

STATE OF MICHIGAN
COURT OF APPEALS

ASHLEY GRANADOS-MORENO,

Plaintiff-Appellant,

v

ROBERT FACCA,

Defendant-Appellee,

and

MEDICAL CONSULTANTS NETWORK, LLC,

Defendant.

UNPUBLISHED

March 3, 2020

No. 346598

Macomb Circuit Court

LC No. 2017-004313-NO

Before: MURRAY, C.J., and SWARTZLE and CAMERON, JJ.

PER CURIAM.

Plaintiff, Ashley Granados-Moreno, appeals the trial court’s order granting summary disposition in favor of defendant Dr. Robert Facca.¹ We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

On November 11, 2015, Granados-Moreno was allegedly injured in a motor vehicle accident. After the accident, Granados-Moreno filed a claim for first-party, no-fault benefits through her no-fault insurance provider, Progressive Casualty Insurance Company (Progressive). At the request of Progressive, Granados-Moreno went to Dr. Facca, who is a licensed chiropractor, for an independent medical examination (IME). Dr. Facca’s IME report concluded that the motor vehicle accident was “causally related” to Granados-Moreno’s neck pain and headaches. However, Dr. Facca believed that Granados-Moreno was exaggerating her symptoms, and he did

¹ Defendant Medical Consultants Network is not a party to this appeal.

not recommend any ongoing treatment. On the basis of the IME report, Progressive suspended Granados-Moreno's no-fault benefits. Granados-Moreno filed suit against Progressive, and a settlement was reached in 2017.

In November 2017, Granados-Moreno filed a complaint against Dr. Facca, alleging (1) fraud, (2) tortious interference with a contract, (3) defamation and libel, (4) civil conspiracy to deprive Granados-Moreno of no-fault benefits, and (5) intentional infliction of emotional distress. Granados-Moreno sought damages in excess of \$25,000. On December 18, 2017, Dr. Facca filed an answer, generally denying Granados-Moreno's allegations.

Dr. Facca later filed a motion for summary disposition, arguing that any damages Granados-Moreno sought were compensable by Progressive through her no-fault claim. Dr. Facca also argued that he was not liable to Granados-Moreno as a result of the conclusions he reached or reported in the IME report on the basis of our Supreme Court's holding in *Dyer v Trachtman*, 470 Mich 45; 679 NW2d 311 (2004). Granados-Moreno opposed the motion, arguing that the *Dyer* Court did not make a sweeping conclusion that a medical professional who conducts an IME could never be liable for his or her opinions. To support that an individual may maintain a cause of action for tortious interference with a contract when an IME physician makes false and misleading statements in his report, Granados-Moreno cited our Supreme Court's order in *Dubuc v El-Magrabi*, 489 Mich 869; 795 NW2d 593 (2011). She also argued that she could recover exemplary damages against Dr. Facca.

After oral argument on Dr. Facca's motion for summary disposition, the trial court stated, "I still believe the *Dyer* case is applicable, and based on the conclusion in that case [Dr. Facca's] motion for summary disposition is granted." On November 8, 2018, the trial court entered an order that reflected this holding. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision regarding a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers "affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in the light most favorable to the party opposing the motion." *Smith*, 460 Mich at 454 (citation omitted). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* at 454-455. MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.*

III. ANALYSIS

Granados-Moreno argues on appeal that the trial court erred in concluding that summary disposition in favor of Dr. Facca on her tortious interference with a contract claim was proper. We agree.

Tortious interference with a contract requires three elements: “(1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant.” *Wood v Herndon*, 186 Mich App 495, 499; 465 NW2d 5 (1990) (quotations and citation omitted). In order to prove such a claim, the plaintiff must show “the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.” *Id.* (citation omitted).

In granting Dr. Facca’s motion for summary disposition on the tortious interference claim, the trial court relied on our Supreme Court’s holding in *Dyer*. However, the holding in *Dyer* is inapplicable to Granados-Moreno’s tortious interference claim because the issue in *Dyer* was whether an examinee can assert a medical malpractice claim against a physician who performs an IME given that a traditional physician-patient relationship does not exist in such a context. *Dyer*, 470 Mich at 48-55. At no point did the *Dyer* Court address whether a party can bring a tortious interference with a contract claim against an individual who conducts an IME, and the *Dyer* Court did not hold that plaintiffs are barred from bringing claims in relation to a medical professional’s conclusions and opinions following an IME. Because the trial court improperly relied on the holding in *Dyer*, we conclude that the trial court erred by granting summary disposition in favor of Dr. Facca on Granados-Moreno’s tortious interference with a contract claim.

Additionally, although not outcome determinative, we agree with Granados-Moreno that our Supreme Court’s statement in *Dyer* that “[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports,” is dictum. As already stated, at issue in *Dyer* was whether an examinee can assert a medical malpractice claim against a physician who performs an IME given that a traditional physician-patient relationship does not exist in such a context. *Dyer*, 470 Mich at 48-55. The *Dyer* Court ultimately concluded that “an IME physician has a limited physician-patient relationship with the examinee that gives rise to limited duties to exercise professional care.” *Id.* at 49. In reaching this conclusion, the *Dyer* Court noted that an IME physician’s relationship with an examinee is “limited” in that “[i]t does not involve the full panoply of the physician’s typical responsibilities to diagnose and treat the examinee for medical conditions.” *Id.* at 50. Based on this observation, the *Dyer* Court indicated that “[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports.” *Id.* Rather, the limited relationship only “imposes a duty on the IME physician to perform the examination in a manner not to cause physical harm to the examinee.” *Id.* Given that the *Dyer* Court’s statement that “[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports,” *id.* at 50, was an extraneous statement that was “unnecessary to the decision in the case,” we conclude that it was nonbinding dictum, see *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003).

Next, Dr. Facca argues, as an alternative ground for affirmance, that the trial court correctly granted summary disposition in his favor because Granados-Moreno did “not have any damages that were not compensable by Progressive in her underlying [personal protection insurance] claim.” This argument was not addressed by the trial court when it decided Dr. Facca’s motion for summary disposition. Furthermore, after reviewing the record, we conclude that the argument was not fully developed and that it would be beneficial for the trial court to address the issue of damages. Consequently, we decline to consider the damages argument and reverse and remand to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Thomas C. Cameron