COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. **98-3401**

STATE OF WISCONSIN **COURT OF APPEALS**
DISTRICT IV

LEE MOUA, MELINDA MAE SMITH, AND JULIE C. MCCAULEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Lee Moua, Melinda Mae Smith, and Julie McCauley appeal a summary judgment dismissing their attempted class action[1] for damages suffered by all minors whose insurance claims were settled by American Family without court approval under § 807.10, STATS. They claim the circuit court erred when it dismissed their claims for intentional misrepresentation by deceit and by concealment, and when it denied their request for an injunction to bar American Family from continuing its practice of settling minors' claims without court approval.[2] We conclude, however, that the appellants failed to submit materials sufficient to create a genuine issue of material fact on the reliance and damages elements of their misrepresentation theories or on the question of injunctive relief. Accordingly, we affirm the decision of the trial court.

BACKGROUND

According to the amended complaint, Moua was injured as a child in 1982 when she was struck by an automobile insured by American Family. The driver of the automobile admitted negligence, and American Family offered Moua's mother a settlement in the amount of $500 in exchange for her signature on a release and indemnity bond, labeled form C-9(b). Neither Moua nor her mother spoke English at the time. The language of the C-9(b) form indicated that the release was "forever" binding, although § 807.10, STATS., provided that

[1] No class was ever certified prior to the dismissal of the action. In light of our decision that the purported class representatives have failed to submit sufficient materials to survive summary judgment, we need not consider whether the class should have been certified. *See* ***Warth v. Seldin***, 422 U.S. 490 (1975) (class representative must demonstrate personal stake in case or controversy).

[2] The court had earlier dismissed the appellants' claims for intentional interference with a prospective contractual relationship and interference with advantageous economic relations for failure to state a claim, and the appellants withdrew claims of denial of due process, denial of a remedy for a wrong, and obstruction of justice.

settlements on behalf of minors were not final unless approved by a court. The indemnity portion of the agreement provided that Moua's mother would reimburse American Family for any future claims brought by Moua against American Family. Moua did not learn about the terms of the settlement until she was sixteen years old. Although Moua had suffered permanent scarring on her leg and ongoing pain from her fractured shoulder, she told her attorney that she did not want to reopen her settlement claim against American Family because she did not want her mother to be held responsible for damages under the indemnity clause. She instead filed this action just before her twentieth birthday.

Smith and McCauley were injured as minors in an automobile accident in 1990, while passengers in a car driven by an American Family insured. Smith's parents accepted a settlement of $700 plus medical expenses on her behalf, and McCauley and her parents negotiated a settlement of $5,000 plus medical expenses. The C-9(b) form was used in both instances. Smith and McCauley first learned about their statutory rights to reopen their settlements notwithstanding the language of the C-9(b) form when they were in their twenties, after the time to reopen their settlements had expired. They then joined Moua's pending action.

STANDARD OF REVIEW

We apply the same summary judgment methodology as that employed by the circuit court. *See* § 802.08, STATS.; *see also* ***State v. Dunn***, 213 Wis.2d 363, 368, 570 N.W.2d 614, 616 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. *See* ***id***. If the pleadings join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish

a prima facie case for summary judgment. *See* ***id***. at 368, 570 N.W.2d at 616-17. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. *See* ***id***.

ANALYSIS

In accordance with the methodology discussed above, we begin by considering whether or not the amended complaint stated claims for misrepresentation and/or injunctive relief.[3] Intentional misrepresentation by deceit requires: (1) a false representation of fact, or a false representation of law made by one who has a superior means of information and professes a knowledge of the law; (2) made with intent to defraud and for the purpose of inducing another to act upon it; (3) upon which another did in fact rely and was induced to act; (4) resulting in injury or damage. *See* ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis.2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991); ***Ritchie v. Clappier***, 109 Wis.2d 399, 402, 326 N.W.2d 131, 133 (Ct. App. 1982). Intentional misrepresentation by concealment occurs when: (1) a person who owes a duty of care to another to disclose the truth; (2) fails to disclose the truth when given an opportunity to do so; (3) inducing the other person to act or refrain from acting; (4) to the other person's detriment. *See* ***Laehn Coal and Wood Co., Inc. v. Koehler***, 267 Wis.2d 297, 300-01, 64 N.W.2d 823, 825 (1954). The elements of a claim for negligent misrepresentation are: (1) a duty of care or voluntary assumption of a duty; (2) a breach of that duty, i.e., failure to exercise

[3] On appeal, the appellants also ask for a declaratory judgment that the C-9(b) form is unenforceable in its entirety against minors and their parents, and that enforcement of an indemnity clause in that form is against public policy where the settlement is not approved by a court. However, neither of these claims were raised in the amended complaint, and they are not properly before us now.

ordinary care in making a representation or in ascertaining the facts; (3) a causal link between the conduct and the injury; and (4) actual loss or damage as a result of the injury. *See* ***D'Huyvetter***, 164 Wis.2d at 331, 475 N.W.2d at 596. A court may issue an injunction to prohibit the continuation of unlawful acts upon a showing of irreparable harm and an inadequate remedy at law. *See* ***City of Wis. Dells v. Dells Fireworks, Inc.***, 197 Wis.2d 1, 539 N.W.2d 916 (Ct. App. 1995); ***Sprecher v. Weston's Bar, Inc.***, 78 Wis.2d 26, 50, 253 N.W.2d 493, 504 (1977).

Broadly construed, the amended complaint alleged that Moua, Smith and McCauley were injured because the C-9(b) form's false statement that the release was "forever" binding induced them to forgo their statutory rights to reopen settlement claims against American Family, and that American Family adjusters knew that noncourt-approved settlements were nonbinding upon the minors but failed to advise the parents that the C-9(b) form was not legally enforceable against their children. These allegations and the inferences which could be made from them address each of the misrepresentation elements discussed above. That is, it could be inferred from the complaint that the settlements offered to each of the appellants failed to fairly compensate them[4] and thus either could have been rejected by a court or supplemented by actions to reopen the claims if American Family had informed, or at least not misled, the appellants about those options.

[4] For instance, the complaint alleged that Moua suffered permanent scarring to her leg and ongoing pain from her fractured shoulder, and that Smith and McCauley continued to suffer pain and headaches from their injuries. Summary judgment materials further alleged that Smith still suffers from a fear of driving, and McCauley still suffers embarrassment from her disfigured nose.

With regard to the claim for injunctive relief, the appellants alleged that American Family was violating the law by settling claims without court approval and likely to continue doing so unless enjoined by a court. It asserted that prospective class members would be irreparably harmed by these noncourt-approved settlements, and would lack an adequate remedy at law. Again, the allegations cover each of the required elements discussed above. We therefore conclude that the amended complaint properly stated claims for misrepresentation and injunctive relief.

We further conclude that American Family's answer, which denied the majority[5] of the appellant's allegations and asserted several affirmative defenses (failure to state a claim, failure to mitigate damages, abandonment of claims, intervening causes of damage, statute of limitations, and failure to meet criteria for class certification), was sufficient to join issue.

We next consider whether the materials submitted by the appellants were sufficient to establish a prima facie case for judgment in their favor. Assuming without deciding that the materials submitted were sufficient to show that (1) the C-9(b) release form falsely represented the finality of the minor's claims, and (2) American Family officials were aware of the falsity of the representation,[6] we conclude the appellants nonetheless failed to present sufficient

[5] American Family conceded that it routinely settles what it considers to be modest claims of minors without court approval, and that it did so with the appellants, but maintained its practice is legal.

[6] The American Family Adjuster's Field Manual explains that the C-9(b) release form "is worded in such manner as to connote discharge of the claim of the minor as well as that for damages of the parents or guardian.… Psychologically, the effect of this agreement is to discourage any further claims."

materials on the elements of detrimental reliance and damages to survive summary judgment.

Moua's assertion of detrimental reliance fails because she learned about her right to reopen her insurance claim before her time to bring such an action had expired. *See* § 893.16(1), STATS. She consulted with counsel and obtained a medical opinion on the extent of her injury well within the statutory tolling period. By her own admission, she chose not to reopen her claim because of the indemnity clause in the release her mother had signed, not because she continued to mistakenly believe the settlement was final. In short, there is nothing in the materials submitted which shows that Moua ultimately relied on American Family's alleged deceit or concealment about the finality of the C-9(b) release when forgoing her right to timely reopen her insurance settlement in favor of this action. The trial court properly dismissed her claims on that ground.

