STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

MATTHEW SOVA, JANE SNELL, JAMES LAMB, SCOTT KUCHAR, ADAM ENGEL, SAMANTHA ENGEL, and all those similarly situated in Saginaw County, Michigan,

Plaintiffs,

v

CONSUMERS ENERGY COMPANY and ARBORMETRICS SOLUTIONS, LLC,

Defendants.

_____/

Civil Action No. 25-002533-CH

Hon. Julie A. Gafkay

DEFENDANT ARBORMETRICS SOLUTIONS, LLC'S MOTION FOR SUMMARY DISPOSITION AND FOR JOINDER IN CONSUMERS ENERGY COMPANY'S MOTION FOR SUMMARY DISPOSITION

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Pursuant to MCR 2.116(C) and/or (C)(10), Defendant ArborMetrics Solutions, LLC ("ArborMetrics") hereby moves for summary disposition as to all claims asserted by Plaintiffs

against ArborMetrics in Plaintiffs' First Amended Complaint (the "FAC"). As support for this motion, ArborMetrics hereby joins in,[1] adopts, and concurs in Defendant Consumers Energy Company's ("Consumers Energy") Motion for Summary Disposition, filed on or about December 9, 2025, and the arguments and supporting authorities cited therein. ArborMetrics similarly requests that the Court dismiss or stay this case pursuant to the primary jurisdiction doctrine, or alternatively based on the Court's inherent authority to manage its docket, pending review and resolution by the Michigan Public Service Commission ("MPSC"). In support, ArborMetrics states:

1. Consumers Energy seeks summary disposition under MCR 2.116(C)(8) and/or (C)(10) on the basis of Michigan's primary jurisdiction doctrine. *See Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 196; 631 NW2d 733 (2001).

2. Among other things, as Consumers Energy explains, the MPSC has primary jurisdiction over challenges to public utility operations, including tree marking, trimming, and removal, activities which form the basis of each of Plaintiffs' claims in the FAC. (*See generally* Mot. Summ. D., p. 4, ¶¶ 13-14). Tree bark painting and related work is an "instrumental part of" Consumers Energy's "MPSC-mandated plan" to ensure "compliance with vegetation management standards," and "to prevent tree crews," like ArborMetrics, "from cutting down or trimming trees that are not part of the plan." (*Id*. at p. 2, ¶ 4). As Consumers Energy points out, "tree marking is an essential first step" to executing the vegetation management plan. (*Id*. at p. 3, ¶ 10).

3. Because the issues raised by Plaintiffs' FAC "clearly fall within the MPSC's specialized knowledge," and because Plaintiffs' complaint challenges the "design and

[1] A party may join in another party's motion for summary disposition. *See Reffitt v Mantese*, unpublished per curiam opinion of the Court of Appeals, issued October 15, 2019 (No. 346471), 2019 WL 5204542, p 6. All unpublished cases are attached as **Exhibit A**.

implementation of an MPSC-mandated line-clearing program," it is appropriate to dismiss without prejudice (or stay) Plaintiffs' claims pending resolution before the MPSC. (*Id*. at p. 4, ¶¶ 13-14).

4. These same arguments also support dismissal, or a stay, of Plaintiffs' claims as to ArborMetrics, who Plaintiffs allege is Consumers Energy's contractor.

5. In particular, Plaintiffs sue ArborMetrics on the basis that ArborMetrics is a "vegetation management contractor retained by Consumers Energy to perform services related to the trees in Saginaw County." (FAC, ¶¶ 11, 36). The FAC brings identical causes of action against both Consumers Energy and ArborMetrics. (*Id*. at ¶¶ 66-103). The FAC does not allege any actions or conduct by ArborMetrics that are independent of, or distinct from, any alleged actions or conduct by Consumers Energy. (*Id*.).

6. Further, Plaintiffs claim that Consumers Energy and ArborMetrics acted "jointly and severally" in allegedly marking "non-interfering trees with permanent blue bark paint," which forms the basis of Plaintiffs' claims against ArborMetrics. (*Id*. at ¶ 84).

7. Moreover, Plaintiffs do not request any different relief from ArborMetrics than they do from Consumers Energy. (*Id*. at ¶ 105(a)-(i)).

8. Accordingly, given that the FAC contains virtually identical allegations, brings identical claims, and seeks identical relief as against Consumers Energy and ArborMetrics, the Court should dismiss or stay the entire action under the primary jurisdiction doctrine.

9. Adhering to the doctrine with respect to Plaintiffs' entire action "reinforces the expertise of" the MPSC as it relates to Plaintiffs' claims, and "avoids the expenditure of judicial resources for issues that can be better resolved by the agency." *Travelers Ins Co*, 465 Mich at 196; *see also Evans v Detroit Edison*, unpublished per curiam opinion of the Court of Appeals, issued

May 15, 2003 (No. 239077), 2003 WL 21130167, p 3 (affirming trial court's referral to MPSC under primary jurisdiction doctrine due to "the need for uniformity and consistency").

10. The Court may also stay the action as to ArborMetrics pending review by the MPSC, pursuant to the Court's inherent authority. A trial court has the "inherent authority to control the progress of a case." *In re MGR*, 504 Mich 852; 928 NW2d 184, 186 (2019) (citing MCR 1.105). The trial court's inherent authority includes the power to issue a stay of the case. *Bazzi v Macaulay*, unpublished per curiam opinion of the Court of Appeals, issued November 1, 2011 (Docket No. 299239), 2011 WL 5299468, p 5; *see also People v Grove*, 455 Mich 439, 470; 566 NW2d 547 (1997) ("Optimum service to the public, to victims, witnesses, jurors, litigants, and to counsel mandates that trial judges have the authority and discretion to manage dockets.") (*superseded on other grounds by* MCR 6.310(B)).

11. Michigan courts have also recognized the authority of a trial court to stay one action where a party's or parties' rights may or will be affected by another action. For example, in *Bank of Com v Hulett*, the Michigan Court of Appeals reversed a judgment issued by the trial court, and stayed the action, where there was another action involving the parties that would impact one or more of their legal rights. 82 Mich App 442, 444-45; 266 NW2d 841 (1978). The appeals court founded its decision on the principle that if the rights of the parties cannot be properly determined until the questions raised in another action are settled, the action should be stayed. *Id*.

WHEREFORE, for the reasons stated in Consumer Energy's Motion for Summary Disposition and herein, Defendant ArborMetrics Solutions, LLC requests that the Court enter summary disposition pursuant to MCR 2.116 in its favor, dismiss or stay Plaintiff's FAC, and for any further relief that the Court deems appropriate.

Dated: December 17, 2025

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DEFENDANT ARBORMETRICS SOLUTIONS, LLC'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION AND FOR JOINDER IN CONSUMERS ENERGY COMPANY'S MOTION FOR SUMMARY DISPOSITION

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_____/

For the reasons stated in the accompanying Motion, and in Consumer Energy's Motion for Summary Disposition, Defendant ArborMetrics Solutions, LLC requests that the Court enter summary disposition pursuant to MCR 2.116 in its favor, dismiss or stay Plaintiff's FAC, and for any further relief that the Court deems appropriate.

Dated: December 17, 2025

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EXHIBIT A

2011 WL 5299468
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Hafez M. BAZZI, Plaintiff–Appellee,

v.

Anne Elizabeth MACAULAY, Defendant–Appellant.

Docket No. 299239.
|
Nov. 1, 2011.

Oakland Circuit Court; LC No.2009–762325–DP.

Before: M.J. KELLY, P.J., and OWENS and BORRELLO, JJ.

Opinion

PER CURIAM.

