Court of Appeals, State of Michigan

ORDER

STAT EMS, LLC, and STAT EMERGENCY MEDICAL SERVICES
v EMERGENCY M.E.D. STAT, LLC

Docket No. 277133

LC No. 05-82576-CZ

Kathleen Jansen
Presiding Judge

Pat M. Donofrio

Alton T. Davis
Judges

The Court orders that the April 15, 2008 opinion is hereby AMENDED. The opinion contained the following clerical error: The lower court number of 05-82576-CZ was omitted from the first page of the opinon.

In all other respects, the April 15, 2008 opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 02 2008
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

STAT EMS, LLC, and STAT EMERGENCY MEDICAL SERVICES, INC.,	UNPUBLISHED April 15, 2008
Plaintiffs/Counter-Defendants-Appellants,	
v	No. 277133 Genesee Circuit Court
EMERGENCY M.E.D. STAT, LLC,	LC No. 277133
Defendant/Counter-Plaintiff-Appellee.	

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Plaintiffs, Stat EMS, LLC and Stat Emergency Medical Services, Inc., appeal as of right from the trial court's grant of summary disposition in favor of defendant, Emergency M.E.D. Stat, LLC in this suit brought under the Business Corporation Act, MCL 450.1101, *et seq*. and the Michigan Trademarks and Service Marks Act, MCL 429.31, *et seq*.[1] Because plaintiffs cannot properly bring any of their statutory claims, we affirm.

I

Plaintiff Stat EMS, LLC, is a Michigan limited liability company that began operating in Genesee County in 2001. Plaintiff Stat Emergency Medical Services, Inc., is a Michigan corporation affiliated with plaintiff Stat EMS, LLC. Pursuant to plaintiffs' complaint, both business entities collectively operate a countywide ambulance service in Genesee County under the "STAT EMS" name and registered mark. Defendant, Emergency M.E.D. Stat, LLC, is a Michigan limited liability company that began operating an ambulance service in Genesee County in 2004.

Plaintiffs filed the present action for damages and injunctive relief, alleging that defendant's name "Emergency M.E.D. Stat" was "effectively identical" to plaintiffs' name "Stat

[1] There are no issues on appeal arising from defendant's counter-complaint in the trial court.

EMS." Plaintiffs asserted that the use of the name "Emergency M.E.D. Stat" violated both MCL 450.1212 and MCL 429.31. The trial court denied plaintiffs' request to enjoin defendant from the use of the name "Emergency M.E.D. Stat" and granted defendant's motion for summary disposition and dismissed the case. This appeal followed.

II

"A trial court's ruling on a summary disposition motion is a question of law that this Court reviews de novo." *Vega v Lakeland Hospitals*, 479 Mich 243, 245; 736 NW2d 561 (2007). A court considering a motion for summary disposition under MCR 2.116(C)(10) must review the evidence "submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 552.

Statutory interpretation is a question of law that this Court reviews de novo. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The first criterion in ascertaining the intent of the Legislature is the language of the statute. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the language of the statute is clear and unambiguous, the Court must assume the Legislature intended its plain meaning, and enforce the statute as written. *Id*.

III

On appeal, plaintiffs argue that the trial court erred in dismissing this action because although they mistakenly pleaded their claim under the Business Corporation Act, MCL 450.1101, *et seq*, they can properly bring their claim under the similar protections afforded them by the Michigan Liability Company Act, MCL 450.4101, *et seq*. Defendant responds initially by stating that because it is a limited liability company and not a corporation, the Business Corporation Act does not apply to it. Defendant also argues that even when applying the Liability Company Act, plaintiffs' argument fails because "Emergency M.E.D. Stat" is clearly distinguishable from "Stat EMS."

A.

The record reflects that plaintiffs indeed sought to amend Count I of their complaint in the trial court to correct their error in filing under the Business Corporation Act and not the Limited Liability Company Act, but the trial court denied plaintiffs' motion. "This Court reviews for an abuse of discretion a trial court's denial of a motion to amend a complaint." *Tierney v Univ of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). If the trial court selects a principled outcome, there is no abuse of discretion, and the reviewing court must defer to the trial court's ruling. *Maldonado, supra*. When the trial court selects an outcome that is neither reasonable nor principled, an abuse of discretion occurs. *Id*.

Amendment is generally a matter of right rather than grace, and a trial court should freely grant leave to amend if justice so requires. MCR 2.118(A)(2); *Tierney, supra* at 687. "'Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile.'" *Tierney, supra* at 687-688, quoting *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). Here, because as our analysis will display *infra*, in Section III B., that amendment would have been futile, the trial court did not abuse its discretion when it denied plaintiffs' motion to amend their complaint. *Id*.

B.

In determining whether plaintiffs could have properly pleaded a claim under the Liability Company Act, MCL 450.4101, *et seq*, we look to the plain language of the statute. Plaintiffs do not clearly state which specific provision of the statute they believe defendants violated in the Limited Liability Company Act, and refer only to the entire statute, MCL 450.4101, *et seq*. "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." *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). For this reason we have the discretion to decline to review this issue, but we will address it.

Had plaintiffs pleaded their claim properly and with specificity, it would appear that they would have claimed defendant violated MCL 450.4204(2)(c)(i) with regard to plaintiff Stat EMS, LLC, and MCL 450.4204(2)(c)(ii) with regard to plaintiff Stat Emergency Medical Services, Inc. The subsections are as follows:

> (2) The name of a domestic or foreign limited liability company formed under or subject to this act shall conform to all of the following:
>
> ***
>
> (c) Shall distinguish the name upon the records in the office of the administrator from all of the following:
>
> (i) The name of a domestic limited liability company, or a foreign limited liability company authorized to transact business in this state, that is in good standing.
>
> (ii) The name of a corporation subject to the business corporation act, 1972 PA 284, MCL 450.1101 to 450.2098, or a nonprofit corporation subject to the nonprofit corporation act, 1982 PA 162, MCL 450.2101 to 450.3192. [MCL 450.4204(2)(c)(i) and (ii).]

The plain language of the statute requires a new limited liability company to incorporate under a name that is distinguishable from the name of any other limited liability company or corporation authorized to transact business in Michigan. MCL 450.4204(2)(c)(i) and (ii). Clearly, defendant's name, Emergency M.E.D. Stat, LLC, is not the same as and is

distinguishable on its face from both the name plaintiffs operate under: "STAT EMS" and plaintiffs' registered mark. Plaintiffs have failed to plead how defendant's name is not distinguishable from plaintiffs' names pursuant to the statute.

Moreover, MCL 450.4204(4) provides: "The fact that a limited liability company name complies with this section does not create substantive rights to the use of the name." Plaintiffs' claims are based on their alleged rights as the limited liability company named, "Stat EMS, LLC," and the corporation bearing the name "Stat Emergency Medical Services, Inc.," to preclude a limited liability company allegedly violating MCL 450.4204 from continuing to use its name. MCL 450.4204(4) plainly provides that plaintiffs' own compliance with name requirements do not give plaintiffs substantive rights in their names. Plaintiffs' claim that defendant violated MCL 450.4204 fails as a matter of law.

For these reasons, we conclude that the plain language of the act would have precluded plaintiffs' claims that defendant violated MCL 450.4204(2)(c) had they properly pleaded their claim.

IV

Next, plaintiffs assert that defendant violated the Michigan Trademark and Service Mark Act, MCL 429.31 *et seq.*[2] MCL 429.42 provides civil liability for a violation of the Act and it provides that any person who shall:

> (a) Use, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of a mark registered under this act in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods or services; or
>
> (b) Reproduce, counterfeit, copy or colorably imitate any such registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used upon or in connection with the sale or other distribution in this state of such goods or services; is liable to a civil action by the owner of the registered mark for any or all of the remedies provided in section 13, except that under subdivision (b) of this section the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that the mark is intended to be used to cause confusion or mistake or to deceive. [MCL 429.42.]

Again, we look to the plain language of the statute. *Wickens, supra*. Plaintiffs do not assert in their complaint or explain in their brief on appeal how plaintiffs have violated the plain language of this statute. In Count II of their complaint at paragraph 22, plaintiffs assert that:

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[2] Again, plaintiffs do not clearly state which specific provision of the statute they believe defendants violated and we could decline to review this issue.

> By utilizing "STAT" in its business name, Defendant Emergency M.E.D. STAT is violating the statute. Moreover, Defendant's use of "STAT" has caused actual confusion and will likely continue to do so to Plaintiff's detriment and Defendant's benefit unless enjoined.

Plaintiffs have never alleged that defendant used, reproduced, counterfeited, copied, or colorably imitated a mark registered by plaintiffs in violation of MCL 429.42. Instead, plaintiffs have only asserted that defendant's *use* of the word "Stat" in its name is a violation of MCL 429.42. Plaintiff's argument is wholly without merit. The statute is plain and unambiguous. In order to bring a cause of action pursuant to MCL 429.42, plaintiffs must have at least alleged that defendant used, reproduced, counterfeited, copied, or colorably imitated a mark registered by plaintiffs in violation of MCL 429.42. Plaintiff's have not done so, and as such, plaintiff's have not properly pleaded a claim for trademark violation under MCL 429.31 *et seq*.

V

Finally, plaintiffs alleged common-law unfair competition relative to defendant's name in their complaint.[3] The trial court granted summary disposition on this issue in defendant's favor. It seems to appear from their argument on appeal that plaintiff's believe that this was error. However, to properly present an issue for appellate consideration, it must be set forth in the statement of questions presented. MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). Although this Court may overlook preservation requirements, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002), considering plaintiffs' treatment of this issue, appellate consideration is not appropriate. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003); *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court").

Were we to reach this issue, we would conclude that plaintiffs are not entitled to relief. Plaintiffs allege in their complaint that defendant's name, Emergency M.E.D. Stat, LLC, is confusingly similar to the name under which plaintiffs operate and that is included on its registered mark: "Stat EMS." Plaintiffs focus on the similar word "stat." Although there is no particular formula for the courts to utilize in these particular cases, precedents reveal that "[c]orporate names are confusingly similar when the first two words of a compound name are identical and in the same sequence." *Ed Subscription Service, Inc v American Ed Services, Inc*, 115 Mich App 413, 421; 320 NW2d 684 (1982).

At oral argument on appeal plaintiffs argued that defendant's name is merely a reconfiguration of plaintiffs' name. However, plaintiffs' operating name and registered mark is "Stat EMS." Clearly, the only shared word is "stat" and it is the third word in defendant's name and the first word in plaintiffs' name. Importantly, the word "stat" in combination with the identifying term "EMS" is readily recognizable. The incorporation of the term EMS in

[3] Any other common law unfair competition claims brought by plaintiffs were dismissed with prejudice by the parties and are not at issue on appeal.

plaintiffs' name clearly differentiates plaintiffs' operating name from defendant's name because defendant does not use the identifying term as part of its name. In defendant's name, the first and dominant word is "emergency" which does not appear in plaintiffs' name and the identifying term "EMS" does not appear in defendant's name. We conclude that the names are distinguishable and there is only a very little likelihood of confusion due to the shared word. Therefore, plaintiffs would not be entitled to an injunction where the similarity of names is "so slight as to be unlikely to confuse others than the careless or indifferent or they involved banks or insurance companies or concerns doing business with a specialized field." *220 Bagley Corp v Julius Freud Land Co*, 317 Mich 470, 473; 27 NW2d 59 (1947).

Affirmed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis