STATE OF MICHIGAN
BRANCH COUNTY CIRCUIT COURT

JASON MATE, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF COLDWATER, MICHIGAN, a municipal corporation, by and through THE COLDWATER BOARD OF PUBLIC UTILITIES,

Defendant.

Case No. 25-12507-CZ

Judge To Be Determined

MAR 20 '26 PM3:18

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NOTICE OF HEARING

PLEASE TAKE NOTICE that *Defendant City of Coldwater's Motion Protective Order to Stay Discovery Pending the Outcome of Defendant's Pending Rule 2.116(C)(8) Motion for Summary Disposition* will be brought on for hearing via Zoom (Meeting ID: 307 264 61 83) on Friday, April 10, at 10:30 a.m. or at a time thereafter to be determined by the Court.

Respectfully submitted,

By: /s/ *Kimberly L. Scott*

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Dated: March 20, 2026

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2026, I caused to be served a copy of the foregoing document upon all counsel of record via email in accordance with the January 14, 2026 Stipulated Order for Alternate Electronic Service.

/s/ Amanda Kathryn O'Boyle

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STATE OF MICHIGAN
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Plaintiff,

v.

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Case No. 25-12507-CZ

Hon. Amy Ronayne Krause

MAR 20 '26 PM 3:18

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DEFENDANT CITY OF COLDWATER'S MOTION AND INCORPORATED BRIEF IN SUPPORT FOR PROTECTIVE ORDER TO STAY DISCOVERY PENDING THE OUTCOME OF DEFENDANT'S PENDING RULE 2.116(C)(8) MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Defendant, the City of Coldwater, by and through the Coldwater Board of Public Utilities (the "City"), respectfully requests that the Court enter an order under Michigan Court Rule 2.302(C) that stays discovery pending the outcome of the City's Motion for Summary Disposition under Michigan Court Rule 2.116(C)(8). The City sought Plaintiff's concurrence in this motion for protective order on February 27, 2026, and again on March 17, 2026. Plaintiff denied concurrence on March 18, 2026.

The City files this motion to stay discovery in order to protect the City from incurring considerable expense responding to Plaintiff's wide-ranging discovery requests and to preserve the rights afforded to the City under the Michigan Court Rules to file a dispositive motion in response to a filed complaint. Plaintiff's discovery requests would basically require the City to answer the allegations in the Complaint before this Court has the opportunity to determine whether Plaintiff's alleged claims can proceed as a matter of law. The City submits that the more prudent course is to stay discovery until after the Court has considered and ruled on the City's Rule 2.116(C)(8) motion for summary disposition.

PROCEDURAL HISTORY AND DEADLINES

This lawsuit was served on the City on January 6, 2026. After obtaining an extension of time "to answer or otherwise respond to Plaintiff's Class Action Complaint", the City filed a motion for summary disposition under Michigan Court Rule 2.116(C)(8) on February 18, 2026. The City argues in its motion that Plaintiff's claims are precluded – as a matter of law – by the plain terms of the City's Charter. A hearing on the motion is scheduled for June 11, 2026, at 1:30 pm EST, the earliest date the Court had available. On February 20, 2026, Plaintiff first sought the City's concurrence to adjourn the March 9, 2026, deadline for Plaintiff's motion for class

certification pursuant to Michigan Court Rule 3.501(B)(1). On February 27, 2026, Plaintiff's counsel sent a proposed stipulation to adjourn the Plaintiff's motion for class certification, noting that the deadline for Plaintiff's motion should be set ***after*** the Court decides the City's pending Rule 2.116(C)(8) motion (ostensibly to save the Plaintiff time and resources if the City's motion is granted). At that time, the City requested that a stay of discovery pending the resolution of the City's Rule 2.116(C)(8) motion also be added to the proposed stipulation (which would similarly save the City time and resources if the City's motion is granted). On March 2, 2026, Plaintiff's counsel responded that he would consider the request but wanted to separate the two issues since the motion for class certification was due in seven days. The City's counsel agreed to the proposed stipulation which moved the motion for class certification from March 9, 2026, to a date to be set by the Court following the Court's ruling on the Rule 2.116(C)(8) motion. The proposed stipulation was entered by the Court on March 3, 2026 (attached as **Ex. A**). The Court has not issued any case management order setting a deadline for the close of discovery.

Plaintiff never responded to the City's request for a stay of discovery pending resolution of the City's dispositive motion. Instead, on March 13, 2026, Plaintiff served its First Requests for Admission on the City. On March 17, 2026, Plaintiff served its First Set of Interrogatories and First Requests for Production of Documents on the City. That same day, the City's counsel advised Plaintiff's counsel that it would be filing a motion for protective order for the purpose of staying discovery until the City's Rule 2.118(C)(8) motion is decided and sought concurrence. Plaintiff's counsel refused. Plaintiff's discovery consists of 27 requests to admit, 6 interrogatories, and 13 requests for production. In particular, Plaintiff's discovery requests seek answers to the allegations in Plaintiff's Complaint. Responses and objections to the Requests to Admit are due April 10, 2026, and to the Interrogatories and Requests for Production are due on April 14, 2026.

ARGUMENT

Good cause exists to stay discovery pending the outcome of the City's Rule 2.116(C)(8) motion for summary disposition. Under Michigan Court Rule 2.302(C), on the motion of a party and for good cause shown, the court in which an action is pending may issue an order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including an order that discovery may be had only on specified terms and conditions, including the designation of time and place. See *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 327; 900 NW2d 680 (2017) (stating that Michigan courts are committed to open discovery, but "a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests."); *Cabrera v Ekema*, 265 Mich App 402, 406-07; 695 NW2d 78 (2005) (same).

With this discretion, trial courts may stay discovery pending the outcome of a motion for summary disposition. See *Temrowski v Kent et al*, No 352207, 2021 WL 4142739, at *3 (Mich App Sept 9, 2021) (affirming decision to limit discovery, noting that "to the extent defendants' motion for summary disposition was premised upon MCR 2.116(C)(8), additional discovery would by definition be irrelevant, because such a motion must be decided solely on the pleadings.") (unpublished op attached as **Ex. B**); *Innovation Ventures, LLC v Liquid Manufacturing, LLC*, No 315519, 2014 WL 5408963, at *3 (Mich App Oct 23, 2014), app lv granted on other grounds, ___ Mich ___; 865 NW2d 28 (2015) (unpublished op attached as **Ex. C**); *Schaub v Bank of New York Mellon NA*, Nos 315242, 315283, 2014 WL 2352695, at *3 (Mich App May 29, 2014) (unpublished op attached as **Ex. D**); *Davis v City of Detroit*, No 347931, 2020 WL 1488661, at *7-8 (Mich App Mar 24, 2020) (trial court did not abuse discretion when it denied a motion to compel deposition pending motion for summary disposition) (unpublished op attached as **Ex. E**).

Here, discovery should be stayed pending the outcome of the City's Rule 2.116(C)(8) motion for summary disposition. If granted, the City's motion would dispose of the entire case. Thus, allowing discovery to proceed while the City's motion is pending would waste time and resources, and needlessly impose costs and expenses upon the City and its taxpayers. If the motion is denied, discovery will continue as normal (indeed, the City would agree to produce objections and responses to the pending discovery requests within 28 days of the Court's order denying the motion). See *Temrowski*, 2021 WL 4142739, at *3. There is little harm to Plaintiff in first adjudicating the questions of law presented in the City's motion. Notably, the Michigan Court Rules suggest that discovery should commence **after** the resolution of a pre-answer motion. Under Michigan Court Rule 2.302(A)(5), a responding party's initial disclosures are not due until 28 days after that party files *its initial answer*, the intention being that these disclosures should be deferred while a pre-answer motion is pending. Under this logic, it makes sense to defer discovery until the Court has had a chance to decide the City's pending motion for summary disposition. Moreover, there are no deadlines requiring discovery to proceed before the resolution of the City's motion. The deadline for the Plaintiff's class certification motion is adjourned until **after** the Court rules on the City's motion. And there are no other discovery deadlines pending.

For these reasons, the City respectfully requests that this Court exercise its discretion to enter a protective order under Rule 2.302(C), staying discovery pending the outcome of the City's Rule 2.116(C)(8) motion for summary disposition.

Respectfully submitted,

By: */s/ Kimberly L. Scott*

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Co-Counsel for Defendant

Dated: March 20, 2026

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2026, I filed the foregoing papers with the Clerk of the Court by hand-delivering them the Clerk's Office and further served them via email on all counsel of record in accordance with the January 14, 2026 Stipulated Order for Alternate Electronic Service.

/s/Amanda O'Boyle

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EXHIBIT A

STATE OF MICHIGAN
BRANCH COUNTY CIRCUIT COURT

JASON MATE, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF COLDWATER, MICHIGAN a municipal corporation, by and through THE COLDWATER BOARD OF PUBLIC UTILITIES

Case No. 2025-12507-CZ

Hon. Kirk A. Kashian
Acting Circuit Court Judge

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ORDER EXTENDING TIME FOR PLAINTIFF TO FILE HIS MOTION FOR CLASS CERTIFICATION

At a session of the Branch County Circuit Court, held in the City of Coldwater, State of Michigan on this 3RD day of March 2026

PRESENT: KIRK A. KASHIAN
Circuit Court Judge

WHEREAS Defendant has filed a Motion for Summary Disposition of Plaintiff's Complaint Under MCR 2.116(C)(8) which has been noticed and scheduled for hearing on June 11, 2026;

WHEREAS pursuant to MCR 3.501 Plaintiff's Motion or Class Certification is currently due on March 9, 2026; and

WHEREAS the parties stipulate and agree that the deadline for Plaintiff to file his Motion for Class Certification should be extended until after the Court determines the City's Motion for Summary Disposition; THEREFORE:

IT IS HEREBY ORDERED that the deadline for Plaintiff to file his Motion for Class Certification pursuant to MCR 3.501 is extended to a date to be set by the Court, if warranted, following the Court's ruling on Defendant's Motion for Summary Disposition of Plaintiff's Complaint Under MCR 2.116(C)(8).

Circuit Court Judge

Stipulated to and Approved as to form:

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Attorney for Plaintiff and the Class

/s/ Sonal Hope Mithani
Sonal Hope Mithani (P51984)
Attorney for Defendant

4929-0429-1731, v. 1

EXHIBIT B

2021 WL 4142739
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Lee Roy TEMROWSKI, Jr., Plaintiff-Appellant,
v.
Robert KENT and Valerie Long, Defendants-Appellees.

No. 352207
|
September 9, 2021

Ingham Circuit Court, LC No. 19-000484-NO

Before: Ronayne Krause, P.J., and Shapiro and Gadola, JJ.

Opinion

Per Curiam.

*1 Plaintiff, Lee Roy Temrowski, Jr., appeals by right the trial court's order granting summary disposition to defendants, Robert Kent and Valerie Long, under MCR 2.116(C)(7) (governmental immunity). We affirm.

I. FACTS

Plaintiff is an attorney who specializes in litigation under the Michigan no-fault act, MCL 500.3101 *et seq.* Underlying this matter, plaintiff successfully represented a client against Allstate Insurance Company. One of that client's medical providers had been the Michigan State University (MSU) Health Team. To enforce his attorney lien, plaintiff instructed Allstate to make checks out to the client and to plaintiff's law firm jointly. Unfortunately, Allstate repeatedly disobeyed plaintiff's instructions, instead making the checks, in relevant part, payable to MSU and plaintiff's law firm jointly. After plaintiff returned numerous such checks (including checks involving other medical providers) to Allstate, defendant Long, a medical biller for MSU, contacted plaintiff by telephone to inquire into plaintiff's client's claims. Plaintiff informed Long about Allstate having made the checks out to his law firm and to MSU jointly.

Plaintiff contends that Long, on behalf of MSU, agreed to permit plaintiff to endorse and deposit the checks on MSU's behalf, withhold a 20% commission instead of his usual 33% commission, and then send the remaining balance to MSU. Long agrees that she discussed that possibility with plaintiff, but she contends that she told plaintiff that she would have to speak to her supervisor. Long further contends that her supervisor instructed her to call plaintiff back and ask him to instead send all of the Allstate checks directly to MSU, but plaintiff did not answer his phone, so Long left him a message asking him to send the Allstate checks to MSU. In any event, plaintiff endorsed the checks, deposited them into his law firm's account, retained a 20% contingency fee of $68.40, and issued a check to MSU for the remainder of Allstate's payment.

According to Long, "[a] few weeks later, [she] noticed that the claims related to Plaintiff's client had only been paid in part, with a balance remaining," which Long thought was "unusual" given plaintiff's indication to her "that the checks he received from Allstate were for the full balance of his client's claims." Pursuant to the discretion she had as a medical biller, Long conducted a further investigation of the claims by requesting copies of the checks from MSU's claim processing system. She eventually decided to escalate the incident to her supervisor.

At some point thereafter, defendant Kent, an attorney in MSU's Office of General Counsel, became involved. According to Kent, another attorney in the same office "brought to [his] attention an incident involving a potential forgery or unauthorized endorsement of two checks on MSU's behalf by [plaintiff], resulting in MSU not receiving a portion of the debt it was owed." Kent then conducted an investigation. Approximately two months after plaintiff's phone call with Long, Kent left a voicemail at plaintiff's law firm inquiring into an outstanding balance of $68.40 on plaintiff's client's account. Plaintiff responded with several lengthy and increasingly-vitriolic emails that, in part, denied any wrongdoing, offered to remit the full payment to MSU if MSU returned his original check "and we can continue to battle it out in court over the payment of your bills," and accused Long of being a liar. Kent indicated that he had confirmed with Long that no agreement had been reached regarding plaintiff's deposit of the checks on behalf of MSU and explained that he had "an ethical obligation to [his] client and to the State Bar to report the conduct you have engaged in." Plaintiff responded by asserting that Long was "nothing but a liar," reiterating that he would provide a full refund to

Allstate upon receipt of a check from MSU but would not permit MSU to "stiff" him out of his 20%, accused Kent and MSU of greed and a desire to cheat him, and challenged Kent's "audacity to accuse me of 'ethical violations' when all [Kent] have to do sir is look in the mirror and it is you who is guilty of the ethical violations and not me."

***2** Kent apparently did not further communicate with plaintiff, and he instead reported the matter to the MSU Police Department. An MSU Police detective spoke with Long and asked plaintiff to contact her to discuss the matter. Plaintiff maintained his innocence but otherwise declined to discuss the matter with the police. The MSU Police then forwarded the matter to the Ingham County Prosecutor's Office, which proceeded to charge plaintiff with two felony counts of uttering and publishing, MCL 750.249, and one misdemeanor count of larceny under $200, MCL 750.356(5). Plaintiff voluntarily surrendered to the police and was bound over for trial after a preliminary examination. However, the prosecution then conceded that it did not have a provable case; the circuit court quashed the felony charges and granted the prosecution's request for noelle prosequi. The criminal matter was therefore dismissed.

Plaintiff then commenced this action. Plaintiff alleged claims of malicious prosecution, abuse of process, intentional infliction of emotional distress (IIED), and civil conspiracy against Kent and Long. Plaintiff also alleged claims of tortious interference with a contract and tortious interference with a business relationship against Kent, and claims of fraudulent misrepresentation and innocent misrepresentation against Long. Plaintiff served discovery requests on Kent and Long with his complaint. Among other things, plaintiff requested that Long admit that she authorized plaintiff to withhold a contingency fee, that defendants admit that they had instituted allegations of criminal activity against plaintiff, that defendants had no probable cause to believe that plaintiff had violated the law, and that defendants made false statements to the MSU Police Department.

In lieu of an answer, defendants moved for summary disposition under MCR 2.116(C)(7) (governmental immunity) and (8) (failure to state a claim on which relief could be granted). Defendants also moved to stay discovery pending the outcome of their motion for summary disposition, arguing that plaintiff had served them with broad discovery requests, whereas their summary disposition motion was based on narrow grounds. The trial court refused to entirely deny plaintiff discovery, but it would limit discovery to what was necessary to resolve the summary disposition motion. The trial court asked plaintiff to identify what specific records he would need to respond to defendants' summary disposition motion. Plaintiff was unable to do so at the hearing, explaining that he would need to "make a list, look at their discovery for that ..." He indicated that he was willing "to whittle down our discovery and be very, very specific." The trial court instructed plaintiff to send a more-specific discovery request to defendants. It then partially granted defendants' motion to stay discovery, "[a]llowing for discovery only for matters that pertain to Plaintiff responding to the pending motion for summary disposition." Plaintiff never availed himself of the opportunity to craft and serve a narrowed-down discovery request. Eventually, the trial court granted summary disposition in defendants' favor on the basis of governmental immunity.

II. STANDARDS OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id.* at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id.* at 119-120. Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id.* at 119. "Where summary disposition is granted under the wrong rule, Michigan appellate courts, according to longstanding practice, will review the order under the correct rule." *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998).

***3** The interpretation and application of statutes, rules, and legal doctrines is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). Whether a claim is barred by governmental immunity is a question of law that we review de novo. *Ray v Swagger*, 501 Mich 52, 61; 903 NW2d 366 (2017). Decisions regarding discovery are discretionary with the trial court, and we review the trial court's decision to limit discovery for an abuse of discretion. *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011). A

trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016). Appellate courts will affirm a right result arrived at on the basis of wrong reasoning. *Kirl v Zinner*, 274 Mich 331, 336; 264 NW 391 (1936); *Fox v Roethlisberger*, 350 Mich 1, 4; 85 NW2d 73 (1957); *Mulholland v DEC Internat'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989).

III. DISCOVERY LIMITATIONS

Plaintiff argues that the trial court erred by staying discovery. We disagree.

In general, Michigan permits broad discovery into any unprivileged matter that is relevant to the subject matter of the litigation, subject to restrictions against fishing expeditions. *Augustine*, 292 Mich App at 419-420. However, Michigan's commitment to broad and far-reaching discovery is not unlimited. Summary disposition is usually premature when discovery is incomplete, but it may nevertheless be proper if there is no reasonable likelihood that further discovery would yield helpful evidence. *Bodnar v St John Providence, Inc*, 327 Mich App 203, 231; 933 NW2d 363 (2019). The party opposing summary disposition must provide more than speculation that additional discovery could be beneficial. *Caron v Cranbrook Ed Community*, 298 Mich App 629, 645-646; 828 NW2d 99 (2012). Furthermore, trial courts may impose restrictions or limitations upon discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." MCR 2.302(C). Trial courts should "protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005).

As an initial matter, to the extent defendants' motion for summary disposition was premised upon MCR 2.116(C)(8), additional discovery would by definition be irrelevant, because such a motion must be decided solely on the pleadings. *Maiden*, 461 Mich at 119-120. Furthermore, critically, the trial court did not deprive defendant of meaningful discovery. Its order limiting discovery was explicitly limited in time to the outcome of defendants' motion for summary disposition; if plaintiff had prevailed, discovery would have continued as normal. Finally, the trial court expressly permitted plaintiff discovery "for matters that pertain to plaintiff responding to the pending motion for summary disposition." To the extent defendants' motion for summary disposition was premised on MCR 2.116(C)(7), plaintiff was therefore fully entitled to any discovery that would bear upon whether defendants did or did not enjoy governmental immunity for their conduct. Plaintiff was given a full opportunity to present a revised discovery request on that basis; he simply chose not to do so.

We find no abuse of discretion in the trial court's decision to temporarily limit discovery to matters relevant to the outstanding motion until the disposition of that motion. Plaintiff could have submitted a revised discovery request tailored to addressing the motion, but he did not. Indeed, plaintiff could conceivably have re-submitted the same discovery request with an explanation for why everything therein was necessary to address the motion for summary disposition. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998). To the extent that defendants failed to respond to plaintiff's discovery requests, we conclude that plaintiff created the error by failing to follow the trial court's instructions to engage in limited discovery.

IV. GOVERNMENTAL IMMUNITY

***4** Under the Governmental Tort Liability Act (GTLA), MCL 691.1407, governmental agencies and their employees generally are immune from tort liability, and can be held liable only when the circumstances fall within the statutory exceptions. MCL 691.1407; *Beals v Michigan*, 497 Mich 363, 370; 871 NW2d 5 (2015). The analysis for determining governmental immunity for an employee depends upon whether the conduct of the employee is alleged to have been a negligent or an intentional tort. Our Supreme Court in *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008), [1] provided the following analytical framework:

> (1) Determine whether the individual is a judge, a legislator, or the highest-ranking appointed executive official at any level of government who is entitled to absolute immunity under MCL 691.1407(5).

(2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.

(3) If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority,

(b) the governmental agency was engaged in the exercise or discharge of a governmental function, and

(c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

(4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross* [*v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984)] test by showing the following:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial. [*Odom*, 482 Mich at 479-480.]

There is no dispute that both defendants were lower-ranking employees of MSU. As plaintiff correctly observes, governmental immunity for employees is an affirmative defense that the employee must prove. *Odom*, 482 Mich at 479.

Most of the claims alleged in this matter are intentional torts. Under the framework set forth in *Odom*, it is necessary to determine regarding the alleged intentional torts whether (1) the alleged acts were undertaken during the course of each defendant's employment, (2) each defendant was acting or reasonably believed he or she was acting within the scope of his or her authority, (3) defendants undertook the acts in good faith and not with malice, and (4) the acts were discretionary or ministerial. Regarding the claim of innocent misrepresentation, the factors necessary to establish governmental immunity regarding a negligent tort are that (1) the defendant was within the course of employment and was acting, or believed he or she was acting, within the scope of his or her authority, (2) the governmental agency was engaged in the exercise or discharge of a governmental function at the time of the alleged injurious acts, and (3) the defendant's conduct did not amount to gross negligence that proximately caused the injury or damage. Malice is essentially synonymous with an absence of good faith. *Odom*, 482 Mich at 474-475. Furthermore, "gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). We regard that definition as conceptually analogous to bad faith, which *Odom* described as " 'malicious intent, capricious action or corrupt conduct' or 'willful and corrupt misconduct ...' " *Odom*, 482 Mich at 474.

***5** Plaintiff's conclusory characterizations of defendants' conduct notwithstanding, the actual allegedly-wrongful acts undertaken by defendants are reporting plaintiff's conduct to the MSU police department, providing the email correspondence between Kent and plaintiff to the MSU police department, accusing plaintiff of misconduct, keeping plaintiff's check and indicating an intent to collect the outstanding $68.40, providing false statements about the telephone discussion between plaintiff and Long, and conspiracy to the above. Under the circumstances, it is unnecessary for us to address whether defendants' acts were undertaken in the course of their employments, within the scopes of their respective authority, and were discretionary. Summary disposition is properly granted when a defendant provides uncontroverted evidence that he or she acted in good faith, and the plaintiff has not identified contradictory evidence. See *Latits v Phillips*, 298 Mich App 109, 118; 826 NW2d 190 (2012).

We agree with plaintiff that Kent's and Long's affidavits should be disregarded to the limited extent that they each state, "At all times, I acted in good faith and without any malice toward the Plaintiff." The fact that the affidavits are "self-serving" is unremarkable; indeed, it would be surprising if a party's affidavit did not favor that party's case. However, the quoted averment sets forth a conclusion of law, not a statement of fact from which a conclusion could be drawn. See *Nat'l Concessions, Inc v Nat'l Circus Corp*, 347 Mich 335, 337-338; 79 NW2d 910 (1956). Those specific averments should be disregarded; however, doing so does not invalidate

the remainder of the affidavits, which do otherwise set forth appropriate factual averments.

Regarding defendant Long, there is no dispute that she and plaintiff discussed the proposal of having plaintiff deposit the checks and mail payments to MSU; the dispute is whether Long actually told plaintiff to effectuate that proposal, or whether Long told plaintiff she would need to discuss it with her supervisor and then left a message for plaintiff explaining that the proposal had been rejected. Nevertheless, presuming Long did tell plaintiff to effectuate that proposal and proceeded to lie about what she told plaintiff, the unrebutted evidence—even disregarding the conclusory averment in Long's affidavit—shows an absence of malice or of gross negligence. Long averred, in relevant part, that she "did not know [plaintiff] prior to this incident and had no ill will toward him or any intent to harm his reputation." Furthermore, Long averred that she merely escalated an anomaly to her supervisor upon determining that plaintiff's client's bill still had an outstanding balance. Plaintiff notably does not explain how he expected his client's bills from MSU to be paid in full under his check-cashing scheme. Importantly, plaintiff's emails to Kent clearly reflect a mutual misunderstanding and mutual efforts to resolve the problem, but the manner in which plaintiff presented himself would likely have been interpreted as unreasonable and hostile. Although reporting the matter to the police might have been an overreaction, when considered in context, the circumstances fail to show that doing so constituted malice or gross negligence.

Defendant Kent also averred, as a proper factual assertion, that he "did not know [plaintiff] prior to this incident and had no ill will toward him or any intent to harm his reputation." Plaintiff argues that defendants knew or should have known that MSU was not entitled to payment from Allstate, but rather was entitled to payment from his client, and the payments from Allstate actually belonged to plaintiff (as to his attorney fee) and to the client (as benefits owed by Allstate). In other words, plaintiff alleges that he and his client were the rightful recipients of any benefits payable from Allstate, that Long knew this as the billing agent for MSU Health Team, and that Kent, as an attorney, knew or should have known this. However, plaintiff overlooks the facts that (1) the check was actually made out in part to MSU, and (2) defendants were investigating the undisputed fact that the client's bill was not being paid. Although plaintiff did extend a conditional offer to remit a full payment and then "battle it out in court," the overall content of plaintiff's communications cannot be regarded as a good faith effort to resolve the matter amicably. Ordinarily, the propriety and necessity of elevating a legitimate dispute over a payment of $68.20 into a criminal matter would be questionable, especially because the real problem was Allstate. However, under these particular circumstances, particularly after reading plaintiff's emails, Kent's subsequent course of conduct cannot be regarded as wholly unreasonable, and there is no evidence Kent knew that criminal charges would actually be filed.

***6** We therefore conclude that the trial court did not err when it determined that defendants established that they lacked malice and did not engage in gross negligence, and that plaintiff did not provide contradictory evidence. [2]

V. ALTERNATIVE GROUNDS FOR AFFIRMANCE

Defendants argue in the alternative that summary disposition would have been proper under MCR 2.116(C)(8) even if the trial court had erred regarding governmental immunity. We agree.

A claim of malicious prosecution requires, in relevant part, "that the defendant has initiated a criminal prosecution against" the plaintiff. *Matthews v Blue Cross and Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998). "A plaintiff's prima facie case against a private person requires proof that the private person instituted or maintained the prosecution and that the prosecutor acted on the basis of information submitted by the private person that did not constitute probable cause." *Id.* at 379. A private individual who supplies wrong information to police officers or prosecuting authorities upon which a prosecution is eventually initiated is not considered to have "initiated" the prosecution, unless (1) the individual knows the information to be false, and (2) the officers or prosecutor acted on that false information without any independent exercise of discretion. *Id.* at 383-386. Presuming defendants submitted knowingly false information to the police, plaintiff's complaint establishes that the police conducted their own independent investigation, including extending an invitation to plaintiff to participate—which plaintiff declined. Because the criminal prosecution was clearly based on an independent exercise of discretion by the officers who actually had the authority to bring the criminal charges, defendants cannot have committed malicious prosecution.

The tort of abuse of process "concerns the willful use of a valid process to obtain a result the law did not intend" and "lies for the improper use of the process after it had been issued, not for maliciously causing it to issue." *Rowbotham v DAIIE*, 69 Mich App 142, 146; 244 NW2d 389 (1976). "A bad motive alone will not establish an abuse of process." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). Fatally to plaintiff's claims, even presuming defendants had an improper motive in attempting to induce the criminal charges to be brought, all of defendants' alleged wrongful conduct occurred before any legal process existed to abuse. *Peisner v Detroit Free Press*, 68 Mich App 360, 367; 242 NW2d 775 (1976). Defendants were not alleged to be involved in the criminal proceeding after it was commenced, so they cannot be liable for abuse of process.

Intentional infliction of emotional distress (IIED) requires "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004) (quotation omitted). Presuming plaintiff has adequately alleged the last three elements, it is an initial question of law for the courts to determine whether a defendant's alleged misconduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). Presuming the facts to be as alleged in the complaint, defendants' alleged falsehoods would certainly be distressing and deplorable, but we are unable to find that they rise to the level of "extreme and outrageous."

***7** Tortious interference with a contract or with a business relationship requires the defendant to be a "third party" to that contract or business relationship. *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). According to the complaint, plaintiff had a contract and a business relationship with MSU by virtue of his alleged agreement with Long. Plaintiff alleged that Kent tortiously interfered with that contract and business relationship. However, plaintiff also alleged that Kent was at all relevant times acting as Assistant General Counsel to Michigan State University. In other words, plaintiff alleged that an agent of MSU, while acting on behalf of MSU, interfered with his contract or business relationship with MSU. Although plaintiff bafflingly speculates that Kent was seeking to punish plaintiff for representing his client against Allstate, even if that is true, Kent's "motives therefore cannot be said to be strictly personal." *Reed*, 201 Mich App at 13. The tortious interference claims were therefore untenable.

A claim for fraudulent misrepresentation requires the defendant to have knowingly or recklessly made a material misrepresentation that the defendant intended for the plaintiff to rely upon, and the plaintiff actually did rely upon that misrepresentation and suffered injury as a result. *Hord v Environmental Research Institute of Michigan*, 463 Mich 399, 404; 617 NW2d 543 (2000). A claim for innocent misrepresentation is similar, but instead of the scienter elements of knowing that a statement is false and intending the statement to be relied upon, the misrepresentation must "be made in connection with making a contract and the injury suffered by the victim must inure to the benefit of the misrepresenter." *US Fidelity and Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). The latter claim obviously fails; not only did plaintiff fail to allege that Long benefitted from her alleged misrepresentation, there is nothing anywhere in the complaint to suggest how Long could have benefitted from the misrepresentation. The former claim appears to be premised on the allegation that Long misrepresented to plaintiff that she had the authority to permit plaintiff to sign the checks on behalf of MSU. However, plaintiff never articulates what alleged misrepresentation Long actually made. Rather, plaintiff only alleges that he and Long reached an agreement that plaintiff could endorse and deposit the checks on MSU's behalf. Although it might otherwise be appropriate to draw some inferences regarding what Long actually told plaintiff, fraud must be pleaded with particularity. MCR 2.112(B)(1); see also *Churchill v Palmer*, 57 Mich App 210, 216; 226 NW2d 60 (1974). Plaintiff has not pleaded his fraud claim with adequate particularity.

Finally, the trial court observed that under the intracorporate conspiracy doctrine, there cannot legally be a conspiracy between agents of the same legal entity when those agents are acting in their official capacities. *Ziglar v Abbasi*, —— U.S. ——, ——; 137 S Ct 1843, 1867; 198 L Ed 2d 290 (2017). This Court has recognized the applicability of the doctrine, but noted that it does not apply when the agents have independent personal stakes in the matter, in which case they are deemed to be acting on their own behalf. *Blair v Checker*, 219 Mich App 667, 674-675; 558 NW2d 439 (1996). To the extent plaintiff alleges that defendants were acting in their capacities as agents of MSU, his civil conspiracy claims necessary fail. However, to the extent plaintiff alleges that defendants were acting on their own

behalf, his civil conspiracy claims nevertheless fail in any event because none of his other claims are viable on their own.

VI. CONCLUSION

*8 The trial court's order temporarily limiting discovery to matters relevant to the pending summary disposition motion, lasting only until the outcome of that motion, was not an abuse of discretion, especially because plaintiff elected not to avail himself of the discovery that the trial court did permit. The trial court properly granted summary disposition in favor of defendants under MCR 2.116(C)(7) on the basis of governmental immunity. Furthermore, summary disposition would also have been proper under MCR 2.116(C)(8) because plaintiff failed to state any claims upon which relief could be granted. The trial court is affirmed in all respects. Defendants, being the prevailing parties, may tax costs. MCR 7.219(A).

Shapiro, J. (concurring in part, dissenting in part).
I agree with the majority that summary disposition of several of plaintiff's claims was warranted under MCR 2.116(C)(8), but I disagree that plaintiff failed to state a claim of malicious prosecution. Further, I conclude that the trial court erred by limiting discovery and, based on the limited record before us, erred by granting defendants summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity.

I. BACKGROUND

Plaintiff is an attorney who successfully secured payment of no-fault insurance benefits for his client in a first-party claim with Allstate Insurance Company. Plaintiff asserted an attorney's lien on the proceeds of the no-fault insurance claims. Plaintiff's client had received medical treatment from Michigan State University for injuries resulting from the auto accident.

On three occasions Allstate sent plaintiff a check jointly issued to his law firm and MSU for payment of services rendered by MSU. Each time plaintiff returned the check to Allstate, requesting that the insurance company make the checks payable to his law firm and his client.

Plaintiff received a fourth check from Allstate that was again jointly issued to plaintiff's law firm and MSU. Plaintiff asserts that he intended to send this check back to Allstate, but he received a phone call from defendant Valerie Long, a medical biller for MSU. Per her affidavit, Long has discretion to contact a patient's attorney regarding outstanding claims. According to plaintiff, he and Long had a long discussion about the check issue. Plaintiff maintains that he and Long reached an agreement where he would endorse the check on MSU's behalf, take 20% of the check as opposed to his agreed upon fee of 33%, and that he would send the balance of the proceeds to MSU. Long, however, denies that she and plaintiff reached an agreement and asserts that she told him that she needed to consult her supervisor and that after doing so she left plaintiff a voice mail instructing him to endorse the checks on his law firm's behalf and then send the check to MSU.

There is no dispute that plaintiff thereafter endorsed the check on behalf of himself and MSU, retained $68.40 (20%) and sent a check for the balance to Allstate for distribution to MSU. Sometime thereafter defendant Robert Kent became involved. According to plaintiff's complaint, Kent, who is an attorney in MSU's Office of General Counsel, left a voice mail for plaintiff on September 27, 2017, inquiring about the $68.40 still owed on the client's account after MSU received payment from Allstate. In a reply e-mail, plaintiff explained the history of the case, Allstate's repeated issuance of joint checks to plaintiff's law firm and MSU, plaintiff's rejection and return of those checks, and the agreement he claims he reached with Long [1] that he would accept only 20% of the fee and send MSU a check for the remaining 80%. Plaintiff ended the e-mail by suggesting that, if MSU was unhappy with the agreement, that all of the proceeds be returned to Allstate and "we can continue to battle it out in court over the payment of your bills."

*9 In response, Kent characterized plaintiff's explanation about the oral agreement he reached with Long as "unreasonable." He explained that the Office of General Counsel handles all legal matters for MSU and that it was irresponsible or negligent for plaintiff to believe that he could call an MSU employee and enter into an oral agreement to provide MSU with legal services. Kent's e-mail concluded, "If you do not agree to pay to the University the remainder of the amount due, I will contact the appropriate authorities."

Plaintiff responded in an e-mail in which he made several assertions. First, he stated that he was contacted by Long, not the other way around as Kent had indicated. Moreover, he argued, if no agreement had been reached between plaintiff and Long, why would he take only 20% as opposed to his

agreed-upon fee of 33%? And why would he not send the check back to Allstate and request a check jointly issued to his law firm and his client, as he had done on multiple prior occasions? Plaintiff denied any wrongdoing and again suggested that all funds be returned to Allstate.

In reply, Kent informed plaintiff that he spoke with Long and that she denied reaching any agreement with plaintiff regarding the check. Kent reiterated that plaintiff was not representing MSU and stated that plaintiff's attempt to enforce an attorney lien on the check from Allstate was "improper"; that plaintiff's "unauthorized endorsement" of MSU on the check "creates serious ethical concerns"; and that he had "an ethical obligation" to report plaintiff's conduct and "plan[ned] to do so."

In the final e-mail between plaintiff and Kent that is part of the record, plaintiff reiterated that he and Long had reached an agreement but that given the continued dispute, all funds should be returned to Allstate and the matter resolved in civil litigation. Kent then reported plaintiff to the MSU Police Department, which eventually led to a criminal complaint being issued for two counts of uttering and publishing and one count of misdemeanor larceny. At his arraignment, plaintiff pleaded not guilty and while he was initially bound over following a preliminary examination, the circuit court promptly quashed the bindover and all charges were dismissed.

Plaintiff brought the instant suit, alleging various torts, including malicious prosecution and abuse of process, against Kent and Long. In lieu of an answer, defendants moved for summary disposition under MCR 2.116(C)(7) (governmental immunity) and (C)(8) (failure to state a claim). After granting defendants' motion to limit discovery, the trial court granted summary disposition on the basis of governmental immunity.

II. ANALYSIS

A. MCR 2.117(C)(7) & DISCOVERY

When reviewing a motion brought under MCR 2.116(C)(7), "the contents of the complaint must be accepted as true unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant." *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate." *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010) (citation omitted).

Governmental employees are entitled to the affirmative defense of governmental immunity for intentional torts if they establish all of the following:

> ***10** (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,
>
> (b) the acts were undertaken in good faith, or were not undertaken with malice, and
>
> (c) the acts were discretionary, as opposed to ministerial. [*Odom v Wayne Co*, 482 Mich 459, 464-465; 760 NW2d 217 (2008).[2]]

"[T]here is no immunity when the governmental employee acts maliciously or with a wanton or reckless disregard of the rights of another." *Id.* at 474 (emphasis removed). In making this determination, courts may consider whether the governmental employee's "conduct or a failure to act ... shows such indifference to whether harm will result as to be equal to a willingness that harm will result." *Id.* at 475 (quotation marks and citation omitted).

Beginning with Kent, I conclude that there is sufficient evidence of bad faith to preclude summary disposition at this very early stage of the litigation. Plaintiff repeatedly suggested that all funds be returned to Allstate, and that the parties could then litigate their dispute. Kent rejected that suggestion, stating that MSU "accepted your partial payment on your client's behalf and will continue to collect [the balance] from your client." Kent's final e-mail threatened to report plaintiff to "the appropriate authorities" if he did not turn over the $68.40, using the threat of criminal prosecution to compel payment of a disputed *de minimis* amount. That Kent chose to file a criminal complaint over $68.40, when plaintiff repeatedly suggested that all funds be returned to Allstate and that the matter be resolved through civil litigation, allows for the inference that Kent was not acting in good faith.

As to Long, a question of material fact is even clearer. Long asserts that she and plaintiff did not reach an agreement, while

plaintiff insists that they did. If plaintiff is correct, then Long's statements to the police and others denying such an agreement were false. It goes without saying that if Long has been falsely denying the existence of an agreement with plaintiff, she has been acting in bad faith. Accordingly, factual development is required to determine whether Long is entitled to immunity.

I also conclude that the trial court's discovery order constituted an abuse of discretion. A motion for summary disposition is generally premature if granted before discovery is complete. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). "It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

After filing their motion for summary disposition in lieu of an answer to the complaint, defendants moved to stay discovery. Defendants had moved for summary disposition under MCR 2.116(C)(8), asking to dismiss the complaint solely on the pleadings, but also moved for summary disposition under MCR 2.116(C)(7), and submitted documentary evidence and affidavits in support of that request. At the hearing on the motion to stay, the trial court repeatedly noted that defendants' motion for summary disposition was to be decided solely on the pleadings, questioning the need for discovery. Plaintiff's counsel reminded the court that defendants also moved for summary disposition under MCR 2.116(C)(7) and that discovery was needed to in order to challenge the conclusory statements made in defendants' affidavits that they were acting in good faith. Counsel also informed the court that there were numerous outstanding discovery requests and that four depositions had been noticed. Despite the fact that no answer to the complaint had been filed and defendants relied on their affidavits in seeking dismissal, the court advised plaintiff's counsel that depositions would not be permitted, stating, "[I]f you think you need a deposition, you're not getting it now but you can have documents." The court further ruled that no new written discovery could be sought and that defendants need not answer any pending written discovery requests unless plaintiff's counsel sent a letter narrowing the requests and explaining why the request was relevant to the pending motion. [3]

***11** The trial court's ruling failed to give plaintiff a meaningful opportunity to respond to defendants' motion for summary disposition and therefore constitutes an abuse of discretion. An affidavit from plaintiff could not have meaningfully contradicted defendants' assertions that they were not acting in bad faith and had no ill toward plaintiff. [4] Plaintiff was entitled to discovery regarding defendants' understanding of the law and the communications relevant to this case, particularly given defendants' decision to move for summary disposition in lieu of filing an answer to the complaint, i.e., defendants never admitted or denied the allegations, let alone provided discovery. Depositions were plainly in order and they were precluded by the trial court's statements from the bench and its vague discovery order. It would have been appropriate to stay discovery and decide the motion for summary disposition solely on the pleadings pursuant to MCR 2.116(C)(8). But it was an abuse of discretion to limit discovery and decide the motion under MCR 2.116(C)(7) based on the documentary evidence submitted by defendants.

The majority notes that plaintiff never submitted a "narrowed-down discovery request," but it is difficult to imagine what such a request would look like. Governmental immunity in this case did not turn on a limited preliminary question, e.g., the proprietary-function exception to governmental immunity. Rather, defendants moved for summary disposition on the ground that they were acting in good faith, and there is substantial overlap between that question and the underlying causes of action. Thus, it is unclear how plaintiff could have submitted a narrow discovery request to address the broad question of whether defendants were acting in good faith.

Accordingly, I would vacate the trial court's order granting summary disposition under MCR 2.116(C)(7) and remand for discovery and further proceedings without prejudice to defendants thereafter seeking summary disposition on grounds of governmental immunity.

B. MCR 2.116(C)(8)

As noted, I agree with the majority that many of plaintiff's causes of actions fail to state a claim. However, I disagree that dismissal of the malicious-prosecution clam is appropriate.

A motion under MCR 2.116(C)(8) "test the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under this subrule is appropriate

only when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008) (quotation marks and citations omitted).

> In maintaining a claim of malicious prosecution, a plaintiff bears the burden of proving that (1) the defendant has initiated a criminal prosecution against him, (2) the criminal proceedings terminated in his favor, (3) the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. [*Walsh v Taylor*, 263 Mich App 618, 632-633; 689 NW2d 506 (2004).]

The majority asserts that plaintiff's malicious-prosecution claim fails because there was an independent exercise of discretion by the officers to bring criminal charges. The majority relies on *Matthews v Blue Cross and Blue Shield of Mich*, 456 Mich 365; 572 NW2d 603 (1998), in which the officer conducted "a three-month independent investigation" of the information provided to him by the insurance's company's financial investigator and afterward signed and swore the criminal complaint against the plaintiff. *Id.* at 372-374.

While there is language in *Matthews* to support the majority's broad reading of the case, precluding claims of malicious prosecution when the officer or prosecutor exercised some independent discretion "would effectively nullify the tort of malicious prosecution" as applied to criminal proceedings. *Radzinski v Doe*, 469 Mich 1037, 1040 (2004) (MARKMAN, J., concurring in part, dissenting in part). As former Justice Markman explained:

> ***12** It is virtually inconceivable that a prosecutor would not conduct at least some modicum of an independent investigation before initiating a criminal prosecution. It has never been the law of our state that the carrying out of an independent investigation by the police or the prosecutor immunizes a complainant from a malicious prosecution charge. The fact of such an investigation has no bearing on what is at the core of the malicious prosecution tort—the false and malicious reporting of a crime. [*Id.*]

Further, while *Matthews* relied on the Restatement Torts, 2d, § 653, comment g, p. 409, for the proposition that "[t]he exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings," *Matthews*, 456 Mich at 385 n 27, it overlooked that comment g goes on to provide that "[i]f, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information." Restatement Torts, 2d, § 653, comment g, p. 409.

Rather than read *Matthews* as essentially vitiating the long-standing common law claim of malicious prosecution of criminal proceedings, I would view the statements suggesting that an officer or prosecutor's exercise of discretion defeats a claim of malicious prosecution as nonbinding dicta. Those statements were not necessary to the resolution of the malicious prosecution claim in *Matthews* when the insurance company's agents did not provide false information; did not fail to disclose material information; and the charges were based on an extensive police investigation. See *Matthews*, 456 Mich at 387-391.

In contrast, it appears that the charges in this case were brought solely on information provided by defendants, and plaintiff alleges that defendants knew this information was false. Further, as noted, an e-mail by Kent suggests that his purpose was to recover payment of the money rather than a good-faith belief that the law had been broken. See *Matthews*, 456 Mich at 386 n 28, quoting *Hall v American Investment Co*, 241 Mich 349, 353; 217 NW2d 18 (1928) ("[I]f the criminal law is used for 'some collateral or private purpose, such as to compel the delivery of property or payment of a debt rather than to vindicate the law, he is guilty of a misuse

of process and a fraud upon the law.' "). Perhaps summary disposition of the malicious-prosecution claim would be warranted after discovery, but I cannot conclude at this early stage that plaintiff failed to state a claim as a matter of law.

All Citations

Not Reported in N.W. Rptr., 2021 WL 4142739

Footnotes

1 Plaintiff argues that *Odom* has been "effectively nullified by statute" and that 2013 PA 173 abolished any distinction between discretionary and ministerial acts in MCL 691.1407(2). However, 2013 PA 173 did nothing of the sort; it renumbered an irrelevant subsection of MCL 691.1407 and added an exception regarding the MISS DIG utility safety notification system. In fact, *Odom* quoted MCL 691.1407(2), and the language quoted is precisely identical to the language found in MCL 691.1407(2) today.

2 Plaintiff further contends that the trial court improperly shifted the burden of establishing governmental immunity to him because governmental immunity is an affirmative defense, and he did not have the duty to plead in avoidance of it. Our review of the record, however, indicates that the trial court based its decision on the lack of evidence that plaintiff provided to rebut defendants' affidavits, and did not require plaintiff to plead in avoidance of governmental immunity.

1 At the time, plaintiff and Kent did not know Long's identity, but there is now no dispute that Long is who plaintiff spoke to on the phone.

2 I agree with the majority that the trial court properly found that defendants were acting within the scope of their employment and that their actions were discretionary.

3 The order entered by the court granted defendants' motion to stay discovery for the reasons stated on the record and allowed discovery "only for matters that pertain to Plaintiff responding to the pending motion for summary disposition."

4 Several times the trial court incorrectly indicated that only affidavits could be submitted with respect to a motion under MCR 2.116(C)(7).

End of Document

EXHIBIT C

2014 WL 5408963
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

INNOVATION VENTURES, L.L.C., d/b/a Living Essentials, Plaintiff–Appellant,
v.
LIQUID MANUFACTURING, L.L.C., K & L Development Of Michigan, L.L.C ., LXR Biotech L.L.C., Eternal Energy, L.L.C., Andrew Krause, and Peter Paisley, Defendants–Appellees.

Docket No. 315519.
|
Oct. 23, 2014.

Oakland Circuit Court; LC No.2012–124554–CZ.

Before: STEPHENS, P.J., and TALBOT and BECKERING, JJ.

Opinion

PER CURIAM.

***1** In this action, plaintiff, Innovation Ventures, LLC, d/b/a Living Essentials, raises several tort and breach of contract claims against defendants Liquid Manufacturing, LLC, K & L Development of Michigan, LLC, and Peter Paisley and Andrew Krause, the presidents and owners of Liquid Manufacturing and K & L Development, respectively. Plaintiff, who produces and sells a product known as 5 Hour Energy, alleges that defendant Liquid Manufacturing, the former bottler of plaintiff's product, and defendant K & L Development, which acted as an independent contractor for plaintiff, breached non-competition and confidentiality provisions in various contractual agreements, misappropriated trade secrets, and engaged in other tortious conduct by forming defendants, Eternal Energy, LLC, and LXR Biotech, LLC, to produce and sell a product called "Eternal Energy," a competitor to 5 Hour Energy. The trial court granted summary disposition to defendants on all of plaintiff's claims. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case primarily concerns plaintiff's business dealings and contracts with two entities, defendant K & L Development and defendant Liquid Manufacturing.

A. AGREEMENTS WITH DEFENDANT LIQUID MANUFACTURING AND PAISLEY

Concerning defendant Liquid Development, on May 18, 2007, plaintiff entered into a contract entitled "Amended Manufacturing Agreement" (AMA) whereby plaintiff hired defendant Liquid Manufacturing to bottle 5 Hour Energy. Defendant Peter Paisley is the president and CEO of Liquid Manufacturing. In June 2010, plaintiff terminated its agreement with defendant Liquid Manufacturing, and the parties entered into an agreement to formalize the termination and to formalize plaintiff's exercise of its option to purchase the equipment that defendant Liquid Manufacturing used to bottle plaintiff's product. Plaintiff was to purchase the equipment one year later. The agreement (Termination Agreement) contained various nondisclosure and non-compete provisions, but permitted defendant Liquid Manufacturing to produce a list of 36 "Permitted Products" on the equipment that was formerly used to bottle plaintiff's product; that permission could be revoked for violation of the Termination Agreement. Plaintiff agreed, though, to give defendant Liquid Manufacturing 30 days to cure any violation of the agreement. For all Permitted Products that defendant Liquid Manufacturing produced, it was required to obtain from the company for which it produced the products a confidentiality agreement verifying that the company would not disclose that its product was bottled using the same equipment that had been used to bottle plaintiff's products.

On March 8, 2011, plaintiff sold the beverage production equipment that it purchased from defendant Liquid Manufacturing pursuant to the option to purchase back to defendant Liquid Manufacturing.

B. AGREEMENTS BETWEEN PLAINTIFF AND DEFENDANTS K & L DEVELOPMENT AND KRAUSE

In approximately 2008, plaintiff reached an oral agreement with defendant Krause and defendant K & L Development whereby those defendants would act as consultants to help

design, manufacture, and install certain beverage production and packaging equipment for plaintiff. Defendant Krause was the managing member of K & L Development, a company that is no longer in existence. Among other matters, defendants Krause and K & L installed equipment at defendant Liquid Manufacturing's facility. They also made certain equipment that was specific to plaintiff's packaging needs. In addition, defendant Krause developed a leakproof cap for plaintiff's 5 Hour Energy bottles.

***2** On April 27, 2009, plaintiff and defendants Krause and K & L Development entered into a written agreement entitled "Equipment Manufacturing and Installation Agreement" (EMI); this was the first written agreement between these parties. The EMI referenced the work that defendants Krause and K & L Development previously performed, and stated that those defendants wished to perform certain manufacturing, designing, and installation services for plaintiff once again, and that plaintiff wished to retain their services once again. The EMI contained non-disclosure and non-compete provisions.

The same day the parties entered into the EMI, defendant K & L Development and plaintiff entered into an agreement entitled "Nondisclosure and Confidentiality Agreement" (NCA) that contained non-disclosure and non-compete clauses. The NCA noted that defendant K & L Development had received and would continue to receive confidential information during the course of its business relationship with plaintiff, and prohibited defendant K & L Development from using or disclosing such information.

On or about May 10, 2009, less than two weeks after the signing of the EMI and the NCA, plaintiff terminated the parties' business relationship.

C. FORMATION OF DEFENDANTS ETERNAL ENERGY AND LXR BIOTECH

On September 10, 2010, defendant Eternal Energy, which produces a liquid energy shot known as "Eternal Energy" was formed. On May 9, 2011, defendant LXR Biotech was formed; its registered agent is the same as that of defendant Eternal Energy. Defendant LXR Biotech markets and distributes Eternal Energy in approximately 2–ounce bottles, which is approximately the size of 5 Hour Energy bottles. Defendants Krause and Paisley are members of defendants Eternal Energy and LXR Biotech; defendant Krause is the president of defendant LXR Biotech. Defendant Liquid Manufacturing bottles Eternal Energy. Although Eternal Energy was initially sold in tattoo and piercing parlors, it soon began to be sold in Wal–Mart, which is one of plaintiff's largest retail customers.

On September 20, 2010, ten days after the formation of defendant Eternal Energy, John P. Criso, defendant Liquid Manufacturing's Chief Financial Officer, contacted Andrew M. Kulpa, plaintiff's associate counsel, and requested that Eternal Energy be added to the list of Permitted Products that defendant Liquid Manufacturing could, pursuant to the Termination Agreement, produce. In an e-mail dated September 21, 2010, plaintiff agreed to add Eternal Energy to the list of Permitted Products. Without citing any agreement between the parties, Kulpa stated that any change in Eternal Energy's formula would require plaintiff to seek re-approval of Eternal Energy.

D. PROCEDURAL HISTORY

On January 27, 2012, plaintiff filed a complaint against defendants, alleging breach of various contractual provisions regarding confidential information and non-compete agreements, as well as separate tort claims for the disclosure of its confidential information. The crux of plaintiff's allegations was that defendant Eternal Energy and/or defendant LXR Biotech wrongfully obtained plaintiff's confidential information and/or trade secrets from defendants Liquid Manufacturing, Paisley, Krause, and/or K & L Development. Plaintiff alleged that one or more defendants used plaintiff's confidential information or trade secrets in marketing, manufacturing, and distributing Eternal Energy, and by representing to Wal–Mart that defendant Liquid Manufacturing previously bottled 5 Hour Energy for plaintiff. Concurrent with the filing of its first amended complaint, plaintiff sent a letter to defendant Paisley alleging a violation of the Termination Agreement. The letter included a demand to cure any and all violations of the Termination Agreement by ceasing the disclosure, if any, of its confidential information or trade secrets, and by assuring that defendant Paisley ensure compliance with the non-disclosure provisions set forth in the Termination Agreement with regard to the companies for which defendant Liquid Manufacturing produced Permitted Products.

***3** On February 19, 2012, defendant Paisley sent a letter to Matthew S. Dolmage, plaintiff's Chief Financial

Officer, in response to the January 27, 2012 letter from plaintiff informing defendant Liquid of the alleged violations of the Termination Agreement. The letter noted that the Termination Agreement, to the extent it was enforceable, permitted defendant Liquid Manufacturing 30 days to cure a breach of the agreement. Defendant Paisley concluded that defendant Liquid cured any breach of the agreement by ceasing to bottle all products that had not been approved as Permitted Products by plaintiff, and by—for the first time—requiring defendant Eternal Energy to execute the requisite confidentiality agreement, as provided in the Termination Agreement.

After being allowed to tour defendant Liquid Manufacturing's facility, plaintiff filed a second amended complaint against defendants, clarifying its allegations and adding new causes of action. In total, plaintiff alleged eight counts against defendants, including: (1) breach of contract against defendants Paisley, Krause, Liquid Manufacturing, and K & L Development for breaches of their respective confidentiality and non-compete agreements with plaintiff; (2) violation of the Michigan Uniform Trade Secrets Act (MUTSA), MCL 445.1901 *et seq.* against all defendants; (3) tortious interference with contract and business relations against all defendants; (4) civil conspiracy against all defendants; (5) unjust enrichment against all defendants; (6) statutory and common law conversion against all defendants; (7) fraud in the inducement against defendants Paisley and Liquid Manufacturing for inducing plaintiff to enter into an agreement whereby defendant Liquid Manufacturing purchased the production equipment that was originally used to bottle plaintiff's products; and (8) declaratory relief that the sale of certain energy drink products violated the parties' various agreements. Plaintiff alleged that defendant Liquid Manufacturing was continuing to produce two liquid energy shots products: Eternal Energy and Perfectly Petite. Perfectly Petite had never been added to the Termination Agreement as a Permitted Product.

Defendants moved for summary disposition in March 2012 on all of plaintiff's claims pursuant to MCR 2.116(C)(8) and (C)(10), and asked the trial court to stay discovery, which the trial court did. In June 2012, the trial court denied the motion in all respects, save for dismissing plaintiff's claims for tortious interference against defendants Krause and Paisley, finding that there were no allegations that either defendant had acted for his own benefit, as opposed to the benefit of the corporate entities at issue. With respect to all other claims, the trial court ruled that plaintiff stated claims upon which relief could be granted, and that, where discovery was incomplete, the trial court concluded that plaintiff presented enough evidence to show that a factual dispute existed.

*4 In the following months, the parties exchanged written discovery requests, and plaintiff sought discovery from third parties, including customers and business associates of defendants. Because of plaintiff's requests to conduct discovery on third parties, defendants moved the trial court for a protective order and to decide their renewed motions for summary disposition, which were forthcoming, before authorizing further discovery. On December 7, 2012, the trial court granted defendants' motions for protective orders and once again stayed discovery pending defendants' motions for summary disposition.

Thereafter, defendants moved for summary disposition on all of plaintiff's claims, and the trial court granted their respective motions. Concerning the breach of contract claims against defendants Liquid Manufacturing and Paisley, the trial court noted that plaintiff's allegations with regard to the confidentiality provisions in the Termination Agreement were essentially that, defendant Liquid Manufacturing's use of the production equipment previously owned by plaintiff inevitably involved the use or disclosure of plaintiff's confidential information; thus, according to plaintiff, it was inevitable that defendant Liquid Manufacturing would use or disclose its confidential information. The trial court ruled that, because plaintiff expressly authorized the use of the equipment for bottling the 36 original Permitted Products and Eternal Energy, it could not maintain a claim for the use or disclosure of confidential information related thereto. In addition, the trial court found that the non-compete provision contained in the Termination Agreement was unenforceable because it was an unreasonable restraint on trade.

Concerning the contractual liability of defendants Krause and K & L Development, the trial court concluded that the NCA lacked consideration, and therefore, was invalid. It also found that the non-compete provisions contained in the NCA were unreasonable. Further, the trial court found that defendant Krause could not be personally liable under the EMI because the EMI expressly excluded from the definition of "confidential information" used therein any information that defendant Krause learned before the signing of the EMI.

Upon granting summary disposition to defendants on plaintiff's breach of contract claims, the trial court found that defendants were entitled to summary disposition on

plaintiff's remaining claims, ruling that: (1) plaintiff failed to establish the existence of a trade secret; (2) plaintiff failed to establish a genuine issue of material fact concerning tortious interference because the NCA lacked consideration and because it expressly authorized the disclosures by defendants Liquid Manufacturing and Paisley about which it complained; (3) there could be no claim for unjust enrichment because there were express contracts between the parties; (4) plaintiff failed to plead fraud with particularity so it failed to state a claim for fraudulent inducement; (5) where there was no genuine issue of material fact concerning the use or disclosure of plaintiff's confidential information, plaintiff's conversion claim must fail; (6) plaintiff's claim for civil conspiracy must fail where plaintiff failed to establish any of its tort claims; and (7) defendants, rather than plaintiff, were entitled to declaratory relief.

II. SUMMARY DISPOSITION AS TO PLAINTIFF'S CONTRACT CLAIMS

A. LIABILITY OF DEFENDANTS PAISLEY AND LIQUID MANUFACTURING UNDER THE NON–COMPETE PROVISION OF THE TERMINATION AGREEMENT

***5** Plaintiff first argues that the trial court erred by granting summary disposition to defendants Paisley and Liquid Manufacturing with regard to plaintiff's claims that those defendants breached the non-compete provision contained in the Termination Agreement. This Court reviews the trial court's decision to grant summary disposition de novo. *Latham v. Barton Malow Co,* 480 Mich. 105, 111; 746 NW2d 868 (2008). Defendants moved for summary disposition on this claim pursuant to MCR 2.116(C)(8) and (C)(10). Although the trial court did not state the subrule under which it granted summary disposition, we consider the motion to have been granted under MCR 2 .116(C)(10) because the record reveals that the trial court relied on information outside of the pleadings. See *Hughes v. Region VII Area Agency on Aging,* 277 Mich.App 268, 273; 744 NW2d 10 (2007). Resolution of this issue also requires interpretation of the Termination Agreement. Contract interpretation is a question of law this Court reviews de novo. *Citizens Ins Co v. Secura Ins,* 279 Mich.App 69, 72; 755 NW2d 563 (2008). Additionally, "[t]he reasonableness of a noncompetition provision is a question of law when the relevant facts are undisputed." *Coates v. Bastian Bros, Inc,* 276 Mich.App 498, 506; 741 NW2d 539 (2007).

Under the Termination Agreement, plaintiff was permitted to produce certain, enumerated Permitted Products. Other than those products, the Termination Agreement provided that:

> for a period of 3 years from the Effective Date, Liquid shall not produce or formulate other than for [plaintiff] (i) an Energy Drink (as defined in Section 24 below), in packaging of 4 fluid ounces or less, or (ii) any other Energy Drink containing glucuronolactone or tyrosine (in all its forms) regardless of package size.

Plaintiff contends that defendants Liquid Manufacturing and Paisley violated the Termination Agreement's non-compete provision by bottling Eternal Energy and Perfectly Petite.

"As a general matter, courts presume the legality, validity, and enforceability of contracts." *Coates,* 276 Mich.App at 507. However, "noncompetition agreements are disfavored as restraints on commerce and are only enforceable to the extent they are reasonable." *Id.* See also *Thermatool Corp v. Borzym,* 227 Mich.App 366, 372; 575 NW2d 334 (1998).

> Thus, a restrictive covenant must protect an employer's reasonable competitive business interests, but its protection in terms of duration, geographical scope, and the type of employment or line of business must be reasonable. Additionally, a restrictive covenant must be reasonable as between the parties, and it must not be specially injurious to the public. *[St Clair Med, PC v. Borgiel,* 270 Mich.App 260, 266; 715 NW2d 914 (2006).]

In order to be reasonable, "a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill." *Coates,* 276

Mich.App at 507 (quotation omitted). In addition, "[b]ecause the prohibition on all competition is in restraint of trade, an employer's business interest justifying a restrictive covenant must be greater than merely preventing competition." *St Clair Med, PC,* 270 Mich.App at 266. "The burden of demonstrating the validity of the agreement is on the party seeking enforcement." *Coates,* 276 Mich.App at 508.

***6** As an initial matter, we find that defendant Paisley cannot be personally liable under the Termination Agreement because, although he signed the agreement, he did so in his capacity as a corporate officer, and not as an individual. A corporate officer generally is not liable for the obligations of the corporation. See *Duray Dev, LLC v. Perrin,* 288 Mich.App 143, 151; 792 NW2d 749 (2010); *Livonia Bldg Materials v. Harrison Const Co,* 276 Mich.App 514, 523–524; 742 NW2d 140 (2007). Moreover, although the Termination Agreement purports to bind the employees of defendant Liquid Manufacturing, one of whom is defendant Paisley, where the Termination Agreement, which imposed a three-year restraint on competition, could not be performed within one year, the statute of frauds required that in order to be enforceable, the Termination Agreement had to be signed by the party to be charged. MCL 566.132(1)(a). Where enforcement is sought against defendant Paisley, who did not sign the contract, MCL 566.132(1)(a) precludes enforcement of the contract against defendant Paisley.

Concerning defendant Liquid Manufacturing, the trial court did not err by finding that there was no genuine issue of material fact related to the production of Eternal Energy. Plaintiff expressly approved the bottling of Eternal Energy as a Permitted Product in a September 21, 2010 e-mail. Although defendant Liquid Manufacturing initially breached the Termination Agreement by failing to have defendant Eternal Energy execute the requisite non-disclosure agreement, defendant Liquid Manufacturing cured that breach within the time specified by the contract after receiving notice of the breach from plaintiff. In reaching this conclusion, we reject plaintiff's arguments that it only granted provisional or conditional approval of Eternal Energy based on its then-existing formula or distribution strategy because the record belies plaintiff's claims, and because the Termination Agreement never provided for the type of provisional or conditional approval allegedly granted by plaintiff in this case.

Furthermore, we find the trial court correctly granted summary disposition to defendant Liquid Manufacturing with regard to its production of any product, including Perfectly Petite, because we agree that the non-compete provision contained in the Termination Agreement was unreasonable and unenforceable. See *Coates,* 276 Mich.App at 507 (a noncompetition agreement is only enforceable to the extent it is reasonable). The non-compete provision contained in paragraph 1 of the Termination Agreement contains a broad provision preventing defendant Liquid Manufacturing from bottling any energy drink in packaging of four ounces or less without prior approval from plaintiff. The burden of demonstrating the validity of a non-compete agreement is on the party seeking its enforcement. *Id.* at 508. When asked to identify the legitimate business purposes furthered by the non-compete provision, plaintiff stated the following in its October 24, 2012 fourth supplemental response to defendant Liquid Manufacturing's request for interrogatories:

> ***7** Under the Agreement to Terminate, Plaintiff *had the right to evaluate, on a case-by-case basis, each brand of energy drink that Liquid Manufacturing proposed to bottle. Products that were approved by Plaintiff were limited in distribution and production, such that Plaintiff believed that the bottling of the product would not infringe on Plaintiff's legitimate business interests.* Contingent on Plaintiff's approval, each proposed energy drink manufacturer was required to execute a confidentiality agreement with Liquid Manufacturing and to follow other contractual specifications. In the event that Liquid Manufacturing or the product did not follow these procedural safeguards embodied in the Agreement to Terminate, such as failing to execute a confidentiality agreement, Plaintiff's legitimate business interest in protecting its goodwill and confidential information was harmed. *For example, Plaintiff's legitimate business interests in protecting its goodwill and confidential information are harmed by Liquid Manufacturing's bottling of Eternal Energy because*

> *it was ultimately distributed to a significantly broader area than originally proposed and provisionally approved,* Eternal Energy failed to execute a confidentiality agreement, and Liquid Manufacturing failed to seek authorization when the formula changed. [Emphasis added.]

By plaintiff's own admission, plaintiff used the non-compete provisions to approve the bottling of those products that were "limited in distribution and production," thereby allowing plaintiff to handpick the competing products that defendant Liquid Manufacturing could bottle. While preventing unfair competition is a legitimate business purpose that can be protected by a non-compete agreement, the prevention of fair competition is not. *St Clair Med, PC,* 270 Mich.App at 266. Where defendant Liquid Manufacturing only bottled products and did not produce its own products, such a broad restraint on defendant Liquid Manufacturing was unreasonable. See *Coates,* 276 Mich.App at 506 (examining the totality of the circumstances in determining reasonableness). Indeed, this is particularly so where plaintiff subsequently sold the bottling equipment to defendant Liquid Manufacturing, then sought to use the non-compete provisions to control what defendant Liquid Manufacturing could do with its own equipment. Further, we reject plaintiff's claim that the non-compete provision was reasonable because it was intended to prevent the disclosure of its confidential information. Preventing the anti-competitive use of confidential information is a legitimate business interest. *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC,* 276 Mich.App 146, 158; 742 NW2d 409 (2007). Here, though, as discussed *infra,* plaintiff expressly authorized any alleged use of confidential information in bottling products when it granted defendant Liquid Manufacturing express approval to bottle competing products on the same equipment that was used to bottle plaintiff's product.

***8** Moreover, we reject plaintiff's argument that the non-compete provision was reasonable because it was intended to protect plaintiff's goodwill. Protecting the goodwill that a party has built up with clients is a legitimate purpose. *St Clair Med, PC,* 270 Mich.App at 268. However, plaintiff's argument ignores the fact that the non-compete provision was a broad, all-encompassing provision that plaintiff admitted was designed to allow it to handpick the competitors for whom defendant Liquid Manufacturing could bottle products. Despite plaintiff's representation of the non-compete provision as a provision protecting its goodwill, the broad nature of the provision demonstrates that it is unreasonable.

In addition, we reject plaintiff's contention, made in passing, that defendant cannot be heard to complain about the non-compete provision when the Termination Agreement contained a provision stating that the provision was reasonable. Our Supreme Court has recognized that courts, not parties to a contract, are to determine the reasonableness of a contract that contains a restraint on trade. See *Rory v. Continental Ins Co,* 473 Mich. 457, 475 n 32; 703 NW2d 23 (2005).

Lastly, plaintiff argues that even if the non-compete provision is unreasonable, this Court should reform the provision and strike any unreasonable terms. Courts may reform a noncompetition agreement if it is found to be unreasonable. See, e.g., *Hopkins v.. Crantz,* 334 Mich. 300, 304; 54 NW2d 671 (1952). Here, however, plaintiff makes no effort to argue whether any portions of the provision are reasonable and could be enforced, nor does plaintiff suggest how the provision could be reformed in a manner that would be reasonable. Thus, plaintiff abandoned the claim. *Berger v. Berger,* 277 Mich.App 700, 712; 747 NW2d 336 (2008) ("A party abandons a claim when it fails to make a meaningful argument in support of its position."). Moreover, we have found no authority stating that a court *must* reform an unreasonable non-compete provision.

B. LIABILITY OF DEFENDANTS PAISLEY AND LIQUID MANUFACTURING UNDER THE TERMINATION AGREEMENT

Next, plaintiff argues that the trial court erred by granting summary disposition to defendants Liquid Manufacturing and Paisley with regard to alleged breaches of the confidentiality provisions contained in the Termination Agreement. We review this issue de novo. *Latham,* 480 Mich. at 111.

The Termination Agreement contains confidentiality and non-disclosure provisions that provide, among other matters, that defendant Liquid, and/or its employees "shall not disclose to representatives from any company or any other person or entity at any time or in any manner any of [plaintiff's] confidential information relating to the formulation, manufacture, production, sale or distribution of

[plaintiff's] products...." The Termination Agreement also restricts the use of any confidential information that defendant Liquid and/or its employees learned from plaintiff.

***9** Plaintiff maintains that defendants Liquid and Paisley [1] "must necessarily *use* Plaintiff/Appellant's confidential information in bottling liquid energy shots." As discussed *supra,* plaintiff expressly authorized defendant Liquid to bottle a number of Permitted Products, including liquid energy shots such as Eternal Energy. Additionally, plaintiff did so knowing that defendant Liquid Manufacturing would be using the same equipment that was used to bottle 5 Hour Energy. Indeed, the Termination Agreement anticipated such use, stating, "[plaintiff] shall have priority over any other parties for which [defendant] Liquid provides services on the Manufacturing Equipment." And, plaintiff eventually sold the bottling equipment to defendant Liquid Manufacturing. In light of these facts, defendants Liquid Manufacturing and Paisley are entitled to judgment as a matter of law with regard to plaintiff's claim for breach of the above-noted confidentiality provisions because plaintiff expressly authorized the disclosure about which it now complains. Where plaintiff expressly approved defendant Liquid Manufacturing's bottling of 37 Permitted Products, which included liquid energy shots, plaintiff authorized the disclosure of the alleged confidential information, and cannot be heard to complain about such disclosure. See *Landelius v. Sackellares,* 453 Mich. 470, 481; 556 NW2d 472 (1996) (explaining that once disclosure of certain information is authorized, the party authorizing the disclosure cannot assert a claim based on the disclosure). Indeed, although plaintiff required the companies for whom defendant Liquid Manufacturing produced Permitted Products to enter into confidentiality agreements regarding where the product was made, it never took any steps to protect the alleged confidential information that it claims was "necessarily use[d]" by defendant Liquid Manufacturing in bottling liquid energy shots. Thus, based on plaintiff's express approval of defendant Liquid Manufacturing's bottling of liquid energy shots, it waived enforcement of the confidentiality provisions in this regard. See *Quality Prods & Concepts Co v. Nagel Precision, Inc,* 469 Mich. 362, 372–374; 666 NW2d 251 (2003).

Citing an anti-waiver provision in the Termination Agreement, plaintiff argues that it could not have waived enforcement of the confidentiality provisions in this regard. This argument is meritless. Even when a contract contains an anti-waiver provision, the parties may still waive or modify the contract by their subsequent actions. *Id.* at 372. "This is because the parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed." *Id.* In order to establish waiver in light of an anti-waiver or anti-modification provision, there must be "a mutual intention of the parties to waive or modify the original contract." *Id.* One way to show a mutual intent to waive a contract or term is by express agreement of the parties. *Id.* at 373. Here, plaintiff expressly agreed, in writing, to allow defendant Liquid Manufacturing to bottle the 37 Permitted Products, some of which constituted liquid energy shots. Thus, there is no genuine issue of material fact that plaintiff, by expressly authorizing the bottling of those products, waived any claim that bottling liquid energy shots on the production equipment constitutes a violation of the confidentiality provisions contained in the Termination Agreement.

C. CONTRACTUAL LIABILITY OF DEFENDANTS KRAUSE AND K & L DEVELOPMENT

***10** Next, plaintiff argues that the trial court erred by granting summary disposition to defendants Krause and K & L Development concerning plaintiff's claims that those defendants violated the non-disclosure and non-compete provisions of the EMI and NCA. We review this issue de novo. *Latham,* 480 Mich. at 111. Again, because the trial court considered information outside the pleadings when it granted summary disposition, we consider the motion to have been granted under MCR 2.116(C)(10). *Hughes,* 277 Mich.App at 273.

Both the EMI and NCA contained non-disclosure and non-compete provisions. We find that defendants Krause and K & L Development were entitled to summary disposition as to all of plaintiff's claims arising out of these contracts because the contracts were unenforceable for a failure of consideration. In order to be valid, a contract must have, among other matters, legal consideration. *Calhoun Co v. Blue Cross Blue Shield of Mich,* 297 Mich.App 1, 13; 824 NW2d 202 (2012). Here, defendants Krause and K & L Development performed work for plaintiff as independent contractors whose work was terminable at the will of any of the parties, without cause. Both the EMI and NCA stated that the consideration for the respective agreements was the promise of a continuing business relationship and employment. We have held that "[m]ere continuation of employment is sufficient consideration to support a noncompete agreement

in an at-will employment setting." *QIS, Inc v. Indus Quality Control, Inc,* 262 Mich.App 592, 594; 686 NW2d 788 (2004). Thus, the agreements, on their face, contained valid consideration for the execution of the NCA and EMI. See *id.*

Nevertheless, although the agreements purported to provide valid consideration, there was no genuine issue of material fact that the discontinuation of the business/employment relationship within two weeks of the signing of the agreements constituted a failure of consideration. In general, a complete or substantial failure of consideration may justify the rescission of a written instrument." *In re Rudell Estate,* 286 Mich.App 391, 403; 780 NW2d 884 (2009). In *Adell Broadcasting v. Apex Media Sales,* 269 Mich.App 6, 12–13; 708 NW2d 778 (2005), this Court described a "failure of consideration" as a situation where consideration may have existed, but has either ceased to exist or was not given. This Court further described a failure of consideration as a failure of performance. *Id.* at 13. This Court added that "rescission is permissible when there is failure to perform a substantial part of the contract or one of its essential items, or where the contract would not have been made if default in that particular had been expected or contemplated." *Id.* at 13–14 (quotation omitted).

The agreement at issue in *Adell Broadcasting* involved a business relationship between the plaintiff, a television station, and the defendant, Apex Media Sales, Inc., who served as plaintiff's exclusive media representative for broadcast spot and program sales. *Id.* at 7–8. When both parties became dissatisfied with the other's performance, they agreed to amend their working agreement, and agreed, rather than ending the business relationship, to continue engaging the other's services. *Id.* at 8–9. This Court explained that "the consideration for the amended agreement was the continuation of the parties' business relationship." *Id.* at 14. Where the parties thereafter continued their business relationship and performed work for the other, this Court found that there was no question of material fact that there was not a failure of consideration. *Id.* ("The parties continued their business relationship, so there is no question of material fact that there was no failure of consideration.").

***11** In contrast to *Adell Broadcasting,* the parties' business relationship ended soon after they entered into the EMI and NCA. Accordingly, defendants Krause and K & L Development never received that which they were promised under the agreements. Although continued employment would serve as consideration, see *QIS, Inc,* 262 Mich.App at 594, where that continued employment was offered, but never given, the termination of the business relationship constitutes a failure of consideration, cf. *Adell Broadcasting,* 269 Mich.App at 14. Indeed, consideration requires a bargained-for exchange. *General Motors Corp v. Dep't of Treasury,* 466 Mich. 231, 239; 644 NW2d 734 (2002). "There must be a benefit on one side, or a detriment suffered, or service done on the other." *Id* . (quotation omitted). Here, the consideration purported to be that plaintiff, who employed defendants Krause and K & L on an at-will basis, would forego its right to immediately terminate the employment relationship in exchange for defendants signing the NCA and EMI. Where plaintiff terminated the business relationship within two weeks after the agreements were signed, plaintiff's forbearance in terminating the relationship amounted to a nullity. Other jurisdictions have held that the continued employment promised in exchange for signing a non-compete agreement must be "for a substantial time after the covenant was signed." See, e.g., *Lucht's Concrete Pumping v. Horner,* 255 P 3d 1058, 1063 (Colo, 2011); *Brown & Brown, Inc v. Mudron,* 379 Ill App 3d 724, 728; 887 N.E.2d 437 (2008); *Summits 7, Inc v. Kelly,* 178 Vt 396, 405; 886 A.2d 365 (2005); *Curtis 1000, Inc v. Suess,* 24 F3d 941, 946 (CA 7, 1994) (citations omitted) (explaining that Illinois law requires "that for continued employment to count as consideration it must be for a 'substantial period.' "); *Zellner v. Stephen D Conrad, MD, PC,* 183 Ad2d 250, 256; 589 N.Y.S.2d 903 (1992) (explaining that, although an employer has the right to terminate the employment of an at-will employee at any time, and forbearance of that right is a legal detriment that can constitute consideration, "[i]t is certainly true that this detriment would have little meaning if the employer exercised his right to terminate the employment shortly after the execution of the agreement."); *Central Adjustment Bureau, Inc v. Ingram,* 678 S.W.2d 28, 35 (Tenn 1984); *Simko, Inc v. Graymar Co,* 55 Md App 561, 567; 464 A.2d 1104 (1983).[2] As such, neither the confidentiality provisions nor the non-compete provisions at issue are enforceable, and there is no genuine issue of material fact with regard to plaintiff's claim for breach of contract related thereto. Although the trial court did not articulate a failure of consideration as its reason for granting summary disposition, this Court can nevertheless affirm the trial court's decision, albeit for alternate reasons. *Gleason v. Mich. Dep't of Transp,* 256 Mich.App 1, 3; 662 NW2d 822 (2003).

III. SUMMARY DISPOSITION AS TO PLAINTIFF'S NON–CONTRACT CLAIMS

***12** Next, plaintiff challenges the trial court's grant of summary disposition with regard to its claims for violation of the MUTSA, tortious interference with a contract and/or business expectancy, conversion, civil conspiracy, unjust enrichment, and fraudulent inducement. We review plaintiff's claims de novo. *Latham,* 480 Mich. at 111. With the exception of plaintiff's claim for fraudulent inducement, the trial court either expressly cited MCR 2.116(C)(10) as the grounds pursuant to which summary disposition was appropriate, or it relied on information outside the pleadings in granting defendants' motions for summary disposition. Thus, this Court considers the trial court's grant of summary disposition as to those claims to have been pursuant to MCR 2.116(C)(10). See *Hughes,* 277 Mich.App at 273. Concerning plaintiff's claim for fraudulent inducement, the trial court expressly granted summary disposition pursuant to MCR 2.116(C)(8). "A motion brought under [MCR 2.116(C)(8)] tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Dalley v. Dykema Gossett,* 287 Mich.App 296, 304; 788 NW2d 679 (2010). "A court may grant summary disposition under MCR 2.116(C)(8) if '[t]he opposing party has failed to state a claim on which relief can be granted.' " *Id.,* quoting MCR 2.116(C)(8).

As an initial matter, plaintiff notes that defendants did not raise any specific arguments with regard to the non-contract claims in their respective motions for summary disposition, and protests the trial court's ability to grant summary disposition on arguments that were not raised by defendants. There is no merit to plaintiff's claim because MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." "Under MCR 2.116(I)(1), the trial court is affirmatively required to 'render judgment without delay' when 'the pleadings show that a party is entitled to judgment as a matter of law.' " *Sobiecki v. Dep't of Corrections,* 271 Mich.App 139, 141; 721 NW2d 229 (2006) (quotation omitted). Moreover, because plaintiff had the opportunity to, but did not, move for reconsideration, we find nothing amiss about the trial court's decision to *sua sponte* grant summary disposition on those claims. See *Al–Maliki v. LaGrant,* 286 Mich.App 483, 489; 781 NW2d 853 (2009).

A. PLAINTIFF'S TRADE SECRET CLAIM

Under the MUTSA, a "trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process" that derives independent economic value from not being generally known or readily ascertainable, and that is the subject of reasonable efforts to maintain its secrecy. MCL 445.1902(d). The party claiming that a trade secret has been misappropriated "bears the burden of pleading and proving the specific nature of the trade secret." *Dura Global Technologies, Inc v. Magna Donnelly Corp,* 662 F Supp 2d 855, 859 (ED Mich, 2009) (quotation omitted).[3] "A party alleging trade secret misappropriation must particularize and identify the purported misappropriated trade secrets with specificity." *Id.* (quotation omitted).

***13** In granting summary disposition, the trial court noted that plaintiff failed to allege any trade secrets beyond the bottling process for liquid energy shots. As the trial court correctly recognized, the bottling process cannot constitute a trade secret where plaintiff disclosed it by expressly authorizing defendant Liquid Manufacturing to bottle for 37 companies, and by not requiring defendant Liquid Manufacturing to maintain the secrecy of the bottling process. See MCL 445.1902(d) (explaining that a trade secret must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."). In addition, although plaintiff claims that it alleged a variety of other trade secrets, it has, on several occasions, failed to state any trade secrets that were allegedly violated. Therefore, summary disposition was appropriate. See *Dura Global Tech,* 662 F Supp 2d at 859. Further, plaintiff does not state how those trade secrets were misappropriated in violation of MCL 445.1902(d). And, defendant Krause stated in an affidavit that he did not receive any confidential information from plaintiff regarding Five Hour Energy's formula, ingredients, pricing, or customers. Based on defendants' evidence, that plaintiff did not make any effort to keep the bottling process a trade secret and that defendant Krause did not obtain any confidential information from plaintiff, and on plaintiff's conclusory allegations that defendants misappropriated trade secrets, summary disposition was appropriate. See *Quinto v. Cross & Peters Co,* 451 Mich. 358, 371–372; 547 NW2d 314 (1996) (explaining that conclusory allegations are not sufficient to survive a properly supported motion for summary disposition).

B. PLAINTIFF'S TORTIOUS INTERFERENCE CLAIMS

In its complaint, plaintiff alleged tortious interference with a contract as well as tortious interference with a business expectancy against all defendants. We find that plaintiff abandoned this claim on appeal by simply alleging, without elaboration, that it "adequately pled each of the elements of tortious interference." See *Berger,* 277 Mich.App at 712. Moreover, we have reviewed plaintiff's claims and found that defendants were entitled to judgment as a matter of law because there was no genuine issue of material fact that defendants did not tortiously interfere with any of plaintiff's contractual agreements, nor was there a genuine issue of material fact concerning defendants' use or disclosure of confidential information beyond the bottling process, which was not wrongful because it was authorized by plaintiff. See *Dalley,* 287 Mich.App at 323–324 (explaining that a plaintiff, in alleging tortious interference, must establish that the defendant's conduct was either improper or without justification).

C. PLAINTIFF'S UNJUST ENRICHMENT CLAIM

"A claim of unjust enrichment requires the complaining party to establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus v. Bank of New York Mellon,* 300 Mich.App 9, 22–23; 831 NW2d 897 (2012). "Not all enrichment is unjust in nature, and the key to determining whether enrichment is unjust is determining whether a party unjustly received and retained an independent benefit." *Id.* at 23. "If this is established, the law will imply a contract in order to prevent unjust enrichment." *Belle Isle Grill Corp v. Detroit,* 256 Mich.App 463, 478; 666 NW2d 271 (2003).

***14** The trial court concluded that because there were express contracts between the parties, plaintiff could not maintain a claim for unjust enrichment. In general, "a contract will be implied only if there is no express contract covering the same subject matter." *Id.* However, "[t]he application of this rule presupposes the existence of a valid, enforceable contract." *Biagini v. Mocnik,* 369 Mich. 657, 659; 120 NW2d 827 (1963). Where the parties' contract is found to be invalid or unenforceable, the general rule barring recovery in the face of an express contract does not apply. *Id.*

The trial court's reasoning was correct with regard to plaintiff's claims against defendants Paisley and Liquid Manufacturing, but incorrect as to defendants Krause and K & L Development. As discussed above, the Termination Agreement between defendants Paisley and Liquid Manufacturing was not held to be invalid or unenforceable with regard to provisions relating to confidential information; rather, the trial court aptly noted that any claim based on the disclosure of confidential information related to the bottling process was without merit because plaintiff expressly authorized such disclosure. Thus, contrary to plaintiff's contentions on appeal, there was an express, valid contract between defendants Paisley and Liquid Manufacturing that pertained to the disclosure of confidential information, and plaintiff could not maintain a claim for unjust enrichment related thereto. *Belle Isle Grill Corp,* 256 Mich.App at 478.

However, as plaintiff correctly recognizes, the trial court's reasoning concerning defendants Krause and K & L Development was erroneous. Where the EMI and NCA were found to be invalid and unenforceable, plaintiff's unjust enrichment claims do not fail simply because there were express contracts concerning plaintiff's confidential information. See *Biagini,* 369 Mich. at 659.

Nevertheless, although the trial court's reasoning with regard to these claims was incorrect, we can affirm the trial court's decision, albeit on different grounds. See *Gleason,* 256 Mich.App at 3. Plaintiff's allegations are based on the use or misappropriation of confidential information. In order to maintain a claim for unjust enrichment, there must be a benefit conferred upon a party. *Karaus,* 300 Mich.App at 23–24. Here, defendant Krause averred that he did not receive any confidential information from plaintiff regarding Five Hour Energy's formula, ingredients, pricing, or customers. Although plaintiff presented affidavits from two of its executives in which they averred that defendants must have used plaintiff's confidential information, plaintiff's conclusory allegations do not constitute a genuine issue of material fact. See *Quinto,* 451 Mich. at 371–372 (noting that conclusory allegations are not sufficient to survive a properly supported motion for summary disposition). Thus, plaintiff's claim must fail because there was no genuine issue of material fact regarding a benefit received. See *Karaus,* 300 Mich.App at 23–24. Moreover, even assuming defendants Krause and K & L Development possessed such confidential information, there is no evidence that either defendant requested this benefit or that they engaged in any effort to acquire the

same. Therefore, even assuming they received confidential information, there was no enrichment that was *unjust.* See *Morris Pumps v. Centerline Piping, Inc,* 273 Mich.App 187, 196; 729 NW2d 898 (2006) (explaining that not all enrichment is unjust). [4]

D. PLAINTIFF'S CONVERSION CLAIM

***15** The trial court did not err by finding that there was no genuine issue of material fact concerning plaintiff's claims for statutory and common law conversion. Concerning statutory conversion, MCL 600 .2919a(1) provides a cause of action for "[a]nother person's stealing or embezzling property or converting property to the other person's own use." "Statutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property." *Lawsuit Fin, LLC v. Curry,* 261 Mich.App 579, 592–593; 683 NW2d 233 (2004). Common law conversion "consists of any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Dep't of Agriculture v. Appletree Mktg, LLC,* 485 Mich. 1, 13–14; 779 NW2d 237 (2010) (quotation omitted).

Plaintiff's conversion claims were premised on defendants' alleged use or disclosure of plaintiff's confidential information and/or trade secrets. As an initial matter, plaintiff's claims must fail with regard to defendants Liquid Manufacturing and Paisley because plaintiff expressly authorized the disclosure about which it complains, i.e., using the equipment to bottle liquid energy shots. Thus, there is no genuine issue of material fact regarding whether defendants Liquid Manufacturing and Paisley exercised dominion and control over plaintiff's property. See *id.* Additionally, as noted above, defendants Krause and K & L Development produced evidence refuting plaintiff's allegations that they used or disclosed confidential information and/or trade secrets, and plaintiff has failed to present any evidence, beyond its mere speculation, that any defendants used or disclosed confidential information or trade secrets. As such, there was no genuine issue of material fact with regard to whether these defendants wrongfully exerted dominion and control over plaintiff's property, and plaintiff's claim must fail with regard to those defendants. See *id.*

E. PLAINTIFF'S FRAUDULENT INDUCEMENT CLAIM

Plaintiff alleged that defendants Liquid Manufacturing and Paisley fraudulently induced plaintiff into selling the equipment that defendant Liquid Manufacturing used to bottle Permitted Products, including liquid energy shots. Plaintiff alleged that those defendants made material misrepresentations concerning whether they were producing or formulating "any other Energy Drink containing glucuronolactone or tyrosine" and that those defendants made those representations with the intent to induce plaintiff to rely thereon. In addition, plaintiff alleged that it relied on those representations when it decided to sell the bottling equipment to defendant Liquid Manufacturing in 2011.

A plaintiff must plead fraud with particularity. MCR 2.112(B)(1); *State ex rel Gurganus v. CVS Caremark Corp,* —— Mich. ——; —— NW2d —— (Docket Nos. 146791, 146792, and 146793, June 11, 2014). General allegations and "conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action." *Id.* See also *LaMothe v. Auto Club Ins Ass'n,* 214 Mich.App 557, 586; 543 NW2d 42 (1995). Here, plaintiff failed to plead its allegations of fraud with particularity. Although plaintiff alleged that defendants Paisley and Liquid Manufacturing made material misrepresentations concerning whether they were producing or formulating "any other Energy Drink containing glucuronolactone or tyrosine," plaintiff made no allegations as to *when* the allegations were made, *to whom* they were made, or how the allegations were false, i.e., which other drinks defendant Liquid Manufacturing was producing. Indeed, it is unclear from plaintiff's complaint whether Eternal Energy—a drink that plaintiff expressly approved—was one of the drinks about which plaintiff complained, or if plaintiff complained about other liquid energy shots. As such, plaintiff's allegations of fraud were not pleaded with particularity, and summary disposition was appropriate pursuant to MCR 2.116(C)(8). *Gurganus,* slip op at 19–20; *LaMothe,* 214 Mich.App at 586.

F. PLAINTIFF'S CIVIL CONSPIRACY CLAIM

***16** Summary disposition was also appropriate regarding plaintiff's claim for civil conspiracy. "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients & Providers v. Auto Club Ins Ass'n,* 257 Mich.App 365, 384; 670 NW2d 569 (2003), aff'd 472 Mich. 91 (2005) (quotation omitted). "[A] claim

for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Id.* (quotation omitted). As discussed *supra,* each of plaintiff's tort claims failed; thus, there was no separate, actionable tort. "Because plaintiff[ ] failed to establish any actionable underlying tort, the conspiracy claim must also fail." *Id.*

G. OPPORTUNITY TO AMEND

Plaintiff argues that summary disposition as to its non-contract claims was inappropriate because the trial court should have given it the opportunity to amend its complaint in order to cure any deficiencies that may have existed in its pleadings. Plaintiff never moved the trial court to amend its pleadings; thus, the issue is unpreserved and we could decline to consider it. *Richard v. Schneiderman & Sherman, PC (On Remand),* 297 Mich.App 271, 273; 824 NW2d 573 (2012); *Nuculovic v. Hill,* 287 Mich.App 58, 63; 783 NW2d 124 (2010). Moreover, we note that despite arguing that it should have been given the opportunity to amend its complaint, plaintiff does not allege how it could have amended its complaint in a way that would not have been futile. Instead, plaintiff simply makes cursory claims that summary disposition was inappropriate because it was never given the opportunity to amend its pleadings. Where plaintiff has not made a meaningful argument in support of its claim, we will not make arguments for plaintiff. See *Berger,* 277 Mich.App at 712. Plaintiff's cursory treatment of this issue constitutes abandonment. *Id.*

IV. DISCOVERY

Lastly, plaintiff argues that the trial court's grant of summary disposition was premature. We note that the trial court granted summary disposition before the close of the discovery period. "We review a trial court's decision on a motion for summary disposition de novo." *VanVorous v. Burmeister,* 262 Mich.App 467, 476; 687 NW2d 132 (2004). "We review a trial court's decision regarding discovery for an abuse of discretion." *Id.*

"Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete." *Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club,* 283 Mich.App 264, 292; 769 NW2d 234 (2009). However, that the discovery period remained open "does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate." *Id.* Instead, "[t]he question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." *Id.* The party contending that summary disposition is premature because of incomplete discovery is not entitled to relief without providing "some independent evidence that a factual dispute exists." *VanVorous,* 262 Mich.App at 477 (quotation omitted).

***17** Although the discovery period remained open at the time the trial court granted summary disposition, the trial court's grant of summary disposition was appropriate. Despite claiming that additional discovery would produce more facts in support of its claims, plaintiff fails to provide any independent evidence that a factual dispute exists. Instead, plaintiff simply makes broad, unsupported allegations of what additional discovery *could* demonstrate. Plaintiff's claim that further discovery will lead to factual support for its claims is based on nothing more than conjecture. Plaintiff's argument is meritless. *Id.*

Affirmed.

All Citations

Not Reported in N.W.2d, 2014 WL 5408963

Footnotes

1 Again, as discussed *supra,* we find that defendant Paisley cannot be personally liable under the contract where he only signed in his capacity as an officer.

2 Although decisions from other jurisdictions are not binding, they may be considered for persuasive value. *Hiner v. Mojica,* 271 Mich.App 604, 612; 722 NW2d 914 (2006).

3 Because the purpose of the MUTSA is to "make uniform the law" with respect to other jurisdictions, see MCL 445.1909, we look to the law of other jurisdictions when interpreting the act, see *Power Press Sales Co v. MSI Battle Creek Stamping,* 238 Mich.App 173, 180; 604 NW2d 772 (1999).

4 Lastly, we note that although plaintiff's complaint raised a claim for unjust enrichment against defendants Eternal Energy and LXR Biotech, it never alleged that those defendants received a benefit *from plaintiff.* Thus, plaintiff's claim must fail with regard to those defendants. See *Karaus,* 300 Mich.App at 23–24 (explaining that there must be a benefit conferred upon the other party).

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EXHIBIT D

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Adam SCHAUB and Wendy Schaub, Plaintiffs–Appellants,
v.
BANK OF NEW YORK MELLON NA, Trustee, Mortgage Electronic Registration Systems, Flagstar Bank, and Kenneth Kurel, Defendants–Appellees,
and
Does 1–10, Defendants.

Docket Nos. 315242, 315283.
|
May 29, 2014.

Grand Traverse Circuit Court; LC No. 12–029252–CH.

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

Opinion

PER CURIAM.

***1** In these consolidated appeals, plaintiffs appeal by right the trial court's grant of summary disposition in favor of all defendants in Docket No. 315242 and the trial court's grant of sanctions against them in favor of defendant Flagstar Bank (Flagstar) in Docket No. 315283. We affirm.

In May 2006, plaintiffs obtained a loan from Great Lakes Mortgage Company, LLC (Great Lakes), in exchange for a promissory note and mortgage on their Traverse City residence. The mortgage was duly recorded on May 30, 2006, showing Great Lakes as the "Lender" and defendant Mortgage Electronic Registration Systems, Inc. (MERS) as the mortgagee "solely as a nominee for Lender and Lender's successors and assigns." MERS is an entity and system that serves as a common agent to hold mortgages for a number of financial institutions to allow those institutions to efficiently transfer loans amongst themselves without the need to record a mortgage transfer each time. See *Residential Funding Co LLC v. Saurman*, 292 Mich.App 321, 328–329; 807 NW2d 412 (2011), overruled on other grounds 490 Mich. 909 (2011). On the same day, according to the MERS Milestones Report, Flagstar registered the loan on the MERS system, and plaintiffs were sent a letter notifying them that Great Lakes had transferred the servicing rights of the loan to Flagstar effective July 1, 2006.

The MERS Milestones Report also reflects that, on October 1, 2006, Flagstar sold the loan to non-party BAC Home Loans Servicing, LP (BAC). [1] On October 20, 2006, Flagstar transferred its servicing rights to BAC, and on October 26, 2008, BAC transferred the loan to defendant Bank of New York Mellon (BNY) as trustee for CWALT, Inc. Alternative Trust Loan 2006–J6 (the Trust). On December 15, 2010, MERS, acting pursuant to its designation as nominee, assigned its title and interest in the mortgage to BNY, and this assignment was duly recorded on December 20, 2010. The note executed by plaintiffs reflects endorsements from Great Lakes to Flagstar, from Flagstar to Countrywide, and from Countrywide "in blank."

At some point, plaintiffs defaulted on the loan and BNY initiated foreclosure proceedings. In 2011, plaintiffs' counsel, Daniel Marsh, filed a complaint on their behalf seeking to prevent BNY from foreclosing on the mortgage. Plaintiffs asserted in that case, No. 11–28572–CH, as they did in this one, that BNY did not have the authority to foreclose on the mortgage because the transfer of the note and mortgage was void ad initio because it occurred after the closing date of the Trust. Based on representations that the foreclosure had been cancelled, that case was dismissed without prejudice by order dated July 25, 2011.

Flagstar, which was a named defendant in that case, sought to be dismissed with prejudice, arguing that Flagstar no longer had any interest in the loan or mortgage and that plaintiffs had "decided to take out a shotgun and name every entity identified in the chain of title after the mortgage origination regardless of whether they were a real party in interest." Flagstar declined to seek costs at the time, but advised plaintiffs that it would sign a stipulated dismissal without prejudice only if the stipulation explicitly preserved the right for Flagstar "to seek the fees and costs it incurred in this action in the event your clients re-file and name Flagstar again." Plaintiffs' counsel replied, in relevant part that "You can make your arguments for costs IF this issue comes back and litigation is necessary. You have made your point very clear and it would support your argument for costs in the future if necessary."

*2 BNY subsequently initiated new foreclosure proceedings. On March 6, 2012, BNY's counsel sent plaintiffs written notice of foreclosure pursuant to MCL 600.3205a, which included a list of housing counselors (the 3205a notice). The 3205a notice provided, in part:

> Within 30 days from the date of this notice, you may contact either a housing counselor from the list enclosed or our Loan Modification Department ... to request a meeting to attempt to work out a modification of the mortgage and avoid foreclosure. If you request a meeting, foreclosure proceedings will not start until 90 days after the date this notice was sent, subject to the provisions of MCL 600.3205b. Plaintiffs contacted the loan modification department and requested a meeting to try to work out a modification of the loan. Plaintiffs were asked to provide certain financial documents to determine if they qualified for a loan modification, and plaintiffs concede that they did not fully comply with the request. Plaintiffs assert that some of their documents were "unreasonably rejected" and others did not exist. BNY contended that plaintiffs simply never responded to an April 30, 2012, letter detailing the missing documents and requesting their production by May 5, 2012. It is undisputed that no loan modification meeting occurred, and on May 18, 2012, plaintiffs were sent a letter accelerating the balance due on the loan and notifying them that foreclosure proceedings were commencing.

The sheriff's sale of the property was originally scheduled for June 20, 2012. Two days before that date, plaintiffs filed their initial complaint in the instant matter, again contesting the assignment from MERS to BNY as invalid, alleging the transfer of the loan to the trust was illegal, and asserting that defendants lacked standing to foreclose and acted improperly and illegally. The trial judge in this case is the same judge who heard the first action. Plaintiffs requested an ex-parte temporary restraining order, which the trial court denied, but it scheduled a hearing on the motion for July 2. The only person who showed up to that motion hearing was Flagstar's counsel, who

> had an extended discussion [with the trial court] about this case and the prior case and the statements that were made in connection with prior hearings, the Court went and retrieved [its] bench notes from the hearing and at that time [it and Flagstar's counsel] had discussions about what the appropriate remedy also would be and the Court determined looking at [its] bench notes that from the hearing that took place, and it had to be July 25, that there is no question that Flagstar did not own the paper, they hadn't owned the paper subject to their lawsuit since October of 2006, which was established by [plaintiffs'] own complaint. Their original complaint [in the previous case] at Paragraph 44 established that Flagstar didn't own the paper.

Flagstar submitted an order under the 7–day rule that would have dismissed Flagstar with prejudice and permitted it to file a motion for sanctions against plaintiffs. Plaintiffs objected on the ground that the proposed order did not accurately reflect the trial court's ruling, even though their counsel was not present at the hearing. The trial court held a hearing on the disputed orders related to Flagstar's dismissal. Ultimately, the trial court requested Flagstar file "a motion with a brief, attaching papers from the file from the prior action," which the trial court would then set for a hearing.

*3 Flagstar then moved for summary disposition and for sanctions, arguing that whatever the merits of plaintiffs' claims against BNY might be, plaintiffs had failed "to state any cause of action under which Flagstar may be found liable" and, indeed, failed "to allege that Flagstar committed any wrongful act whatsoever." Flagstar also reasserted that it "has

no interest in the Loan or Property, and is claiming no interest in the Loan or Property." MERS and BNY also moved for summary disposition, alleging that plaintiffs had failed to state a claim under MCR 2.116(C)(8). Defendant Kenneth Kurel moved for summary disposition under MCR 2.116(C)(8) and (10). Defendants also sought a protective order and stay of discovery pending resolution of their motions for summary disposition, which the trial court granted.[2]

At the summary disposition hearing, plaintiffs' arguments largely concerned whether the mortgage and the note were held by the same entity and whether that entity was the foreclosing party. Plaintiffs argued that Flagstar had represented that it owned the note and mortgage simultaneously with BNY and that the Trust was "prohibited from receiving it" because the Trust had received it past its closure deadline. Plaintiffs also argued that the assignment of the mortgage from MERS to BNY was invalid because defendant Kenneth Kurel, Vice President of MERS at the time and whose signature appeared on the assignment, had not actually signed it at all in lieu of "robo-signing."

Regarding the trust, the trial court concluded that plaintiffs were raising an issue not belonging to them, although it noted that "people in New York will get all excited about that" and that they would undoubtedly "appreciate your help on interfering on their behalf." The trial court rejected plaintiffs' contention that BNY did not own the note or mortgage on the basis of the trust deadline. It therefore also concluded that Flagstar had no interest in either and the note, as a bearer instrument because it was endorsed in blank, was owned by BNY. Plaintiffs' own expert indicated that Kurel's signature was likely his actual signature, as Kurel stated in an affidavit, and MERS ratified the assignment after it occurred in any event. Ultimately, the trial court granted summary disposition in favor of Flagstar, MERS, and Kurel.

Plaintiffs also argued that that they were not given the requisite 90 days to which they were entitled pursuant to MCL 600.3205a while loan modifications were ongoing. The trial court determined that the notice was sent March 6, 2012, making 90 days June 4, 2012. The trial court agreed with plaintiffs that the statute prohibited "commencement" of foreclosure proceedings, rather than completion thereof, prior to that date, and sending the notice commenced the proceedings. BNY conceded that "it was probably commenced prior to June 4th," but argued that whether plaintiffs had previously gone through the loan modification process may alter the requirements under the statute. The trial court concluded that BNY would be required to brief the issue of whether there was any legal significance to whether plaintiffs engaged in loan modification in 2011, but in any event the appropriate remedy would be judicial foreclosure. The trial court entered an order dismissing all counts with prejudice other than the alleged violation of MCL 600.3205a, and it required plaintiffs to amend the complaint to seek conversion of the proceedings to a judicial foreclosure. In addition, BNY was not precluded from filing for summary disposition against the revised complaint.

*4 Plaintiff duly filed an amended complaint. BNY filed a renewed motion for summary disposition, asserting that there was no factual dispute that plaintiffs failed to provide foreclosure counsel with required documents, so BNY was permitted to schedule the sheriff's sale pursuant to MCL 600.3205b(2). The trial court observed that BNY was not contending that it complied with the 90–day requirement, but rather that circumstances permitted it to proceed after a different statutory requirement of only 60 days. Plaintiffs conceded that they had no proof that the documents requested on April 2 and again on April 30 were provided. The trial court determined that, under the statute, there was no violation because there was "a wholesale failure to provide the documents that were requested" and granted BNY's motion for summary disposition.

Flagstar moved for sanctions and noted that plaintiffs' objection thereto was simply a bare request for an evidentiary hearing without any particular objection to any time entry, task, billable rate, or anything else in the submitted bills. The trial court determined that plaintiffs' claim against Flagstar was frivolous and awarded sanctions. It agreed that plaintiffs had objected to the entire concept of sanctions, but had not objected to any of the rates, entries, or details. The trial court awarded "the full amount" of Flagstar's requested sanctions. Plaintiffs reiterated their objection, to which the trial court again noted that the bills were excellent and detailed and that plaintiffs had made no objection to anything specific in them. However, the trial court did reconsider Flagstar's requested hourly rate and reduced it.

After the trial court entered the order awarding sanctions and closing the case, plaintiffs moved for reconsideration of the order granting BNY's renewed request for summary disposition and the order awarding Flagstar sanctions. Plaintiffs asserted that they had provided the requested materials and that whether they had participated in the loan modification process was a question of fact .[3]

They attached an affidavit from Adam Schaub as well as various emails purporting to show that plaintiffs were in the loan modification process. Plaintiffs also asserted that the sanctions were awarded in contravention of Michigan caselaw and that there was no basis for concluding that the filing against Flagstar had been frivolous. The trial court denied both motions for reconsideration. It noted in particular that the additional evidence plaintiffs had submitted had been in plaintiffs' possession "all along" and could not have misled anyone because it should have been presented previously. Plaintiffs then filed the instant two appeals, which were administratively consolidated. *Schaub v. Bank of New York Mellon NA,* unpublished order of the Court of Appeals, entered May 17, 2013 (Docket Nos. 315242, 315283).

I. DOCKET NO. 315242

In Docket No. 315242, plaintiffs' claims all relate to the trial court's grant of summary disposition in favor of defendants. "This Court reviews de novo whether a trial court properly granted a motion for summary disposition." *Barnard Mfg Co, Inc v. Gates Performance Engineering, Inc,* 285 Mich.App 362, 369; 775 NW2d 618 (2009). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, all evidence submitted by the parties must be considered, and it must be viewed in the light most favorable to the non-moving party; summary disposition should be granted if the evidence fails to establish a genuine issue regarding any material fact. *Maiden v. Rozwood,* 461 Mich. 109, 120; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id.,* 119. In contrast to a motion under MCR 2.116(C)(10), only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id.,* 119–120.

***5** Plaintiffs first argue that the trial court was not permitted to grant summary disposition in favor of BNY pursuant to MCR 2.116(C)(10) because it had already denied BNY's motion for summary disposition pursuant to MCR 2.116(C)(8). As noted, the two bases for granting summary disposition are completely different and not necessarily relevant to each other. The trial court found at the first hearing that plaintiff's pleadings sufficiently alleged a genuine cause of action: a violation of MCL 600.3205a. The fact that a complaint articulates a cause of action does not mean there necessarily exists evidence to support it. Indeed, in granting defendants' (C)(8) motion, the trial court explicitly did so without prejudice to defendants' right to bring a subsequent (C)(10) motion. Furthermore, the trial court did not "grant" plaintiffs' request for judicial foreclosure, but rather directed plaintiffs to amend their complaint to request judicial foreclosure. The trial court's subsequent grant of summary disposition pursuant to MCR 2.116(C)(10) was in no way a "reversal" of its denial under MCR 2.116(C)(8). To the extent that plaintiffs selectively rely on the trial court's statements at the hearing, that reliance is misplaced because "[i]t is well settled that a court only speaks through written judgments and orders." *Brausch v. Brausch,* 283 Mich.App 339, 353; 770 NW2d 77 (2009).

Plaintiffs contend summary disposition was inappropriate because they "provided an affidavit supporting that they in fact participated in the loan modification program as specifically alleged in the complaint." However, the affidavit was only provided with the motion for reconsideration, and their counsel conceded at the hearing that he had no evidence at that time to show that plaintiffs had provided the necessary documents. Plaintiffs' argument that the trial court erred by considering an affidavit provided by BNY on the theory that the affiant was not available for cross-examination reflects a fundamental failure to comprehend how a motion under MCR 2.116(C)(10) works. The moving party may support its position with affidavits, and the opposing party may not merely rely on allegations or denials in its pleadings. MCR 2.116(G)(3)-(4). The trial court was in fact required to consider the affidavit under MCR 2.116(C)(10). The fact that the proponent of the affidavit was not available for cross-examination was irrelevant. See *Barnard Mfg,* 285 Mich.App at 373 ("although the evidence must be substantively admissible, it does not have to be in admissible form").

"If the moving party properly supports its motion, the burden 'then shifts to the opposing party to establish that a genuine issue of disputed fact exists.' " *Barnard Mfg,* 285 Mich.App at 370, quoting *Quinto v. Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996). At the time of the hearing, BNY provided evidence showing that plaintiffs had failed to provide all of the requested documents and that evidence remained completely unrebutted, entitling BNY to summary disposition on the issue. *Id.* at 370, 375. Plaintiffs' protestations that the denial of discovery precluded their claims are particularly difficult to reconcile with the fact that all of the emails attached to the affidavit they provided with

the motion for reconsideration were within their possession and, thus, "should have [been] presented ... at the prior hearings."

*6 Lastly, plaintiffs provide a cursory attack on the legal basis of BNY's motion, with no substantive analysis, and simply assert that BNY "cannot be allowed to unilaterally manufacture a defect in the loan modification process under 3204(4) and 3205a to give it authority to avoid the remedy provided in the statute that a judicial foreclosure is appropriate." Nevertheless, MCL 600.3205b(2) expressly permitted BNY to take the actions it did.

> Within 10 days after being contacted by a borrower or housing counselor under subsection (1), the person designated under section 3205a(1)(c) may request the borrower to provide any documents that are necessary to determine whether the borrower is eligible for a modification under 3205c. *The borrower shall give the person designated under section 3205a(1)(c) copies of any documents requested under this section within 60 days after the notice under section 3205a is mailed to the borrower. If the borrower does not provide the documents requested as required by this subsection, a party entitled to foreclose may proceed with the foreclosure.* [MCL 600.3205b(2) (emphasis added).]

The language is clearly intended to permit a truncation of the 90–day window found in MCL 600.3205a(1)(e) to induce prompt compliance by borrowers to any document requests. Because BNY provided evidence that it requested documents from plaintiffs, but never received them, and plaintiffs provided no evidence to the contrary, either in their written response, or at the time of the hearing, the trial court properly granted summary disposition to BNY on the ground that MCL 600.3205b(2) authorized BNY as "a party entitled to foreclose" to "proceed with the foreclosure." The trial court properly granted summary disposition in BNY's favor pursuant to MCR 2.116(C)(10).

Plaintiffs next allege that summary disposition was erroneous because questions of fact existed concerning whether BNY had the authority to foreclose, whether MERS had the corporate authority to execute the assignment, and whether Kurel's signature was fraudulent. However, the trial court granted summary disposition to these defendants under (C)(8), not (C)(10). Thus, the existence of a question of fact is irrelevant if plaintiffs have failed to state a claim. In any event, plaintiffs' protestations that the assignments were invalid would be irrelevant regardless of their accuracy, because the long-settled rule in Michigan is that a person who is not a party to an assignment lacks standing to challenge it. *Bowles v. Oakman,* 246 Mich. 674, 678; 225 NW 613 (1929). Plaintiffs were not parties to the assignments of either the note or the mortgage. Furthermore, Michigan law permits a blank endorsement and the document simply becomes a bearer instrument. MCL 440.3205(2). BNY asserted that it had the note in its possession, and the record provided unrebutted support for that assertion.

Likewise, the record chain of title unambiguously reflected that plaintiffs executed the mortgage in favor of MERS, MERS subsequently assigned the mortgage to BNY, and all such assignments were recorded. Thus, the record chain of title evidenced "the assignment of the mortgage to the party foreclosing the mortgage." MCL 600.3204(3). Plaintiffs' position was that the interim transfers among MERS lenders, including Flagstar, were required to be recorded before BNY had a perfected chain of title. The trial court did not explicitly address this argument, but its necessarily implied rejection thereof was correct.

*7 As noted above, MCL 600.3204(3) provides, "If the party foreclosing a mortgage by advertisement is not the original *mortgagee,* a record chain of title shall exist prior to the date of the sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage (emphasis added)." In *Kim v. JP Morgan Chase Bank, NA,* 493 Mich. 98, 113; 825 NW2d 329 (2012), our Supreme Court held that, pursuant to MCL 600.3204(3), if a foreclosing party acquires a mortgage through a voluntary transfer and is not the original mortgagee, it is required "to record the assignment of the mortgage to it before foreclosing." In this case, the mortgage provided that MERS was the mortgagee, as nominee for the "Lender." Although the ownership interest in the mortgage shifted, the mortgagee only changed when MERS assigned the mortgage to BNY. That assignment was recorded, so the recorded chain of title consisted of plaintiffs' original mortgage with MERS as mortgagee and MERS's assignment

to BNY. Consequently, there is no break in the chain, and BNY, as the foreclosing party, provided evidence of the assignment of the mortgage to it. Nothing in the statutory language or the caselaw interpreting it required the recording of the intermediate transfers of the mortgage interest among MERS lenders while MERS remained the mortgagee.

Plaintiffs did not have standing to challenge the validity of the assignments to which they were not a party; and, without any challenge to the assignments, the record before the trial court clearly established that BNY owned both the note and the mortgage. The trial court properly granted summary disposition under (C)(8) to BNY, MERS, and Kurel.

Plaintiffs next assert that the trial court improperly granted summary disposition in favor of Flagstar pursuant to MCR 2.116(C)(10).[4] Plaintiffs argue that the trial court should not have considered statements made by Flagstar's counsel to have been judicial admissions and that the trial court should not have relied on an affidavit submitted by Flagstar.

In both the instant matter and in the 2011 case, Flagstar's counsel verbally represented to the trial court, on the record in open court, that it had no interest in the note or mortgage and, therefore, had no claim against plaintiffs. Plaintiffs correctly contend that statements by counsel are generally not evidence. See *Papke v. Tribbey*, 68 Mich.App 130, 137; 242 NW2d 38 (1976). However, an attorney can make a "judicial admission" to dispense with the necessity of some fact at trial. *Radtke v. Miller, Canfield, Paddock & Stone*, 453 Mich. 413, 420; 551 NW2d 698 (1996); *Ortega v. Lenderink*, 382 Mich. 218, 222–223; 169 NW2d 470 (1969). "Judicial" admissions "are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Radtke*, 453 Mich. at 420, quoting 2 McCormick, Evidence (4th ed, § 254, p 142). In this case, Flagstar's counsel was making a judicial admission because it was conceding it had no interest in the mortgage or note.

***8** Plaintiffs assert that counsel's statements were "not a stipulation of fact as to what rights Flagstar ever had in the loans to allow it to breach the mortgage contract and break the chain of title necessary" under the foreclosure statute. Plaintiffs are correct insofar as counsel's statements did not establish what interest Flagstar ever had in the mortgage and note. However, Flagstar made no attempt to deny that it had *ever* had an interest in the mortgage or note. Rather, the statements were a stipulation of fact that Flagstar did not *currently* possess an interest in the mortgage or note, so it was not a necessary party to either action. Plaintiffs rely on an argument to the effect that Flagstar had somehow claimed ownership of the mortgage simultaneously with BNY, but the assignment to BNY is unambiguously dated more than four years after Flagstar divested itself of any rights to the mortgage. Plaintiffs presume that Flagstar must claim ownership because the transfer to the trust was allegedly impermissible at the time of the transfer, but as noted, plaintiffs lack standing to challenge that assignment.

Plaintiffs assert that Flagstar's affidavit, made by Courtney Chang, was not made with personal knowledge and, somewhat incomprehensibly, "does not assert or aver to any facts which support a finding that FLAGSTAR is owner of the note or mortgage at issue." The affidavit establishes Chang's position with Flagstar, that she is authorized to make the affidavit, that she has access to the relevant records, and is "familiar with how each document attached to this Affidavit was retrieved and complied" and "personally viewed each document." Clearly, the affidavit was made with personal knowledge.

Plaintiffs' latter assertion presumably refers to Flagstar's prior ownership, but because plaintiffs have not alleged that any of the endorsements on the note are fraudulent, the note itself establishes on its face Flagstar's prior ownership and subsequent transfer of ownership in the note. There was no need for the affidavit to contain a statement in that regard. The record contains no document other than the MERS Milestones Report to show Flagstar's interest in the mortgage because of the nature of how mortgage interests are transferred when MERS is the mortgagee. See *Residential Funding Co LLC*, 292 Mich.App at 328–329. The Report was attached to Chang's affidavit, in which she attested that it was a business record; in any event, during a summary disposition hearing, the trial court may rely on evidence that is not in admissible form so long as it is substantively admissible. *Barnard Mfg*, 285 Mich.App at 373. The MERS Milestones Report was sufficient to establish that Flagstar received an interest in the mortgage, which it subsequently transferred to BAC. Furthermore, the contents of the Report were substantively admissible, so the fact that the document had yet to be authenticated was irrelevant. Accordingly, the trial court did not err in relying on either the judicial admissions or Chang's affidavit in granting summary disposition to Flagstar.

II. DOCKET NO. 315283

***9** In Docket No. 315242, plaintiffs' claims all relate to the trial court's determination that their complaint against Flagstar was frivolous and its decision to award sanctions against plaintiffs' counsel.

Plaintiffs first contend that the trial court erroneously relied on its case notes from the 2011 case. The long-standing rule in Michigan provides that "a circuit judge may take judicial notice of the files and records of the court in which he sits." *Knowlton v.. City of Port Huron,* 355 Mich. 448, 452; 94 NW2d 824 (1959). See also *In re Jones,* 286 Mich.App 156, 129; 777 NW2d 728 (2009) ("a court may take judicial notice of its own files and records"). Accordingly, there is no legal basis to plaintiffs' argument that the trial court erred in the use of its notes from the 2011 case.

Moreover, it is evident that counsel has misunderstood what the trial court stated on the record. Counsel's argument is premised on his belief that the trial court held that counsel conceded that there was no claim against Flagstar. At the October 8, 2012 hearing, the trial court stated:

> Says here in my notes from July 25, 2011, Jasinski/Flagstar haven't owned mortgage since 2006, wants to reserve right to claim attorney fees under 2.114 if a new action is filed; I said we'll have a clean dismissal without prejudice, thinking nobody in the face of that would sue Flagstar, would they, when you've got a statement we do not have a right against you and then they filed the suit against you and they don't have anything, I can't understand.

It is clear from the context of the statement, and the record as a whole, that the trial court was referring to Flagstar's judicial admissions on the record in the 2011 case that *Flagstar* had no claim against *plaintiffs* because it had no interest in the mortgage or note. Accordingly, the factual basis of plaintiffs' argument—that the trial court supposedly relied on an alleged concession by plaintiffs' counsel—is also without merit. Consequently, there is neither legal nor factual merit to plaintiffs' objection to the trial court's use of notes from the 2011 case.

Plaintiffs next claim that the trial court erred when it concluded that its claims against Flagstar were frivolous. This Court reviews a trial court's finding that a lawsuit is frivolous for clear error. *Kitchen v. Kitchen,* 465 Mich. 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 661–662. Under MCL 600.2591(3)(a) and under MCR 2.114(D)(2), in relevant part, a claim is frivolous if the party making it has no good basis for believing that it is factually supported or legally supportable. See *id.* at 662. The trial court effectively concluded that plaintiffs' counsel was subject to sanctions pursuant to MCR 2.114 for filing claims against Flagstar that were ungrounded in law or fact.

***10** Plaintiffs first assert that their arguments were good-faith arguments for the extension of *Kim,* 493 Mich. 98, because they were requesting a declaratory judgment that interim assignments of mortgages had to be recorded and, therefore, the failure of Flagstar to record its alleged acquisition and subsequent conveyance of interest in the mortgage and note resulted in a break in the chain of title that precluded BNY from foreclosing on the property. However, plaintiffs' complaint was filed months before our Supreme Court's decision in *Kim.* Plaintiffs may have intended to refer to this Court's decision which held, in part, that a foreclosure was void *ab initio* if the mortgage interest was not recorded before the sheriff's sale and that even mortgage interests acquired by operation of law must be recorded. *Kim v. JP Morgan Chase Bank, NA,* 295 Mich.App 200, 205–206, 208; 813 NW2d 778, overruled in part 493 Mich. 98 (2012). Nonetheless, neither case referred to interim transfers, and Flagstar clearly did not acquire its interest in the mortgage through operation of law.

Accordingly, given the absence of any caselaw directly related to interim transfers, plaintiffs had an arguable claim that BNY did not have the authority to foreclose because there was a break in the chain of title on the Mortgage due to a lack of recording the interim transfers among MERS lenders.[5] In addition, because this Court's decision in *Kim* ruled that a foreclosure is void *ab initio* for lack of a record title after the 2011 case was dismissed, but before the instant case was filed, plaintiffs arguably had new law on which to rely to conclude that the foreclosure was void. However, the sanctions were not based on a conclusion that the entire complaint was

frivolous, but rather only the claims against Flagstar. More specifically, whether it was frivolous for plaintiffs to have concluded that Flagstar was a necessary party as an entity with an interest adverse to plaintiffs.

As discussed above, the statements made by Flagstar's counsel were judicial admissions that Flagstar had no interest in the mortgage or note. Therefore, title could have been quieted in plaintiffs or any other party without Flagstar's presence in the lawsuit. In addition, nothing in the documentary record required Flagstar's inclusion. The endorsements on the note show that Flagstar had transferred its interest to Countrywide, which in turn had endorsed the note in blank, resulting in the note becoming a bearer instrument. MCL 440.3205(2). BNY represented that it actually held the note and provided a copy of it, and there was no evidence in the record that disputed their possession. Moreover, regardless of the truth of BNY's possession, the record was clear that Flagstar held no interest in the note.

Regarding the mortgage, the trial court could have plausibly reached opposite conclusions regarding BNY's chain of title, but neither would have required Flagstar to be a party. The trial court apparently concluded, properly, that the plain language of MCL 600.3204(3) only required transfers to be recorded when the mortgagee changes, so BNY had perfected its chain of title and Flagstar had no interest. Alternatively, the trial court could have agreed with plaintiffs' position that all voluntary assignments must be recorded irrespective of whether the mortgagee changes, in which case BNY would not have been permitted to foreclose, but Flagstar would nevertheless not have retained an interest. Rather, the mortgage on its face shows the "Lender" to be Great Lakes and does not show that mortgage interest changing, and the MERS Milestones Report shows that BAC was the immediately-prior holder of the mortgage interest before BNY. Therefore, the mortgage would revert either to BAC or to Great Lakes, but in no event to Flagstar. Either way, Flagstar would not have had an interest adverse to plaintiffs and therefore would not have been a necessary party. Plaintiffs' claims against Flagstar based on the alleged actions of Kurel and MERS were meritless because neither could have acted on behalf of Flagstar over four years after Flagstar had transferred its interest to BAC. [6]

***11** We agree with plaintiffs that the trial court did not explicitly state on the record that it found counsel's inquiry into the factual and legal viability of the claims against Flagstar to be objectively unreasonable. See *Attorney General v. Harkins*, 257 Mich.App 564, 576; 669 NW2d 296 (2003). However, the trial court appears to have considered the issue, and it clearly expressed an opinion that counsel's actions defied rational belief. As discussed, no set of facts or law could have vested in Flagstar any interest in the property, so little, if any, investigation would have been necessary to determine that plaintiffs had no basis for bringing any claims against Flagstar. Accordingly, we find that the record adequately reflects the trial court's finding that counsel's inquiry was objectively unreasonable.

Finally, plaintiffs object to the trial court's award of sanctions without an evidentiary hearing to determine the reasonableness of the attorney fees and expenses requested by Flagstar. This Court reviews a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v. Khouri*, 481 Mich. 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

Plaintiffs are correct that "[i]f a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Id.* at 532. However, the record in this case does not establish that plaintiffs ever created a factual dispute. Plaintiffs' entire objection consisted of two paragraphs with only generalized statements. Plaintiffs never made any specific objections and simply claimed that the rates and hours were unreasonable altogether. Such general, nonspecific statements are insufficient to create a level of dispute that necessitates an evidentiary hearing. Accordingly, the trial court's decision to deny the request does not appear to be an abuse of discretion.

Plaintiffs argue that the trial court erred by failing to consider all of the factors in *Smith* to determine the reasonableness of the requested fees. Plaintiffs' argument is not properly before this Court, because plaintiffs' sought relief is an evidentiary hearing, and as noted, the trial court did not err in denying an evidentiary hearing in the first place. *Mich Ed Ass'n v. Secretary of State*, 280 Mich.App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich. 194 (2011) ("[W]e generally do not consider any issues not set forth in the statement of questions presented."). In any event, also as discussed, plaintiffs made no specific objections, with the possible exception of 17 hours for reviewing the prior complaint and a generalized assertion that Flagstar's contention of frivolity could not possibly have

warranted an expenditure of so much time. Consequently, there was little for the trial court to assess, and the trial court in fact did reduce Flagstar's requested hourly rate, which plaintiffs do not contend to be unreasonable. Therefore, we find no abuse of discretion in the trial court's failure to hold an evidentiary hearing.

III. CONCLUSION

***12** In Docket No. 315242, the trial court properly granted summary disposition to BNY, MERS, Kurel, and Flagstar. In Docket No. 315283, the trial court's decision that plaintiffs' claims against Flagstar were frivolous was not erroneous, and plaintiffs were not entitled to an evidentiary hearing.

Affirmed.

All Citations

Not Reported in N.W.2d, 2014 WL 2352695

Footnotes

1 There are references in the record to BAC, Countrywide Homes Loans, Inc (Countrywide) and Bank of America NA (BOA). There are uncontradicted representations in the record that BAC was the successor by merger to Countrywide and that BOA is the successor by merger to BAC, but dates of those mergers were not provided. Nevertheless, it makes no difference for the purpose of our analysis when or even if these mergers occurred. Accordingly, this opinion uses the names contained on the documents themselves rather than referring to them all as BOA.

2 Plaintiffs have provided us with a transcript of the hearing pursuant to MCR 7.210(B) at which the trial court decided to grant this motion.

3 Plaintiffs also renewed their arguments regarding the Mortgage and Note ownership by arguing there was an outstanding factual question of whether BNY "possesses the credentials to be the foreclosing party necessary to issue the 3205a notice."

4 We address plaintiffs' arguments regarding sanctions in Flagstar's favor *infra* in analyzing the appeal in Docket No. 315283. For the moment, we address only whether summary disposition in Flagstar's favor was proper.

5 Although both we and the trial court concluded that the argument was not supported by the language of the statute, because no case has expressly decided this issue, the legal basis for the claim is not wholly without merit.

6 Curiously, plaintiffs did not sue Great Lakes or BAC, the two entities that could conceivably have still had an interest in the mortgage.

EXHIBIT E

2020 WL 1488661
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Robert DAVIS, Plaintiff-Appellant,
v.
CITY OF DETROIT, Defendant-Appellee.

No. 347931
|
March 24, 2020

Wayne Circuit Court, LC No. 18-015502-CZ

Before: Beckering, P.J., and Sawyer and Gadola, JJ.

Opinion

Per Curiam.

***1** Plaintiff appeals as of right the order granting summary disposition for defendant, denying plaintiff's motion for summary disposition, dismissing plaintiff's amended complaint with prejudice, and awarding sanctions in favor of defendant. We affirm.

The underlying facts of this case originate on November 14, 2018, when plaintiff purportedly sent a Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, request via first class mail to defendant's FOIA coordinator, Jack Dietrich. Plaintiff requested nine sets of documents including written and email communications between Detroit's Mayor, Mike Duggan, and Dr. Sonia Hassan from January 2015 to the present, all contracts or employment agreements between defendant and Dr. Hassan from January 2015 to the present, all monetary payments made by defendant to two nonprofit organizations with which Dr. Hassan is associated, and all contracts between defendant and Bill Nowling from January 2015 to the present.

On December 5, 2018, plaintiff's attorney, Andrew A. Paterson, emailed Dietrich asserting that plaintiff had not received a response to his November 14, 2018 request, and therefore, plaintiff intended to file a civil action to compel defendant to disclose the requested documents. Dietrich replied to Paterson the same day informing Paterson that he had not received the November 14, 2018 FOIA request, but he told Paterson that he could email the request and Dietrich would process it. On December 6, 2018, Paterson emailed Dietrich. Paterson did not send the November 14, 2018 FOIA request, but rather, he requested six of the nine sets of documents originally requested by plaintiff. Paterson asserted that "this request is made in accordance with Mich.Const.1963, art. 9, sec. 23 and not the FOIA. My clients November 14, 2018 FOIA request that was previously mailed is separate and distinct from this request." Paterson requested that the documents be made available for inspection by 4:30 p.m. the following day. On December 7, 2018, Dietrich responded to Paterson explaining that defendant had no duty to disclose the documents under article 9, § 23, of Michigan's 1963 Constitution because that section of the Michigan Constitution only applies to " 'summaries, balance sheets and other compilations' and not 'every writing evidencing a receipt or expenditure.' " Dietrich further stated that, "[d]espite the foregoing, and in view of your claim that the City did not timely respond to the purported Nov. 14 FOIA, the city has conducted an expedited search for all documents responsive to your Dec. 6 email request," and "THERE ARE NO SUCH DOCUMENTS."

On December 6, 2018, one day prior to Dietrich's response, plaintiff filed a complaint for declaratory judgment alleging four counts. Plaintiff requested that the court (1) declare that defendant failed to respond to his November 14, 2018 FOIA request, (2) declare that defendant must immediately disclose the documents requested on November 14, 2018, (3) declare that defendant must immediately disclose the documents requested on December 6, 2018, in accordance with article 9, § 23, of Michigan's 1963 Constitution, and (4) award plaintiff court costs and attorney fees under MCL 15.240(6) of the FOIA. On January 9, 2019, plaintiff filed an amended complaint for declaratory judgment. In the amended complaint, plaintiff no longer alleged claims regarding the November 14, 2018 FOIA request. Rather, plaintiff requested that the court (1) declare that the December 6, 2018 request constituted a "written request" under the FOIA, (2) declare that Dietrich's December 7, 2018 response constituted a "written response" and "final determination" under the FOIA, (3) declare that the documents requested on December 6, 2018, exist and order defendant to immediately disclose the documents in accordance with the FOIA, (4) declare that defendant must immediately disclose the documents requested on December 6, 2018, in accordance with article 9, § 23, of Michigan's 1963 Constitution, and (5) award plaintiff

court costs and attorney fees under MCL 15.240(6) of the FOIA. Defendant filed a motion for summary disposition arguing that plaintiff could not maintain claims brought under the FOIA because the December 6, 2018 request was not made in accordance with the FOIA, and defendant had no duty to disclose the requested documents under article 9, § 23, of Michigan's 1963 Constitution. Plaintiff also moved for summary disposition arguing that the court should grant summary disposition for plaintiff on Counts 1, 2, and 4 of plaintiff's amended complaint. Plaintiff also argued that summary disposition was premature in regard to Count 3 because there was a genuine issue of material fact as to whether the requested documents exist. The trial court found that plaintiff's claims were frivolous and made solely to harass defendant. The trial court granted summary disposition for defendant, denied plaintiff's motion for summary disposition, dismissed plaintiff's amended complaint with prejudice, and awarded sanctions for defendant in the amount of $1,000, concluding that the December 6, 2018 request was not a FOIA request. This appeal follows.

I. THE FOIA AND ARTICLE 9, § 23, OF MICHIGAN'S 1963 CONSTITUTION

A. THE FOIA

***2** Plaintiff argues that the trial court erred in granting summary disposition for defendant regarding his claims brought under the FOIA. We disagree.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), but the trial court considered evidence outside the pleadings. Therefore, this Court considers the motion as having been decided pursuant to MCR 2.116(C)(10). *Candler v. Farm Bureau Mut. Ins. Co. of Mich.*, 321 Mich. App. 772, 776; 910 N.W.2d 666 (2017). This Court reviews a trial court's decision on a motion for summary disposition de novo. *Bodnar v. St. John Providence, Inc.*, 327 Mich. App. 203, 211; 933 N.W.2d 363 (2019). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil v. Oakwood Healthcare, Inc.*, 504 Mich. 152, 160; 934 N.W.2d 665 (2019). A trial court's grant of summary disposition under MCR 2.116(C)(10) is proper when the evidence, "viewed in the light most favorable to the nonmoving party, show[s] that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v. LMPS & LMPJ, Inc.*, 500 Mich. 1, 5-6; 890 N.W.2d 344 (2016). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich. at 160 (citation and quotation marks omitted). "[S]tatutory interpretation of the FOIA presents a question of law that is subject to review de novo." *Arabo v. Mich. Gaming Control Bd.*, 310 Mich. App. 370, 382; 872 N.W.2d 223 (2015).

"The Freedom of Information Act declares that it is the public policy of this state to entitle all persons to complete information regarding governmental affairs so that they may participate fully in the democratic process." *Arabo*, 310 Mich. App. at 380 (citation and quotation marks omitted). "[A] public body must disclose all public records that are not specifically exempt under the act." *Id.* (citation and quotation marks omitted). "The FOIA provides that a person has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body." *Id.* (citation and quotation marks omitted). "[O]nce a request under the FOIA has been made, a public body has a duty to provide access to the records sought or to release copies of those records unless the records are exempted from disclosure." *Id.* (citation and quotation marks omitted).

The following are the relevant provisions of the FOIA regarding the requirements for a written request. MCL 15.233(1) [1] provided that "[e]xcept as expressly provided in [MCL 15.243], upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body." Similarly, under MCL 15.235, "[e]xcept as provided in [MCL 15.233], a person desiring to inspect or receive a copy of a public record shall make a written request for the public record to the FOIA coordinator of a public body." A "written request" is defined as follows: "a writing that asks for information, and includes a writing transmitted by facsimile, electronic mail, or other electronic means." MCL 15.232(m). A "writing" is defined as follows:

> ***3** "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films

> or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, hard drives, solid state storage components, or other means of recording or retaining meaningful content.

Upon receipt of a written request, a public body must do the following in accordance with MCL 15.235(2) and (5):

> (2) Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:
>
> (a) Granting the request.
>
> (b) Issuing a written notice to the requesting person denying the request.
>
> (c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.
>
> (d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.
>
> * * *
>
> (5) A written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request. The written notice must contain:
>
> (a) An explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request.
>
> (b) A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if that is the reason for denying the request or a portion of the request.
>
> (c) A description of a public record or information on a public record that is separated or deleted pursuant to [MCL 15.244], if a separation or deletion is made.
>
> (d) A full explanation of the requesting person's right to do either of the following:
>
> (*i*) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial.
>
> (*ii*) Seek judicial review of the denial under section 10.
>
> (e) Notice of the right to receive attorneys' fees and damages as provided in section 10 if, after judicial review, the court determines that the public body has not complied with this section and orders disclosure of all or a portion of a public record.

On December 6, 2018, Paterson emailed Dietrich requesting the following:

> On behalf of my client, Robert Davis, in accordance with Mich.Const.1963, art. 9, sec., 23, I am respectfully requesting that the following financial documents be made available immediately for public inspection and copying:
>
> ***4** 1. Copies of any and all monetary payments, including checks, invoices, cancelled checks, check registers, issued to Dr. Sonia Hassan by the City of Detroit or any of its departments from January 2015 to the present.
>
> 2. Copies of any and all contacts [sic] and/or employment agreements entered into by and between any employee, agent or representative of the City of Detroit and Dr. Sonia Hassan from January 2015 to the present.
>
> 3. Copies of any and all contracts the City of Detroit entered into or have with Bill Nowling from January 2015 to the present.
>
> 4. Copies of any and all monetary payments, including copies of checks, the City of Detroit has made to Bill Nowling from January 2015 to the present.
>
> 5. A copy of any and all gifts, donations, grants, and/or monetary payments the City of Detroit has made to the nonprofit corporation Mark Your Date Detroit from January 2015 to the present.
>
> 6. A copy of any and all gifts, donations, grants, and/or monetary payments the City of Detroit has made to the nonprofit corporation SisterFriends Detroit from January 2015 to the present.
>
> Please be advised that this request is made in accordance with Mich.Const.1963, art. 9, sec. 23 and not the FOIA.

> My client's November 14, 2018 FOIA request that was previously mailed is separate and distinct from this request.
>
> My client desires to publicly inspect the aforementioned financial documents on or before 4:30 pm on Friday, December 7, 2018. I look forward to your response.