While Smith and McCauley did not discover that the C-9(b) release was nonbinding until after the statute of limitations had passed on reopening their claims, and thus may have presented a prima facie case for reliance, they did not present anything to show they would have obtained additional compensation from American Family if they had known that they were not bound by the release forms signed by their parents.[7] While the assertion that their insurance claim would have been successful but for the loss of witnesses caused by delay attributable to misrepresentation could give rise to measurable damages, that is not what the

[7] The issue in that respect is not whether Smith and McCauley still suffered pain, but whether they had been unfairly compensated for that pain as a direct result of the alleged instances of misrepresentation.

appellants are seeking. Instead, they claim they are each entitled to recover $2,000 for the costs of investigating whether to reopen their claims.

The appellants' damages argument is flawed in several respects. First, it would allow recovery of investigation costs regardless of whether investigation revealed that additional compensation was warranted. We reject the proposition that a minor whose parents have collected a fair settlement on his or her behalf has been damaged merely by ignorance of a right to reopen the settlement which would have yielded no additional compensation.

Even if investigation were to reveal that a particular settlement had been unfair, we see no reason why a person whose parents were uninformed or misinformed about their child's right to reopen a settlement, made on the child's behalf while the child was a minor, should be placed in a better position than a minor whose parents were aware of the child's rights all along. The child whose parents were aware that he or she could reopen the settlement before the child's twentieth birthday would also need to investigate whether there would be any basis for doing so, and could not recover those costs.

The appellants rely on ***Luebke v. Miller Consulting Engineers***, 174 Wis.2d 66, 496 N.W.2d 753 (Ct. App. 1993), to support their contention that costs of investigation are a recognized measure of damages for misrepresentation claims in this state, regardless of what the investigation reveals. However, the investigative costs at issue in ***Luebke*** were the costs of determining the extent of contamination on property which had already been placed on a list of potential contamination clean-up sites. The property's placement on the list rendered it unmarketable, with a zero value. Thus, the buyer in that case had already suffered a recognizable injury and the investigative costs "to combat nonmarketability"

were remedial in nature. *See* ***id***. at 75-76, 496 N.W.2d at 757. In contrast, the appellants do not seek to recover the costs of investigating a possible remedy for demonstrated injuries, but rather the costs of investigating whether they have suffered any injuries at all. They have failed to establish a prima facie case entitling them to trial on their misrepresentation claims.

They have also failed to establish a prima facie case for injunctive relief. Section 807.10(2), STATS., provides:

> A cause of action in favor of or against a minor or mentally incompetent person may, without the commencement of an action thereon, be settled by the general guardian, if the guardian is represented by an attorney, with the approval of the court appointing the general guardian, or by the guardian ad litem with the approval of any court of record. An order approving a settlement or compromise under this subsection and directing the consummation thereof shall have the same force and effect as a judgment of the court.

The appellants contend that this provision mandates that all settlements of minors' claims be approved by a court. We disagree. The provision is permissive, not mandatory. It simply renders noncourt-approved settlements unenforceable. *See* ***Andreson v. Mutual Serv. Cas. Ins. Co.***, 17 Wis.2d 380, 382, 117 N.W.2d 360, 361 (1962) ("We are aware that settlements are sometimes made in cases involving the claims of minors wherein releases are taken from the parents, but court approval is not sought…. Since it is clear that a minor cannot be bound by an extra judicial settlement, a calculated risk is taken in striking a bargain without the benefit of judicial approval.").

Furthermore, even if falsely representing that noncourt-approved settlements are binding could be deemed unlawful, the appellants have failed to show irreparable harm, either to themselves or to the other purported class

members, which could be prevented by the injunction sought. Moua, Smith and McCauley have already had their claims settled. American Family's continued use of the C-9(b) form would have no direct effect on them. Other minors whose parents have not yet settled their claims against American Family retain the right to reopen or challenge those settlements before their twentieth birthdays, or to claim that they failed to timely reopen meritorious claims due to American Family's misrepresentation. The trial court properly denied injunctive relief.

In light of our conclusion that the appellants have failed to present sufficient materials to entitle them to trial, we need not consider whether any of the respondent's affirmative defenses would be barred by *estoppel in pais*.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.