STATE OF MICHIGAN

COURT OF APPEALS

ADVANCE EMPLOYMENT SERVICES, INC., Plaintiff-Appellant,	UNPUBLISHED March 11, 2004
v	No. 244608 Court of Claims
STATE OF MICHIGAN, Defendant-Appellee.	LC No. 02-000025-MK

Before: Fitzgerald, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Plaintiff Advanced Employment Services, Inc., appeals as of right from the opinion and order of the court of claims granting summary disposition in favor of defendant State of Michigan and dismissing the case. We affirm.

This case arises from the relationship between the state and Advance Employment, a company in the business of providing labor to clients on a temporary basis and assisting clients in recruiting for permanent positions. In 1998, Advance Employment responded to the state's invitation to bid concerning a three-year contract for temporary employment services for agencies in the Central Michigan Area. Advance Employment and the state, through the Michigan Department of Management and Budget, entered into an exclusive contract concerning the state's use of temporary employees supplied by Advance Employment. Although the contract contains no provision concerning a temporary employee becoming permanently placed with the state, the time cards that Advance Employment supplied to its temporary employees working for the state and that Advance Employment required to be signed by a state-employed supervisor contained language to the effect that if the employee named on the timecard is employed by the state during a temporary assignment or within six months thereafter, the state will pay Advance Employment a "settlement fee."

On January 31, 2002, Advance Employment commenced this suit by filing in the court of claims a complaint containing multiple counts, including breach of contract and various torts. The complaint alleges that the state made numerous permanent hires of Advance Employment employees without compensating Advance Employment and used temporary employment services of other companies in violation of the contract. After Advance Employment filed its first amended complaint, the state moved for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity) and (8) (failure to state a claim on which relief can be granted). Approximately two weeks later, Advance Employment filed a second amended complaint, and

later filed a response to the state's motion for summary disposition. The parties filed supplement briefs concerning the state's motion for summary disposition, taking into consideration the second amended complaint (hereinafter "the complaint"). On August 30, 2002, the court of claims, having heard oral argument, issued its opinion and order granting the state's motion for summary disposition and dismissing the case. The court denied Advance Employment's request for reconsideration, and this appeal ensued.

On appeal, Advance Employment argues that the court of claims erred in granting summary disposition in favor of the state. Advance Employment essentially argues that summary disposition was inappropriate because the allegations in each count of its complaint were sufficient to state a claim and/or avoid governmental immunity. We disagree.

We review a trial court's grant of summary disposition de novo.[1] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). With respect to MCR 2.116(C)(7), this Court has explained:

> In analyzing a motion for summary disposition pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). If a party supports a motion under MCR 2.116(C)(7) by submitting affidavits, depositions, admissions, or other documentary evidence, those materials must be considered. MCR 2.116(G)(5); *Maiden, supra*. The substance or content of the supporting materials must be admissible into evidence. *Maiden, supra*. [*Pusakulich v City of Ironwood*, 247 Mich App 80, 82-83; 635 NW2d 323 (2001).]

Also, when reviewing a grant of summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the complaint "'to determine whether facts have been pleaded justifying a finding that recovery in tort is not barred by governmental immunity.'" *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996), quoting *Harrison v Dep't of Corrections*, 194 Mich App 446, 449; 487 NW2d 799 (1992).

"A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint." *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003). In evaluating a motion under MCR 2.116(C)(8), a court considers only the pleadings and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Summary disposition is appropriate under this subsection "only where the claims alleged are 'so

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[1] To the extent that Advance Employment argues that the court of claims erred in making findings of fact, even if we were to agree, such is not "reversible error" as Advance Employment claims because our review is de novo, and we will not reverse the lower court if it reached the right result, albeit for the wrong reasons. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.* at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

We begin by addressing Advance Employment's breach of contract claims. Advance Employment first argues that its breach of contract count concerning the written contract it entered into with the state regarding the provision of temporary employees to the Central Michigan Area was properly pleaded and sufficient to survive the motion for summary disposition. Noting the nature of its business, Advance Employment claims that the written contract dealt with only *temporary* employment services, and had *permanent* placement been a purpose of the contract, the contract "could have and would have read that way" and "temporary implies not permanent."

