STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS K. MACLEAN,

Plaintiff/Appellant/Cross-Appellee,

v

RMA PHYSICIANS and ROGER M. AJLUNI, M.D.,

Defendant–Appellees,

and

SEAN COYLE, M.D. and SEAN COYLE, P.C.

Defendants/Appellees/
Cross-Appellants.

UNPUBLISHED
November 1, 1996

No. 182666
LC No. 94-413614

Before: Gribbs, P.J., and Young and W. J. Caprathe,* JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motions for summary disposition. Plaintiff brought this action against defendants, alleging that their refusal to supply plaintiff with plaintiff's father's medical records constituted breach of contract, conversion, and a violation of the Michigan Consumer Protection Act. We affirm.

Robert Maclean, Sr., executed a durable power of attorney appointing plaintiff, his son, as his attorney in fact for purposes of obtaining copies of all Maclean's medical records from defendants, his physicians. Plaintiff made four requests for these copies within a week's time. One month later, plaintiff brought this action for breach of contract, conversion, and violation of the Michigan Consumer Protection Act. On July 29, 1994, the trial court granted defendants summary disposition on the conversion and Michigan Consumer Protection Act claims and ordered defendants to copy the records

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

for plaintiff. On November 29, the trial court dismissed the remaining contract claims on the ground that defendants had complied with its orders. On appeal, plaintiff argues that its Michigan Consumer Protection Act and conversion claims should not have been dismissed.

This Court reviews a motion for summary disposition pursuant to MCR 2.116(C)(8) by reference to the pleadings alone. *Monroe Beverage Co., Inc. v. Stroh Brewery Co*, 211 Mich App 286, 292; 535 NW2d 253 (1995). All factual allegations supporting a claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* 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. *Id.*

The Michigan Consumer Protection Act defines thirty-one "[u]nfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce." MCL 445.903(1); MSA 19.418(3)(1). "Trade or commerce" is defined as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902(d); MSA 19.418(2)(d). Individuals who have suffered loss as a result of violation of the Michigan Consumer Protection Act may bring an action to recover actual damages or $250, whichever is greater. MCL 445.911(2); MSA 19.418(11)(2). Individuals may also bring actions for a declaratory judgment that a practice is unlawful under MCL 445.903; MSA 19.418(3). MCL 445.911(1)(a); MSA 19.418(11)(1)(a).

We conclude that plaintiff has failed to state a claim which would entitle him to relief. Plaintiff cites ten of the unfair trade practices enumerated in MCL 445.903(1); MSA 19.418(3)(1) which he alleges were committed by defendants. None of these practices has any relation to the facts of this case. The statute applies only to actions which are committed in the conduct of trade or commerce. MCL 445.903(1); MSA 19.418(3)(1). We find that copying patient records is not trade or commerce within the act because a physician is not in the business of providing such a service. Rather, providing patients with copies of records is incidental to the practice of medicine. Defendants were therefore entitled to summary disposition pursuant to MCR 2.116(C)(8).

Plaintiff argues in his second issue that the trial court erred in granting defendants summary disposition on the conversion claim. The Michigan Supreme Court has defined conversion as "as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Insurance Company v Allstate Insurance Company*, 439 Mich 378, 391; 486 NW2d 600 (1992). Persons cannot convert their own property. *Id.* In *McGarry v J A Mercier Co*, 272 Mich 501; 262 NW2d 296 (1935), the Michigan Supreme Court held that unless the parties have agreed otherwise, X-ray negatives are the property of the physician who prepared them. *Id.* at 503-504. We find the reasoning in *McGarry* applicable in this case. No conversion could have taken place with respect to Maclean's medical records, as these records were the property of defendants. We see no merit in plaintiff's argument that *McGarry* has been rendered obsolete by

Federal Trade Commission v Indiana Federation of Dentists, 476 US 447; 106 S Ct 2009; 90 L Ed 2d 445 (1986).

Defendant Coyle argues on cross-appeal that plaintiff was not the real party in interest and lacked standing to bring this suit. MCR 2.201(B) requires that all actions be prosecuted in the name of the real party in interest. The rule also provides certain specific exceptions to this general rule. A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties. *Fieger v Commissioner of Insurance*, 174 Mich App 467, 471; 437 NW2d 271 (1988). An exception is made for "a party with whom or in whose name a contract has been made for the benefit of another." MCR 2.201(B)(1).

Plaintiff's power of attorney did not give him the power to maintain litigation on his father's behalf. The power of attorney therefore does not excuse plaintiff from the standing requirement. See *Crane v Kangas*, 53 Mich App 653, 656; 220 NW2d 172 (1974). Furthermore, MCR 2.201(B) requires that actions be prosecuted in the name of the real party in interest. Even if the power of attorney did permit plaintiff to prosecute litigation on his father's behalf, his father still would have to be a named party.

In the instant case, plaintiff's complaint included counts for breach of contract, conversion, and violations of the Michigan Consumer Protection Act. Plaintiff alleged in the contract count that defendants offered to provide copies of the records to plaintiff, and that plaintiff accepted this offer. Plaintiff therefore made a contract in his own name and had standing to sue for breach of that contract. MCR 2.201(B)(1). Plaintiff's Michigan Consumer Protection Act count did not specify whether the alleged wrongful acts occurred in defendants' transactions with plaintiff or with Maclean. Assuming arguendo that these acts occurred in the transactions with plaintiff, plaintiff had standing to sue under the Michigan Consumer Protection Act.

However, plaintiff clearly lacked standing to bring the conversion action. Plaintiff had no apparent legal right to these medical records, and cannot argue that he was protecting his own rights by bringing the conversion suit. Defendants were entitled to dismissal of this claim pursuant to MCR 2.201. However, since this claim was dismissed pursuant to the trial court's order of summary disposition, defendants were not harmed by the trial court's ruling that plaintiff had standing to bring the suit.

Affirmed.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe