

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOHN MICHAELS ENTERPRISES,

Plaintiff-Appellant,

v

RICHARD A. ADAMS, HAROLD KRUL,  
GUARDIAN SALES CORPORATION and  
AUTOMOTIVE SPECIALTIES, INC.,

Defendants-Appellees,

and

JOHN MAYACK<sup>1</sup> and AGAPE PLASTICS, INC.,<sup>2</sup>

Defendants.

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Before: Kelly, P.J., and Holbrook, Jr. and Collins, JJ.

PER CURIAM.

Plaintiff, John Michaels Enterprises, Inc. (JME), appeals as of right the circuit court's order granting summary disposition in favor of defendants Richard A. Adams (Adams) and Guardian Sales Corporation (Guardian), and granting costs and sanctions in favor of defendants Harold Krul (Krul) and Automotive Specialties, Inc. (AMS). JME also appeals the circuit court's order granting costs and sanctions in favor of Adams and Guardian. We affirm in part, reverse in part, and remand for further proceedings.

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<sup>1</sup> Plaintiff acknowledges that Mayack was never served with a copy of the summons and complaint and has never participated in the suit.

<sup>2</sup> Agape Plastics Inc., was dismissed with prejudice by stipulation of the parties and is not a party to the appeal.

JME argues first that the trial court erred in granting summary disposition in favor of Guardian with regard to count IV, breach of contract, of JME's second amended complaint,

because JME never requested summary disposition with regard to Guardian on count IV and JME had no opportunity to make a proper presentation to the court on that issue. We agree. A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition relying upon MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* at 338. When considering a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court must consider the pleadings, affidavits, admissions, depositions, and other documentary evidence in a light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

In their March 25, 1997, motion for summary disposition pursuant to MCR 2.116(C)(10), defendants requested that the court dismiss Adams, Guardian's president, from Counts II, IV, V, and VI of plaintiff's second amended complaint, and dismiss Adams and Guardian from Counts VII and X. Defendants specifically stated in their brief in support of the motion: "If a claim for breach of contract exists, it is against Guardian Sales only . . . ." However, the circuit court, sua sponte, granted summary disposition to Guardian, as well as Adams, on count IV.

While there were two written opinions issued in this case, neither is helpful in shedding light on the court's reason for granting summary disposition in favor of Guardian on count IV of JME's complaint. Initially, the court simply stated that "[d]efendant Guardian is also entitled to dismissal of Plaintiff's remaining claim against it set forth in count IV." In its order denying plaintiff's motion for reconsideration, the court acknowledged that it was not asked to grant summary disposition as to Guardian, but stated that, "[b]ased upon its review of the documentary evidence, the Court was satisfied Defendant Guardian was entitled to dismissal of count IV."<sup>3</sup> However, JME never had the opportunity to brief the court regarding count IV as it related to Guardian. Because JME was prevented from making a proper presentation to the court on the issue of summary disposition with regard to Guardian on count IV, remand is necessary. See *Boje v Wayne Co General Hosp*, 157 Mich App 700, 709; 403 NW2d 203 (1987).

JME argues next that the trial court erred in granting summary disposition in favor of Adams with regard to count IV of JME's complaint. We disagree. JME contends that Guardian was simply Adams' alter ego and that the corporate veil should have been pierced in order to assess personal and individual liability against Adams.

Courts will generally treat a corporation as a separate entity from its stockholders, even where the evidence demonstrates that one person owns all of the stock. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). The "fiction" of the corporate entity is honored to

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<sup>3</sup> Citing MCR 2.116(I)(2), the circuit court also stated that defendants' failure to seek summary disposition of count IV on behalf of Guardian did not preclude the court from granting summary disposition in favor of Guardian on count IV. We note that MCR 2.116(I)(2) is not applicable, as it addresses a situation where the opposing party, rather than the moving party, is entitled to judgment.

serve the ends of justice, but may be ignored when justice would be subverted. *Id.* A three-prong test is applied to determine whether it is appropriate to pierce the corporate veil. First, a plaintiff must demonstrate that the corporation is nothing more than “a mere instrumentality of another entity or individual.” *Id.* at 457, quoting *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994). Second, it must be shown that the corporation was used to “commit a fraud or wrong.” *Foodland, supra*. While fraud must be established by clear and convincing evidence, fraud may be established through circumstantial evidence. *Id.* at 457-458. Finally, a plaintiff must show an unjust loss or injury to himself as a result of the corporate entity shielding an individual. *Id.* at 460.

