

STATE OF MICHIGAN
COURT OF APPEALS

JOANN WILLIAMS, as Next Friend for
JONATHAN WILLIAMS, a minor,

UNPUBLISHED
June 4, 1996

Plaintiff-Appellant,

v

No. 176644
LC No. 87-704698-NM

JOSEPH M. SOMMER,

Defendant-Appellee.

Before: Griffin, P.J., and Smolenski and L. P. Borrello,* JJ.

PER CURIAM.

In this case of alleged misrepresentation and fraud, plaintiff appeals as of right an order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(8). We affirm.

The facts giving rise to this action are set forth in *Williams v Logan*, 184 Mich App 472; 459 NW2d 62 (1990); and *Williams v Logan*, unpublished opinion per curiam of the Court of Appeals, issued November 4, 1993 (Docket No. 139252). Following this Court's unpublished opinion in this matter, see *Williams, supra*, defendant moved for summary disposition; arguing that this Court's holding that Jonathan Williams (the alleged "illegitimate" son of decedent John Sommer) was not decedent's legal heir, see *Williams, supra* at 1, makes it impossible for plaintiff to prove that defendant's alleged fraud caused Jonathan to receive a reduced share of the proceeds of the underlying wrongful death action. The trial court agreed, and granted summary disposition for plaintiff on the ground that:

It appears impossible for Sommer's misrepresentations to have been the reason the son did not take the entire amount of the settlement, given that pursuant to MCL 702.83 - the statute the Court of Appeals determined applies - he had no rights to the settlement at all. While it is true that the Court of Appeals apparently contemplated that a trial on this matter would take place, this Court cannot conduct a trial on the issue of fraud

* Circuit judge, sitting on the Court of Appeals by assignment.

when the Court of Appeals appears to have ruled that fraud cannot have been the proximate cause of any damages. [Emphasis in original.]

On appeal, plaintiff contends that summary disposition is improper. In support of this proposition, plaintiff argues that the trial court's rationale for granting summary disposition is contrary to this Court's earlier unpublished opinion in this matter. We conclude that, although the trial court's rationale for granting summary disposition was incomplete and arguably inconsistent with this Court's prior opinion, the result, when based on proper grounds, does not violate "the law of the case."

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 394; 516 NW2d 498 (1994); *Feister v Bosack*, 198 Mich App 19, 21; 497 NW2d 522 (1993). All factual allegations and reasonable implications drawn therefrom are accepted as true. *ETT Ambulance Service, supra* at 395. 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 recovery. *Id.* at 396; *Feister, supra* at 22.

Prior to the 1985 amendment to the Wrongful Death Act, MCL 600.2922 *et seq.*; MSA 27A.2922 *et seq.*, MCL 600.2922(2); MSA 27A.2922(2) provided for two types of damages to be awarded in a wrongful death action. The first included:

damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death.

The second type was "recovery for the loss of the society and companionship of the deceased." MCL 600.2922(2); MSA 27A.2922(2). According to our Supreme Court's holding in *Crystal v Hubbard*, 414 Mich 297, 307, 309, 311, 315; 324 NW2d 869 (1982), recovery under the statute is not limited to decedent's legal heirs. Instead, recovery is proper when a "relative" of the deceased can demonstrate compensable "pecuniary injury" or the loss of society and companionship. *Id.* at 309-311.

Consistent with our Supreme Court's holding in *Crystal, supra*, this Court concluded that the fact that Jonathan is not decedent's legal heir does not necessarily preclude him from recovering under the wrongful death statute. *Williams, supra* at 1-2. For this reason, the trial court erred in determining that the fact that Jonathan is not decedent's legal heir necessarily precludes his ability to recover in a wrongful death action. Had plaintiff demonstrated that Jonathan incurred either a "pecuniary injury" that is compensable under the act or a compensable loss of decedent's society and companionship, he may have been entitled to recover in a wrongful death action. However, plaintiff has alleged neither such form of loss. Therefore, even assuming that Jonathan falls within the definition of "relative" as defined by our Supreme Court in *Crystal*, summary disposition is still proper because, in this case, plaintiff does not allege that Jonathan suffered a compensable loss under the applicable wrongful death statute. See

MCL 600.2922(2); MSA 27A.2922(2). Further, as this Court has already determined that Jonathan is not decedent's legal heir, *Williams, supra* at 1, he is entitled to none of the proceeds of a wrongful death action that might pass through the estate. Accordingly, because plaintiff has failed to claim that defendant's alleged fraud caused Jonathan a form of loss to which Jonathan would otherwise be entitled, we conclude that summary disposition is the proper result.

When premised on these grounds, summary disposition does not conflict with this Court's earlier unpublished opinion in this matter. See *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959) (so long as the action taken is not inconsistent with the judgment of the appellate court, a lower court addressing a case on remand may take such action as law and justice may require); *Barcheski v Grand Rapids Bd of Ed*, 162 Mich App 388, 394; 412 NW2d 296 (1987) (same); *Meyering v Russell*, 85 Mich App 547, 552; 272 NW2d 131 (1978) (same). Indeed, in rejecting the specific grounds for summary disposition at issue in the former appeal, this Court did not hold that plaintiff had stated a valid claim. Thus, summary disposition is not contrary to this Court's prior holding. Furthermore, neither of the specific reasons for summary disposition that were rejected in the prior appeal dealt with the specific reasons why this Court now finds summary disposition proper. Therefore, we hold that summary disposition, does not violate the "law of the case." See generally *Poirier v Grand Blank Twp (After Remand)*, 192 Mich App 539, 546; 481 NW2d 762 (1992); *Toska v Campbell*, 155 Mich App 671, 674; 400 NW2d 617 (1986).

Affirmed.

/s/ Richard Allen Griffin
/s/ Michael R. Smolenski
/s/ Leopold P. Borrello