***1** In this paternity suit, defendant Anne Elizabeth Macaulay appeals by leave granted the trial court's order staying her motion to dismiss plaintiff Hafez M. Bazzi's paternity suit and appointing a guardian ad litem for her child. On appeal, Macaulay argues that, once she presented evidence that another man signed an affidavit of parentage, the trial court had to dismiss Bazzi's paternity suit because Bazzi had no standing to bring the action. Because Bazzi had no standing, Macaulay further contends, the trial court had no jurisdiction to appoint a guardian ad litem for her child. We conclude that the trial court had jurisdiction over the paternity suit until it determines that Bazzi lacks standing as a matter of law. However, whether Bazzi has standing is a matter that must be determined by applying the law to the relevant facts, which includes a determination that the document that Macaulay presented to the court was a duly and properly executed affidavit of parentage. The trial court elected to postpone that determination until the facts surrounding the execution of that affidavit had been developed through discovery. The trial court has the inherent authority to stay a motion to dismiss for further discovery. And, under the facts of this case, we cannot conclude that the trial court abused its discretion when it decided to temporarily stay resolution of Macaulay's motion until after the parties have had time to conduct discovery. We also conclude that the trial court did not abuse its discretion when it determined that the child's best interests should be safeguarded by appointment of a neutral third-party—a guardian ad litem—to represent the child during the pending litigation. For these reasons, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Macaulay became pregnant during a time when she was involved in an intimate relationship with Bazzi.[1] Indeed, Bazzi asserted that the relationship was "an exclusive monogamous romantic relationship." Macaulay gave birth to the child in January 2005. According to Bazzi, Macaulay told him that he was the child's father and similarly represented to others that he was the child's father. He also maintained a "regular parenting arrangement" with the child for approximately three years and during that time Macaulay accepted financial support for the child. However, in December 2008, Macaulay abruptly broke off all contact with Bazzi and, as a result, effectively precluded him from maintaining a relationship with the child.

In August 2009, Bazzi sued Macaulay to establish his paternity. He alleged, in relevant part, that he had a relationship with Macaulay both before and after the child's birth and that, upon information and belief, Macaulay became pregnant by him. He also alleged that Macaulay had "not taken any steps to acknowledge or confirm paternity of the minor child." He asked the trial court to determine the child's paternity, order joint legal and physical custody, grant parenting time, and determine his child support and health care obligations.

***2** Macaulay did not answer the complaint; instead, in December 2009, she moved for the dismissal of Bazzi's suit. In her motion, Macaulay stated that—one day after the child's birth—she and Steven Szakaly signed an affidavit acknowledging Szakaly as the child's father. Macaulay also attached a copy of a document purporting to be an affidavit of parentage. This affidavit, she contended, conclusively established the child's paternity. Macaulay further argued that, because Bazzi lacked standing to challenge the affidavit under Michigan law, the trial court had to dismiss Bazzi's suit under MCR 2.116(C)(5).

Bazzi did not answer Macaulay's motion. Rather than answer the motion, Bazzi moved to stay resolution of

Macaulay's motion pending further discovery. Bazzi asserted that Macaulay had repeatedly represented that Szakaly was just a "platonic" friend from college. He also stated that Szakaly was involved in a committed relationship with another woman during the time at issue and that he later married that same woman. Bazzi related that Szakaly had told him that he was not the child's father and wanted nothing to do with either Macaulay or her child. Given these potential facts, Bazzi argued that it was necessary to conduct further discovery to—among other things—investigate "the manner in which the Affidavit of Parentage was procured." Indeed, he contended that the purported affidavit of parentage was not "properly executed." In addition, Bazzi asked the trial court to appoint a guardian ad litem to protect the child's best interests.

The trial court held a hearing on Bazzi's motion for a stay and the appointment of a guardian ad litem in January 2010. After hearing oral arguments, the trial court noted that, although the law clearly defined the rights at issue, the potential facts presented two "exceptional circumstances": that Bazzi allegedly acted as the father to the child for three years and that the affidavit of parentage might be fraudulent. The trial court also expressed concern for the child's rights. And, for the benefit of the child, the trial court determined that the allegations should be investigated before dismissing the "matter off hand." The trial court also determined that a guardian ad litem should conduct the investigation to determine what was in the child's best interests after assessing the facts. For those reasons, the trial court stated that it would grant Bazzi's motion for a stay and for the appointment of a guardian ad litem to represent the child and conduct the investigation into the facts of the case.

On July 1, 2010, the trial court entered an order appointing a guardian ad litem for the child and holding Macaulay's motion to dismiss in abeyance pending the guardian ad litem's investigation. On the same day, the trial court entered an order staying the lower court proceedings in order to permit Macaulay to appeal to this Court. Macaulay then moved for leave to appeal to this Court, which this Court granted in December 2010.[2]

II. ANALYSIS

A. STANDARDS OF REVIEW

***3** On appeal, Macaulay argues that the trial court did not have the authority to hold her motion in abeyance because Bazzi did not have standing to bring a paternity suit; indeed, she contends that, because Bazzi did not have standing to bring his suit, the trial court did not have jurisdiction and its July 1, 2010 order was, accordingly, void. This Court reviews de novo the proper interpretation and application of statutes. *Adair v. Michigan,* 486 Mich. 468, 477; 785 NW2d 119 (2010). This Court also reviews de novo the proper application of the law of standing. See *McHone v. Sosnowski,* 239 Mich.App 674, 676; 609 NW2d 844 (2000). However, this Court reviews a trial court's decision to hold a motion in abeyance to permit additional discovery for an abuse of discretion. See *Westlake Transp, Inc v. Public Service Comm'n,* 255 Mich.App 589, 611; 662 NW2d 784 (2003) (determining that the trial court did not abuse its discretion when it denied the plaintiffs' request to stay the proceedings to conduct additional discovery). Similarly, this Court reviews a trial court's decision on a matter committed to its discretion, such as whether to appoint a guardian ad litem to represent the interests of a minor child involved in the litigation, for an abuse of discretion. See *Borowsky v. Borowsky,* 273 Mich.App 666, 672; 733 NW2d 71 (2007). This Court will not reverse a trial court's discretionary rulings unless the decision falls outside the range of reasonable and principled outcomes. *Id.*

B. STANDING AND JURISDICTION

Standing was traditionally a limited, prudential doctrine that developed to ensure sincere and vigorous advocacy. *Lansing Schools Educ Ass'n v. Lansing Board of Ed,* 487 Mich. 349, 359; 792 NW2d 686 (2010). To establish standing, the litigant must establish that he or she has a cause of action provided by law or otherwise had standing on the basis of a special injury or right that would be detrimentally affected in a manner different from the citizenry at large. *Id.* However, the Legislature can permissibly limit a person's standing; this "doctrine has been referred to as a requirement that a party possess 'statutory standing.' " *Miller v. Allstate Ins Co,* 481 Mich. 601, 607; 751 NW2d 463 (2008). The statutory standing inquiry is jurisdictional; if the complaining party does not have standing under the statute, the trial court will lack jurisdiction to reach the merits of the claim. *Id.* at 608, 612 (noting that statutory standing is jurisdictional and, because only the Attorney General has standing to pursue a claim that a corporation is improperly incorporated, the trial court should not have considered the merits of Allstate's claim).

The Legislature has provided a statutory scheme for determining the paternity of children born out of wedlock with the Paternity Act. See MCL 722.711 *et seq.* Under that act, a father—among others—may bring an action in the Circuit Court to establish the paternity of a child. MCL 722.714(1). A child born to a married woman is, however, considered to be the product of the marriage. See *In re KH,* 469 Mich. 621, 634; 677 NW2d 800 (2004) ("The presumption that children born and conceived during a marriage are the issue of that marriage is deeply rooted in our statutes and case law."). Because the Paternity Act applies only to children born out of wedlock,[3] one cannot bring a suit to establish the paternity of a child born to a married woman unless there has been a prior court determination that the child was not the issue of the marriage. See *id.* at 635; see also *Girard v. Wagenmaker,* 437 Mich. 231, 252; 470 NW2d 372 (1991) (holding that a putative father cannot challenge the legitimacy of a child born to a marriage under the paternity act or the custody act absent a prior determination that the child was not the issue of the marriage). In addition to this limitation, the Legislature has provided that a putative father cannot bring a paternity action where the paternity of the child has already been legally established: "An action to determine paternity shall not be brought under this act if the child's father acknowledges paternity under the acknowledgement of parentage act, or if the child's paternity is established under the law of another state." MCL 722.714(2).

***4** In this case, Bazzi sued to establish his paternity over a child that was not born to a married woman. In addition to allegations to establish grounds for his belief that he is in fact the child's biological father, Bazzi alleged that Macaulay had not taken any action—to his knowledge—to establish the child's paternity. As pleaded, Bazzi established his standing to pursue a paternity claim under the Paternity Act. See *Altman v. Nelson,* 197 Mich.App 467, 475–477; 495 NW2d 826 (1992) (noting that a putative father need only plead facts that, if true, would establish his standing to sue under the paternity act in order to properly invoke the trial court's jurisdiction). As such, the trial court had jurisdiction over Bazzi's suit.

With her motion to dismiss, Macaulay challenged Bazzi's standing. And Macaulay appears to be entitled to summary disposition in her favor under MCR 2.116(C)(5), because the child's paternity has already been established through what appears to be a valid affidavit of parentage. See MCL 722.714(2). However, the mere filing of her motion to dismiss for lack of standing did not establish that Bazzi actually lacked standing and did not divest the trial court of jurisdiction; Bazzi's standing remains and the trial court retains jurisdiction over Bazzi's suit. As this Court has recognized, once a trial court has jurisdiction over a properly pleaded paternity claim, a trial court does not lose jurisdiction even when it acts in error:

> Where jurisdiction of the subject matter and the parties exist, errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, do not render the judgment void; until the judgment is set aside, it is valid and binding for all purposes and cannot be collaterally attacked. Once jurisdiction of the subject matter and the parties is established, any error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends is error in the exercise of jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made.
>
> If the court has jurisdiction of the parties and of the subject matter, *it also has jurisdiction to make an error.* [*Altman,* 197 Mich.App at 473 (citations omitted) (emphasis added).]

Here, the trial court has jurisdiction over Bazzi's paternity claim until such time as it makes a judicial determination that Macaulay is entitled to dismissal under MCL 2.116(C)(5). But it has not made such a determination. Indeed, it specifically stated that it was neither denying nor granting Macaulay's motion to dismiss for lack of standing. Instead, the trial court determined that it was in the best interest of the child to hold Macaulay's motion in abeyance pending further limited discovery; specifically, an investigation into the nature of the relationship between Bazzi and the child after the child's birth and into the background behind the execution of the affidavit that Macaulay submitted with her motion. Thus, the allegations in Bazzi's complaint remain unrebutted—for the time being—and the court retained jurisdiction over the suit. See *Altman,* 197 Mich.App at 477–479 (stating that the allegations in the complaint were sufficient to establish the plaintiff's standing and, therefore, the trial court erred when it determined that the orders that it entered were void as an improper exercise of jurisdiction).

C. THE STAY

***5** Although Macaulay framed her claim of error on appeal in terms of standing and jurisdiction, her real claim of error

is that the trial court should not have held her motion in abeyance. A trial court has the inherent authority to control the progress of a case. See MCR 1.105; MCR 2.401; see also *People v. Grove,* 455 Mich. 439, 470; 566 NW2d 547 (1997) ("Optimum service to the public, to victims, witnesses, jurors, litigants, and to counsel mandates that trial judges have the authority and discretion to manage dockets. The interplay between MCR 2.401 and MCR 6.001 provides for such efficient management, while allowing judges the flexibility to exercise their discretion appropriately, given the circumstances of an individual case."). And we conclude that this inherent authority includes the discretion to hold a motion in abeyance.

On appeal, Macaulay did not directly address the trial court's decision to exercise its discretion to hold her motion in abeyance pending further discovery. For that reason, we conclude that she has abandoned any claim of error in that regard. *Chen v. Wayne State University,* 284 Mich.App 172, 206–207; 771 NW2d 820 (2009) (stating that the failure to argue and support a claim of error constitutes the abandonment of that claim on appeal). Nevertheless, even if Macaulay's brief could be said to raise such a claim of error, on this record, we cannot conclude that the trial court abused its discretion when it elected to hold Macaulay's motion in abeyance pending further discovery.

This Court has recognized that it is normally inappropriate for a trial court to grant summary disposition before the parties have had a chance to conduct discovery. *Prysak v. R L Polk Co,* 193 Mich.App 1, 11; 483 NW2d 629 (1992). This is especially important when the grounds for the motion are founded on facts that are in dispute. See *Marilyn Froling Revocable Trust v. Bloomfield Hills Country Club,* 283 Mich.App 264, 292; 769 Nw2d 234 (2009). In such cases, a trial court is warranted in proceeding only when further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Id.*

A motion under MCR 2.116(C)(5) tests the plaintiff's capacity to bring the suit. In reviewing such a motion, the trial court must consider the pleadings, affidavits, and other documentary evidence. *Aichele v. Hodge,* 259 Mich.App 146, 152; 673 NW2d 452 (2003). And whether a party has standing is a matter of applying the law to the *established facts*. See *McHone,* 239 Mich.App at 676. Accordingly, a trial court's decision to grant a motion under MCR 2 .116(C)(5) should only follow if the undisputed facts establish that the complaining party does not have standing.

In this case, Macaulay claims that there is a valid affidavit of parentage establishing the paternity of the child. If this is true, then she would be entitled to the dismissal of Bazzi's suit because he would lack standing to bring a paternity suit. See MCL 722.714(2). However, MCL 722.714(2) refers to an acknowledgment of paternity under the acknowledgement of parentage act. See MCL 722.1001 *et seq.* That is, the paternity must have been established in compliance with all the provisions of that act. A man acknowledges that he is the natural father of a child, if he "joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgement of parentage." MCL 722.1003(1). In order to be valid, the acknowledgement must be signed by the mother and the father and notarized. MCL 722.1003(2). The acknowledgement must contain certain provisions, see MCL 722.1007, and must be filed, see MCL 722 .1005. Although the affidavit of parentage appears valid on its face, and would normally be sufficient to sustain a motion for summary disposition under MCL 2.116(C)(5), it is possible that further discovery will reveal evidence tending to establish that the affidavit is not valid under the acknowledgement of parentage act.[4] If that were the case, then Macaulay might not be entitled to the relief requested under her motion. It must also be remembered that Macaulay filed her motion before the parties had conducted *any* discovery. Indeed, Bazzi was apparently completely blind-sided by Macaulay's claim that Szakaly was the child's real father. Under these circumstances, we cannot conclude that the trial court's decision to postpone consideration of Macaulay's motion for summary disposition pending further limited discovery fell outside the range of reasonable and principled outcomes. *Borowsky,* 273 Mich.App at 672.

D. THE DECISION TO APPOINT A GUARDIAN AD LITEM

***6** We also cannot conclude that the trial court erred when it appointed a guardian ad litem to conduct an investigation and make recommendations on behalf of the child. An action to establish paternity may include an order concerning custody of the child as provided under the child custody act. See MCL 722.717b (stating that the trial court must include specific provisions for custody and parenting time, as provided under the child custody act, in any order of filiation). Further, trial courts may appoint a guardian ad litem to make recommendations and represent the best interests of the child. See MCL 722.27(1) and (1)(d) (providing that a trial court

may appoint a guardian ad litem in an action arising under the child custody act or another action that incidentally involves a child custody dispute when it is in the best interests of the child); see also MCL 722.24(2); MCR 3.916(A); MCR 2.201(E). Hence, the trial court had the discretion to appoint a guardian ad litem to conduct an investigation and make recommendations if it determined that it was in the child's best interest to do so.

In this case, Bazzi has made allegations that he acted as the child's father for a considerable period of time, provided for the child financially, and established a bond with the child. Despite this, Macaulay has apparently severed this relationship and refused Bazzi's aid. Similarly, Bazzi has alleged that the man that Macaulay claims to be the child's natural father is married, has denied paternity to the minor child, and has stated that he wants nothing to do with the child. Accordingly, there is the distinct possibility that Macaulay has not only refused Bazzi's efforts to provide for the child, but also has not sought support from Szakaly. A child has the right to receive support from *both* parents. See *Borowsky,* 273 Mich.App at 672–673 ("It is well settled that children have the right to receive financial support from their parents and that trial courts may enforce that right by ordering parents to pay child support."). And a mother cannot waive that right. See *Tuer v. Niedoliwka,* 92 Mich.App 694, 699–700; 285 NW2d 424 (1979) (noting that paternity proceedings are for the benefit of children born out of wedlock and that a mother cannot waive her child's right to support). Given the allegations, the trial court could reasonably conclude that Macaulay was not acting in the best interests of her child. See *id.* at 699 (stating that a child's natural guardian "has no authority to do an act which is detrimental to the child."). Under these circumstances, the trial court could reasonably conclude that a neutral third-party—a guardian ad litem—should be appointed to ensure that the child's interests were adequately represented and to make recommendations to the court with regard to what might be in the child's best interest.

We are moreover untroubled by Macaulay's claims that the trial court is essentially enabling Bazzi to collaterally attack the validity of the affidavit of parentage through the appointment of a guardian ad litem. Macaulay correctly notes that a putative father cannot challenge the validity of an affidavit of parentage. See MCL 722.1011(1). Nevertheless, the acknowledgement of parentage act clearly provides that the *child* does have the right to challenge the validity of an affidavit of parentage on the basis of—among other things—fraud, misrepresentation, or misconduct. See MCL 722.1011(1), (2). And nothing within the acknowledgment of parentage act prevents a trial court from appointing a next friend to pursue such a claim on behalf of a minor child as part of a paternity suit. See MCR 2.201(E)(2) (authorizing trial courts to appoint a next friend for a minor). Indeed, the acknowledgement of parentage act provides that a person who has standing may challenge the validity of affidavit of parentage with a motion in "an existing action for child support, custody, or parenting time" and all the provisions of the acknowledgement of parentage act "apply as if it were an original action." MCL 722.1011(1). Because Bazzi's paternity claim is a type of suit for custody and parenting time, if the guardian ad litem returns with a recommendation that the trial court appoint a next friend to challenge the validity of the affidavit of parentage, there is nothing to preclude the trial court from doing so.

***7** In addition, although Macaulay appears to anticipate that the guardian ad litem will return with unfavorable recommendations, the trial court has not yet taken any actions with regard to the guardian ad litem's recommendations because the guardian ad litem has not yet conducted an investigation or made recommendations. It is quite possible that Macaulay will be the beneficiary of the guardian ad litem's investigation and recommendations. The guardian ad litem might plausibly conclude that Szakaly is the natural father and that *he* should be held responsible for the support and maintenance of the child. As such, the trial court might in the end grant Macaulay's motion. In any event, if Macaulay feels aggrieved by the decisions that the trial court ultimately makes, she can appeal those decisions at that time.

The trial court did not abuse its discretion when it decided to appoint a guardian ad litem to investigate and submit recommendations with regard to the child's best interests. *Borowsky,* 273 Mich.App at 672.

There were no errors warranting relief.

Affirmed.

OWENS, J. (dissenting).

***7** I respectfully dissent. I would reverse the trial court's determination that it had the authority to appoint a guardian ad litem (GAL) to investigate the affidavit of parentage signed by Mr. Szakaly and I would find that the trial court erred by failing to grant defendant's motion for summary disposition upon defendant's presentation of the signed affidavit of

parentage. Plaintiff did not have standing under MCL 722.714 to bring this action to determine paternity. Any decision to the contrary violates the clear language of MCL 722.714(2): "[a]n action to determine paternity ***shall not*** be brought under this act if the child's father acknowledges paternity under the acknowledgment of parentage act ...." (emphasis added). The word " 'shall' is mandatory; it expresses a directive, not an option." *Wolverine Power Supply Coop, Inc v. DEQ,* 285 Mich.App 548, 561; 777 NW2d 1 (2009).

The primary purpose of statutory construction is to determine and give effect to the Legislature's intent. *Bush v. Shabahang,* 484 Mich. 156, 166; 772 NW2d 272 (2009). To determine that intent, this Court looks first to the language of the statute. *Id.* at 166–167. It must interpret the language in accordance with the Legislature's intent and, to the extent it can, give effect to every phrase, clause and word used. *Id.* at 167. It must read and construe the language in its grammatical context, unless it is clear that the Legislature had a different intent. *Id.*

The specific provision upon which defendant relies, MCL 722.714(2), appears clear and unambiguous, although we must consider what the Legislature meant by "the child's father." "Father" is not defined in the Paternity Act, MCL 722.711. However, it is defined in the Acknowledgment of Parentage Act, MCL 722.1001 *et seq.* Under that act, "father" is "the man who signs an acknowledgment of parentage of a child." MCL 722.1002(d).

***8** MCL 722.1003 provides:

> (1) If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage.
>
> (2) An acknowledgment of parentage form is valid and effective if signed by the mother and father and those signatures are notarized by a notary public authorized by the state in which the acknowledgment is signed. An acknowledgment may be signed any time during the child's lifetime.

The six-year-old child in this case was born out of wedlock. Szakaly signed the acknowledgment of parentage with defendant the day after the child was born and is therefore considered the child's natural father. MCL 722.1003(1).

The statute provides for revocation of an acknowledgment of parentage ***only*** by certain persons:

> (1) The *mother* or the *man who signed the acknowledgment, the child* who is the subject of the acknowledgment, *or a prosecuting attorney* may file a claim for revocation of an acknowledgment of parentage.
>
> (2) A claim for revocation shall be supported by an affidavit signed by the claimant setting forth facts that constitute 1 of the following:
>
> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress in signing the acknowledgment.
>
> (3) If the court finds that the affidavit is sufficient, the court may order blood or genetic tests at the expense of the claimant, or may take other action the court considers appropriate. The party filing the claim for revocation has the burden of proving, by clear and convincing evidence, that the man is not the father and that, considering the equities of the case, revocation of the acknowledgment is proper. [MCL 722.1011; emphasis added.]

Based on these two statutes, plaintiff may neither bring an action for paternity nor seek revocation of the acknowledgment of parentage executed by defendant and Szakaly. Plaintiff does not have standing and the trial court therefore erred in failing to dismiss this action and in appointing a GAL.

As stated by the United States Supreme Court, "constitutionally protected parental rights do not arise simply because of a biological connection between a parent and a child; rather, they require more enduring relationships." *Lehr v. Robertson,* 463 U.S. 248, 260–261, 103 S Ct 2985, 77 L.Ed.2d 614 (1983). Indeed, as this Court noted in *Hauser v. Reilly,* 212 Mich.App 184, 188–189; 536 NW2d 865, even "a rapist has a biological link with a child conceived by that rape." In *Sinicropi v. Mazurek,* 273 Mich.App 149, 165, 729 NW2d 256 (2006), this Court stated unequivocally, "[i]f an acknowledgment of parentage has been properly executed,

subsequent recognition of a person as the father in an order of filiation by way of a paternity action cannot occur unless the acknowledgment has been revoked." The *Sinicropi* Court held that the alleged biological father had no standing to pursue his paternity action as long as the acknowledgment of parentage was unrevoked, and MCL 722.1011(1) clearly identifies only four parties who can seek revocation: the mother, the man who signed the acknowledgment, the child, and the prosecuting attorney. Here, the child already has a legal father: Mr. Szakaly. Szakaly is not even a party to these proceedings. As stated by our Supreme Court in *In re KH,* 469 Mich. 621, 624, 677 NW2d 800 (2004), "where a legal father exists, a biological father cannot properly be considered even a putative father." Plaintiff cannot, under Michigan law, challenge the acknowledgment of parentage. The trial court was required to dismiss his claim ab initio upon presentation to the court of a facially valid acknowledgment of parentage. It was improper for the trial court to appoint a GAL and then hold these proceedings in abeyance while the GAL investigated whether grounds existed to file an action under a statute other than the Paternity Act; in this case, the Acknowledgment of Parentage Act.

***9** In this case, of the four people who have statutory standing to challenge the validity of the acknowledgment of parentage, neither the mother, nor the man who signed the acknowledgment, nor the child, nor the prosecuting attorney, has done so. It could be argued that because the child cannot file an action herself while a minor, the language in the statute permitting the child to challenge the validity of the acknowledgment would be surplusage if a court in another action could not appoint a GAL to act for the child. This argument would fail for several reasons. A guardian appointed for a child under the Estates and Protected Individuals Code (EPIC) (MCL 700.1101 et seq.) could file on behalf of the child or the child, once an adult, could file on her own behalf. It may be argued that the child would then no longer be a "child" under the act and it would be too late to file. In using the term "child", rather than "minor", the legislature has clearly indicated that "child" refers not to age or minority status, but to identify the person who is the subject of the acknowledgment of parentage. This is also shown by the language of MCL 722.1003(2) wherein the statute provides that "an acknowledgment of parentage may be signed any time during the child's lifetime." The statute does not limit the time for executing an acknowledgment of parentage to the first eighteen years of the child's life.[1]

Here, the majority would permit the self-proclaimed biological father to circumvent the limitation in MCL 722.1011(1) on who may challenge an acknowledgment of parentage by permitting a paternity action to continue long enough for a GAL appointed in the paternity action to conduct discovery and file an action under the Acknowledgment of Parentage Act challenging the validity of the acknowledgment of parentage. Such a paternity proceeding is clearly contrary to law and must be dismissed for lack of standing upon the presentation to the court of either a facially valid certificate of marriage showing that the mother was married at the time of conception or birth of the child, or a facially valid acknowledgment of parentage. The reason the court may appoint a GAL for a child under the Paternity Act is to protect the child's interests in the paternity action, not to facilitate a "fishing expedition" with an eye to a possible suit under another statute, such as the Acknowledgment of Parentage Act.

If the alleged biological father believes a fraud has been committed, he is free to urge the prosecuting attorney to challenge the acknowledgment of paternity.

I would reverse and remand this case for dismissal.

All Citations

Not Reported in N.W.2d, 2011 WL 5299468

Footnotes

1 Because the parties had not conducted discovery as of the time of this appeal, in order to provide some background, we have drawn the facts from the parties' submissions to this Court and the lower court.

2 See *Bazzi v. Macaulay,* unpublished order of the Court of Appeals, entered December 20, 2010 (Docket No. 299239).

3 The paternity act repeatedly refers to the "child." The term child is defined to mean a child born out of wedlock. See MCL 722.711(b). And the phrase child born out of wedlock means a child "begotten and born to a woman who was not married

from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a).

4 For example, if Szakaly were to disavow the signature on the affidavit, that evidence would tend to show that the affidavit was not made in compliance with the acknowledgment of parentage act.

1 One may question why a person would sign an acknowledgement of parentage after a child reached the age of eighteen years. The reasons are varied and undoubtedly the same as the reasons why the legislature provided for the adoption of an adult (MCL 710.43(3), MCL 710.56(3)): to legally recognize an emotional bond, for purposes of inheritance, etc.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Stephen D. EVANS and Ernest G. Nassar, Plaintiffs-Appellants,

v.

DETROIT EDISON, Defendant-Appellee.

No. 239077.
|
May 15, 2003.

Before: MARKEY, P.J., and CAVANAGH and HOEKSTRA, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiffs appeal as of right the trial court's grant of summary disposition in defendant's favor on the ground that the Michigan Public Service Commission (MPSC) had primary jurisdiction over this action against defendant, a public utility. We affirm.

In July of 1998, a thunderstorm caused tree damage, downed power lines, and widespread power outages in plaintiffs' neighborhood and the surrounding areas. Defendant held an easement along the back of plaintiffs' property through which its power lines were located. As a consequence of the magnitude of damage caused by the storm, defendant implemented its catastrophic storm response procedures which included its policy to cut tree debris into manageable sizes and leave it in the easement for removal by the property owner. When performing routine power line clearance maintenance, defendant removes associated tree debris. However, when defendant responds to catastrophic storm damage its "crews must work quickly to remove downed wire hazards and restore power to thousands of customers;" therefore, such debris is left to be disposed of by the property owner.

Plaintiffs filed the instant "class" action after they were required to gather and move such debris to their street-side curb for removal by the Department of Public Works. Plaintiffs claimed that they were injured "by the loss of the use and enjoyment of their property, and incurred the burden and cost of clearing, collecting, and removing said debris." Plaintiffs requested the lower court to "enter an order compelling Defendant to change its maintenance policy subsequent to 'storm damage' of not removing maintenance debris from property burdened by or abutting easements carrying Defendant's electrical transmission lines, to one of removal of cut or fallen tree parts and other debris in all maintenance procedures without distinction, restoring property of Plaintiffs and members of their class to a status quo ante condition ." Plaintiffs also requested that the court grant "other relief as may be deemed just and equitable," as well as costs and attorney fees.

In response to plaintiffs' complaint, defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(7), arguing that the doctrine of primary jurisdiction applied and required the trial court to defer the action for adjudication by the MPSC, the administrative agency with exclusive regulatory authority over public utilities. See M.C.L. § 460.6. In response to defendant's motion, plaintiffs argued that their complaint sounded in tort and, thus, the doctrine of primary jurisdiction was inapplicable. The trial court agreed with defendant that plaintiffs' "storm debris policy" claim, which sought to compel defendant to modify this policy, must be filed with the MPSC. The trial court stayed plaintiffs' damage claim contingent on plaintiffs filing their claim with the MPSC within forty-five days, after which, if plaintiffs failed to file, the entire action would be dismissed without prejudice upon defendant's motion. Thereafter, plaintiffs failed to file their claim with the MPSC and their complaint was dismissed. Plaintiffs appeal.

***2** Plaintiffs argue that the trial court, as a court of general jurisdiction, was the proper forum to adjudicate plaintiffs' claims. We disagree. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v. Dep't of Transportation,* 456 Mich. 331, 337; 572 NW2d 201 (1998). The applicability of the primary jurisdiction doctrine is, likewise, reviewed de novo on appeal as a question of law. *Michigan Basic Prop Ins Ass'n v Detroit Edison Co,* 240 Mich.App 524, 528; 618 NW2d 32 (2000).

In their complaint, plaintiffs claimed that defendant's maintenance procedures included "negligently and arbitrarily dumping ... debris" on "the property of plaintiffs and others of their class" causing them to be "damaged by the loss of the use and enjoyment of their property, and incurred the burden and cost of clearing, collecting, and removing said debris." However, plaintiffs' claim arose after a storm struck their area and defendant implemented its catastrophic storm response procedures which provided that cut tree debris be left in the easement for removal by the property owner. Therefore, any "negligent" and "arbitrary" dumping of tree debris by defendant occurred as a consequence of its catastrophic storm response policy.

MCL 460.6 provides, in pertinent part:

The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state.... The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities....

The doctrine of primary jurisdiction recognizes this broad grant of authority to the MPSC and applies "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body...." *Travelers Ins Co v. Detroit Edison Co,* 465 Mich. 185, 197-198; 631 NW2d 733 (2001) (citations omitted).

As a public utility, defendant is subject to the jurisdiction of the MPSC and must abide by the administrative rules promulgated by the MPSC. See 1992 MR 10, R 460.2101. Under MPSC Rule 505, defendant was required to "adopt a program of maintaining adequate line clearance" that included tree trimming. 1996 MR 4, R 460.3505. Defendant claims that its catastrophic storm response policy was adopted, pursuant to 1992 MR 10, R 460.2105, as part of its line clearance program. MPSC Rule 5 provides:

A utility may adopt additional rules governing relations with its customers that are reasonable and necessary and that are not inconsistent with these rules. The utility's rules shall be an integral part of its tariffs and shall be subject to approval by the commission. [Rule 460.2105.]

***3** Whether defendant's catastrophic storm response policy was appropriately adopted as part of its mandated line clearance program is the decisive question presented by plaintiffs' case and is properly within the jurisdiction of the MPSC.

In determining whether a court should defer to an administrative agency under the doctrine of primary jurisdiction, the court generally considers (1) "the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue," (2) "the need for uniform resolution of the issue," and (3) "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities." *Rinaldo's Const Corp v. Michigan Bell Tel Co,* 454 Mich. 65, 71; 559 NW2d 647 (1997) (citation omitted). Here, all three criteria weigh in favor of deferral to the MPSC. First, defendant was allegedly acting under the MPSC's mandate that it implement a line clearance program when it developed and instituted its catastrophic storm response policy, implicating the MPSC's unique expertise on its regulatory scheme. Second, the need for uniformity and consistency is apparent because of the widespread impact of the decision on other customers, as well as on defendant's storm response efforts. Third, plaintiffs' case implicates the MPSC's regulatory responsibilities in that it presents an issue relating to defendant's "obligations to [its] customers as governed by the regulatory scheme." *Michigan Basic Prop Ins Ass'n, supra* at 538. Therefore, we agree with the trial court that the MPSC was the proper forum to adjudicate plaintiffs' claim against defendant. Consequently, we also agree with the trial court's decision to stay further proceeding until the MPSC rendered its decision as to whether defendant's catastrophic storm response policy comported with its regulatory scheme. Accordingly, because plaintiffs failed to file their action with the MPSC, summary disposition was properly granted in defendant's favor.