We find Advance Employment's argument unavailing. The written contract dealt with temporary employees, which Advance Employment freely admits. Advance Employment's argument that a contract covering temporary placement impliedly prohibits permanent placement disregards the rules of contract interpretation. The plain language of the written contract is clear and unambiguous and thus the intent of the parties was to contract regarding temporary employment services. *Wausau Underwriters Ins Co v Ajax Paving Ind, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003). Although Advance Employment claims that nothing in the contract provided that the state could hire away its employees, they point to nothing in the contract that says the state may not do so. Moreover, in the context of employment law, where persons have the ability to obtain, change, or leave employment freely unless otherwise restricted by an agreement, Advance Employment's argument is at best unpersuasive. On the basis of the clear and unambiguous language of the contract, the state was entitled to summary disposition as a matter of law.

To the extent that Advance Employment also argues that it properly stated a claim for breach of contract concerning the state's use of other temporary service providers, we decline to reach this issue because Advance Employment's briefing on appeal is deficient. See *Check Reporting Services, Inc v Michigan Nat Bank-Lansing*, 191 Mich App 614, 628; 478 NW2d 893 (1991) ("An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims … Arguments without supporting citation are considered abandoned on appeal."); *Leitch v Switchenko*, 169 Mich App 761, 764; 426 NW2d 804 (1988); MCR 7.212 (A)(7) (the argument portion of the brief must provide supporting authorities and facts must be supported by reference to the pleadings). Likewise, to the extent that Advance Employment's breach of contract count alleges breach of an implied covenant of good faith, it does not address this topic on appeal and thus it is abandoned. *Leitch, supra*.

Next, Advance Employment argues, essentially, that its allegations with regard to its breach of contract claim related to the settlement fees are sufficient to withstand the state's motion for summary disposition. Advance Employment proffers several arguments concerning its theory that the time cards that each temporary employee utilized, which contained language concerning a "settlement fee" for hiring permanent employees, constituted an offer that the state accepted when representatives of the state signed the time cards, thus constituting an additional contract with the state that the state breached by failing to pay the settlement fees. According to Advance Employment, the allegations in the complaint imply that Advance Employment will seek to prove the authority of the individuals who signed on behalf of the state.

The law is clear that one must have constitutional or statutory authority to bind any state agency. *Sittler v Bd of Control of the Michigan College of Mining & Technology*, 333 Mich 681, 687; 53 NW2d 681 (1952). In *Sittler, supra* at 687-688, our Supreme Court stated:

> In *Roxborough v Unemployment Compensation Commission*, 309 Mich 505[; 15 NW2d 724 (1944)], we quoted with approval the following from 59 CJ, pp 172, 173:
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> > Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution. * * * Nor is a State bound by an implied contract made by a State officer where such officer had no authority to make an express one. * * *
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> > The powers of State officers being fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the State, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. [Internal quotations omitted.]

Accordingly, Advance Employment could not have a contract with the state concerning settlement fees unless it was entered into by someone with authority to do so.[2] The complaint, being devoid of any such an allegation, let alone the factual basis for that authority, is insufficient to state a cause of action for which relief may be granted. Advance Employment acted at its peril in assuming that its temporary employees' state supervisors had the authority to enter into a contract that was binding on the state. See *Sittler, supra* (Trial court correctly granted the defendants' motion to dismiss despite some controverted issues of fact because "there are presented questions of law herein considered which are decisive of plaintiff's right to recover.").

Advance Employment also argues that it pleaded facts sufficient to support its unjust enrichment counts. We disagree.

In *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003), this Court explained:

> In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. *Barber*

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[2] MCL 18.1261(1) provides in pertinent part that the Department of Management and Budget "shall provide for the purchase of, *the contracting for*, and the providing of supplies, materials, *services*, insurance, utilities, third party financing, equipment, printing, and all other items as *needed by state agencies* for which the legislature has not otherwise expressly provided." [Emphasis supplied.]

> *v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). If this is established, the law will imply a contract in order to prevent unjust enrichment. *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992). However, a contract will be implied only if there is no express contract covering the same subject matter. *Id*.

Here, Advance Employment's complaint alleges two counts of unjust enrichment, both of which allege facts concerning the agreement that it would supply temporary employees for the state in its Central Michigan Area. Both counts further allege that the state "breached that agreement" and caused it to suffer economic injury and loss of business opportunities and that it is inequitable for the state to retain the benefit of the value of the placement of Advance Employment's temporary employees without compensating Advance Employment for it. Because Advance Employment's factual allegations in the unjust enrichment counts of its complaint allege breach of an express contract causing damages, its pleadings are insufficient to state a claim for unjust enrichment and summary disposition was appropriate on both unjust enrichment counts. *Belle Isle Grill Corp, supra*.

Advance Employment also argues that it properly stated a claim for promissory estoppel and thus summary disposition was improper. We disagree.

The elements of promissory estoppel are "(1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997). "The sine qua non of promissory estoppel is a promise that is definite and clear." *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993), mod in part by *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994). "A promise is a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would justify a promisee in understanding that a commitment had been made." *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995). The doctrine of promissory estoppel should be applied only when the facts are unquestionable and the wrong to be prevented undoubted. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999).

While Advance Employment alleges a promise, i.e., that the contract was for the temporary placement of its employees, Advance Employment's alleged damages do not stem from that promise. The contract does not contemplate the placement of permanent employees, nor does it expressly preclude such. Rather, the purpose of the contract, as expressed in the contract itself, is "to obtain the services of [Advance Employment] to provide temporary clerical and industrial employment services for [a]ll [s]tate [a]gencies in the Central Michigan Area." The complaint, however, offers no facts showing that the state clearly and definitely agreed to abstain from permanently hiring temporary staff. The alleged promise to hire temporary employees from Advance Employment rather than from other service firms does not equate to a clear and definite promise to abstain from hiring permanent employees. Summary disposition on the pleadings was appropriate.

Advance Employment's complaint also contains a breach of fiduciary count. However, Advance Employment does not question, and makes no argument concerning, the grant of

summary disposition on this count, and thus we do not address this issue. See *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("'It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'").

Advance Employment also argues that the pleadings are sufficient to avoid the defense of governmental immunity with respect to its tort claims.[3] Advance Employment claims that it alleged that the state's intentional conduct with regard to the hiring of Advance Employment's employees harmed it and that the state's conduct is outside the scope of a governmental function, and thus governmental immunity. Advance Employment points out that the complaint alleges that the state engaged in ultra vires activities including tortious conduct.

However, we conclude that the counts sounding in tort were properly dismissed pursuant to MCR 2.116(C)(7) because Advance Employment failed to plead facts in avoidance of governmental immunity. *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002) (Governmental immunity is a characteristic of government that prevents imposition of tort liability and plaintiffs are required to plead their case in avoidance of immunity.); *Peters*, *supra*. "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack*, *supra* at 204. To survive a motion under MCR 2.116(C)(7) concerning immunity granted by law, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). "Under MCL 691.1407(1), a government agency is generally immune from suit for actions undertaken in the performance of its governmental functions." *Id.*; see also *Weakley v Dearborn Heights (On Remand)*, 246 Mich App 322, 325; 623 NW2d 177 (2001); MCL 691.1407(1) ("Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."). The immunity conferred upon governmental agencies is broad. *Fane, supra*; *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000).

Here, Advance Employment makes over two hundred allegations in its complaint. However, Advance Employment fails to allege that an exception to governmental immunity applies. Moreover, the allegations all concern actions by the state during the exercise of a governmental function, i.e., the undertaking to provide for employees to work for the state in the Central Michigan Area. Although Advance Employment alleges in the complaint that the state acted "in an ultra vires manner," it alleges that the state did so in "engaging in the conduct set forth in this [c]omplaint," by engaging "in fraudulent conduct," and "by acting in bad faith."

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[3] Advance Employment complaint contains counts of tortious interference with contractual relations, tortious interference with a business expectancy, fraudulent misrepresentation, innocent/negligent misrepresentation, fraud based on bad-faith promise, silent fraud, breach of implied covenant of good faith and fair dealing, and breach of fiduciary duty.

Essentially, the allegations are circular and assert that by committing torts, the state acted ultra vires. Advance Employment's argument demonstrates a misunderstanding about the concept of acting "ultra vires." See *Richardson v Jackson Co*, 432 Mich 377, 381, 387; 443 NW2d 105 (1989) ("[U]ltra vires activity is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner."). Further, Advance Employment cites no law to support its claim that its allegations of ultra vires acts are sufficient to avoid governmental immunity. Advance Employment fails to even mention a statutory exception to governmental immunity. *Mack, supra*. Nor does Advance Employment plead facts that demonstrate that the alleged torts occurred during the exercise or discharge of a nongovernmental or proprietary function. *Id.* Because Advance Employment's allegations are lacking, the trial court properly dismissed the tort claims. MCR 2.116(C)(7), (8).

Advance Employment also claims, in a one-paragraph argument without citation to law or to the pertinent portions of the complaint, that its allegation that the state "has repeatedly and consistently engaged in the conduct of permanently hiring resources which were supplied to it only on a temporary basis without compensating Advance Employment for the permanent placements received" is sufficient to satisfy the requirement that it "plead that the deprivation of due process was the result of a custom or policy" of the state, and if not sufficient, Advance Employment should be permitted to amend its complaint. Because Advance Employment has failed to properly brief this argument, it has been abandoned on appeal. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). See also *Community Nat Bank of Pontiac v Michigan Basic Property Ins Ass'n*, 159 Mich App 510, 520-521; 407 NW2d 31 (1987) (This Court may decline to consider issues given only cursory treatment in an appellate brief with little or no citation of supporting authority.).

Finally,[4] with respect to Advance Employment's contract reformation count, we conclude that summary disposition in favor of the state is proper. "[C]ourts are required to proceed with the utmost caution in exercising jurisdiction to reform written instruments." *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995), citing *Theophelis v Lansing General Hosp*, 430 Mich 473, 492; 424 NW2d 478 (1988). "'Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties.'" *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24; 592 NW2d 379 (1998), quoting *Olsen, supra* at 29.

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[4] Advance Employment's additional argument that it "did not 'slumber' in bringing its cause of action or in notifying the state of its wrongful permanent hiring of Advance Employment's employee assets and no prejudice has been caused to the state by Advance Employment's waiting until the completion of the contract term prior to bringing this action" is inapposite and does not require our consideration.

Here, although Advance Employment argues that it has pleaded the elements of fraud that would justify reformation, the pleadings suggest silent fraud, but fail to plead facts demonstrating that the state had a legal duty of disclosure. "Michigan courts have recognized that silence cannot constitute actionable fraud *unless* it occurred under circumstances where there was a legal duty of disclosure." *M&D, Inc v McConkey*, 231 Mich App 22, 28-29; 585 NW2d 33 (1998). Stated another way, with regard to silent fraud, mere nondisclosure is insufficient; there must be circumstances that establish a legal or equitable duty to make a disclosure. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000). Thus, summary disposition was proper under MCR 2.116(C)(8). Moreover, Advance Employment has arguably abandoned this issue on appeal because its briefing is again lacking in specifics and citations. See *Prince, supra*.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra