

STATE OF MICHIGAN
COURT OF APPEALS

MARY SMITH and WILLIAM MORRISON
SMITH,

UNPUBLISHED
December 30, 1997

Plaintiff-Appellants,

v

No. 189804
Huron Circuit Court
LC No. 94-08932-NH

CITY OF BAD AXE, DAVID MILLER, COUNTY
OF HURON, CAROL HENNY, FOUR SEASONS
HEALTH CARE, HEALTH ENTERPRISES OF
MICHIGAN, DARLENE KUHN, R.N., KENNETH
S. KUBE, M.D., P.C., SHARON MORELL, R.N.
and ADRIAN ROTH, R.N.,

Defendant-Appellees.

Before: Saad, P.J., and Holbrook and Doctoroff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(8) and (10). We affirm.

On February 10, 1992, plaintiff Mary Smith, who had cerebral palsy, was admitted to Huron Memorial Hospital because she was having upper respiratory problems. Having treated Mary, defendant Dr. Kenneth S. Kube (Kube), who was her attending physician, determined that plaintiff William Smith, who also has cerebral palsy, was unable to care for his wife. Kube had Mary transferred to Four Seasons Nursing Home (Four Seasons). On March 6, 1992, William removed Mary from Four Seasons. Defendant Darlene Kuhn, who was a social worker assigned to Mary's case, immediately filed a petition in Huron Probate Court for the appointment of a guardian for Mary. Her petition was supported by reports prepared by defendant Kube and defendants Sharon Morell and Adrian Roth, who were nurses at Four Seasons. Defendant Carol Henny was appointed co-guardian of Mary for the purpose of carrying out Dr. Kube's orders. That same day, Henny and defendant David Miller, who was a police officer for the City of Bad Axe, went to plaintiffs' home, removed Mary and returned her to Four Seasons. The order of co-guardianship was subsequently set aside and the

conservatorship was terminated when, following an investigation, it was determined that plaintiffs were competent.

Mary was then released from Four Seasons, and plaintiffs brought this action for false arrest and imprisonment and intentional infliction of emotional distress against all defendants, assault and battery against Miller and Henny, vicarious liability for the acts of Miller and Henny against the City of Bad Axe and Huron County, respectively, negligence or medical malpractice and violation of the Michigan Handicapper's Civil Rights Act, MCL 37.1101-.1607; MSA 3.550(101)-(607), against Four Seasons, Kube, Kenneth S. Kube, P.C., Roth, Morell and Kuhn, and vicarious liability against Four Season for the acts of Kube, Kenneth S. Kube, P.C., Roth, Morell and Kuhn.¹

Appellate review of a motion for summary disposition is de novo. *Cooper v Wade*, 218 Mich App 649, 654; 554 NW2d 919 (1996). This Court must review the record to determine whether the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiffs argue that the trial court erred in determining that Kube, Roth and Morell had not breached a duty by recommending that Mary be transferred to Four Seasons and by submitting an opinion to the probate court regarding the petition for a guardian. We disagree. In any negligence action, the plaintiff must establish (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) causation; and (4) damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). A duty is a legally recognized obligation to conform to a particular standard of conduct toward another. *Howe v Detroit Free Press*, 219 Mich App 150, 155; 555 NW2d 738 (1996). "The standard of conduct to which an actor must conform to avoid being negligent is that of a reasonable man under like circumstances." *Id.* No duty exists with respect to an actor's conduct unless the standard of care includes the conduct for which the plaintiff seeks to hold the defendant liable. *Id.* The existence of a duty is a question of law, and if no duty exists, a court may properly grant summary disposition to the defendant. *Id.*, 156.

"Malpractice" is

the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty, which the law implies from the employment, to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or a similar locality, in the light of the present state of medical science. [*Kambas v St. Joseph's Hospital*, 389 Mich 249, 254-255; 205 NW2d 431 (1973).]

An action for malpractice may be brought against "any person professing or holding himself out to be a member of a state licensed profession." MCL 600.2912(1); MSA 27A.2912(1).

Any person interested in the welfare of another may petition the court for a finding of incapacity and appointment of a guardian. MCL 700.443(1); MSA 27.54. Kube, Roth and Morell determined that it was in Mary's best interest to be placed in a nursing home rather than return to her home. Mary and William reluctantly agreed. In making this recommendation, Kube, Roth and Morell sought to

avoid harm that might come to Mary if she were to return home. This was not a breach of a duty. In submitting an opinion to the probate court, Kube, Roth and Morell acted in accordance with a right imposed by MCL 700.443(1); MSA 27.5443. This also was not a breach of a duty. Thus, the trial court did not err in granting summary disposition to Kube, Roth and Morell on plaintiffs' malpractice or negligence claim.

Plaintiffs next argue that the trial court erred in granting Kuhn's motion for summary disposition. Plaintiffs correctly contend that Kuhn could be liable to plaintiffs on either a malpractice theory, since she held herself out to be a licensed social worker, MCL 600.2912(1); MSA 27A.2912(1), or on a negligence theory. However, Kuhn did not breach a duty owed to plaintiffs when she in good faith signed the petition for a court-appointed guardian, an act permitted by MCL 700.443(1); MSA 27.5443. Instead, she acted out of a concern for Mary's welfare as would have any reasonable social worker in like circumstances. Thus, the trial court did not err in granting Kuhn's motion for summary disposition.

Because Kube, Roth, Morell and Kuhn are not liable to plaintiffs for negligence or malpractice, Four Seasons is not liable to plaintiffs on a theory of vicarious liability.

Plaintiffs contend that the trial court erred in granting defendants' motions for summary disposition regarding their claims of false arrest and false imprisonment. We disagree. To sustain a claim for false imprisonment, the plaintiff must establish that the defendant placed an unlawful restraint on the plaintiff's liberty or freedom of locomotion. *Clarke v K Mart Corp*, 197 Mich App 541, 546; 495 NW2d 820 (1992). The plaintiff does not have a claim for false imprisonment if he or she has not been arrested. *Id.*, 546-547. There is no false arrest if the plaintiff voluntarily agrees to stay with the defendant. *Id.*, 547. In his deposition, William admitted that Mary's initial admission to Four Seasons was voluntary and that she was allowed to leave when she attempted to do so. Her subsequent admission was made pursuant to a court order and was therefore not an act of defendants. Because her initial admission was voluntary, it cannot form the basis of an action for false arrest or false imprisonment. *Clarke, supra*, 197 Mich App 546-547. Accordingly, the trial court properly granted defendants' motions for summary disposition.

We agree with plaintiffs' contention that intentional infliction of emotional distress is a tort that is recognized in Michigan. See *Duran v Detroit News*, 200 Mich App 622, 629-630; 504 NW2d 715 (1993). Nonetheless, the trial court did not err in dismissing plaintiffs' claims of intentional infliction of emotional distress. The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress." *Id.* In his deposition, William stated that he did not believe that Four Seasons or its staff had acted with malice. In fact, he believed that the people at Four Seasons had acted out of a concern for Mary's well-being. No other evidence was presented regarding the intent of Four Seasons or its staff. Moreover, there is no indication in the record that defendants' conduct caused plaintiffs to suffer emotional distress. Therefore, there was no genuine issue of material fact relating to this claim, and the trial court did not err in granting summary disposition to defendants.

Finally, this Court wishes to note that when, as here, there is clearly no support in the record for any of plaintiff's claims, our review of the trial court's grant of summary disposition is a waste of judicial resources. Although we do not award defendant sanctions pursuant to MCR 7.216(C), we do wish to caution plaintiffs' counsel against bringing such a meritless appeal.

Affirmed.

/s/ Henry William Saad

/s/ Donald E. Holbrook, Jr.

/s/ Martin M. Doctoroff

¹ After the briefs on appeal were filed, the parties stipulated to the dismissal of plaintiffs' actions against the City of Bad Axe, David Miller, the County of Huron, and Carol Henny, and this Court entered an order dismissing the appeal with respect to those parties pursuant to MCR 7.218. *Mary Smith v City of Bad Axe, et al*, unpublished order of the Court of Appeals, entered March 27, 1997 (Docket No. 189804).