Affirmed.

All Citations

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Kevin REFFITT, Pencon, Inc., and Ronald Reffitt, Sr., Plaintiffs-Appellants,

v.

Gerard MANTESE, Mantese Honigman, PC, Kent Gerberding, Running Wise & Ford, PLC, and Dawn Bachi-Reffitt, Defendants-Appellees.

No. 346471
|
October 15, 2019

Oakland Circuit Court, LC No. 2018-166093-CB

Before: Fort Hood, P.J., and Sawyer and Shapiro, JJ.

Opinion

Per Curiam.

***1** This case stems from plaintiff Kevin Reffitt and defendant Dawn Bachi-Reffitt's divorce. Plaintiffs' claims of malicious prosecution, abuse of process, and tortious interference with business relationships are based on an action brought by Dawn in federal court asserting violations of the Racketeer Influence and Corrupt Organizations Act (RICO), 18 USC 1961 *et seq.* for plaintiffs' alleged scheme to conceal assets from the marital estate. The federal court granted plaintiffs a dismissal of the case, and awarded them sanctions on the basis that Dawn's complaint was frivolous. Plaintiffs then brought the instant action against Dawn and the attorneys representing her in the federal case. The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim). Plaintiffs appeal, and for the reasoned stated below, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. FACTS AND PROCEDURE

Kevin and Dawn divorced in April 2013 pursuant to a consent judgment of divorce (JOD) entered in Grand Traverse family court.[1] Kevin asserted in those proceedings that he sold his stock in plaintiff Pencon, Inc., to his father, plaintiff Ronal Reffitt, Sr., for $150,000 before the divorce proceedings were initiated. Kevin and Dawn divided the proceeds of the stock sale equally in their settlement.

In June 2014, Dawn filed a motion for relief from judgment arguing that Kevin failed to disclose two assets in the divorce case: (1) proceeds from a life insurance policy resulting from his brother's death; and (2) that his ownership interest in Pencon was worth over $1 million. The family court held that the motion was time-barred.

In October 2014, Dawn filed an independent action in Grand Traverse circuit court claiming fraud based on the same allegations regarding Kevin's failure to disclose. The circuit court dismissed the complaint without prejudice, concluding that the alleged fraud occurred during the divorce proceedings and therefore must be raised before the family court.

In January 2015, Dawn filed in the family court a motion to enforce the JOD concerning the concealed life insurance policy asset. The court eventually granted Dawn summary disposition after determining that Kevin concealed or failed to disclose the life insurance policy and proceeds thereof. The JOD provided that if either party "concealed assets" the circuit court would award the other party the "entire value" of those assets. Accordingly, in April 2016 the court entered an order awarding Dawn the full value of the life insurance proceeds, $1.5 million.[2]

***2** In March 2017, Dawn filed suit against Kevin, his father, and Pencon (collectively "plaintiffs") in the United States District Court for the Western District of Michigan.[3] Dawn alleged RICO violations based on plaintiffs' "scheme to defraud Dawn of millions of dollars, through a pattern of mail fraud and wire fraud," i.e., "racketeering activity under RICO." The counts pertained only to plaintiffs' alleged efforts to keep Dawn from receiving a share of Kevin's Pencon stock or the actual value thereof. But Dawn also relied on the concealment of the life insurance policy in support of her claims. In addition to the RICO violations, Dawn alleged various state-law claims such as fraud and unjust enrichment. Dawn was represented in the federal action by defendant Gerard Mantese and defendant Mantese Honigman PC; defendant Running, Wise & Ford PLC

provided co-counsel, including member attorney defendant Kent Gerberding (collectively "defendants").

After suit was filed, Mantese Honigman sent letters to plaintiffs' family members and business associates informing them of their continuing obligation to preserve evidence relating to Kevin and Dawn's dispute. The letters are substantially similar. They remind the recipients of previous correspondences outlining their obligation to preserve evidence, inform them of the federal action and explain that it involves "a wide-ranging and long active scheme to defraud various individuals."

In December 2017, the federal court granted plaintiffs' motion to dismiss Dawn's complaint under FRCP 12(b)(1) (lack of subject-matter jurisdiction) and (b)(6) (failure to state a claim). The court declined to reach the merits of the RICO claims, but instead granted the motion on numerous procedural grounds. The court rule that (1) it was precluded under Michigan law from addressing any allegation of intrinsic fraud in the divorce proceedings; (2) the doctrine of res judicata barred Dawn's claims; (3) the JOD's release-of-claims provision precluded Dawn's complaint; and (4) Dawn failed to establish RICO standing. The court also imposed sanctions, concluding that Dawn's claims violated FRCP 11(b)(2) (prohibiting frivolous claims) "because they are contrary to both the facts and the law and are not otherwise supported by a nonfrivolous legal argument."[4] Dawn's appeal to the Sixth Circuit is still pending.

In June 2018, plaintiffs brought the instant action, asserting claims of malicious prosecution, abuse of process, and tortious interference on the basis of the frivolous federal lawsuit and the corresponding preservation letters. Plaintiffs averred that the federal litigation and the preservation letters were intended to damage their reputation, to gain leverage in the divorce action and to interfere with their business relationships. They specifically alleged that the letters were sent with malicious intent and without a legitimate purpose, and that they lost business relationships as a result.

In July 2018, defendants moved for summary disposition under MCR 2.116(C)(8) for failure to state a claim. They contended that the malicious prosecution claim had not accrued because Dawn's appeal was still pending. They also argued that plaintiffs had not alleged a "special injury" necessary to support a claim for malicious prosecution. As for abuse of process, defendants argued that plaintiffs had not alleged that a "proper legal procedure" had been used for a collateral purpose. They relied on caselaw holding that the filing of a claim is not enough; abuse of process must pertain to an action taken after the filing of a suit. Defendants asserted that the preservation letters were not sent pursuant to any judicial process. Finally, defendants argued that the filing of a lawsuit and corresponding preservation letters were not a sufficient basis for a tortious interference claim. Dawn filed a concurrence and joinder in the motion for summary disposition.

***3** In response, plaintiffs did not dispute that their malicious prosecution claim had not yet accrued given the pending appeal, but argued that any dismissal of the claim should be without prejudice; they also requested the opportunity to file an amended complaint. As for the merits, plaintiffs maintained that they had stated a claim in all three causes of action. They argued that defendants' malicious intent could be inferred from the filing of a frivolous lawsuit, or at least created a question of fact on that matter. With respect to abuse of process, plaintiffs contended that defendants failed to use "legitimate discovery" and instead sent the preservation letters outside the "regular process of litigation." Plaintiffs also argued that the issuance of "bogus" preservation letters was enough to support a claim for tortious interference. Finally, they contended that Dawn's joinder in defendant's motion was improper and not contemplated by court rules. Defendants filed a reply brief addressing plaintiffs' arguments.

The trial court decided the motion without hearing oral argument. In a written opinion, the court first determined that the premature malicious prosecution claim should be dismissed with prejudice and that the filing of an amended complaint would be futile when Dawn's appeal in federal court was still pending. The court also found that plaintiffs had failed to state a claim for malicious prosecution because they "have not alleged injuries that qualify as 'special injury' for the purposes of a malicious prosecution claim." The court next determined that plaintiffs failed to state a cognizable claim for abuse of process because the filing of lawsuit is not an improper use of process and the sending of preservation letters did not involve use of legal process. As for tortious interference, the court found that the filing of lawsuit does not support such a claim. The court continued, "Further, the allegations are not sufficient to show that the sending of the preservation letters was done with malice and without justification." Finally, regarding Dawn's joinder in defendants' motion, the court concluded that plaintiffs did not

demonstrate that the arguments raised by defendants did not apply equally to Dawn.

II. ANALYSIS

As to each cause of action, plaintiffs argue that the trial court erred in determining that they failed to state a claim. We affirm the trial court's grant of summary disposition, dismissing the claims for malicious prosecution and abuse of process. However, we reverse the court's ruling that plaintiffs failed to state a claim for tortious interference.[5]

A. MALICIOUS PROSECUTION

Plaintiffs argue that the trial court erred in dismissing their malicious prosecution claim with prejudice on the basis that the claim had not yet accrued given Dawn's pending appeal in the underlying action. We decline to address that issue, however, because we conclude that the trial court properly dismissed the claim with prejudice on the grounds that plaintiffs failed to plead a special injury.

In order to establish malicious prosecution of a civil proceeding, the plaintiff must show that (1) the prior proceedings terminated in the plaintiff's favor; (2) there was no probable cause for the prior proceedings; (3) the prior proceedings were brought with malice, i.e., "a purpose other than that of securing the proper adjudication of the claim"; and (4) a "special injury" resulted from the prior proceedings. *Young v. Motor City Apartments Ltd.*, 133 Mich. App. 671, 675; 350 N.W.2d 790 (1984), citing *Friedman v. Dozorc*, 412 Mich. 1, 48; 312 N.W.2d 585 (1981).

***4** In *Friedman*, the Supreme Court declined to depart from the "English rule" requiring a special injury for this tort. A special injury has historically been limited to three categories: injury to one's fame, injury to one's person or liberty, and injury to one's property. *Id.* at 32-34. A review of the Supreme Court's caselaw showed that malicious prosecution claims have only been recognized where a special injury, or "an interference with the plaintiff's person or property," had occurred. *Id.* at 35. The Court found that there was no allegation of special injury in that case, which involved a doctor suing the attorneys that unsuccessfully litigated a medical malpractice claim against the doctor. *Id.* at 16, 34.

In *Barnard v. Hartman*, 130 Mich. App. 692, 698; 344 N.W.2d 53 (1983), we held that damage to professional reputation does not constitute a special injury. That case involved a court reporter who had been charged in the prior proceedings with preparing a false and misleading transcript. *Id.* at 693. We noted that *Friedman* did not explain whether an injury to fame was still a viable category of special injury or "whether damage to one's professional reputation" constituted a special injury. *Id.* at 694. But we read *Friedman* as implicitly rejecting those damages as a sufficient basis for a special injury. See *id.* at 694, 696. We also noted the modern view that a special injury "must be some injury which would not necessarily occur in all suits prosecuted for similar causes of action." *Id.* at 695, citing 52 Am Jur 2d, Malicious prosecution, § 11, pp. 194-195. We concluded that the plaintiff did not plead a special injury because "[t]he damage to her professional reputation on which plaintiff relies is the damage which would ordinarily result" in the type of action brought by the defendant. *Id.* at 696.

In *Young*, 133 Mich. App. at 677, we further held that "[i]nterference with one's usual business and trade, including the loss of goodwill, profits, business opportunities and the loss of reputation, is not cognizable as special injuries." In that case the plaintiffs were attorneys who had been sued in a prior action for malpractice by their former clients. *Id.* at 674. We determined that the alleged business damages "do not differ substantially from the claims of the physician in *Friedman*, and fall short of being equivalent to a seizure of property." *Id.* at 677.

In their appellate brief, plaintiffs do not address the trial court's ruling that they failed to plead a special injury. When a party fails to address the reason for the trial court's decision, this Court need not consider granting appellate relief. *Derderian v. Genesys Health Care Sys.*, 263 Mich. App. 364, 381; 689 N.W.2d 145 (2004). In their reply brief, plaintiffs argue that the "destruction of both personal and business relationships, including lost profits," constitutes a special injury. As explained, however, loss of profits and business opportunities is not enough to show a special injury. *Young*, 133 Mich. App. at 677. And the alleged loss of personal relationships is substantially similar to a claim of damage to reputation, which does not constitute a special injury.[6] *Barnard*, 130 Mich. App. at 698. Plaintiffs do not attempt to distinguish either *Barnard* or *Young* or explain why they suffered a unique injury in this case. For those reasons, we affirm the dismissal of the malicious prosecution claim

with prejudice on the grounds that plaintiffs failed to plead a special injury.[7]

B. ABUSE OF PROCESS

***5** Plaintiffs next argue that the trial court erred in ruling that they failed to state a claim for abuse of process. We disagree.

"Abuse of process is the wrongful use of the process of a court." *Lawrence v. Burdi*, 314 Mich. App. 203, 211; 886 N.W.2d 748 (2016) (cleaned up). "To recover upon a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding." *Friedman*, 412 Mich. at 30.

The trial court correctly concluded that the filing of a suit does not by itself support a claim for abuse of process. "A complaint [asserting an abuse of process] must allege more than the mere issuance of the process, because an 'action for abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue.' " *Dalley v. Dykema Gossett*, 287 Mich. App. 296, 322; 788 N.W.2d 679 (2010), quoting *Friedman*, 412 Mich. at 31. See also *Lawrence*, 314 Mich. App. at 211-212. This is what distinguishes abuse of process from malicious prosecution, i.e., "[a]buse of process is concerned with the wrongful use of process after it has been issued, while the tort of malicious prosecution is concerned with the wrongful issuance of process." 54 CJS, Malicious Prosecution, § 4, p 738.

Thus, plaintiffs' abuse of process claim necessarily turns on the sending of the preservation letters. Improper use of discovery devices can give rise to an abuse of process claim. In *Lawrence*, 314 Mich. App. at 213-214, for instance, we held that the plaintiff successfully stated a claim for abuse of process on the basis of requests for admissions that were wholly irrelevant to the underlying action. However, in that case there was "no doubt that filing requests to admit is an act of process ...." *Id.* at 213.

Here, the trial court found that sending preservation letters was not an act of process. Plaintiffs do not argue otherwise. Indeed, they seem to concede that defendants did not use judicial process in sending the preservation letters. They contend that the sending of the letters was "not part of the regular process of litigation" and that defendants should have used "legitimate discovery." Thus, plaintiffs seem to be arguing that defendants' decision to *not* use legal process, i.e., discovery devices, in the federal action supports their abuse of process claim. But they cite no authority in support of this novel theory, and the federal action was dismissed before any discovery occurred.

In the one case we found addressing the issue, the Colorado Court of Appeals held that the sending of preservation letters to third parties did not constitute a use of judicial process for purposes of an abuse of process claim.[8] *Active Release Techniques, LLC v. Xtomic, LLC*, 413 P.3d 210; 2017 COA 14 (Colo App., 2017). The court noted that the preservation letters related to the plaintiff's complaint, but reasoned,

> The letters were not, however, issued in conjunction with or as the result of a hearing or pleading before the court. They were sent prior to any court filing and independent of any court action or involvement, and there was no evidence that the court was asked to play any role in their issuance or enforcement. Therefore, we cannot conclude that they were a legal proceeding as contemplated by the abuse of process tort. [*Id.* at 214.]

***6** The same reasoning applies in this case. Defendants sent preservation letters before the federal complaint was filed. More letters were sent thereafter, but they did not require any court involvement. Thus, defendants did not need to file the federal action in order to send the letters, and plaintiffs have not identified any provision of the Federal Rules of Civil Procedures that mandates or event contemplates the sending of preservation letters. Accordingly, the trial court correctly granted summary disposition on the grounds that plaintiffs did not allege the improper use of a legal procedure.[9]

C. TORTIOUS INTERFERENCE

Plaintiffs also argue that the trial court erred in finding that they failed to sufficiently plead a tortious interference claim. We agree.

The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. *Cedroni Ass'n.,*

Inc. v. Tomblinson, Harburn Assoc., Architects & Planners Inc., 492 Mich. 40, 45; 821 N.W.2d 1 (2012). The third element requires the plaintiff to show that the defendant acted improperly. *Dalley*, 287 Mich. App. at 323. Thus, "in order to succeed under a claim of tortious interference with a business relationship, the plaintiffs must allege that the interferer did something illegal, unethical or fraudulent." *Early Detection Center, PC v. New York Life Ins. Co.*, 157 Mich. App. 618, 631; 403 N.W.2d 830 (1986). There are two different ways to allege an improper act. The plaintiff must allege either "the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *CMI Intern, Inc. v. Intermet Intern Corp.*, 251 Mich. App. 125, 131; 649 N.W.2d 808 (2002).

Plaintiffs no longer claim that the filing of the lawsuit supports a claim of tortious interference. See *Early Detection Center, PC*, 157 Mich. App. at 631 ("There is nothing illegal, unethical or fraudulent in filing a lawsuit, whether groundless or not."). They contend, however, that the preservation letters, sent in connection with a frivolous lawsuit, are sufficient to maintain a tortious interference action. They rely on *Winiemko v. Valenti*, 203 Mich. App. 411; 513 N.W.2d 181 (1994), in which we upheld a tortious interference award premised on an improper "lien letter" sent by an attorney to the plaintiff's client. The issue in that case appears to have been whether a claim of tortious interference could be maintained when it was *the plaintiff* who ended the business relationship with the client. See *id.* at 417. Still, the case lends some support to plaintiffs' position that an improper communication sent to a third party can form the basis of tortious interference claim.

Regardless, we conclude that plaintiffs have stated a cognizable claim for tortious interference. Sending a preservation letter is not wrongful per se, so plaintiffs expressly pleaded that the letters were sent with malice and without justification. The trial court concluded that plaintiffs had not set forth sufficient allegations in support of that theory. Viewing the complaint in a light most favorable to plaintiffs, however, there were specific allegations that reasonably informed defendants of the nature of the claim. See *Dalley*, 287 Mich. App. at 305. Plaintiffs alleged that the preservation letters served no legitimate purpose and they provided two supporting examples. First, defendants sent a letter to plaintiffs' accountant, who could not disclose any information given the accountant-client privilege. Second, defendants sent a letter to someone who had no involvement with the issues involved in the underlying action, i.e., plaintiffs' alleged scheme to defraud Dawn in the divorce proceedings. Thus, when the complaint is fairly read, it alleges that defendants sent preservation letters to plaintiffs' business associates[10] without any reason to believe that those individuals had evidence relevant to the federal action, but instead to indicate that plaintiffs were involved in "a wide-ranging and long active scheme to defraud various individuals." Accepting that allegation as true—as we must at this stage—the letters were sent without justification and with the sole intent to harm plaintiffs. Accordingly, plaintiffs set forth a cognizable claim for tortious interference.

***7** Defendants rely on *Dalley*, 287 Mich. App. 296, in support of their position that a preservation letter cannot support a tortious interference claim. In *Dalley*, the underlying action was a dispute between an insurance company and its agent. The company obtained a temporary restraining order (TRO) that required a computer consultant (the plaintiff) to make available to the insurance company all computer data that contained the company's records. *Id.* at 300. When served with the TRO, the plaintiff directed the agents to the hard drive containing the company's data. But the agents insisted on transferring data from all of the plaintiff's computers, which contained "highly personal information medical records, photographs, and tax returns." *Id.* at 302. We held that the plaintiff, who had been diagnosed with AIDS, stated viable claims for invasion of privacy and trespass, but affirmed summary disposition of the tortious interference claim based on the underlying litigation and the TRO. *Id.* at 324. We reasoned that there was nothing improper about the filing of a lawsuit, and "decline[d] to find that defendants' pursuit of the TRO amounts to illegal, unethical, or fraudulent conduct ...." *Id.*

Defendants argue that *Dalley* "compels the conclusion that reliance on the litigation process to ensure preservation of records" cannot serve as the basis for a tortious interference claim. But recall that with respect to the abuse of process claim, defendants argued—and we agreed—that the sending of the preservation letters did *not* involve legal process. Thus, even assuming that defendants' reading of *Dalley* is correct, the case is inapposite because the preservation letters did involve the use of the litigation process, for the reasons discussed above.

Defendants also rely on the caselaw providing that a plaintiff alleging a malicious and unjustified act "must demonstrate specific, affirmative acts that corroborate the unlawful

purpose of the interference." *CMI Intern, Inc.*, 251 Mich. App. at 131. First, we reject the argument that plaintiffs may not rely on the underlying lawsuit to show defendants' intent. While the federal action itself cannot support a tortious interference claim, defendants do not adequately explain why it cannot be considered by a jury in determining whether defendants acted with malice when sending the preservation letters. To the contrary, the fact the lawsuit was found to be frivolous supports plaintiffs' position that the letters were sent with an intent to damage plaintiffs' business relationships rather than out of a genuine concern about the preservation of evidence. Moreover, the preservation letters sent to plaintiffs' family and friends can serve as corroborating acts to the letters sent to plaintiffs' business associations.

Second, we question whether the caselaw calling for corroborating acts is always applicable. That requirements stems from a case where the defendant purchased nursing homes before the plaintiff could exercise its option to do the same. See *Feldman v. Green*, 138 Mich. App. 360, 362, 369-370; 360 N.W.2d 881 (1984). The defendant in that case was plainly motivated by legitimate business purposes, and this Court understandably imposed a high bar for that plaintiff to show that the defendant's actions were nonetheless unlawful. In this case, however, plaintiffs allege that defendants were not acting for a legitimate purpose in sending the preservation letters. If plaintiffs can carry their burden of proof on that matter, we see no reason why they must identify other wrongful acts. In any event, we conclude that plaintiffs' complaint sufficiently sets forth acts corroborating their position that defendants sent preservation letters to plaintiffs' business associates without justification.

D. DAWN'S JOINDER

Finally, plaintiffs argue that the trial court erred in allowing Dawn to join defendants' motion for summary disposition. We disagree. Plaintiffs do not identify any authority supporting their position that a party may not join another party's motion. Further, trial courts have the authority to sua sponte grant summary disposition to a party under MCR 2.116(I)(1) ("If 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."). *Al-Maliki v. LaGrant*, 286 Mich. App. 483, 485; 781 N.W.2d 853 (2009). So the court could have granted Dawn summary disposition even if she did not join the motion.

***8** Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in N.W. Rptr., 2019 WL 5204542

Footnotes

1 Because the trial court granted summary disposition under MCR 2.116(C)(8), we accept plaintiffs' well-pleaded allegations as true. *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 N.W.2d 817 (1999). We also consider the court filings and orders attached to plaintiffs' complaint, see *Laurel Woods Apartments v. Roumayah*, 274 Mich. App. 631, 635; 734 N.W.2d 217 (2007), and other court orders referenced by the parties as matters of public record, see *Dalley v. Dykema Gossett*, 287 Mich. App. 296, 301 n. 1; 788 N.W.2d 679 (2010).

2 This Court denied Kevin leave to appeal that order, *Reffitt v. Bachi-Reffitt*, unpublished order of the Court of Appeals, issued October 24, 2016 (Docket No. 333149), as did the Supreme Court, *Reffitt v. Bachi-Reffitt*, 501 Mich. 866 (2017).

3 *Bachi-Reffitt v. Reffitt*, United States District Court for the Western District of Michigan (Case No. 1:17-cv-263).

4 The federal court denied Dawn's motion for reconsideration, but acknowledged that it did not address Dawn's state-law claims in its prior order. Given the dismissal of the RICO claims, the court declined to exercise supplemental jurisdiction over the state-law claims and dismissed them without prejudice.

5 We review de novo a circuit court's decision to grant summary disposition. See *Pace v. Edel-Harrelson*, 499 Mich. 1, 5; 878 N.W.2d 784 (2016). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 N.W.2d 817 (1999). Summary disposition under this subrule is proper 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 N.W.2d 121 (2008) (cleaned up). To make this determination, all well-

pleaded allegations are accepted as true and construed in a light most favorable to the nonmonving party. *Maiden*, 461 Mich. at 119.

6 We note that plaintiffs did not actually allege loss of personal relationships in their complaint.

7 Summary disposition under MCR 2.116(C)(8) is generally considered to be on the merits and it is therefore granted with prejudice to the refiling of the claim. *ABB Paint Finishing, Inc. v. Nat'l. Union Fire Ins Co. of Pittsburgh, PA*, 223 Mich. App. 559, 563; 567 N.W.2d 456 (1997). We decline to address whether that holds true—or whether subrule (C)(8) is necessarily applicable—when a claim is dismissed because it has not yet accrued.

8 We may rely on authority from sister state courts for its persuasive value. *Estate of Voutsara by Gaydos v. Bender*, 326 Mich. App. 667, 676; 929 N.W.2d 809 (2019).

9 Given our ruling, we decline to address defendants' alternative argument that plaintiffs failed to plead a sufficient ulterior purpose.

10 Although letters were also allegedly sent to plaintiffs' friends and family, the tortious interference claim will pertain only to those with whom plaintiffs had a business relationship.

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