JME failed to establish any of these requisites such that Adams could be held personally liable for the alleged breach of contract. JME came forward with no evidence that Guardian was a “mere instrumentality” for Adams or that corporate formalities were not observed. Further, JME presented no evidence that Guardian was formed in order to insulate Adams from personal liability and obligation. Additionally, the deposition testimony of JME’s president, Terrence Donohoe, clearly indicated that the contracts were formed between Guardian and JME and not between the presidents of the corporations in their individual capacity. Although JME argues that summary disposition was premature where discovery remained open, it failed to show that further discovery would have created a genuine issue of material fact to warrant a trial. *Gara v Woodbridge Tavern*, 224 Mich App 63, 68; 568 NW2d 138 (1997). Therefore, summary disposition in Adams’ favor with regard to count IV of JME’s complaint was proper.

JME argues next that the trial court erred in granting Adams summary disposition with regard to count VI of JME’s complaint, breach of fiduciary relationship. We disagree. “A fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another.” *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). Where a fiduciary relationship exists, “[r]elief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed.” *Id.*

JME relies upon the fact that Donohoe and Adams were friends to establish that there was a fiduciary relationship. However, although the two men were friends, they were also businessmen. Both were presidents of small corporations and both had been in business for some time and were familiar with making deals. Plaintiff presented no evidence that Adams was in a “position of influence” with regard to Donohoe or that he relied on Donohoe’s judgment or advice. Because there was no showing of a fiduciary relationship between the parties, the trial court properly granted summary disposition with regard to count VI of JME’s complaint.

JME’s next argument is that the trial court erred in granting costs and sanctions in favor of Krul and AMS. We disagree. A trial court’s finding that a claim is frivolous will not be reversed on appeal unless clearly erroneous. *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). A finding of fact is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Septor v Tjarksen*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

An attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. MCR 2.114(D); *LaRose Market, supra*. The reasonableness of the inquiry is determined according to an objective standard and depends on the particular facts and circumstances of the case. *Id.* The signature of an attorney of record certifies that (1) the signer has read the pleading; (2) to the best of the signer's knowledge, information, and belief after reasonable inquiry, the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) the pleading is not interposed for any improper purpose. MCR 2.114(D); *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 720; 591 NW2d 676 (1998). If a pleading is signed in violation of MCR 2.114, the party or attorney or both are subject to sanctions. MCR 2.114(E); *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 88-89; 592 NW2d 112 (1999). Also, MCR 2.625(A)(2) mandates that a court tax costs, as provided by MCL 600.2591; MSA 27A.2591, to reimburse a prevailing party for its costs incurred as a result of frivolous litigation. *LaRose Market, supra*. A claim is frivolous if (1) the party's primary purpose was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe that the underlying facts were true; or (3) the party's position is devoid of arguable legal merit. *Id.*; MCL 600.2591(3)(a); MSA 27A.2591(3)(a).

Plaintiff's claims against Krul and AMS were for civil conspiracy and tortious interference with contractual relations. In determining that plaintiff's claims lacked a factual basis, the trial court cited counsel's statement that the claims against these defendants were based on reasonable belief and that he did not "have any specific facts at this time as to who said what, where and when and for now they're based upon belief . . . ." The court further noted that plaintiff's claims against Krul and AMS were pending almost two years before plaintiff finally agreed to dismissal. We find no clear error in the court's finding that the claims against these defendants were without factual basis.

Although civil conspiracy may be established by circumstantial evidence, *Temborius v Slatkin*, 157 Mich App 587, 599-600; 403 NW2d 821 (1986), "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable, tort." *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). JME failed to establish a factual basis for its claim of tortious interference with contractual relations against Krul and AMS. JME offered no facts or evidence to support its allegation that Krul was the alter ego of AMS or any other evidence to establish that Krul could be held personally liable. Further, the record shows that AMS was not incorporated at the time that Guardian was dismissed by Agape. Accordingly, we are unable to conclude that the circuit court's finding was clearly erroneous.

Finally, JME argues that the trial court erred in granting costs and sanctions in favor of Adams and Guardian. As discussed above, JME failed to produce any evidence to support its claim that Adams could be held personally liable for the alleged breach of contract. Therefore, we find no clear error in the circuit court's grant of costs and sanctions in favor of Adams. However, in view of our conclusion that summary disposition was improperly granted to Guardian with regard to count IV, we find that the circuit court erred in granting costs and sanctions to Guardian.

We affirm the circuit court's grant of summary disposition in favor of Adams and its grant of costs and sanctions in favor of defendants Krul, AMS, and Adams. We reverse the circuit court's grant

of summary disposition and costs and sanctions in favor of defendant Guardian and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Donald E. Holbrook, Jr.

/s/ Jeffrey G. Collins