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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2071**

Sara Anderson,
Respondent,

vs.

Mayo Clinic,
Appellant,

Forum Communications Company,
Respondent.

**Filed August 19, 2008
Reversed and remanded
Toussaint, Chief Judge**

Clay County District Court
File No. 14-CV-07-399

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Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

Appellant Mayo Clinic challenges the district court's denial of its motions for judgment on the pleadings dismissing respondent Sara Anderson's invasion-of-privacy claims and respondent Forum Communications Company's cross-claim for indemnification. Because the plain language of Anderson's written authorization permitted Mayo's conduct; because the evidence is insufficient to support a finding of fraudulent inducement; and because there is accordingly no basis for an indemnity claim, we reverse and remand for entry of judgment in Mayo's favor.

DECISION

Anderson initiated this action against Mayo and Forum after a videotaped interview of her discussing a private medical condition, produced and disseminated by Mayo, aired on Forum's news broadcast in the city where she lives. Mayo asserts that it was privileged to publicize Anderson's medical condition by virtue of her written consent. Anderson asserts, and the district court concluded, that genuine issues of material fact exist with respect to whether consent was fraudulently induced.

Anderson initially asserts that the district court's order is not appealable. We disagree. While the denial of a motion to dismiss generally is not subject to immediate

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

review, the district court's decision here is appealable under the collateral-order doctrine. See Minn. R. Civ. App. P. 103.03 (identifying appealable orders); *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 240 (Minn. 2002) (holding appeal available under collateral-order doctrine when order being appealed (1) conclusively decides question in dispute, (2) resolves important issue completely separate from merits of action, and (3) is effectively unreviewable on appeal from final judgment); see also *Redwood County Tel. Co. v. Luttmann*, 567 N.W.2d 717, 720 (Minn. App. 1997) (holding decision on absolute privilege in defamation context immediately appealable under "same policy allowing interlocutory appeals based on official and statutory immunity"), review denied (Minn. Oct. 21, 1997).

An order denying a motion for judgment on the pleadings is subject to de novo review. See *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). Dismissal is appropriately granted when it is not possible "on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Brakke v. Hilgers*, 374 N.W.2d 553, 555 (Minn. App. 1985) (quotation omitted).

Consent is an absolute defense to an invasion-of-privacy claim. See Restatement (Second) of Torts § 652F (2008); see also *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233 (Minn. 1998) (adopting Second Restatement formulation of invasion-of-privacy claims but not recognizing false-light claim). Sometimes referred to as a waiver of the right to privacy, consent may be limited in duration, geographical scope, or by other factors. See Restatement (Second) of Torts § 652F cmt. b (2008).

Consent need not be in writing, but courts have construed written consents according to the rules of contract construction, including the parol evidence rule, which forbids the consideration of extrinsic evidence to vary the unambiguous terms of a written instrument. *See, e.g., Myskina v. Conde Nast Pub'ns, Inc.*, 386 F. Supp. 2d 409, 416 (S.D.N.Y. 2005); *Russell v. Marlboro Books*, 183 N.Y.S.2d 8, 21 (N.Y. Sup. Ct. 1959).¹ Parol evidence may be considered, however, to determine whether the consent was fraudulently induced. *See Ganley Bros., Inc. v. Butler Bros. Bldg. Co.*, 170 Minn. 373, 375, 212 N.W. 602, 602 (1927).

Here, Anderson's consent was without limitation. The one-page written authorization that she signed stated that Mayo could disclose Anderson's name and contact information as well as details regarding her condition and surgical treatments "to media representatives selected by Mayo Clinic in Rochester ('Media Representatives'), or through interviews, photographs, audiotapes, and/or films (including digital media) ('Materials') for public dissemination by Mayo or media." The expressed purpose of the authorization was to "allow Media Representatives to record Materials, and for Mayo to disseminate health information to the general public." Consistent with that purpose, the

¹ Because our courts have not considered consent in the context of invasion-of-privacy claims, we find caselaw from other jurisdictions, including New York, instructive in this regard. We are mindful, however, of the distinction between the use of parol evidence to vary a written agreement's unambiguous terms—which is coextensively prohibited by Minnesota and New York law—and the use of parol evidence to demonstrate fraudulent inducement—which appears to be allowed to a greater extent under Minnesota law. *See, e.g., Randall v. Lady of Am. Franchise Corp.*, 532 F. Supp. 2d 1071, 1083-85 (D. Minn. 2007) (comparing Minnesota and New York jurisprudence and concluding that Minnesota more broadly allows consideration of extrinsic evidence in cases alleging fraudulent inducement).

authorization permitted Mayo and the media to “use the Materials in any manner they wish, including dissemination to the general public via any media.” Thus, under the plain and unambiguous language of this written consent, publication of the video footage was privileged unless Anderson’s consent was induced by fraudulent misrepresentation.

Anderson asserts that her consent was fraudulently induced by the doctor who performed her surgeries and initially asked her to participate in a video. In her complaint, Anderson alleges that the doctor represented that the video was “intended to educate patients about the condition and treatment options available to them.” It does not follow from this alleged representation that the video footage would be used solely for in-office patient education, as Anderson apparently envisioned. Nor is a broadcast news segment inconsistent with the allegedly expressed educational goal. Rather, it seems likely that Mayo uses a variety of methods to reach and educate both current and prospective patients.

Even assuming that Anderson’s doctor told her that her videotaped interview would be used *only* for a patient-education video, her fraudulent-inducement claim nevertheless fails for two reasons. First, she has not alleged a misrepresentation of fact. Second, the unambiguous and contrary language of the written authorization precludes reasonable reliance as a matter of law.

“It is a well-settled rule that a representation or expectation as to future acts is not a sufficient basis to support an action for fraud merely because the represented act or event did not take place.” *Vandeputte v. Soderholm*, 298 Minn. 505, 508, 216 N.W.2d 144, 147 (1974). Rather, a party claiming fraud must assert the misrepresentation of *past*

or present fact. See id. (affirming rejection of fraudulent-inducement defense as matter of law because defendant did not allege facts establishing misrepresentations of past or present fact); *see also Cannon Falls Holding Co. v. Peterson*, 184 Minn. 294, 296, 238 N.W. 487, 488 (1931) (reversing jury verdict based on prejudicial failure to instruct jury that broken promise alone could not support finding of fraud); *Bigelow v. Barnes*, 121 Minn. 148, 151, 140 N.W. 1032, 1033 (1913) (finding no fraudulent inducement in publisher's promise to continue publishing particular book). An exception to this rule exists when a promise is made with no present intent to perform that promise. *Vandeputte*, 298 Minn. at 508, 216 N.W.2d at 147.

Here, the alleged representation by Anderson's doctor amounts to no more than statements of future intent, that it was Mayo's intent to use the video footage of Anderson for a patient-education video. Without more, this statement of future intent cannot support a finding of fraudulent inducement.

We further agree with Mayo that Anderson could not reasonably have relied on her doctor's alleged promises in light of the subsequent, unambiguous language in the authorization that she signed. Reliance is unreasonable as a matter of law when "the written contract provision explicitly state[s] a fact completely contradictory to the claimed misrepresentation." *Johnson Bldg. Co. v. River Bluff Dev. Co.*, 374 N.W.2d 187, 194 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985); *see also Midland Nat'l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 412 (Minn. 1980) (holding that parties could not have reasonably relied on oral representations contradicting terms of written agreement); *Vint v. Nelson*, 267 Minn. 490, 496, 127 N.W.2d 177, 181 (1964)

(holding that fraudulent-inducement cannot be shown by alleged misrepresentations regarding “matters known to be covered by the written agreement and to the claim that plaintiff had represented that contractual provisions having reference thereto would not be effective”).

Here, the alleged representation by Anderson’s doctor that use of the video footage would be limited to the creation of a patient education video is directly contradicted by the written authorization that Anderson signed. Indeed, the expressed purpose of the authorization was to “allow Media Representatives to record Materials, and for Mayo to disseminate health information to the *general public*,” which purpose was to be accomplished “*via any media*.” (Emphasis added.) We reject Anderson’s assertion that this broadly worded language does not contradict her doctor’s alleged earlier promises because the authorization does not outline the specific ways in which the video footage would be disseminated. The authorization allowing unrestricted use clearly contradicts the alleged promise of limited use. This is not a case in which the contract is “couched in ambiguous legal language which a layman could reasonably believe supported the representation.” *See Midland Nat’l Bank*, 299 N.W.2d at 412. While Anderson may not be a sophisticated contracting party, the authorization in this case is a one-page document drafted in clear language. Under these circumstances, Anderson could not have reasonably relied on her doctor’s alleged earlier representations.

Anderson’s assertion that she shared a fiduciary relationship with her doctor does not alter our conclusion. Initially, we find no authority to support imposing a fiduciary relationship on physicians, particularly with respect to matters outside the context of

diagnosis and treatment. *Cf. D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. App. 1997) (holding that fiduciary relationship did not exist between patients and doctor who accepted inducements to prescribe certain medications). Even assuming that a fiduciary relationship did exist, however, that relationship would impact only the misrepresentation prongs of the fraud analysis, by allowing reliance on a failure to disclose material facts in the place of the usual requirement of an affirmative misrepresentation. *See Heidbreder v. Carton*, 645 N.W.2d 355, 367 (Minn. 2002) (“To establish fraud, a plaintiff must demonstrate: that [the] Defendant (1) made a representation (2) that was false . . .”). Anderson’s claims nevertheless would fail because she has not alleged what material *facts* were omitted or how, in light of the unambiguous authorization language, she could justifiably have relied on the alleged omissions.

Neither does Anderson’s and the district court’s characterization of the right to revoke the consent as “illusory” impact our analysis. The right to revoke a gratuitous consent arises by operation of law, not contract. *See, e.g., Garden v. Parfumerie Rigaud, Inc.*, 271 N.Y.S. 187, 188-89 (N.Y. Sup. Ct. 1933) (holding that gratuitous consent to the use of one’s name and portrait is revocable at any time). There is no allegation that Anderson revoked her consent before the newscasts. Rather, Anderson alleges that, because she was not provided with a copy of the video prior to it airing, her right to revoke was “illusory.” But there is no basis for Anderson’s implicit assertion that the right to revoke necessarily implies a right to preview.

Because Anderson failed to allege facts sufficient to support a finding of fraudulent inducement, her claims are barred by consent and should be dismissed. Mayo

and Forum agree that, absent a basis for tort liability, Forum's indemnity claim fails as well. Accordingly, we reverse the district court's order in these respects and remand for entry of judgment in Mayo's favor on Anderson's claims and Forum's cross-claim.²

Reversed and remanded.

² Anderson asserted identical claims against Forum and Mayo. Forum moved for summary judgment dismissing Anderson's claims, but has not appealed the district court's denial of that motion. Thus, although they are subject to the same analysis, our decision does not reach Anderson's claims against Forum.