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**DISTRICT II**

June 12, 2013

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2013AP201-FT

Mary E. Gettel v. Newcastle Place, Inc. (L.C. # 2011CV559)

Before Brown, C.J., Reilly and Gundrum, JJ.

Mary E. Gettel appeals from a judgment dismissing her complaint for breach of contract. Mrs. Gettel argues that summary judgment in favor of Newcastle Place, Inc., was improper because there was a genuine issue of material fact as to whether Newcastle provided the amount of care required in the parties' continuing care residency agreement (care agreement). Pursuant to a presubmission conference and this court's order of February 15, 2013, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2011-12).<sup>1</sup> Upon review of those memoranda and the record, we affirm the judgment of the trial court.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version.

Newcastle Place offers a continuum of living arrangements for senior adults, including independent living apartments, a residential care apartment complex (RCAC), and a skilled nursing home. Pursuant to the parties' care agreement signed on July 24, 2001, Mrs. Gettel resided in one of Newcastle's independent living apartments from 2001 until 2010, when she began to require additional assistance and was transferred to an assisted living apartment within Newcastle's RCAC. By statute, an RCAC may only provide up to twenty-eight hours per week of supportive, personal, and nursing services to any one resident. *See* WIS. STAT. § 50.01(6d). Gettel retained private contractors to provide additional care. In 2011, Mrs. Gettel left Newcastle and moved to a community based residential facility (CBRF) where there is no statutory limit on the supportive and personal services permissibly provided.

Mrs. Gettel filed a claim alleging that Newcastle breached the parties' care agreement by providing insufficient services, and that as a result she was constructively evicted. Newcastle moved for summary judgment, arguing that the undisputed facts demonstrated that it had provided the twenty-eight hours per week allowed by statute and therefore, there was no breach of contract.<sup>2</sup> On December 5, 2012, the trial court granted summary judgment in Newcastle's favor and dismissed Mrs. Gettel's amended complaint. The trial court determined that the Newcastle employees' affidavits established the provision of twenty-eight hours of weekly services, the maximum permitted by statute.

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<sup>2</sup> The supporting affidavits averred that Newcastle provided over twenty-five hours of care because Newcastle attempted to limit the planned weekly services to twenty-five hours in order to be available for unexpected or emergency care needs, which were included in and counted toward the twenty-eight hour statutory limit.

This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Frost v. Whitbeck*, 2001 WI App 289, ¶ 6, 249 Wis. 2d 206, 638 N.W.2d 325. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶ 24, 241 Wis. 2d 804, 623 N.W.2d 751. We view the materials in the light most favorable to the motion's opponent. *Id.*, ¶ 23.

The Newcastle affidavits established that its employees provided at least twenty-five to twenty-eight hours of weekly services. Relying on a handwritten note in Mrs. Gettel's chart and her son's affidavit testimony, she argues that there was a legitimate question of fact as to whether Newcastle actually provided the service hours averred. We disagree.

In her response opposing summary judgment, Mrs. Gettel included a handwritten note from her Newcastle chart listing three categories of care<sup>3</sup> and tallying the total spent across these categories to be fourteen and one-half hours per week. The note also stated that if private providers were not in place, "many other services would have been in place." Mrs. Gettel argues that this creates a question of fact because it suggests that Newcastle spent only fourteen and one-half hours per week on her care. She argues that this inference is further supported by her son's affidavit averring that when Newcastle was notified of Mrs. Gettel's intent to move, it offered to provide an extra hour of service each day. Mrs. Gettel argues that given the statutory cap, the implication is that Newcastle must have been providing less than twenty-five to twenty-eight hours per week.

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<sup>3</sup> The listed categories are: (1) medical management/ administration; (2) assisting with toileting; and (3) wellness monitoring.

We conclude that Mrs. Gettel failed to establish a disputed material fact sufficient to thwart summary judgment. First, Newcastle's affidavits establish that it provided Mrs. Gettel with additional services beyond those listed in the handwritten note, including supportive care in meal transports, dressing in the morning, and one-on-one supervision and counseling. The affidavits supplement and are not contradicted by the information in the handwritten note. Second, the affidavit of Mrs. Gettel's son, including his account of Newcastle's hypothetical offer, does not contradict Newcastle's affidavits. The notion that the provision of extra services might exceed the statutory limit does not contradict the employees' affidavits establishing their firsthand knowledge of the amount of care actually provided. Further, given the context of Newcastle's offer to provide "extra" services, the reasonable inference is that it planned to provide additional care once it established its personal aide program. Any "extra" services would not be included in those limited by statute. Newcastle's offer is not reasonably construed as a concession that during the period of Mrs. Gettel's residency, it was providing less care than required by the parties' contract.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is affirmed.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*