litigation, the settlement agreement only pertained to the claims of class members. Thus, the release only reaches potential claims that Dickshott, as policy owner, might make against CIGNA or its agents "related to, or in connection with the marketing, purchase or sale of the CGLIC insurance policies that are the subject of this litigation." That being the case, the release only bars Dickshott's potential claims against defendant, but not the claims of the other plaintiffs. Thus, plaintiffs are correct in saying that "this release cannot result in the dismissal of all of the plaintiffs' claims.

Issues of Material Fact

The trial court properly granted summary disposition to defendant as to the negligent misrepresentation claim because Kawaelde cannot establish a question of material fact that he was defrauded. As this Court observed in *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992), "there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant." In *Webb*, the plaintiffs brought an action against First of Michigan Corporation alleging that they were induced to make a bad investment as a result of fraudulent representations by the defendant's agent about the risks and the income potential of an investment. Viewing the facts in the light most favorable to the plaintiffs, this Court affirmed the trial court's order dismissing the plaintiffs' complaint. Specifically, this Court noted:

> Here, plaintiffs acknowledged receipt of the Damson 1983-84 Oil and Gas Income Fund prospectus and agreement [sic] to its terms by signing the subscription agreement form before making their initial investment. The subscription agreement and power of attorney form states that the person signing "warrants, represents, covenants and agrees" that the "undersigned" "understands the nature of the risks involved" in the investment and "the financial hazards involved in the offering, including the speculative nature of the investment and the risk of losing the undersigned's entire investment." Further, the front page of the prospectus states that the investment involves special risks and that the reader should consult the risk factors section. Beginning on page four of the prospectus, the risk factors involved are explained in detail and cover 3-1/2 pages. Even a cursory review of any of these documents would have enlightened plaintiffs that the investment was not "risk free" as represented by the broker. Accordingly, we hold that plaintiffs cannot claim to have been defrauded when they had information available to them that they chose to ignore. [*Id*. at 474-475.]

As in *Webb*, Kawaelde cannot claim to have been defrauded when he had available to him information regarding the truthfulness of defendant's misrepresentations but chose to ignore it. As Kawaelde admitted, he never read the insurance policy, nor any of the documentation that defendant gave him describing how the policy worked. The policy clearly stated that premiums were "payable annually" and that the first premium was $71,058. Further, Kawaelde admitted that he repeatedly ignored Dickshott's warnings before and after the policy was purchased that more payments would be necessary because the policy was dependent upon future interest rates. Moreover, Dickshott warned him by fax, dated November 6, 1991, that defendant misrepresented the policy because the policy could not perform as expected unless the initial payment earned "over 24% for 28 years or more." As in *Webb*, Kawaelde cannot show that he detrimentally relied upon defendant's representations about the policy when he had information available to him, which was set forth in the language of the insurance policy and presented by Dickshott, regarding the truthfulness of defendant's representations.

Thus, given the facts and circumstances of this case, Kawaelde cannot raise a genuine issue of material fact regarding his claim of negligent misrepresentation.

Conclusion

Mr. Kawaelde was the proper plaintiff to bring the negligent misrepresentation claim and the claim was not barred by the statute of limitations or the *Spitz/Novacheck* release. However, Kawaelde failed to establish that he detrimentally relied on defendant's misrepresentations. We affirm the trial court's order granting summary disposition to defendant on this claim on the basis that the trial court reached the right result for the wrong reason. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989).

C. Breach of Contract

To state a claim of breach of contract, a plaintiff must first establish the elements of a valid contract. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). The essential elements of a contract are: (1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991) .

Proper Plaintiffs

As to the breach of contract claim, the trial court erred in concluding that Dickshott was the only proper party to bring this claim. Carlson was also an appropriate party to proceed on the breach of contract claim because she was arguably a third-party beneficiary under MCL 600.1405, which provides:

> Any person for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

As plaintiffs point out, "[t]he contract in question was unquestionably designed for the benefit of Mr. and Mrs. Kawaelde's daughter, Ms. Carlson" because defendant knew that "[t]he whole purpose of the policy was to defray the substantial federal estate tax liability which Ms. Carlson would be responsible for following the death of both of her parents."

Statute of Limitations

Dickshott's and Carlson's claims of breach of contract began accruing on November 1, 1996 when Dickshott received notice that an additional premium of $71,058 was due in order to maintain the policy. The six-year period of limitation for contract actions is set forth in MCL 600.5807(8).

Spitz/Novacheck Litigation

The trial court did not err by granting summary disposition under MCR 2.116(C)(7) on the basis that the final order and judgment in the *Spitz/Novacheck* litigation barred Dickshott's breach of contract claim. According to the terms of the final judgment and order in the *Spitz/Novacheck* litigation, the settlement agreement pertained to the claims of class members. Dickshott, as policy owner and class member, released defendant, who was an agent of Profit Centers Group, and therefore released Profit Centers Group from all liability as to his claims. See *Larkin v Otsego Memorial Hospital Ass'n*, 207 Mich App 391, 393; 525 NW2d 475 (1995) (noting that under the common law, the release of an agent discharges any claim of liability against the principal that arises vicariously through the agent).

As discussed in issue B, *supra*, the *Spitz/Novacheck* litigation barred only the claims made by Dickshott. Carlson's claim of breach of contract was not barred by the settlement agreement.

Issues of Material Fact

There was no genuine issue of material fact regarding any breach of the insurance contract. As defendant points out, Kawaelde admitted that he had no contract with defendant or his company. There is also no indication that defendant breached any contract with Dickshott. Neither Dickshott nor Carlson can establish a genuine issue of material fact regarding their claims of breach of contract. Carlson would have a claim as a third party beneficiary if there were a contract with Angelocci. However, the contract which was to have benefited Carlson was between Dickshot and CIGNA. For Carlson to pursue a breach of contract claim as a third party beneficiary, it would have to be against one of the parties to the contract, either CIGNA or Dickshot, but not defendant. Here, defendant arranged for the insurance policy contract, but he was not a party to the contract nor did his conduct constitute grounds for a breach of contract action.

Conclusion

Dickshot and Carlson were the proper plaintiffs to bring a breach of contract claim. Their claim was not barred by the statute of limitations. However, Dickshot's claim is barred by the *Spitz/Novacheck* settlement. Carlson's claim for breach of contract fails because she did not establish a genuine issue of material fact. We affirm the trial court's order granting summary

disposition as to their breach of contract claims on the basis that the trial court reached the right result for the wrong reason. *Mulholland, supra,* at 411 n 10..

D. Intentional Misrepresentation

"The elements of intentional or fraudulent misrepresentation are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

Proper Plaintiff

We find that Mr. Kawaelde was the only proper plaintiff to bring the intentional misrepresentation claims. See analysis of issue B, *supra*.

Statute of Limitations

As noted, Mr. Kawaelde's claim of intentional misrepresentation began accruing on November 1, 1996 and plaintiffs' complaint was filed on July 26, 2000. Claims of intentional misrepresentation are governed by the six-year period of limitation found at MCL 600.5813. The trial court erred in granting summary disposition of the intentional misrepresentation claim where the claim was timely filed.

Spitz/Novacheck Litigation

As discussed in issue B, *supra*, the *Spitz/Novacheck* release only reaches potential claims that Dickshott, as policy owner, might make against CIGNA or its agents. The release does not bar the claims of Mr. Kawaelde.

Issues of Material Fact

As discussed in issue B, *supra,* Kawaelde cannot claim to have been defrauded when he had available to him information regarding the truthfulness of defendant's misrepresentations but chose to ignore it. Dickshott warned him repeatedly that defendant misrepresented the policy. Thus, Kawaelde failed to establish a genuine issue of material fact regarding his claim of negligent misrepresentation.

Conclusion

Mr. Kawaelde was the proper plaintiff to bring the negligent misrepresentation claim and the claim was not barred by the statute of limitations or the *Spitz/Novacheck* release. However, Kawaelde failed to establish that he detrimentally relied on defendant's misrepresentations. We affirm the trial court's order granting summary disposition as to the negligent misrepresentation claim on the basis that the trial court reached the right result for the wrong reason. *Mulholland, supra,* at 411 n 10.

E. Fraudulent Concealment

The elements of a fraudulent concealment action are: (1) a material representation which is false; (2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; (3) that defendant intended plaintiff to rely upon the representation; (4) that, in fact, plaintiff acted in reliance upon it; and (5) thereby suffered injury. *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988). The false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose. *Id*

Proper Plaintiff

Neither plaintiffs nor defendant address the fraudulent concealment claim explicitly. However, plaintiffs generally claim that Angelocci made misrepresentations to Kawaelde about the policy. Considering the allegations set forth in plaintiffs' complaint, it is apparent that Mr. Kawaelde is the proper plaintiff to proceed with this claim because he is the party who allegedly detrimentally relied upon defendant's false representations that Kawaelde's $300,000 single lump sum premium purchased a "paid up" policy.

Statute of Limitations

As noted, Mr. Kawaelde's claim of fraudulent concealment began accruing on November 1, 1996 and plaintiffs' complaint was filed on July 26, 2000. Claims of fraudulent concealment are governed by the six-year period of limitation found at MCL 600.5813. The trial court erred in granting summary disposition of the fraudulent concealment claim where the claim was timely filed.

Spitz/Novacheck Litigation

As discussed in issue B, *supra*, the *Spitz/Novacheck* release only reaches potential claims that Dickshott, as policy owner, might make against CIGNA or its agents. The release does not bar the claims of Mr. Kawaelde.

Issues of Material Fact

As discussed in issues B and E, *supra*, Kawaelde failed to establish a genuine issue of material fact regarding his claim of fraudulent concealment, specifically that he relied on Angelocci's claims to his detriment.

Conclusion

Mr. Kawaelde was the proper plaintiff to bring the fraudulent concealment claim and the claim was not barred by the statute of limitations or the *Spitz/Novacheck* release. However, Mr. Kawaelde failed to establish that he detrimentally relied on defendant's misrepresentations. We affirm the trial court's order granting summary disposition as to the fraudulent concealment claim on the basis that the trial court reached the right result for the wrong reason. *Mulholland, supra,* at 411 n 10.

F. Intentional Interference with an Expected Inheritance

Plaintiff Carlson's final argument on appeal is intriguing. Carlson presents a cause of action based on the tort of intentional interference with an expected inheritance. This tort has not been acknowledged or recognized by our Supreme Court, nor has it been codified by the Michigan Legislature.

However, the elements of a claim of interference with an expected inheritance have been set forth in *In re Green*, an unpublished per curiam opinion of this Court, issued August 16, 1996 (Docket No. 173335), as follows:

> We expressly recognize this tort and join the numerous jurisdictions which have defined its elements as: (1) the existence of an expectancy; (2) intentional interference with that expectancy; (3) the interference involved conduct tortious in itself such as fraud, duress or undue influence; (4) a reasonable certainty that the devise to the plaintiff would have been received had the defendants not interfered; and (5) damages. *Doughty v Morris*, 871 P2d 380, 384 (NM App, 1994); *Firestone v Galbreath*, 67 Ohio St 3d 87; 616 NE2d 202, 203 (1993); *In re Estate of Knowlson*, 204 Ill App 3d 454; 562 NE2d 277, 280 (1990); see also *Hammons v Eisert*, 745 SW2d 253, 258 (Mo App, 1988); *Harmon v Harmon*, 404 A2d 1020, 1022 (Me, 1979).

While the *Green* decision is well reasoned and persuasive, it is not binding precedent, MCR 7.215(C)(1). Furthermore, as thought provoking as Carlson's argument may be, judicial restraint causes us to refrain from specifically recognizing this tort until the Michigan Legislature codifies this tort, or upon appropriate judicial review and expression of our Supreme Court. Therefore, the trial court did not err by granting summary disposition under MCR 2.116(C)(8) on the basis that plaintiff Carlson failed to state a claim on which relief could be granted for her claim of intentional interference with an expected inheritance.

Affirmed.

/s/ Bill Schuette
/s/ Mark J. Cavanagh