Plaintiff contends that, despite the language stating that this request was not a FOIA request, the request fulfilled the statutory requirements of a written request under the FOIA. Plaintiff also argues that, despite Dietrich's reply email failing to conform to all of the requirements set forth under MCL 15.235(5), Dietrich's response nonetheless constituted a written response under the FOIA. Thus, plaintiff contends that he was entitled to declaratory relief in regard to Counts 1 and 2 of his amended complaint because the request and response constituted a "written request" and a "written response," respectively, under the FOIA. Accordingly, plaintiff argues that the trial court erred in granting summary disposition for defendant on Counts 1 and 2. In addition, plaintiff argues that, because the request and response complied with the FOIA, the court erred in granting summary disposition for defendant in regard to Count 3 of plaintiff's amended complaint because plaintiff created a genuine issue of material fact as to whether the requested documents exist. Counts 1 through 3 of plaintiff's amended complaint all arose under the FOIA. Thus, whether defendant had any duty to respond to the request in accordance with the FOIA or to disclose the documents in accordance with the FOIA, the subject of Counts 2 and 3, is dependent on the threshold question of whether plaintiff submitted a "written request" under the FOIA, thereby triggering defendant's obligations under the FOIA.

The December 6, 2018 request fulfilled the basic requirements for a "written request" as set forth by MCL 15.233(1). Paterson sent the request to Dietrich, the FOIA coordinator, in accordance with MCL 15.233(1), and requested information in a typewritten letter sent by electronic mail in accordance with MCL 15.232(1) and (m). However, the issue is whether plaintiff's December 6, 2018 request, which explicitly stated that it was made in accordance with article 9, § 23, of Michigan's 1963 Constitution and not the FOIA, may constitute a properly submitted request under the FOIA.

***5** "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Zoo Yang v. Everest Nat'l Ins. Co.*, —— Mich. App. ——, ——; —— N.W.2d —— (2019) (Docket No. 344987); slip op. at 3. "To do so, we interpret the words, phrases, and clauses in a statute according to their ordinary meaning." *Id.* at ——; slip op. at 3. "However, this Court must construe the FOIA as a whole, harmonizing its provisions." *Arabo*, 310 Mich. App. at 386 (citation and quotation marks omitted).

Despite the fact that plaintiff's request fulfilled the basic requirements of a "written request," a request made to the FOIA coordinator must be a request made under the FOIA and not under a separate and distinct law. "The FOIA sets forth specific requirements that must be followed in filing and responding to information requests." *Thomas v. New Baltimore*, 254 Mich. App. 196, 201; 657 N.W.2d 530 (2002). "[O]nce a request *under the FOIA* has been made, a public body has a duty to provide access to the records sought or to release copies of those records unless the records are exempted from disclosure." *Arabo*, 310 Mich. App. at 280 (citation and quotation marks omitted; emphasis added). Thus, a public body's duty to respond to a request within five days and to provide a final determination is triggered upon receipt of a request made under the FOIA. "[P]ublic bodies and trial courts can only make decisions on FOIA matters on the basis of the information that is before them at the time, and it is not the function of appellate courts to second-guess those decisions on the basis of information that later becomes available." *State News v. Mich. State Univ.*, 481 Mich. 692, 703; 753 N.W.2d 20 (2008). Because duties are imposed on a public body upon receipt of a FOIA request, it would retroactively impose duties on a public body to allow a request made under a different law to later constitute a request made under the FOIA. This is because, on the basis of the explicit language in the request, the public body would not have been prompted to respond in accordance with the requirements of the FOIA. For example, in this case, plaintiff argues that defendant had a duty under the FOIA to disclose the documents requested on December 6, 2018. Defendant never received a request made under the FOIA, and therefore, defendant had no duty to respond in accordance with the FOIA. In addition, a request made under the FOIA is subject to the FOIA standards for disclosure of documents. Therefore, a person would effectively circumvent the laws and procedures of the FOIA by demanding that the documents be disclosed without the documents ever having been subject to the disclosure requirements.

Here, Paterson emailed Dietrich on December 5, 2018, asserting that Dietrich had failed to respond to plaintiff's November 14, 2018 FOIA request. Dietrich replied the same day, explaining to Paterson that he had not received the

November 14, 2018 request. Dietrich also told Paterson to forward the November 14, 2018 FOIA request and Dietrich would process it. Instead of forwarding the FOIA request, Paterson sent another email on December 6, 2018, expressly requesting the documents under article 9, § 23, of Michigan's 1963 Constitution and not the FOIA. Paterson stated twice in his email that he was requesting the documents under the Michigan Constitution. Moreover, in plaintiff's first complaint, plaintiff did not contend that the December 6, 2018 request constituted a FOIA request, but rather, plaintiff maintained that the December 6, 2018 request was made under article 9, § 23, of Michigan's 1963 Constitution, and defendant's duty to disclose the documents arose from an obligation under article 9, § 23, of Michigan's 1963 Constitution. It was not until plaintiff filed his amended complaint, five weeks after Paterson sent the December 6, 2018 request, that plaintiff asserted that Paterson had erroneously stated that the request was not made under the FOIA, but claimed that, despite the erroneous statement, the request nonetheless constituted a "written request" under the FOIA.

***6** As an initial matter, "generally, an attorney's negligence is attributable to that attorney's client[.]" *Amco Builders & Developers, Inc. v. Team Ace Joint Venture*, 469 Mich. 90, 96; 666 N.W.2d 623 (2003). Moreover, the evidence indicates that plaintiff, through Paterson, intended not to request documents under the FOIA, but rather, under article 9, § 23, of Michigan's 1963 Constitution as illustrated by the express language used in the December 6, 2018 email and plaintiff's continued contention in the original complaint that defendant had a duty to disclose the documents under article 9, § 23, of Michigan's 1963 Constitution. Moreover, Paterson asked for the documents to be disclosed within 24 hours which is not in accordance with the FOIA requirements. Even if Paterson's statement was made in error, the December 6, 2018 request made no indication that it was a request under the FOIA. The request expressly stated that it was made under article 9, § 23, of Michigan's 1963 Constitution, not the FOIA, and that it was a separate and distinct request from plaintiff's prior FOIA request. Because there was no indication that the request was made under the FOIA, defendant had no obligation to respond to the request in a manner consistent with the FOIA requirements.

Therefore, the trial court did not err in declining to hold that the December 6, 2018 request and Dietrich's December 7, 2018 response constituted a written request and response, respectively, under the FOIA. Accordingly, the trial court did not err in granting defendant's motion for summary disposition and denying plaintiff's request for summary disposition in regard to Counts 1 and 2.

Moreover, a determination that plaintiff failed to submit a FOIA request is dispositive as to whether the trial court erred in granting summary disposition for defendant on Count 3. Because defendant had no duty to respond to the request in accordance with the FOIA, the court did not err in granting summary disposition in regard to Count 3 of plaintiff's amended complaint. In Count 3 of plaintiff's amended complaint, plaintiff requested that the court declare that the requested documents exist and compel defendant to immediately disclose the documents "to Plaintiff in Accordance with FOIA." Despite the fact that plaintiff submitted his own affidavit in the lower court to support that the requested documents did in fact exist, defendant had no duty to disclose the documents in accordance with the FOIA. Thus, plaintiff could not maintain Count 3 brought under the FOIA, and it was irrelevant whether plaintiff presented evidence that the documents exist.

In light of our conclusion regarding plaintiff's FOIA claims, it is not necessary to address defendant's alternate grounds for affirmance—whether plaintiff lacked standing to bring claims under the FOIA and whether plaintiff's amended complaint was defective.

B. ARTICLE 9, § 23, OF MICHIGAN'S 1963 CONSTITUTION

Plaintiff argues that the trial court erred when it denied plaintiff's request for summary disposition in regard to Count 4 of plaintiff's amended complaint because defendant was required to disclose the requested documents in accordance with article 9, § 23, of Michigan's 1963 Constitution. We disagree.

Article 9, § 23, of Michigan's 1963 Constitution provides: "All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law." The documents plaintiff requested are outside the scope of article 9, § 23, of Michigan's 1963 Constitution. This Court interpreted article 9, § 23, of Michigan's 1963 Constitution in *Grayson v. Mich. State Bd.*

of Accountancy, 27 Mich. App. 26, 34-35; 183 N.W.2d 424 (1970), stating:

> The manifest purpose of article 9, § 23 is to allow the public to keep their finger on the pulse of government spending. The most expeditious way of so doing is to give the public access to summaries, balance sheets, and other such compilations which map out and correlate a myriad of financial transactions into a meaningful account. It strains one's credulity to think that the framers of the Constitution meant to allow the public to inspect every receipt, every application for licensure and every writing evidencing a receipt or expenditure. It is totally unnecessary to give such authority to the public to achieve the purpose aforementioned and such authority could easily serve as a tool to harass governmental agencies by unreasonable demands for great volumes of individual documents. We hold that the public right to information given by article 9, § 23 is best promoted, and the smooth functioning of the government best protected, by construing the words "financial records" to require more than a receipt or document[.]

***7** Two sets of documents requested by plaintiff—"Copies of any and all contacts [sic] and/or employment agreements entered into by and between any employee, agent or representative of the City of Detroit and Dr. Sonia Hassan from January 2015 to the present" and "Copies of any and all contracts the City of Detroit entered into or have with Bill Nowling from January 2015 to the present"—clearly do not constitute "financial records, accountings, audit reports and other reports of public moneys." Thus, plaintiff is not entitled to those documents under article 9, § 23, of Michigan's 1963 Constitution.

The other documents requested by plaintiff—(1) copies of any and all monetary payments, checks, invoices, cancelled checks, check registers, issued to Dr. Sonia Hassan by defendant or any of its departments from January 2015 to December 2018 (2) copies of any and all monetary payments defendant made to Bill Nowling from January 2015 to December 2018, and (3) copies of any and all gifts, donations, and or monetary payments from defendant to two nonprofit organizations from January 2015 to December 2018—essentially amounted to a request for every expenditure by defendant to Nowling, Dr. Hassan, and the two nonprofit organizations over a nearly four-year period. Plaintiff is not entitled to these documents under article 9 § 23, of Michigan's 1963 Constitution as they do not constitute "summaries, balance sheets, and other such compilations." Furthermore, plaintiff's extensive requests appear to be the exact kind the *Grayson* Court aimed to prevent so as not to allow article 9, § 23, of Michigan's 1963 Constitution to be used as a "tool to harass governmental agencies by unreasonable demands for great volumes of individual documents." *Grayson*, 27 Mich. App. at 35.

Thus, defendant had no duty to disclose the requested documents under article 9, § 23, of Michigan's 1963 Constitution. Accordingly, the trial court did not err in granting defendant's motion for summary disposition in regard to Count 4 of plaintiff's amended complaint.

In light of our conclusion regarding plaintiff's claim brought under article 9, § 23, of Michigan's 1963 Constitution, it is unnecessary for us to address defendant's alternate ground for affirmance—whether plaintiff had a private right of action under article 9, § 23, of Michigan's 1963 Constitution.

II. MOTION TO COMPEL THE DEPOSITION OF A NONPARTY

Plaintiff argues that the trial court erred when it denied plaintiff's motion to compel the deposition, or in the alternative for leave to take the deposition, of Dr. Hassan. We disagree.

"This Court reviews a trial court's discovery orders, such as an order to compel, for an abuse of discretion." *PCS4LESS, LLC v. Stockton*, 291 Mich. App. 672, 676; 806 N.W.2d 353 (2011). "An abuse of discretion occurs when the trial court chooses an outcome falling outside a range of principled outcomes." *Id.* at 676-677.

"The purpose of discovery is to simplify and clarify the contested issues, which is necessarily accomplished by the open discovery of all relevant facts and circumstances related to the controversy." *Hamed v. Wayne Co.*, 271 Mich. App. 106, 109; 719 N.W.2d 612 (2006). "While Michigan is strongly committed to open and far-reaching discovery, a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Planet Bingo, LLC v. VKGS, LLC*, 319 Mich. App. 308, 327; 900 N.W.2d 680 (2017). A court may limit discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." MCR 2.302(C).

***8** The trial court did not abuse its discretion when it denied plaintiff's motion to compel the deposition of, or in the alternative for leave to take the deposition of, Dr. Hassan pending the court's determination on defendant's motion for summary disposition. Plaintiff requested to take the deposition of Dr. Hassan because plaintiff believed that Dr. Hassan would have firsthand knowledge that the requested documents exist and would reveal such in her deposition. However, at the time the court denied plaintiff's motion to compel the deposition of Dr. Hassan and stayed discovery, defendant had filed its renewed motion for summary disposition challenging the legal sufficiency of plaintiff's amended claims on the basis that plaintiff never submitted a FOIA request, and therefore, defendant had no legal duty to disclose the requested documents under the FOIA. Moreover, defendant contended that it had no legal duty to disclose the requested documents under article 9, § 23, of Michigan's 1963 Constitution. Thus, the threshold questions before the court were whether plaintiff had properly requested the documents under the FOIA, and whether defendant had any duty to disclose the documents. As the court needed to address these threshold questions before the court could address whether the documents existed, the trial court did not abuse its discretion in denying plaintiff's motion to compel, or motion for leave to take, the deposition of Dr. Hassan.

III. SANCTIONS

Plaintiff argues that the trial court clearly erred in imposing sanctions against him. We disagree.

"This Court reviews a trial court's ruling on a motion for costs and attorney fees for an abuse of discretion." *Keinz v. Keinz*, 290 Mich. App. 137, 141; 799 N.W.2d 576 (2010). "A trial court's findings with regard to whether a claim or defense was frivolous, and whether sanctions may be imposed, will not be disturbed unless it is clearly erroneous." *Meisner Law Group PC v. Weston Downs Condo. Ass'n*, 321 Mich. App. 702, 730; 909 N.W.2d 890 (2017) (citation and quotation marks omitted). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* (citation and quotation marks omitted).

MCL 600.2591(1) requires a court to sanction an attorney or party that files a frivolous action or defense. MCL 600.2591(1); *Meisner Law Group*, 321 Mich. App. at 731. MCL 600.2591(3)(a) defines "frivolous" as follows:

> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

The trial court did not abuse its discretion in awarding sanctions to defendant. The trial court concluded that plaintiff's primary purpose in initiating this case was to harass defendant. In support of this conclusion, the court found that, upon review of the facts and procedural history of this case, plaintiff's conduct resulted in "a waste of time and resources of the Court and [defendant]" and the claims in this lawsuit "could have been avoided altogether if Paterson had simply emailed Dietrich a copy of the alleged November 14, 2018 FOIA request and indicated that his request in the December 6, 2018 email was made under FOIA." The facts of this case support the trial court's conclusion. Plaintiff contends that he submitted a written FOIA request via first class mail to Dietrich on November 14, 2018, but when Dietrich explained to Paterson on December 5, 2018, that he had not received the FOIA request but Paterson could email it to Dietrich, Paterson's response was not to send the November 14, 2018 FOIA request or to even submit a new FOIA request. Rather, Paterson requested that the documents be produced within 24 hours, not in accordance with the FOIA, but with article 9, § 23, of Michigan's 1963 Constitution. Plaintiff then filed an amended complaint requesting the court declare the exact opposite—that the documents were requested under the FOIA.

Plaintiff also argues on appeal that the trial court found that plaintiff's claims were frivolous and awarded sanctions for defendant because the trial court was "attempting to intimidate" plaintiff because of his personal relationship with Mayor Duggan. During the hearing on plaintiff's motion to compel the deposition of Dr. Hassan, the trial judge disclosed to the parties, prior to any arguments, that he had worked as general counsel for Wayne County, and therefore, at one point in time, Mayor Duggan had been his boss. The judge also disclosed that plaintiff had been his son's coach and mentor in the past. When asked by the judge whether the parties would like to adjourn the matter as a result of his disclosures, Paterson stated that "[plaintiff] believes you may proceed on this perfectly good basis." Thus, plaintiff waived any claim that the judge was biased. "A waiver consists of the intentional relinquishment or abandonment of a known right." *Patel v. Patel*, 324 Mich. App. 631, 634; 922 N.W.2d 647 (2018). "[A] party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *Braverman v. Granger*, 303 Mich. App. 587, 608; 844 N.W.2d 485 (2014). Moreover, there is no indication on the record that the judge was in any way biased because of his relationship with Mayor Duggan or that he was attempting to intimidate plaintiff by imposing sanctions.

***9** Affirmed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 1488661

Footnotes

1 MCL 15.233(1) was amended on December 28, 2018. The current provision now requires additional material to be provided in the request. However, we have applied the versions of the FOIA in effect at the time of the December 6, 2018 request and Dietrich's December 7, 2018 response herein. "[S]tatutes and amended statutes are to be applied prospectively unless the Legislature manifests an intent to the contrary." *Davis v. State Employees' Retirement Bd.*, 272 Mich. App. 151, 155; 725 N.W.2d 56 (2006). "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Id.* at 155-156.

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STATE OF MICHIGAN
BRANCH COUNTY CIRCUIT COURT

JASON MATE, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF COLDWATER, MICHIGAN, a municipal corporation, by and through THE COLDWATER BOARD OF PUBLIC UTILITIES,

Defendant.

Case No. 25-12507-CZ

Hon. Amy Ronayne Krause

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[PROPOSED] ORDER STYAYING DISCOVERY PENDING COURT'S RULING ON DEFENDANT CITY OF COLDWATER'S MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY PENDING THE OUTCOME OF DEFENDANT'S PENDING RULE 2.116(C)(8) MOTION FOR SUMMARY DISPOSITION

The Court having received for filing the Motion of Defendant City of Coldwater's for Protective Order to Stay Discovery Pending the Outcome of Defendant's Pending Rule 2.116(C)(8) Motion for Summary Disposition (the "Stay Moton");

WHEREAS, the City filed a motion for summary disposition pursuant to MCR 2.116(C)(8) on February 18, 2026;

WHEREAS, the City's motion for summary disposition pursuant to MCR 2.116(C)(8) is scheduled to be heard on Thursday, June 11, 2026, at 1:30pm;

WHEREAS, the hearing on the City's Stay Motion will be heard on Friday, April 10, 2026, at 10:30 am;

WHEREAS, upon seeking a hearing date for the Stay Motion, the Court informed the City that discovery in this matter is stayed pending a ruling on the Stay Motion;

IT IS HEREBY ORDERED that discovery is stayed pending a ruling on the City's Stay Motion.

SO ORDERED.

This is not a final order and does not close this case.

Date: _____

_____
The Honorable Amy Ronayne Krause

Prepared by:

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Dated: March 20, 2026

STATE OF MICHIGAN
BRANCH COUNTY CIRCUIT COURT

JASON MATE, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF COLDWATER, MICHIGAN, a municipal corporation, by and through THE COLDWATER BOARD OF PUBLIC UTILITIES,

Defendant.

Case No. 25-12507-CZ

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[PROPOSED] ORDER STYAYING DISCOVERY PENDING COURT'S RULING ON DEFENDANT CITY OF COLDWATER'S MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY PENDING THE OUTCOME OF DEFENDANT'S PENDING RULE 2.116(C)(8) MOTION FOR SUMMARY DISPOSITION

The Court having received for filing the Motion of Defendant City of Coldwater's for Protective Order to Stay Discovery Pending the Outcome of Defendant's Pending Rule 2.116(C)(8) Motion for Summary Disposition (the "Stay Moton");

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WHEREAS, upon seeking a hearing date for the Stay Motion, the Court informed the City that discovery in this matter is stayed pending a ruling on the Stay Motion;

IT IS HEREBY ORDERED that discovery is stayed pending a ruling on the City's Stay Motion.

SO ORDERED.

This is not a final order and does not close this case.

Date: _____

_____
The Honorable Amy Ronayne Krause

Prepared by:

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Dated: March 20, 2026