STATE OF MICHIGAN

COURT OF APPEALS

DONALD SALMON and SHIRLEY SALMON, Plaintiff-Appellants, v CITY OF CADILLAC and CADILLAC AREA FARMERS MARKET, LLC, Defendant-Appellees.	UNPUBLISHED December 13, 2005 No. 263586 Wexford Circuit Court LC No. 03-017775-PZ

Before: Whitbeck, CJ, and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's June 6, 2005 order granting defendants summary disposition on all of plaintiffs' claims and determining this action to be frivolous "from and after the date of October 20, 2003," and that plaintiffs and their attorney are jointly and severally liable for defendants' costs and actual attorney fees. We affirm.

I. The Basic Facts and Proceedings

This case involves the operation of a seasonal farmers' market in the city of Cadillac. An ad hoc committee of participating farmers had operated the market for more than 15 years without incident. Plaintiffs are farmers residing in Montcalm County who had participated in the market for many years. Plaintiff Shirley Salmon served as "market master," and Donald Salmon operated a vendor's booth. Gloria Roderick, president of defendant Cadillac Area Farmers Market (CAFM), a limited liability corporation, testified in her deposition that the farmers selling their products were a "good group" who never had a problem. Indeed, Roderick testified that whatever Shirley wanted to do, "we all agreed with her."

In 2002, several things happened to disturb these good relations. Participating farmers discussed with representatives of the local Michigan State University Cooperative Extension office and the city possible changes in how the market should be managed. Roderick described one meeting when Donald Salmon became upset and "ranted and raved the whole meeting." Both the city and cooperative extension office declined to participate in the future management of the market. Hard feelings continued to develop between the Salmons and other farmers. The core group of participating farmers sought legal counsel. They organized the defendant CAFM, adopted rules, and appointed a new "market master." The Salmons were particularly concerned with rules that required vendors to be residents of Wexford County or a county immediately

adjacent to Wexford County, and requiring "farm checks" of vendors to ensure that produce marketed was grown on the vendor's farm. These rules provide:

> l. The Cadillac Area Farmers Market is for residents of Wexford, Osceola, Lake, Manistee, Benzie, Grand Traverse, Kalkaska, and Missaukee counties who grow their own produce. Vendors who have participated in the Market prior to the filing date of the Articles of Organization (i.e., March 26, 2003) who are not residents of the above counties shall be excluded from the above residency requirements. All vendors that participate in the Market after the filing date of the Articles of Organization shall meet the residency requirements.
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> 7. Before attending the Market each vendor will be required to complete a Producers Information Sheet required by Michigan law, including copies of any licenses or permits required by Michigan law. Farm checks will then be scheduled to verify the information given. If rules have been violated and a request is made for a second farm check, the vendor must submit $150.00 before the farm check can occur.

The CAFM rules also set the market season as "8:00 a.m. until 4:30 p.m., on Tuesday and Friday, beginning the first weekend in July and continuing through the end of October." Rule two described the market as a "growers' market" limited to Michigan-grown produce. Rule five limited the number of vendors to eighteen, and rule sixteen permitted no more than two retail businesses to sell "Michigan fruits, vegetables, nursery stock, or bedding plants only."

On July 10, 2003, the city issued to CAFM a "use permit" for a described parking lot for the purpose of the annual farmers' market every Tuesday and Friday from July 11, 2003 through October 31, 2003 from 6:30 a.m. until 5:00 p.m. The city collected a $350 fee for this permit.

On August 21, 2003, plaintiffs filed a complaint for injunctive relief against the CAFM and the city. Plaintiffs alleged that the committee running the market had attempted to exclude them in September 2002 for rules violations, that participating farmers had formed the "LLC" in 2002 or 2003 to manage and oversee the Cadillac farmers market, and that CAFM had advised plaintiffs they could not attend the market during 2003 because they were not members of the CAFM. Plaintiffs further alleged that they would lose good will and business reputation if they were not permitted to participate in the market as they had the prior fifteen years, and that no adequate remedy at law existed. Plaintiffs asserted three theories to justify granting them relief. First, plaintiffs contended that defendants' conduct violated the Right to Farm Act (RTFA), MCL 286.471, *et seq*. Second, plaintiffs alleged that CAFM's requiring that farm market vendors be residents of certain counties or be members CAFM was an attempt to establish a monopoly or restraint of trade in violation of federal antitrust statutes, 15 USC 1, *et seq*., (the Sherman Act), and Michigan's Antitrust Reform Act (MARA), MCL 445.771, *et seq*. Finally, plaintiffs asserted that CAFM's restrictions on vendor participation and requiring farm checks violated the First, Fourth, Ninth and Fourteenth Amendments of the United States Constitution, the comparable provisions of Michigan's Constitution, and the federal civil rights statute, 42 USC 1983.

The court heard plaintiffs' motion for a preliminary injunction or temporary restraining order on August 26, 2003. Before the hearing, counsel for the city mediated a settlement with plaintiffs' counsel that was placed on the record. Members of CAFM who were present but not represented by counsel apparently agreed to the settlement. A written "Stipulation and Order Regarding Plaintiffs' participation in the Cadillac Farm Market" was eventually signed by Roderick on behalf of CAFM on October 20, 2003. The same day, the trial court approved the agreement with a handwritten, "It is so ordered." The essence of the agreement permitted plaintiffs to participate in CAFM's farm market without being members of CAFM, provided plaintiffs paid the appropriate daily space fees. Plaintiffs also agreed to comply with CAFM's rules, including having a "farm check" performed by either the Montcalm County Cooperative Extension or a suitable third party.

Despite plaintiffs being permitted to participate in the farmers' market, problems soon developed. Market manager Jean Kohler states in her affidavit that plaintiff Donald Salmon was antagonistic toward her and threatened to sue her. On September 16 and 19, 2003, CAFM permitted traveling musicians to perform at the market but instructed the minstrels not to return after plaintiffs apparently complained to the police. On October 3, 2003, plaintiff Donald Salmon complained to Kohler about her placement of traffic control cones, and according to Kohler, told her that her name had been added to this lawsuit. Someone other than Kohler called the police whose presence facilitated her placement of traffic control cones. As a result of these incidents, plaintiffs moved to amend their complaint to add a count of tortious interference with a business relationship or expectancy and a count of defamation against CAFM. The trial court granted plaintiffs motion by order entered November 4, 2003. Plaintiffs filed their first amended five-count complaint on December 4, 2003.

After discovery, and motions concerning discovery, all parties moved for summary disposition. The trial court heard the motions on April 25, 2005. The city noted its only involvement with CAFM was its granting a use permit. It had never prevented plaintiffs or anyone else from marketing produce in Cadillac. The city supported its claim that no monopoly existed by affidavit establishing that several other entities besides CAFM sold farm produce in Cadillac. CAFM noted that plaintiffs had conceded that the RTFA did not apply to the instant case, agreed with the city no monopoly existed, argued plaintiffs had alleged no facts to support their constitutional claim, and that plaintiffs had failed to establish any damages as a result of the tort claims raised in the amended complaint. Plaintiffs argued that CAFM's farmers market was a public, not a private, market and that material issues of fact remained on its monopoly and restraint of trade claims.

The trial court granted defendants' motions for summary disposition explaining that the court failed to see that a "controversy" existed after the parties had agreed plaintiffs could participate in the farmers' market. In addressing the individual counts of plaintiffs' amended compliant, the trial court noted that plaintiffs had conceded that the RTFA did not apply. The court distinguished this case from *Gale v Village of Kalamazoo*, 23 Mich 344 (1871) because CAFM's market was not the only place farmers could or do sell their produce in Cadillac. The court observed that neither plaintiffs nor any other person or entity had applied for a permit to establish a farmers' market, nor was there any evidence the city would have refused such a request. The court also noted, without deciding, that although it was problematic to exclude residents of some counties from an "open public market," no other parties were complaining.

The court's specific reasoning with respect to plaintiffs' constitutional claims is unclear. With regard to plaintiffs' tort claims, the trial court observed that there were "bad feelings both ways, but every time a person feels offended is not a time to come to court to protract litigation." Further, the court observed that even if plaintiffs had sustained damages, they were less than the court's jurisdictional limit of $25,000.

In addition, the trial court ruled that it was frivolous within the meaning of the court rules and statute for plaintiffs to have continued this litigation after the parties' settlement in 2003. The court stated, "We are here today and we have been here for over a year to grind an axe, and the courts cannot be used as a sword to grind an axe with people that you don't get along with. The Court cannot tolerate that." In clarifying its ruling, the court observed that plaintiffs' original complaint regarding exclusion from CAFM's market had "some merit" because "[t]his is a public market on public property, and its [sic] not an exclusive club to the [CAFM] either."

Although the trial court indicated at the April 2005 hearing that its prior order approving the parties' 2003 settlement would continue, the parties were back in court on June 6, 2005 to settle the contents of a proposed order granting defendants summary disposition. The trial court stated its desire that plaintiffs be permitted to continue participating in the market to avoid future litigation but also recognized plaintiffs could be excluded if they did not comply with CAFM's rules. In the end, the trial court ruled no permanent injunction would be entered and signed the order granting summary disposition in favor of defendants. Nevertheless, the trial expressed its desire that "the spirit of the original temporary restraining should be followed by all sides."

II. Standard of Review

We review de novo a trial court's decision to grant or deny summary disposition. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A party's motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion to determine if a party is entitled to judgment as a matter of law. *Id*. at 118, 120. The court properly grants summary disposition when no genuine issue regarding any material fact exists and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

We also review de novo questions of law. *Bertrand v Mackinac Island*, 256 Mich App 13, 28; 662 NW2d 77 (2003).

III. Analysis

a. Plaintiffs' Antitrust Claims

We disagree with the trial court and conclude that plaintiffs' original complaint for injunctive relief had no merit at all. But, we will affirm when a trial court reaches the correct

result even when it does so for the wrong reason. *Zdrojewski v Murphy*, 254 Mich App 50, 70-71; 657 NW2d 721 (2002).

First, plaintiffs' claim of a Sherman Act violation is without merit. The undisputed facts establish that CAFM operates a market for the sale of farm produce grown by Michigan farmers. We find it untenable to conclude that CAFM's 18-booth, two day a week, seasonal market has any affect, much less the required substantial affect on interstate commerce necessary to establish a Sherman Act claim. "With respect to the Sherman Act, jurisdiction is established either by the proscribed activities actually being in interstate commerce, or the activities, when considered in the aggregate, have [sic] a substantial effect on interstate commerce." *Battle v Liberty Nat'l Life Ins Co*, 493 F2d 39, 47 (CA 5, 1974).

Michigan's antitrust statute, however, mirrors the Sherman Act. Moreover, the Legislature has required that in the construction and application of the MARA, "the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes". MCL 445.784(2). Thus, because Michigan's antitrust legislation is patterned after federal antitrust legislation, federal court decisions applying the Sherman Act are persuasive authority in interpreting the MARA. *Goldman v Loubella Extendables*, 91 Mich App 212, 219; 283 NW2d 695 (1979).

MARA prohibits two basic types of anti-competitive activities. Section two makes unlawful contracts, combinations, or conspiracies between two or more persons "in restraint of, or to monopolize, trade or commerce in a relevant market." MCL 445.772. Section three renders unlawful the "establishment, maintenance, or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing, or maintaining prices." MCL 445.773.

The elements of a § 2 restraint of trade include: (1) the existence of a contract, combination, or conspiracy between two or more persons, (2) the contract, combination, or conspiracy must be in restraint of trade or commerce, and (3) the contract, combination, or conspiracy must be an undue restraint of competition amounting to a restraint of trade. See *Michigan Ass'n of Psychotherapy Clinics v Blue Cross & Blue Shield of Michigan (After Remand)*, 118 Mich App 505, 513-514; 325 NW2d 471 (1982) (discussing the comparable section of the Sherman Act). Element three recognizes that "not every combination which restrains trade or tends to reduce competition . . . is illegal; only those which are unreasonable." *Attorney Gen ex rel State Banking Comm'r v Michigan Nat Bank*, 377 Mich 481, 491; 141 NW2d 73 (1966).

The elements necessary to prove a monopoly or attempt to monopolize in violation of § 3 include: "'(1) [the] specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; [and] (3) a dangerous probability of success.'" *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 397; 516 NW2d 498 (1994), quoting *Williams v Kleaveland*, 534 F Supp 912, 922 (WD Mich, 1981). A monopoly is created when "'previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to

practically suppress competition.'" *ETT Ambulance, supra* at 396, quoting *Attorney Gen ex rel State Banking Comm'r, supra* at 488-489.

A claimant seeking to establish either a restraint of trade or monopoly must also prove the antitrust violation in relationship to a relevant market area. *Id*. at 489; MCL 445.772; MCL 445.773. The Supreme Court has described the concept of a "relevant market area" in the context of antitrust legislation as the "the area of effective competition in the known line of commerce," that is, "the market area in which the seller operates, and to which the purchaser can practicably turn for" the product at issue. *Tampa Electric Co v Nashville Coal Co*, 365 US 320, 327; 81 S Ct 623; 5 L Ed 2d 580 (1961). The Legislature has incorporated this definition into MARA by defining "relevant market" as "the geographical area of actual or potential competition in a line of trade or commerce, all or any part of which is within this state." MCL 445.771(b). Thus, a plaintiff in an antitrust action, as prerequisite to recovery, must establish the relevant market, both as to the product at issue and the geographic area of effective competition. *Id*.; *Morton Bldgs of Nebraska, Inc v Morton Bldgs, Inc*, 531 F2d 910, 918-919 (CA 8, 1976). See, also, *American Key Corp v Cole Nat'l Corp*, 762 F2d 1569, 1579 (CA 11, 1985).

In the instant case, plaintiffs could succeed in their antitrust claims only if they could establish that the "relevant market" at issue consists of the parking lot designated in the permit issued by the city to CAFM on Tuesdays and Fridays from July through October. To state the proposition highlights its absurdity. Plaintiffs did not allege or offer any proof that CAFM in operating its farmers' market had any ability to control, fix, or maintain farm produce prices. Although CAFM had the ability to exclude farmer vendors from its own sales' operations, it had no ability to exclude competitors from setting up shop on the next corner, nor could it prevent competitors from competing at the same place five days of the week. Further, the city offered undisputed proof that others sold farm produce elsewhere in the city. In addition, plaintiffs admitted that they never applied for a permit from the city to establish their own farmers' market, and there is no evidence that either defendant ever attempted to prevent plaintiffs from selling farm produce. In sum, plaintiffs neither alleged nor produced any evidence that defendants harmed any competition in the sales of farm produce in any relevant market.

The essence of all antitrust claims is harm to competition over the relevant product in the relevant geographic market to the detriment of the public. *Id*. at 1579, n 8. See, also, *Attorney Gen ex rel State Banking Comm'r, supra* at 492 ("the overriding test, of course, is protection of the public interest"), and *McDill v McDonald Cooperative Dairy Co*, 91 Mich App 611, 619; 283 NW2d 819 (1979) ("Under the antitrust laws, market conduct is measured by its effect upon competition."). Here, plaintiffs have not alleged or produced evidence to support a claim that either CAFM or the city engaged in any activity, or entered a contract or conspiracy, that had the effect of lessening competition regarding farm produce to the detriment of the public. For this reason alone plaintiffs' antitrust claims lack merit.

Indeed, the heart of plaintiffs' antitrust claim is that they have a right to participate in CAFM's farmers' market. But neither the antitrust statutes nor any other statute of which we are aware conveys to plaintiffs such a right. In *American Key*, the plaintiff operated a chain of key duplication stores and claimed defendants had conspired to exclude the plaintiff from "regional enclosed malls having two or more anchor tenants and 500,000 or more square feet of retail selling space." *American Key Corp, supra* at 1575. The court in *American Key* affirmed the district court's finding that the plaintiff had incorrectly identified the relevant market because

"considering the patterns of trade, replacement keys and related items are available to customers not only in large regional shopping malls but also in free-standing hardware stores, variety stores, drug stores and locksmiths." *Id* at 1578. Further, the court agreed with the district court that it would violate "the basic right of businessmen to select with whom they will do business and the terms and conditions on which they will do business" to hold that major mall anchors or shopping center managers could not determine who would be allowed to operate key duplicating shops on the premises. *Id.*

This Court has likewise upheld the freedom of business association. In *Luttig v Brusher*, 147 Mich App 424; 383 NW2d 224 (1985), the plaintiff claimed he had been unlawfully excluded from the defendant's highly respected and profitable Ann Arbor antique's market. The defendant had a policy of not allowing antique dealers who had participated during the same season in other antique markets in Michigan or northern Ohio so that it could keep its market "completely different in dealers, merchandise and quality." *Id*. at 426. The plaintiff alleged an illegal restraint of trade after he was barred from the defendant's market for violating the defendant's policy. First, this Court found that the defendant had not entered into a contract in restraint of trade. Indeed, it had declined to contract with the plaintiff. *Id*. at 429. Further, this Court opined, "We are aware of no law or public policy in this state which would require persons or businesses to contract and do business with other persons or businesses as long as their decision not to do business is not based upon discriminatory or otherwise illegal grounds." *Id*. Plaintiffs in the instant case allege no illegal discrimination.

