IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 11, 2008 Session

**HERMOSA HOLDINGS, INC.
f/k/a/THE MONROE PAGE GROUP
v.
MID-TENNESSEE BONE AND JOINT CLINIC, P.C., AMSURG, THE SURGERY CENTER OF MIDDLE TENNESSEE, et al**

**Appeal from the Chancery Court for Davidson County
No. 07-1476-III Honorable Ellen Hobbs Lyle, Chancellor**

No. M2008-00597-COA-R3-CV - Filed March 16, 2009

The Plaintiff, Hermosa Holdings, Inc., instituted the case at bar against several Defendants by asserting various causes of action with reference to a proposed medical office building development. All Defendants responded to the original complaint by filing motions to dismiss pursuant to Tenn.R.Civ.P. 12.02(6) and for improper venue. The Plaintiff subsequently filed an amended complaint. The Defendants responded by filing additional motions to dismiss. By Order entered February 14, 2008, the Chancery Court of Davidson County granted the Defendants' motions and dismissed the amended complaint with prejudice. We affirm in part, vacate in part and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Vacated in Part; Case Remanded

THOMAS R. FRIERSON, II, SP.J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, joined.

James A. Crumlin, Jr., Lane Moorman, Nashville, Tennessee, for the Appellant, Hermosa Holdings, Inc., f/k/a/ The Monroe Page Group.

Michael L. Dagley, Kelly A. Cunningham, Nashville, Tennessee, for the Appellee, AmSurg Corporation & The Surgery Center of Middle Tennessee.

L. Webb Campbell, II and Phillip F. Cramer, Nashville, TN, Dalton M. Mounger, Columbia, TN for Appellees, Mid-Tennessee Bone and Joint Clinic, P.C., James Campbell Bloulevard Properties, LLC, Charles D. Atnip, M.D., Timothy Gordon, M.D. and Ralph F. Hamilton, M.D.

OPINION

PROCEDURAL AND FACTUAL BACKGROUND

For purposes of this appellate review of the trial court's rulings on the Tenn.R.Civ.P. 12 motions, we presume all factual allegations contained in the amended complaint to be true, giving the Plaintiff the benefit of all reasonable inferences. The Plaintiff, Hermosa Holdings, Inc., LLC, (Hermosa) is a Tennessee limited liability company engaged in the business of land development and site construction.[1] Its principal business office is in Nashville, Davidson County, Tennessee. Hermosa was contacted on or about August 22, 2005 by Mr. Daniel A. Buehler, Vice President of Center Development for Defendant Amsurg Corporation (Amsurg) with reference to a proposed project called "The Columbia Tennessee Ambulatory Services Pavilion."

Amsurg, the majority owner of Defendant The Surgical Center of Middle Tennessee (SCMT), led the initial negotiations. Both Amsurg and SCMT maintain principal places of business in Nashville, Davidson County, Tennessee.

Hermosa further alleges that in October 2005, Mr. Buehler directed Hermosa to representatives of SCMT and Mid-Tennessee Bone & Joint Clinic, PC (Clinic) for the purpose of selecting a developer for the construction of a new medical office building in Maury County. After considering several potential construction sites, Hermosa transmitted to Mr. Buehler and Mr. Randy Wilmore on behalf of the Clinic, separate memorandums of understanding with reference to the contemplated medical office building construction. On or about January 23, 2006, the Clinic and Hermosa executed a feasibility study agreement and proposal for professional services regarding real property identified as the "Pace Property.".

In February 2006, the Clinic's legal counsel requested of Hermosa additional details with regard to Hermosa's memorandum of understanding. On or about February 11, 2006, Hermosa attended the Clinic's yearly retreat for the purpose of presenting the Clinic with additional development options. According to the amended complaint, upon conclusion of Hermosa's presentation, the "medical office defendants" indicated that they wished to construct a 45,000 square foot building, to include a 10,000 square foot surgery center.[2] On March 9, 2006, legal counsel for Hermosa and counsel for the Clinic, met to select a development option best suiting the needs of the medical office defendants.

Meanwhile, the medical office defendants decided to include in the project another medical group, including defendants Charles D. Atnip, M.D., Timothy Gordon, M.D. and Ralph F.

[1] For ease of reference, we have abbreviated the names of the parties as identified in the amended complaint.

[2] By Paragraph 21 of the amended complaint, Hermosa identifies the "Medical Office Defendants" as a combination of the Clinic and SCMT principals.

Hamilton, M.D. (Eye Doctors).[3] On March 24, 2006, Hermosa met with Dr. Gordon to discuss plans and options for the eye doctors to be included in the proposed property development. At the request of the medical office defendants and eye doctors, Hermosa continued to explore all options with various financial institutions. On June 13, 2006, Plaintiff learned that the medical office defendants were not comfortable paying Plaintiff the fee associated with a "turn-key build." Hermosa later learned that the Clinic had decided to forego partnering on the land purchase and instead decided to purchase the entire property and sell back to Plaintiff a portion thereof. On or about June 22, 2006, several doctors formed Defendant James Campbell Boulevard Properties, L.L.C. (JCBP).

On June 27, 2006, Plaintiff submitted its final due diligence study to Mr. Wilmore. In late June, 2006, Mr. Wilmore contacted Blue Ridge Survey and obtained a copy of a real property survey, giving it to the Ritzen Group.[4] On June 30, 2006, Mr. Wilmore, by letter, notified Hermosa that the Clinic had decided to "go in another direction" and was therefore "terminating its relationship" with Plaintiff. Plaintiff asserts that the Defendants thereafter entered into a development agreement with the Ritzen Group for the construction project anticipated by Hermosa.

Following a hearing on February 1, 2008, the trial court entered an Order of Dismissal granting the Defendants' motions to dismiss. In its Order, the court stated as follows:

> After considering Defendants' motions, Plaintiff's response in opposition to those motions, Defendants' replies, arguments of counsel, the entire record and the relevant law, it is hereby ORDERED that the motions are granted and the Amended Complaint is dismissed, with prejudice. As the basis for its decision, the Court expressly adopts the reasoning set forth in the memoranda and reply briefs filed in support of these motions.
>
> It is, therefore, ORDERED that Defendants' motions to dismiss are granted and all claims of Plaintiff against AmSurg Holdings, Inc., The Surgery Center of Middle Tennessee, LLC, Mid-Tennessee Bone and Joint Clinic, P.C., James Campbell Boulevard Properties, LLC, Charles D. Atnip, M.D., Timothy Gordon, M.D. and Ralph F. Hamilton, M.D. are hereby dismissed with prejudice.

The appeal followed.

STANDARD OF REVIEW

[3] In Paragraph 10 of the amended complaint, Hermosa identifies Defendants Atnip, Gordon and Hamilton as the "Eye Doctors."

[4] All causes of action asserted against the Ritzen Group, originally named as a Defendant, were dismissed by Order of Voluntary Nonsuit entered March 24, 2008.

The trial court dismissed the amended complaint upon the independent bases of failure to state a claim upon which relief can be granted and improper venue. The issue of venue shall be addressed separately. The determination of whether a trial court has erred in ruling on a motion to dismiss for failure to state a claim upon which relief can be granted is a question of law, *Doe v. Catholic Bishop for Diocese of Memphis*, 2008 Tenn.App. LEXIS 527, 2008 WL 4253628 (Tenn.Ct.App. 2008). The Tennessee Supreme Court in *Trau-Med of America, Inc. v. Allstate Insurance*, 71 S.W.3d 691, 696-697 (Tenn. 2002) explained the proper standard of review for a Rule 12.02(6) motion to dismiss as follows:

> A Rule 12.02(6) motion to dismiss only seeks to determine whether the pleadings state a claim upon which relief can be granted. Such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof, and, therefore, matters outside the pleadings should not be considered in deciding whether to grant the motion. See *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). In reviewing a motion to dismiss, the appellate court must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. See *Pursell v. First Am. Nat'l Bank*, 937 S.W.2d 838, 840 (Tenn. 1996). It is well-settled that a complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. See *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Fuerst v. Methodist Hosp. S.*, 566 S.W.2d 847, 848 (Tenn. 1978). Great specificity in the pleadings is ordinarily not required to survive a motion to dismiss; it is enough that the complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." *White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000) (citing Tenn. R. Civ. P. 8.01). We review the trial court's legal conclusions de novo without giving any presumption of correctness to those conclusions. *Id.*

By its recent decision in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the United States Supreme Court elucidated the appropriate standard of pleading for a complaint attacked by a federal Rule 12(b)(6) motion to dismiss. Although the Tennessee Supreme Court has not adopted the standard announced in *Twombly*, we find it consistent with Tennessee law and therefore recognize its applicability.[5] As reasoned in *Twombly*:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations; ... a plaintiff's obligation to provide the "grounds"

[5] Because of the similarities between Tennessee Rule of Civil Procedure 12 and Federal Rule of Civil Procedure 12, the decisions of the federal courts construing Federal Rule of Civil Procedure 12 provide us with helpful guidance in our interpretation and application of Tennessee Rule of Civil Procedure 12. Decisions of the federal courts construing analogous federal rules of procedure can provide helpful guidance in interpreting our rules, Nagarajan v. Terry, 151 S.W.3d 166 (Tenn.Ct.App. 2003); *Frazier v. East Tennessee Baptist Hosp.*, 55 S.W.3d 925 (Tenn. 2001).

> of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. ... Factual allegations must be enough to raise a right to relief above the speculative level. (Citations omitted.)

Within the amended complaint, Hermosa sets forth numerous factual allegations with respect to its claims of (i) breach of implied contract/quantum meruit; (ii) promissory estoppel; (iii) civil conspiracy; (iv) breach of the duty of good faith and fair dealing; (v) violation of the Tennessee Consumer Protection Act; and (vi) fraud and intentional misrepresentation. Against this procedural backdrop and by incorporating the appropriate standard of review, we shall consider separately Plaintiff's claims asserted against the Defendants.

BREACH OF IMPLIED CONTRACT/QUANTUM MERUIT

Hermosa asserts by Count I of its amended complaint a cause of action for breach of implied contract/quantum meruit against all Defendants. In support of its claims, Hermosa makes the following factual averments:

...

17. Upon information and belief, Plaintiff asserts that each defendant named in this complaint, as well as the individuals listed above on behalf of the respective defendant for which each works, is in some manner responsible for the wrongs and damages as alleged below, and in so acting was functioning, at least at all times relevant to the allegations of this Complaint, as the agent, servant, partner, alter ego and/or employee of the other defendants, and in doing and/or not doing the actions mentioned below was acting within the course and scope of his or its authority as such agent, servant, partner, and/or employee with the permission and consent of the other defendants. Further, all acts were approved of and ratified by each and every other defendant.

...

38. On or around January 18, 2006, Plaintiff sent Mr. Buehler and Mr. Wilmore separate Memorandums of Understanding in which Plaintiff stated that it would construct a medical office building on land acquired from Medical Office Defendants and that upon completion of the construction, Medical Office Defendants would assume partial ownership of the building.

39. On or around January 23, 2006, Mr. Wilmore and Plaintiff executed a Feasibility Study Agreement and a proposal for professional services with respect to the Pace Property. On or around January 23, 2006, Plaintiff contracted with AMEC Environmental to begin evaluating the Pace Property site and projected anticipated completion of the environmental evaluation on or around February 27, 2006.

40. On or around January 25, 2006, Plaintiff prepared for Medical Office Defendants a summary of options regarding development on the Pace Property. The Medical Office Defendants expressed total confidence in Plaintiff and Plaintiff's ability to develop the Pace Property and repeatedly stated that Plaintiff was to be the developer of the Pace Property.

...

57. Meanwhile, Medical Office Defendants were engaging in negotiations to add another physician group, Eye Doctors, to be included in the development of the Pace Property.

...

59. On March 24, 2006, Plaintiff met with Dr. Gordon to discuss plans and options for Eye Doctors to be included in the development of the property. Dr. Hunter and Dr. Daniel attended that meeting as well. Dr. Gordon stated that he represented the Eye Doctors and that this group needed approximately 10,000 square feet of space.

60. On approximately, April 18, 2006, Plaintiff sent Mr. Wilmore an e-mail requesting that Plaintiff and the Clinic memorialize their intent to enter into a development agreement with Plaintiff, as Plaintiff had already expended vast resources and time on behalf of the Clinic.

...

71. Based on this new decision by Medical Office Defendants and Eye Doctors and at their request, Plaintiff began to revise all architectural plans and designs.

72. On or around June 6, 2006, Mr. Fleming contacted Plaintiff and stated that he had contacted The Ritzen Group to obtain comparable lease rates and gave those rates to the doctors who indicated their discomfort with the fees associated with the project.

...

76. Mr. Wilmore went on to state that The Clinic had decided to forego partnering on the land purchase and instead the Clinic intended to purchase the entire tract of land and sell back to Plaintiff the portion that would be needed to develop the remaining buildings.

...

80. On approximately June 27, 2006, Plaintiff submitted hard and electronic copies of its final Due Diligence Study to Mr. Wilmore.

81. The Due Diligence Study included the updated boundary survey for the tract of land, a breakdown on the usable land area, the architectural conceptual layout, the development pro

forma, including rent rolls, and the information regarding the city of Columbia's development requirements in an executive summary.

...

84. On June 30, 2006, Plaintiff received a letter from Mr. Wilmore stating that the Clinic had decided to "go in another direction" and was terminating its relationship with Plaintiff.

...

94. Over the course of eight (8) months, to Plaintiff's financial detriment, Defendants encouraged Plaintiff to negotiate with third party vendors, and requested that Plaintiff on numerous occasions analyze various development and cost options for development of the proposed land sites.

95. Two weeks prior to the closing date of Plaintiff's purchase of the land sites that Defendants selected for their medical and surgical buildings, the Clinic terminated its business relationship with Plaintiff.

96. By way of a press release on January 26, 2007, Defendants announced its new medical building and surgical center would open on (sic) Fall of 2007.

97. As evidenced herein, Plaintiff provided valuable goods and services to Defendants.

98. As evidenced herein, Defendants received the valuable goods and services.

99. A substantial benefit was conferred on Defendants in that Defendants used the information and feasibility study that Plaintiff generated for the Clinic in reliance on a development agreement to build on and develop the land sites.

100. Defendants clearly appreciated and accepted the benefits bestowed upon it by Plaintiff's substantial economic expenditures in reliance on a development agreement with Defendants, as Defendants developed the land and built the medical and surgical buildings–from the ground up–in just approximately five months using the voluminous information that Plaintiff imparted to Defendant.

101. As evidenced herein, the circumstances show Defendants should have reasonably understood that Plaintiff should have been compensated for providing the goods and/or services.

102. As evidenced herein, the circumstances demonstrate that it would be unjust for Defendants to retain the goods or services without payment.

. . .

Tennessee courts recognize that contracts may be either express, implied in fact or implied in law. *River Park Hosp. v. Bluecross Blueshield TN,* 173 S.W.3d 43, 57 (Tenn.Ct.App. 2002). Contracts implied in fact arise under circumstances which show a mutual intent or assent to contract while contracts implied in law are created by law "without the assent of the party bound, on the basis that they are dictated by reason and justice." *Angus v. City of Jackson*, 968 S.W.2d 804, 808 (Tenn.Ct.App. 1997).

As Hermosa has not pursued causes of action against the Defendants based upon any claim of breach of the written feasibility agreement and as the facts do not evince circumstances which show a mutual intent or assent to contract beyond the feasibility agreement, its cause of action necessarily claims a breach of a contract implied in law. As the court in *River Park Hosp.*, *supra*, explained, in order to establish a claim based upon a contract implied in law, the Plaintiff must show that "(1) a benefit has been conferred upon the defendant; (2) the defendant appreciated the benefit; and (3) acceptance of the benefit under the circumstances would make it inequitable for the defendant to retain the benefit without paying the value of the benefit." *Id.* at 58.

With reference to Hermosa's companion claim against all Defendants seeking recovery under a theory of quantum meruit, the Court in *Swafford v. Harris*, 967 S.W.2d 319, 324 (Tenn. 1998) identified the elements of such a claim as follows:

> A quantum meruit action is an equitable substitute for a contract claim pursuant to which a party may recover the reasonable value of goods and services provided to another if the following circumstances are shown:
>
> 1. There is no existing, enforceable contract between the parties covering the same subject matter;
>
> 2. The party seeking recovery proves that it provided valuable goods or services;
>
> 3. The party to be charged received the goods or services;
>
> 4. The circumstances indicate that the parties to the transaction should have reasonably understood that the person providing the goods or services expected to be compensated; and
>
> 5. The circumstances demonstrate that it would be unjust for a party to retain the goods or services without payment.

Having reviewed the factual allegations of the amended complaint and by incorporating the appropriate standard of review with reference to the Tenn.R.Civ.P. 12.02(6)

motions, we conclude that Hermosa's amended complaint alleges sufficient facts to state a claim for breach of an implied contract in law and/or claim under quantum meruit. We therefore hold that the trial court erred in granting the Defendants' Rule 12 motions to dismiss these claims.

PROMISSORY ESTOPPEL

Hermosa asserts a cause of action by Count II for promissory estoppel against the Medical Office Defendants and Eye Doctors. For a factual basis of its claims against these Defendants, Hermosa, through the amended complaint, makes the following additional averments:

...

106. Medical Office Defendants and Eye Doctors stated to Plaintiff that Plaintiff would be the developer and/or later, the project manager for the proposed land sites.

107. Throughout the course of their dealings, the Medical Office Defendants' and Eye Doctors' statements and actions led Plaintiff to believe that it would be the developer and/or, later, the project manager for the proposed land sites.

108. Relying to their detriment on Medical Office Defendants' and Eye Doctors' unambiguous promise of a development agreement and/or later a third party services agreement to serve as project manager, as well as additional statements and actions, as described in this complaint, Medical Office Defendants and Columbia Eye Associates induced Plaintiff to incur substantial expenses and expend extraordinary efforts on their behalf with the purpose of securing a development agreement and/or third party services agreement.

109. That Plaintiff would incur substantial expenses and expend extraordinary efforts for the purpose of securing a development agreement and/or later a third party services agreement to serve as project manager was reasonably foreseeable to Medical Office Defendants and Eye Doctors.

110. Thus, Plaintiff acted reasonably in justifiable reliance based on Medical Office Defendants' and Eye Doctors' unambiguous promise of a development agreement to serve as the developer and/or later a third party services agreement to serve as project manager, as well as Medical Office Defendants and Eye Doctors additional actions and statements over the course of approximately eight (8) months.

. . .

In Tennessee, promissory estoppel is sometimes referred to as equitable estoppel or detrimental reliance. As with a claim of an implied contract, a claim of promissory estoppel does not depend upon the existence of an express agreement between the parties. *Engenius*

Entertainment, Inc. v. Herenton, 971 S.W.2d 12, 14 (Tenn.Ct.App. 1997). The cause of action has been generally explained by the court in *Shedd v. Gaylord Entertainment Co.*, 118 S.W.3d 695, 699 (Tenn.Ct.App. 2003) (quoting *Alden v. Presley*, 637 S.W.2d 862, 864 (Tenn. 1982)) as:

> A promise which the promissor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Our courts do not liberally apply the doctrine of promissory estoppel and generally limit its application to exceptional cases. *Barnes & Robinson Co. v. Onesource Facility Services, Inc.,* 195 S.W.3d 637, 645 (Tenn.Ct.App. 2006). In *Rice v. NN, Inc. Ball & Roller Div.*, 210 S.W.3d 536, 544 (Tenn.Ct.App. 2006), this court explained the limited application of promissory estoppel thusly:

> Promissory estoppel is said to be limited to situations where (1) the detriment suffered in reliance is substantial in an ecomonic sense; (2) the substantial loss to the promisee is foreseeable by the promisor; and (3) the promisee acted reasonable in justifiable reliance on the promise as made. *Alden v. Presley*, 637 S.W.2d at 864 (citing L. Simpson, *Law of Contracts* § 61 (2d ed. 1965)).
>
> To successfully state a claim for promissory estoppel, the asserting party must first show that a promise was made and that it reasonably relied upon the promise to its detriment. *Calabro v. Calabro*, 15 S.W.3d 873, 879 (Tenn. Ct. App. 1999) (citations omitted). The promise upon which the party relies "must be unambiguous and not unenforceably vague." *Id.*, (citing *Amacher v. Brown-Forman Corp.*, 826 S.W.2d 480, 482 (Tenn.Ct.App. 1991)).

We again have carefully examined the factual allegations contained in the amended complaint by incorporating the applicable standard of review under Tenn.R.Civ.P. 12. We conclude that Hermosa's amended complaint alleges sufficient facts to state a claim for relief under a cause of action for promissory estoppel against Defendants, Clinic, SCMT and Eye Doctors. We therefore hold that the trial court erred in granting the respective Defendants' Rule 12 motions to dismiss this cause of action.

CIVIL CONSPIRACY

By Count III of the amended complaint, Hermosa asserts a cause of action for civil conspiracy against all Defendants. The elements of a cause of action for civil conspiracy have been set forth by the court in *Kincaid v. Southtrust Bank*, 221 S.W.3d 32, 38 (Tenn.Ct.App. 2006) as:

> (1) [A] common design between two or more persons,

(2) [T]o accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means,

(3) [A]n overt act in furtherance of the conspiracy, and

(4) [R]esulting injury.

Civil conspiracy claims must be pled with some degree of specificity, *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn.Ct.App. 2002) while conclusory allegations unsupported by material facts will not be sufficient to state such a claim, *Kincaid, supra*. Having reviewed the factual allegations of the amended complaint, we conclude that they are conclusory and merely a formulaic recitation of the elements of the cause of action for civil conspiracy. We hold that the trial court properly granted the motions to dismiss this cause of action.

GOOD FAITH AND FAIR DEALING

Hermosa, by Count V of its amended complaint, asserts a separate cause of action for breach of the duty of good faith and fair dealing against the Medical Office Defendants and Eye Doctors. Paragraphs 128 and 129 of the pleadings contain the following additional factual allegations:

128. Medical Office Defendants' and Eye Doctors' promises of a development agreement and Plaintiff's reasonable and justifiable reliance to Plaintiff's detriment on said promise constituted formation of an implied contract and thus, imposed upon Medical Office Defendants and Eye Doctors a duty of good faith and fair dealing in relation to its performance thereunder. Defendants failed to adhere to this duty of good faith and fair dealing.

129. Medical Office Defendants and Eye Doctors breached their duty of good faith and fair dealing which has resulted in substantial economic damages to the Plaintiffs in an amount to be determined at trial.

In Tennessee, the common law imposes a duty of good faith in the performance of contracts. *Wallace v. National Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996). "Parties to a contract owe each other a duty of good faith and fair dealing as it pertains to the performance of a contract. *Barnes & Robinson Co., supra*, 642. "The extent of the duty to perform a contract in good faith depends upon the individual contract in each case," 643. Our courts have not recognized a duty to negotiate in good faith absent an express contractual agreement to do so. *Barnes & Robinson Co., Id.* Although lack of good faith may be an element or circumstance in an action for breach of contract, Tennessee courts do not recognize lack of good faith, standing alone, as an actionable tort. *Solomon v. First American National Bank*, 774 S.W.2d 935, 945 (Tenn.Ct.App. 1989).

The court in *TSC Industries, Inc. v. Tomlin*, 743 S.W.2d 169, 173 (Tenn.Ct.App. 1987) further explained the parameters of such duty thusly:

> It is true that there is implied in every contract a duty of good faith and fair dealing in its performance and enforcement, and a person is presumed to know the law. . . . What this duty consists of, however, depends upon the individual contract in each case. In construing contracts, courts look to the language of the instrument and to the intention of the parties, and impose a construction which is fair and reasonable. (Citations omitted.)

The gravamen of Hermosa's Count V cause of action for breach of the duty of good faith and fair dealing is aimed toward the alleged, implied contract among the parties. We hold that no such independent cause of action is recognized by our courts and therefore, the trial court's granting of the motions to dismiss this claim is upheld.

TENNESSEE CONSUMER PROTECTION ACT

Hermosa alleges through Count IV of its amended complaint that all Defendants have participated in actions with respect to their business dealings constituting unfair and deceptive acts in violation of the Tennessee Consumer Protection Act. The Act is codified at Tenn. Code Ann. § 47-18-101, *et seq.* One of the Act's stated purposes is "[t]o protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state." Tenn. Code Ann. § 47-18-102(2); see *ATS Southeast, Inc. v. Carrier Corp.*, 18 S.W.3d 626 (Tenn. 2000).

Generally, the Act is afforded a liberal construction so as to afford protection to consumers and others from those engaging in deceptive acts or practices. *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992). However, our courts have construed the Act so as not to apply "to isolated, casual transactions between individuals not engaged in the conduct of a trade or business." *Colquette v. Zaloum*, 2004 LEXIS 566 at *12 (Tenn.App. 2004) 2004 WL 1924022 (2004); see also *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997).

Upon full review of the factual assertions contained in Hermosa's amended complaint, we determine that they appear to be no more than conclusions and a formulaic recitation of the elements of the cause of action. Inasmuch, no factual allegations exist that the Defendants regularly solicited or engaged in the type of consumer transaction or business establishing the genesis for the instant dispute. This Court therefore holds that the trial court properly granted the Defendants' motions to dismiss Plaintiff's claim of a violation under the Tennessee Consumer Protection Act.

FRAUD AND INTENTIONAL MISREPRESENTATION

Plaintiff through Count VII of its amended complaint asserts causes of action for fraud and intentional misrepresentation against the Medical Office Defendants and Eye Doctors. In Tennessee, the elements of fraud are "(1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, ... (3) an injury caused by reasonable reliance on the representation [and (4) the requirement] that the misrepresentation involve a past or existing fact...". *Dobbs v. Guenther*, 846 S.W.2d 270, 274 (Tenn.Ct.App. 1992). With reference to review of factual allegations of fraud, the court in *Kincaid v. Southtrust Bank*, 221 S.W.3d 32, 41 (Tenn.Ct.App. 2006) explained as follows:

> Allegations of fraud must be plead with particularity. Tenn. R. Civ. P. 9.02; *Strategic Capital Resources, Inc. v. Dylan Tire Industries, LLC,* 102 S.W.3d 603, 611 (Tenn.Ct.App. 2002). A claim of fraud is deficient if the complaint fails to state with particularity an intentional misrepresentation of a material fact. *See Dobbs*, 846 S.W.2d at 274. . . . To pass the particularity test, the actors should be identified and the substance of each allegation should be pled. *Strategic Capital Res., Inc. v. Dylan Tire Indus., LLC,* 102 S.W.3d 603, 611 (Tenn.Ct.App. 2002).

Plaintiff's factual allegations asserting causes of action for fraud and intentional misrepresentation generally claim that the Medical Office Defendants and Eye Doctors made intentional misrepresentations upon which Hermosa relied. We conclude that such broad and general allegations of fraud have not been pled with particularity. No particular defendant is identified as the one making the respective false and misleading statements. Further, the substance of each allegation has not been specifically pled. We hold that the trial court properly granted the Defendants' motions to dismiss regarding these causes of action.

VENUE

The trial court granted the Defendants' motions to dismiss for improper venue pursuant to Tenn.R.Civ.P. 12.02(3). The issue presented is a question of law. Consequently, the scope of review is *de novo* with no presumption of correctness, *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87 (Tenn. 1993). Venue is a concept based on privilege of and convenience to the parties. *Meighan v. U.S. Sprint Communications*, 924 S.W.2d 632 (Tenn. 1996). Venue relates to the appropriateness of the location of the action. *Id.*

Tennessee venue rules are largely statutory. Venue is either local or transitory, depending on the subject matter of the cause of action. *Hawkins v. Tennessee Dept. of Correction*, 127 S.W.3d 749 (Tenn.Ct.App. 2002). A local action focuses upon an injury to an immovable object such as real estate, while a transitory action is one in which the injury has occurred to a subject not having an immovable location such as an action sounding in tort or contract. *Five Star Exp., Inc.*

v. Davis, 866 S.W.2d 944 (Tenn. 1993). Our review must begin with Tenn. Code Ann. § 20-4-101 which provides in pertinent part as follows:

> (a) In all civil actions of a transitory nature, unless venue is otherwise expressly provided for, the action may be brought in the county where the cause of action arose or in the county where the defendant resides or is found.
>
> (b) If, however, the plaintiff and defendant both reside in the same county in this state, then such action shall be brought either in the county where the cause of action arose or in the county of their residence.
>
> . . .

On its face, the statute does not specifically address a circumstance involving multiple defendants residing in different counties. Hermosa argues that venue is proper in Davidson County since it and Defendants AmSurg and SCMT maintain principal places of business there.[6] Where multiple defendants with different residences are involved, Tennessee courts have recognized that proper venue is maintained where the plaintiff and material defendants reside in the same county, that county being the county where the cause of action accrued. *Tims v. Carter*, 241 S.W.2d 501, 503 (Tenn. 1951). This rule provides little guidance however where the plaintiff and cause of action are located in different counties.

Upon careful inspection of the amended complaint, we find that no allegations exist that venue was expressly provided for by the parties in the event of a dispute. As Hermosa argues that it maintains a common residence with some of the defendants, Tenn. Code Ann. § 20-4-101(a) is inapplicable. Under paragraph (b) our inquiry is directed first toward whether Davidson County is "where the cause of action arose." Tennessee courts follow the rule that a prerequisite to determining where a cause of action arose for purposes of venue is the identification of the cause of action itself. *Mid-South Milling Co. v. Loret Farms, Inc.*, 521 S.W.2d 586 (Tenn. 1975). As determined above, Hermosa's surviving causes of action are in the nature of a contract implied in law/quantum meruit and promissory estoppel.

Hermosa argues that these causes of action arose in Davidson County by reason of it having been initially engaged to provide services by Defendant AmSurg which acted as a representative of the Defendants. Hermosa further argues that it prepared certain models, cost analysis and other information from its Davidson County location. These considerations are not fully determinative, however.

According to the factual assertions contained in the amended complaint, Hermosa prepared and presented various development scenarios and options to certain Defendants in Maury

---

[6] For purposes of venue, "the county of the residence of the corporation is that county where it maintains its principal office or place of business." *Skaggs v. Tennessee Cent. Ry. Co.*, 246 S.W.2d 55 (Tenn. 1952).

County. Much of the work performed, including preparation of the survey, was conducted in Maury County as well. Clearly the focal point of the dispute is upon the real property which had been proposed to be developed in Maury County. We conclude that the cause of action arose in Maury County, see *TPC Facility Delivery Group v. Lindsey*, 2004 LEXIS 76 (Tenn.App. 2004), 2004 WL 193051 (Tenn. App. 2004).

"The language of Tenn. Code Ann. § 20-4-101(b) is mandatory and has been consistently recognized as such." *Mills v. Wong*, 39 S.W.3d 188, 190 (Tenn.Ct.App. 2000). As Tenn. Code Ann. § 20-4-101(b) permits an action to be brought alternatively in the county where "plaintiff and defendant both reside", our focus returns to the thorny question of venue for multiple defendants with different residences. Plaintiff asserts that Defendants AmSurg and SCMT are "material" Defendants whose principal places of business are common to that of Hermosa. As the applicable statute does not contain any reference to "material" defendants, we must consider applicable common law since Tennessee courts have adopted several ancillary rules. *Mills,* at 190. The *Mills* court, quoting from Lawrence A. Pivnick, Tennessee Circuit Court Practice § 6-2 (1999), explained that:

> First, if venue is proper as to one of several defendants who is a material party, venue is proper as to all properly joined defendants, even if venue would not be proper as to the other defendants if sued individually. *An exception, however, applies as to a defendant having common county residence with the plaintiff.* (Emphasis original.)

The concept of a "material" defendant for purposes of venue does not appear to be fully developed by our courts. The Tennessee Court of Appeals in *Ward v. Nat'l Healthcare Corp.,* 2007 LEXIS 695 (TennApp. 2007) , 2007 WL 3446340 concluded that a material defendant need not be a "principal" or "significant" defendant. In *Deaton v. Evans*, 241 S.W.2d 423 (Tenn. 1951), the Tennessee Supreme Court addressed a circumstance where plaintiff had filed suit in Shelby County against a state highway patrolman whose residence was in Shelby County and the Tennessee Commissioner of Finance and Taxation who maintained a residence in Davidson County. The relief sought included an order restraining the Department from cancelling plaintiff's vehicle registration. The Court concluded that where the only relief sought against the Shelby County defendant was "incidental to and dependent upon obtaining against non-resident defendants the main relief sought", the resident defendant was not a material defendant so as to provide a sufficient basis for venue. *Id.*, 426.

A close reading of the factual allegations contained in Hermosa's pleadings lead us to the conclusion that although AmSurg is not a material Defendant, SCMT is. Notwithstanding the fact that the Plaintiff asserts numerous factual allegations generally against all Defendants, the most specific allegations are directed toward the Medical Office Defendants, of which SCMT is a part. The relief sought against SCMT includes the main relief requested in this case. We conclude Defendant SCMT is a material Defendant for purposes of establishing a common residence with Plaintiff for venue purposes. Davidson County is a county providing proper venue. Accordingly,

we hold that the trial court incorrectly dismissed Plaintiff's amended complaint for improper venue.

CONCLUSION

The judgment of the trial court is affirmed in part and vacated in part. This cause is remanded to the trial court for further proceedings consistent with this Opinion. Costs on appeal are taxed equally between the Appellant and Appellees and their sureties, for which execution may issue, if necessary.

_____

THOMAS R. FRIERSON, II, Sp.J.