

STATE OF MICHIGAN
COURT OF APPEALS

REINHOLD GROUP, INC., and JOHN FOSTER,

Plaintiffs-Appellees,

v

DEPARTMENT OF TREASURY,

Defendant-Appellant.

UNPUBLISHED

April 13, 2004

No. 248025

Court of Claims

LC No. 02-000125-MT

Before: O’Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from a court of claims order granting plaintiffs’¹ motion for summary disposition and requiring that final assessments J070159 and J075988 be cancelled and that plaintiffs be refunded. On appeal, defendant argues that the court of claims improperly granted plaintiffs’ motion for summary disposition when a question of fact existed regarding whether plaintiff qualified for a small business credit under the Single Business Tax Act (hereinafter “SBTA”). Additionally, defendant contended that summary disposition should be granted in its favor. We affirm.

I

Plaintiff was a Michigan corporation doing business in Michigan and, apparently, John Foster was the sole shareholder. Reinhold Landscape, Inc. (hereinafter “RLI”), apparently incorporated in Florida, was a business that conducted landscape contracting and maintenance services for clients in Florida. John Foster owned eighty percent of the outstanding capital stock in RLI.

Plaintiffs were audited for the period December 2, 1992 through December 31, 1995, and a deficiency was found for the 1994 and 1995 tax years due to disallowance of a small business credit. An audit prepared by Carol Dine, indicated that plaintiff’s small business credit was

¹ Throughout this opinion Reinhold Group, Inc., which is now dissolved, will be referred to as plaintiff, John Foster will be referred to by name, and the two will be referred to collectively as plaintiffs.

disallowed “BECAUSE THE TAXPAYER IS PART OF A CONTROLLED GROUP THAT HAS BUSINESS ACTIVITY IN MICHIGAN.” The audit also provided that Melanie Foster, John Foster’s wife, “did the book work and major purchases for [RLI] out of their residence in Michigan and received a wage. . . . Therefore it was determined the Florida Company [RLI] has business activities in Michigan. Since the auditor determined that it was a controlled group an officer having compensation of more than \$95,000 would automatically disallow them for a small business credit in either company.”

On November 17, 2000, an informal hearing was held on the intent to assess plaintiffs. Following the hearing, the referee issued a report finding that plaintiff was the member of a controlled group and that its business activities with RLI must be consolidated for purposes of the SBTA, which disqualifies plaintiff from small business credit. The referee recommended that plaintiff be assessed as determined by defendant. The report indicated that Melanie Foster “conceded that decisions regarding major purchases for [RLI] were made from her home in Michigan and financial statement/records of [RLI] were reviewed while Melanie was in Michigan. Melanie further conceded she is paid a wage for these functions. The wage Melanie received suggests that work performed for [RLI] was not insignificant.”

On March 27, 2002, final assessment nos. J070159 and J075988 were issued by defendant for single business tax (hereinafter “SBT”) in the amount of \$48,461 and \$39,332, plus interest totaling \$140,730.83. On May 8, 2002, plaintiffs paid the assessment under specific written protest.

On June 1, 2002, plaintiffs filed a complaint with the court of claims alleging that defendant’s decision and final assessment was illegal and not authorized by law or statute, and should be reversed entitling plaintiffs to cancellation of the final assessments and a full refund. On March 5, 2003, plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10). Plaintiffs’ argued that plaintiff qualified for the small business credit and that the assessment should be canceled because defendant improperly determined that RLI had business activity in Michigan.

On March 17, 2003, defendant filed a motion in response to plaintiffs’ motion for summary disposition and requested summary disposition pursuant to MCR 2.116(I). Defendant contended that the assessment was proper because plaintiff and RLI were members of a controlled group and should have been consolidated, which would disqualify plaintiff from receiving the small business credit. Defendant further contended that RLI had business activity in Michigan requiring consolidation because Melanie Foster, an employee of RLI, lived in Michigan and made RLI business decisions from her home in Michigan.

On March 26, 2003, a hearing was held on plaintiffs’ motion for summary disposition. Plaintiffs argued that defendant failed to set forth specific facts that are admissible to contradict what plaintiffs submitted in the affidavits of Melanie Foster and Gary Outlaw (a full time employee and shareholder of RLI). Plaintiffs further argued that defendant’s submitted evidence was inadmissible hearsay. In response, defendant argued that a question remains as to whether plaintiff is part of a controlled group and whether Melanie Foster is a shareholder by attribution. Defendant further argued that with regard to business activity in Michigan, Melanie Foster spent two hours a week reviewing cash flow and financial records in Michigan, and this is enough to reach the threshold of nexus and business activity under the SBTA. The court of claims,

deciding on the issue, granted summary disposition in favor of plaintiffs because “[d]efendant has failed to present any admissible evidence to withstand Plaintiff’s motion for summary disposition.” On March 26, 2003, the court of claims entered an order granting plaintiffs’ motion for summary disposition, and further ordered that final assessment numbers J070159 and J075988 (for the tax years 1994 and 1995) be canceled and that plaintiffs be refunded.

II

Defendant’s issue on appeal is that the trial court erred in granting plaintiffs’ motion for summary disposition and by failing to grant defendant’s motion for summary disposition.

A. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Plaintiffs filed a motion for summary disposition under MCR 2.116(C)(9) and (C)(10). Although the court of claims did not state the particular subrule under which it decided the summary disposition motion, it is clear that the court relied on proofs outside the pleadings in reaching its decision and, thus, granted summary disposition pursuant to MCR 2.116(C)(10).²

In evaluating a motion under MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions and other documentary evidence in a light most favorable to the nonmoving party and determines whether the moving party was entitled to judgment as a matter of law. *Maiden, supra* at 120. When reviewing a motion granted under MCR 2.116(C)(10), this Court must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ. *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2000). Once the moving party meets its initial burden, the party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999), and the disputed factual issue must be material to the dispositive legal claims, *Auto Club Ins Ass’n v State Automobile Mutual Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003). The nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

The existence of a disputed fact must be established by admissible evidence. MCR 2.116(G)(6), *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). An affidavit submitted in support of or in opposition to a motion must affirmatively show that the affiant, if sworn as a witness, could testify competently to the facts stated in the affidavit. MCR 2.119(B)(1)(c), *Regents of the University of Michigan v State Farm Mutual Ins Co*, 250 Mich App 719, 728; 650 NW2d 129 (2002). Speculation and conjecture are insufficient, but an

² MCR 2.116(C)(9) provides for summary disposition where the "opposing party has failed to state a valid defense to the claim asserted against him or her."

opposing party need not rebut every possible theory that the evidence could support. *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

B. The SBTA Small Business Credit

Michigan taxes businesses pursuant to the SBTA. MCL 208.1 *et seq.* The intended effect of the SBT is to impose a tax on the privilege of conducting business activity within Michigan. *Cowen v Dep't of Treasury*, 204 Mich App 428, 432; 516 NW2d 511 (1994). The Michigan SBT constitutes a percentage of "the adjusted tax base of every person with business activity" that is allocated or apportioned to Michigan. MCL 208.31(2).

The SBTA includes a small business credit that reduces qualifying small businesses' SBT liability. MCL 208.36. To qualify for the small business credit, a business must demonstrate, among other things, that no corporate officer receives more than \$95,000 in compensation for a "respective tax year." MCL 208.36(2)(b)(i). Specifically, MCL 208.36 of the SBTA provides the following limitations that are pertinent to the present case:

(2) The credit provided in this section shall be taken before any other credit under this act, and is available to any person whose gross receipts do not exceed \$6,000,000.00 for tax years commencing on or after January 1, 1984 and before January 1, 1989; \$7,000,000.00 for tax years commencing in 1989; \$7,250,000.00 for tax years commencing in 1990; \$7,500,000.00 for tax years commencing in 1991; or \$10,000,000.00 for tax years commencing after 1991, and whose adjusted business income minus the loss adjustment does not exceed \$475,000.00 for tax years commencing on or after January 1, 1985, subject to the following:

(a) An individual, a partnership, or a subchapter S corporation is disqualified if the individual, any 1 partner of the partnership, or any 1 shareholder of the subchapter S corporation receives more than \$95,000.00 for tax years commencing on or after January 1, 1985 and before January 1, 1998 or more than \$115,000.00 for tax years commencing after December 31, 1997 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, or the subchapter S corporation.

* * *

(7) An *affiliated group* as defined in this act, a controlled group of corporations as defined in section 1563 of the internal revenue code and further described in 26 C.F.R. 1.414(b)-1 AND 1.414(c)-1 to 1.414(c)-5, or an entity under common control as defined by the internal revenue code shall not take the credit allowed by this section unless the *business activities* of the entities are consolidated. [Emphasis added.]

Significant to the present case is the definition of "affiliated group" and "business activity," which are defined in MCL 208.3 as follows:

(1) "Affiliated group" means 2 or more United States corporations, 1 of which owns or controls, directly or indirectly, 80% or more of the capital stock with voting rights of the other United States corporation or United States corporations. As used in this subsection, "United States corporation" means a domestic corporation as those terms are defined in section 7701(a)(3) and (4) of the internal revenue code.

(2) "Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction. Although an activity of a taxpayer may be incidental to another or other of his business activities, each activity shall be considered to be business engaged in within the meaning of this act.

In *Almeda Gage Corp v Dep't of Treasury*, 159 Mich App 693, 697; 407 NW2d 61 (1987), this Court further confined "business activity" in Michigan, providing the following:

Petitioner interprets this section as meaning that "business activity" is activity occurring within the State of Michigan. We agree. Indeed, we can think of no meaning to ascribe to the words "within this state" as used in § 3(2) other than to mean that "business activity" includes only those activities occurring within the State of Michigan. To accept a definition of "business activity" to include activities occurring outside the State of Michigan is to render the clause "within this state" meaningless. To do so would violate the cardinal rule of statutory construction that every phrase, clause and word in a statute must be given effect. *In re Harris Estate*, 151 Mich App 780, 785-786; 391 NW2d 487 (1986).

Accordingly, only Michigan business activities of an affiliated group shall be used to determine eligibility for the small business credit. *Almeda Gage Corp, supra* at 697.

Defendant determined that plaintiff and RLI were members of an affiliated controlled group. Plaintiffs do not dispute that plaintiff and RLI "may" be affiliated entities under common control. John Foster was the sole stockholder and officer of plaintiff, and defendant contends that Melanie Foster is an owner by attribution. John Foster also owned eighty percent of the outstanding capital stock of RLI in Florida, and defendant also contends that Melanie Foster is an owner by attribution of RLI. Therefore, the overriding issue is whether RLI had business activity, as defined in MCL 208.3(2), in Michigan so as to require consolidation, pursuant to MCL 208.36(7), which would make plaintiff ineligible for the small business credit under MCL 208.36(2)(a).

Defendant argues that there is SBT nexus in Michigan for RLI because Melanie Foster was an employee and owner by attribution of RLI who lived in Michigan and made business decisions from her home in Michigan. Plaintiffs argue that RLI conducted no business activities

in Michigan. The court of claims granted plaintiffs' motion for summary disposition because defendant failed to submit admissible evidence in opposition to it.

C. The Admissibility of Fred Magdaleno's Affidavit

The court of claims granted summary disposition in favor of plaintiffs because defendant failed to present admissible evidence that would raise of question of fact in opposition to plaintiffs' motion for summary disposition. Defendant contends that audit supervisor Fred Magdaleno's affidavit was not inadmissible hearsay, and should have been considered admissible evidence for summary disposition purposes.

Magdaleno, in his affidavit, stated that "[b]ased upon a review of the audit and the testimony in the Informal Conference Meeting of Melanie Reinhold Foster, it is my understanding that Melanie Reinhold Foster made business decisions from her home in Michigan." Magdaleno, in his affidavit, further stated that "[b]ased upon a review of the audit and the testimony in the Informal Conference Meeting," it was his understanding that Melanie Foster made decisions regarding purchases of RLI from her home in Michigan, reviewed financial statements, was an employee of RLI, and that her activities included the responsibility of overseeing RLI from Michigan.

Pursuant to MRE 802, hearsay is inadmissible unless otherwise provided by the Michigan Rules of Evidence. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Defendants were offering this document extra judicially and to prove the truth of the matter asserted. When considering a motion for summary disposition brought pursuant to MCR 2.116(C)(10), the trial court must consider the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties *to the extent that the content or substance would be admissible as evidence* to establish or deny the grounds stated in the motion. MCR 2.116(G)(5); MCR 2.116(G)(6) (emphasis added). MCR 2.119(B)(1) requires that an affidavit filed in support of or in opposition to a motion must: (a) be made on personal knowledge; (b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit. The affidavit does not serve to resolve issues of fact; its purpose is to help the court determine whether a genuine issue of material fact exists. *SSC Associates Ltd Partnership v Gen'l Retirement System of the City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule. *Id.*

The statements in Magdaleno's affidavit, seemingly, are either inadmissible hearsay and/or opinions. See *id.* There is nothing indicating the Magdaleno could testify to any of his assertions based on personal knowledge. At the motion hearing, defense counsel while arguing for admissibility stated "I would urge the Court not to be super technical." Magdaleno's affidavit does not satisfy the personal knowledge requirement of MCR 2.119(B)(1)(a), because there is no indication that he had firsthand knowledge of the facts alleged to establish the defenses. Rather, Magdaleno had only secondhand knowledge gained from the audit and apparently from the informal hearing. See *Miller v Rondeau*, 174 Mich App 483, 487; 436 NW2d 393 (1988).

With regard to Magdaleno's review of Melanie Foster's testimony, there is no indication that it was based on personal knowledge, and from the wording of the affidavit it could be gleaned that Magdaleno read a transcript or retrieved the statements from the referee's report. We note that the affidavit does indicate that Magdaleno was in attendance at the informal hearing. But defendant does not even contend, until its brief on appeal, that Magdaleno had personal knowledge,³ and even if it did there is no affirmative showing with particularity that Magdaleno could competently testify regarding admissible facts. See *SSC Associates Ltd Partnership, supra* at 364.

Additionally, the same problem exists with defendant's contention that Magdaleno could testify with regard to what he reviewed in the audit and audit papers. Even if Magdaleno was the supervisor, it does not mean that he had personal knowledge of the information contained in the audit, and if he did have personal knowledge there was no affirmative showing Magdaleno could testify with particularity regarding admissible facts within the audit or audit papers.⁴ Furthermore, it does not appear that Magdaleno could testify competently as to the statements of Melanie Foster and the statements made by the auditor. See MRE 802. Basically, the statements included in the audit by Dine appear to be her opinions based on hearsay statements she received (or based on non-hearsay statements if any of the statements are party admissions, MRE 801(d)(2)(A)). But these are not plaintiffs' statements in the audit, as it is the auditor's opinions and conclusions. The affidavit of Magdaleno, at best, without further qualification presents his opinion and information that would be inadmissible hearsay at trial, thus, does not satisfy MCR 2.119(B)(1). The evidence of a disputed fact must be established by admissible evidence, and the conjecture provided in Magdaleno's affidavit is not sufficient. See *Veenstra, supra* at 163; *Detroit, supra* at 139. For the above reasons, the Magdaleno affidavit did not provide pertinent admissible evidence for purposes of MCR 2.116(C)(10) review.

³ At the summary disposition hearing defendant did not affirmatively argue that Magdaleno had personal knowledge of the statements made by Melanie Foster. Defendant did not raise this issue before the lower court, therefore, the court of claims did not consider it. The appellate court need not address issues first raised on appeal. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Because defendant did not preserve this issue for appeal by raising it below, this Court need not address it. *Id.* Failure to address this issue will not result in manifest injustice. See *Herald Co v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998).

⁴ We note that defendant did contend that some statements in the audit were those of Magdaleno, but did not state with any particularity that he was competent to testify. And, it appears that the statements Magdaleno was referencing in his affidavit were those of Dine, as his affidavit statements were premised with "Based upon a review of the audit . . . it is my understanding." This does not indicate that Magdaleno had any personal knowledge to which he could competently testify to what was stated in the affidavit. In addition, the statements from the audit that defendant relies on were not the statements initialed by Magdaleno. The statements defendant claims in support of its motion opposing plaintiffs' motion for summary disposition are the statements which appear to be Dine's opinions and conclusions based on her investigation.

D. Admissibility of the Audit and the Audit Papers

With regard to the audit and audit papers, at the summary disposition hearing defendant only argued that the audit was admissible because Magdaleno supervised it and had comments within the document. Now, defendant, in its brief on appeal, contends that the statements in the audit are admissible because they come within the hearsay exception MRE 804(a)(5), for declarant unavailable. Defendant did not raise this issue before the court of claims, therefore, the court of claims did not consider it. The appellate court need not address issues first raised on appeal. *Booth Newspapers, supra* at 234. Because defendant did not preserve this issue for appeal by raising it below, we need not address it. *Id.* And, failure to address this issue will not result in manifest injustice. See *Herald Co, supra* at 390. Regardless, defendant has not made a showing that the document was admissible under MRE 804(a)(5).

MRE 804(a) provides in relevant part:

"Unavailability as a witness" includes situations in which the declarant--

* * *

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.

Due diligence is the attempt to do everything that is reasonable, not everything that is possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988); see also *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

There was no showing that defendant made any attempt to obtain a statement from Dine. Defendant argues in its brief on appeal that Dine suffered a stroke since the audit and is now retired. But notes that Dine, if able, should be allowed to give testimony at trial. Defendant further contends that it informed plaintiffs of Dine's condition in a letter requesting further time for discovery. A letter attached to defendant's brief on appeal, which apparently was sent to plaintiffs' counsel and copied to the court of claims, provides Dine has taken a "medical retirement." Nothing is mentioned of stroke or that due diligence was used to obtain a statement from Dine.⁵ Defendant has made no showing that diligent efforts were made and, thus, for purposes of MCR 2.116(C)(10), the audit and audit papers are not admissible. The evidence of a

⁵ Defendant claims that Dine's unavailability was discussed at a hearing on its motion to extend discovery. However, defendant has waived any argument with regard to a hearing on the motion to extend discovery because it has not provided this Court with the transcript. The appellant must provide this Court with the lower court record by filing all transcripts in the lower court file. MCR 7.210(B)(1)(a), *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 414; 425 NW2d 797 (1988). The obligation to produce the transcripts applies regardless whether the transcript is directly relevant to the issues on appeal. *Nye, supra* at 416. This Court will refuse to consider issues for which the appellant failed to produce the transcript. *Myers v Jarnac*, 189 Mich App 436, 444; 474 NW2d 302 (1991).

disputed fact must be established by admissible evidence, and defendant has not established that the audit would be admissible. See *Veenstra, supra* at 163. Thus, defendant's audit is not sufficient to raise a question of fact.

In its reply brief, defendant argues that the audit and audit papers are admissible pursuant to MRE 803(6), as regularly conducted activity, and MRE 803(8), as a public record. Because the MRE 803(6) and MRE 803(8) argument is raised in defendant's reply brief, it is untimely and not properly raised on appeal. "Reply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) citing MCR 7.212(G); *Check Reporting Services, Inc v Michigan Nat'l Bank*, 191 Mich App 614, 628; 478 NW2d 893 (1991). Thus, we need not address the issue.

Nonetheless, the statements in the audit that defendant claims in support of its motion opposing plaintiffs' summary disposition motion are the statements that appear to be Dine's opinions and conclusions based on her investigation.⁶ The audit contains Dine's opinion and conclusions, which may or may not have been based on statements. We believe that the statements in the audit are lacking in the reliability and trustworthiness that has been the basis offered to justify the regularly conducted business and public record exceptions to the hearsay rule. See, generally, 5 Wigmore, Evidence (Chadbourn Rev), §§ 1522-1528, pp 442-449. These are statements by an unavailable witness placed in a document, and there is no indication of how they were specifically obtained; whether through investigation, interview, or documentation. The statements appear to be a combination of information gathered in an investigation and Dine's evaluation and findings based on that information. Without the ability to cross-examine Dine, even if MRE 803(6) and (8) were raised at trial the evidence would still not be admissible. Furthermore, defendant has not laid a proper foundation for the audit and audit papers to be admitted under either MRE 803(6) or (8).

For the above reasons, defendant has not established that either the Magdaleno affidavit or the audit papers were admissible evidence for purposes of opposing plaintiffs' motion for summary disposition pursuant MCR 2.116(C)(10).⁷

⁶ Although prior to the current Michigan Rules of Evidence (which became effective in March 1978), our Supreme Court has stated even if the figures of an audit might be admissible at the discretion of the court, the statements included are not admissible as "[i]ncompetent written statements are not made competent because attached to and forming part of an audit . . . forming a part of his report." See *Michigan Bankers' Ass'n v Ocean Accident & Guarantee Corp*, 274 Mich 470, 483; 264 NW 86 (1936).

⁷ We further note that in its reply brief defendant contends that the referee's informal conference report is admissible. However, "[r]epley briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, supra* at 252. Thus, we need not address the issue.

E. Whether Summary Disposition Was Proper

Because defendant did not submit admissible evidence in support of its motion against plaintiffs' motion for summary disposition, the question that remains is whether plaintiffs' met the initial burden of showing there was no genuine issue of material fact. *Smith, supra* at 455. Specifically, whether summary disposition is proper based on plaintiffs' submissions. Plaintiffs' motion for summary disposition included an affidavit from Melanie Foster and one from Outlaw.

Melanie Foster, in her affidavit, provides that she was a resident of Michigan during the pertinent tax period. Melanie Foster's affidavit states that she was a part time RLI employee that conducted landscape contracting for RLI in Florida, and she would travel to Florida approximately once every two weeks; she was not an officer or shareholder; was not employed to run day-to-day operations; and did not oversee the financial aspects of RLI. Melanie Foster's affidavit indicated that she did spend approximately two hours each week reviewing information such as cash flow data and other financial information for RLI to help John Foster monitor his investment, but she did not contact customers from Michigan, did not solicit business from Michigan, did not collect accounts receivable from Michigan, did not have the responsibility for purchasing supplies or materials, and did not perform any estimating or designing services in Michigan.

Outlaw stated, in an affidavit, that he was responsible for day-to-day activities of RLI and that Melanie Foster was a part time employee during the tax years 1994 and 1995, under his supervision. Outlaw further provided, in his affidavit, that Melanie Foster would travel to Florida approximately once every two weeks; performed all of her responsibilities in Florida; did not run day-to-day operations or oversee financial aspects of RLI; and on occasion RLI would send her financial information to review on behalf of John Foster. Outlaw also provided that RLI: (1) did not have any property in Michigan; (2) did not have an address, office or phone number listing in Michigan; and (3) did not have any Michigan suppliers.

Defendant contends that based on the statements in Melanie Foster's affidavit; *Kaiser Optical*, MTT Docket No. 2233475 (2000) (*Kaiser I*), *Kaiser Optical Systems, Inc v Michigan Dep't of Treasury*, 254 Mich App 517; 657 NW2d 813 (2002) (*Kaiser II*), and Revenue Administration Bulletin (RAB) 1998-1 support that a substantial nexus was established for SBT purposes because the fact that Melanie Foster reviewed financial statements, as admitted in her affidavit, is sufficient.

RAB 1998-1(I)(1) and (6) provide:

An out-of-state business is subject to Michigan's single business tax jurisdiction when it engages in any of the following activities:

* * *

1) It has one or more Michigan resident employees conducting business activity in Michigan.

* * *

6) It regularly and systematically conducts in-state business activity through its employees, agents, representatives, independent contractors, brokers or others acting on its behalf, whether or not these individuals or organizations reside in Michigan.

As previously presented, the SBTA, MCL 208.3(2), provides that:

"Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction. Although an activity of a taxpayer may be incidental to another or other of his business activities, each activity shall be considered to be business engaged in within the meaning of this act.

Defendant does not dispute that RLI did not have any property in Michigan, but claims that Melanie Foster engaged in the performance of services, within Michigan, with the object of gain, benefit, or advantage being that of RLI.

There is no admissible evidence supporting that RLI had business activity in Michigan within the meaning of the statute. See MCL 208.3(2), MCL 208.36(7), *Alameda Gage Corp*, *supra* at 697. Plaintiffs' motion for summary disposition was supported by affidavits indicating that Melanie Foster performed no service on behalf of RLI in Michigan with the "object of gain, benefit, or advantage," to RLI. Without the Magdaleno affidavit and the audit papers, there was no evidence that Melanie Foster performed personal services for RLI while she was in Michigan for the "object of gain, benefit, or advantage" of RLI. Even though Melanie Foster was reviewing the financial statements for her husband, according to her affidavit, it was not a part of her job and she was not performing this service for RLI. In addition, *Kaiser I*, *supra*, and *Kaiser II*, *supra*, do not support defendant's contention because there is no admissible evidence supporting that Melanie Foster engaged in business activity on behalf of RLI.⁸ Melanie Foster's

⁸ In *Kaiser I*, *supra*, the Michigan Tax Tribunal affirmed a referee's finding that a business had sufficient nexus with California, when the business was seeking to apportion its tax base under the SBTA. *Kaiser II*, *supra* at 518. The tribunal in *Kaiser I*, *supra*, determined that the business had a nexus with California because accounting and financial services were performed there. *Id.* This Court found that there was a substantial nexus in California because the business had occupancy space in California for accounting functions, and having a staff perform accounting services for it resulted in an economic benefit derived by the business in California. *Id.* at 527. And, this Court noted that a business presence may qualify under MCL 208.3 as business activity. *Id.* at 527 n 4. The present case is distinguishable because plaintiffs' motion for summary disposition presented evidence supporting that there was no finance work done by
(continued...)

statement in her affidavit was that she completed all of her part time employment duties for RLI in Florida, and that all she did in Michigan was review financial statements to monitor her husband's investment. The statements in Outlaw's affidavit also supported Melanie Foster's statements. There is no admissible evidence that Melanie Foster performed any services on behalf of RLI in Michigan, and for consolidation the activities must have been performed in Michigan. See *Alameda Gage Corp*, *supra* at 697. Therefore, plaintiffs have met the initial burden in showing that no genuine issue of material fact exists through the affidavits of Melanie Foster and Outlaw, which together suffice in establishing an initial showing for purposes of MCR 2.116(C)(10); i.e., the affidavits provide the proper supporting documentary evidence. See *Smith*, *supra* at 455.

The burden shifted to defendant, as the party opposing the motion, to establish by documentary evidence that a genuine issue of material fact existed. *Smith*, *supra*. To meet this burden, defendant may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings and provide substantively admissible evidence setting forth specific facts showing that a genuine issue of material fact exists. *Id.* As discussed, hereinbefore, a review of the record reveals that defendant did not comport with these requirements. Defendant did not present admissible evidence that raised a genuine issue of material fact. Upon a de novo review, we find that summary disposition in favor of plaintiffs was proper as no genuine issue of material fact exists with regard to whether the actions of Melanie Foster constituted business activity for RLI in Michigan.

III

There is no basis for defendant's motion for summary disposition, as the court of claims properly granted plaintiffs' motion for summary disposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray

(...continued)

Melanie Foster in Michigan for the benefit of RLI and RLI had no office or property in Michigan. This was not rebutted with admissible evidence.