Moreover, the MARA specifically excludes from its purview the type of voluntary association resulting in the creation of CAFM. MCL 445.774(2) provides, "This act shall not be construed to forbid the existence and operation of any labor, agricultural, or horticultural organization instituted for the purpose of mutual help, while lawfully carrying out its legitimate objects."

We also disagree with the trial court that the city's granting a use permit converted CAFM's farmers' market into a "public market." In the context of an action for alleged violation of constitutional rights requiring "state action" for liability, it is generally held that the mere issuance of a license or permit, or even extensive government regulation, does not convert the activity of a private entity into "state action" in the absence of significant involvement by the government in the activity at issue. See *Three Lakes Ass'n v Whiting*, 75 Mich App 564, 577-578; 255 NW2d 686 (1977). Here, the city only permitted CAFM to use its property; the city did not participate in the management of the farm market or the adoption of CAFM's rules. Furthermore, the city's mere issuance of a permit to CAFM is insufficient to implicate it with CAFM for purposes of MARA. It is undisputed that the city had the authority to grant CAFM a use permit; therefore, the city's action in that regard was beyond the ambit of Michigan's antitrust statute. MCL 445.774(3); *Bio-Magnetic Resonance, Inc v Dept of Public Health*, 234 Mich App 225; 593 NW2d 641 (1999).

In sum, we find that the trial court committed clear err by characterizing CAFM's farmers' market as a "public market" and in assuming without deciding that CAFM could not make and enforce rules governing the operation of its farmers' market, provided, of course, that CAFM did not practice invidious discrimination. *Luttig*, *supra* at 429. Nevertheless, the trial court reached the correct result regarding plaintiffs' antitrust claims by concluding that

defendants were entitled to judgment as matter of law. Accordingly, we affirm the trial court even though we disagree with some of its reasoning. *Zdrojewski, supra* at 70-71.

b. Other Alleged Basis for Injunctive Relief

As noted previously, plaintiffs conceded the Right to Farm Act, MCL 286.471, *et seq*., did not support their claim for relief. We agree.

Plaintiffs also alleged in their original complaint that defendants violated several federal and Michigan constitutional provisions and 42 USC 1983. Plaintiffs did not support these allegations with authority below and have not submitted even a cursory argument regarding this claim in their brief on appeal. A party may not simply announce a position and then expect this Court to discover the basis for the party's claim. *Badiee v Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005). Plaintiffs' failure to properly address the merits of this claim constitutes an abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002); *Three Lakes Ass'n, supra* at 579.

Moreover, even if not abandoned, plaintiffs' claim has no merit. Constitutional protections apply only to governmental actions. *Grand Rapids v Impens*, 414 Mich 667, 673; 327 NW2d 278 (1982). In other words, a party claiming an actionable constitutional violation must establish that "state action" is present. *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 212; 378 NW2d 337 (1985). Likewise, a claimant asserting a violation of 42 USC 1983 must establish "state action." *Three Lakes Ass'n, supra* at 576-578; *Ritter v Wayne Co Gen Hosp*, 174 Mich App 490, 497-498; 436 NW2d 673 (1988). In addition, § 1983 is not itself a source of substantive rights; rather, it merely provides a remedy for violations of rights guaranteed by the federal constitution or federal statutes. *Meagher v Wayne State University*, 222 Mich App 700, 720; 565 NW2d 401 (1997). Here, plaintiffs have established neither state action nor a constitutional violation.

c. Tort Claims

Plaintiffs alleged in their first amended complaint that CAFM committed the tort of intentional interference with a business relationship or expectancy by permitting musicians to perform at its farm market on two occasions and adjusting the placement of cones to control customer parking on another occasion.

> "The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." [*Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996).]

In this case, plaintiffs produced no evidence that any of CAFM's actions were specifically intended to harm plaintiffs. To the contrary, CAFM demonstrated that it had legitimate business reasons for its actions. Accordingly, the trial court properly granted CAFM summary disposition regarding this claim.

Plaintiffs also alleged that CAFM defamed them when as a result of the parking cone dispute, someone telephoned the police. Plaintiffs contend the party who called the police stated that Donald Salmon "was assaultive and/or threatening and/or disruptive and/or interfering with market business." Plaintiffs assert this communication to the police amounted to actionable defamation per se without regard to proof of special damages. We disagree.

> In order to establish a claim of defamation, a plaintiff must show: (1) a false or defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication (defamation per quod). [*Mino, supra* at 72, citing *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000).]

But even if we were to assume that the alleged statement constituted defamation per se, plaintiffs claim still fails. First, plaintiffs produced no evidence that whatever was said to the police was made by an authorized representative of CAFM and within the scope of the speaker's authorization. In this regard, plaintiffs point to the deposition of Jean Kohler, who testified that Jim Webb called the police. Although Webb spoke at the hearings held on August 26 and October 20, 2003, he denied that he was "part of the LLC or a farmers market committee."

More important, under the undisputed facts regarding the parking cone incident, whoever called the police under these circumstances enjoys a qualified privilege. "The elements of a qualified privilege are (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only." *Prysak v RL Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992). To overcome the qualified privilege plaintiffs must establish actual malice, that is, that the statement was made with knowledge of its falsity or with reckless disregard of the truth. *Id.* Moreover, evidence that statements were made with preconceived objectives or insufficient investigation will not establish reckless disregard for the truth, nor will evidence of ill will, spite or even hatred, standing alone, prove actual malice. *Kefgen, supra* at 624, quoting *Ireland v Edwards*, 230 Mich App 607, 622; 584 NW2d 632 (1998). Accordingly, "[g]eneral allegations of malice are insufficient to establish a genuine issue of material fact." *Prysak, supra* at 15.

Kohler testified that when she attempted to reposition the parking cones on a rainy day to facilitate closer parking to the market, Donald Salmon told her she was violating the court order, and her name would be added to this litigation. Kohler testified that Salmon's statement frightened her and that she would not return to that part of the market where plaintiffs were located without assistance. She testified Webb called the police because she needed assistance but did not know what Webb told the police. It is undisputed that the police came, spoke to both sides, Kohler was able to complete placement of the traffic cones, and no criminal charges were instituted. Under these circumstances, we find that the communication to the police to request assistance to resolve the parking cone dispute was protected by a qualified privilege. *Prysak,*

supra at 15. Accordingly, it was incumbent on plaintiffs to produce evidence of actual malice. *Id*. ; *Kefgen, supra* at 624. Because plaintiffs failed to do so, the trial court properly granted CAFM summary disposition on this claim.

d. Sanctions

The trial court found this litigation to have been "frivolous" from and after the date the parties agreed that plaintiffs would be permitted to participate in CAFM's farmers' market. The order granting defendants summary disposition provided that "costs and attorney fees are awarded to each defendant, to be paid by plaintiffs and their attorney . . . , jointly and severally, the same to be taxed according to the provisions of MCL 600.2591; . . . MCR 2.114; MCR 2.625; and MCR 2.626." A claim or defense may be found frivolous when: (1) a party's primary purpose was to harass, embarrass or injure the prevailing party; (2) a party had no reasonable basis to believe that the underlying facts were true; or (3) a party's position was devoid of arguable legal merit. MCL 600.2591(3)(a); *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). We review the trial court's finding that a claim was frivolous for clear error. *Id*. at 661. A trial court commits clear error when, although there is evidence to support its finding, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id*. at 661-662.

We find that the trial court did not clearly err. There was evidence from which the trial court could find that after reaching a settlement with CAFM, plaintiffs utilized this litigation as a club and sought to amend their complaint to "harass, embarrass, or injure the prevailing party." MCL 600.2591(3)(a)(i). Accordingly, we are not left with a definite and firm conviction that a mistake was made. *Kitchen, supra* at 661-662.

In addition, we disagree with the trial court's finding that plaintiffs' initial complaint possessed arguable legal merit. As discussed in § b, plaintiffs either explicitly or implicitly conceded that two of the three counts in their initial complaint were without merit. Further, for the reasons discussed in § a, plaintiffs' main antitrust claims were also without merit. Indeed, the underlying premise of the antitrust claims, that a parking lot used by CAFM on a seasonal basis, two days a week, could constitute a "relevant market" of farm produce within the meaning of MCL 445.771(b), is so meritless as to be "frivolous" as provided in MCL 600.2591(3)(a)(iii): "The party's legal position was devoid of arguable legal merit." Accordingly, we affirm the trial court on that alternative basis. *Zdrojewski, supra* at 70-71.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey