STATE OF MICHIGAN

COURT OF APPEALS

JAMES K. LONTZ and BRIGITTE LONTZ, Plaintiffs-Appellants, v CONTINENTAL CASUALTY COMPANY, Defendant-Appellees.	UNPUBLISHED March 26, 2009 No. 281183 Wayne Circuit Court LC No. 04-425621-CZ

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

In this contract dispute, plaintiffs appeal by right the trial court's grant of summary disposition in favor of defendant. We affirm.

Defendant began selling both non-tax-qualifying (NTQ) and tax-qualifying (TQ) long-term care insurance policies to consumers in 1997. Plaintiffs purchased NTQ policies from defendant. Plaintiffs acknowledged that their NTQ policies did not qualify for favorable income tax treatment under the law in effect at the time they were purchased. However, the NTQ policies contained an "exchange privilege," which provided:

> We are currently working with your state insurance department to obtain approval of long-term care policies that will qualify for this favorable tax treatment. Once this approval has been received, you may exchange this policy for a new tax qualified policy without having to provide new evidence of insurability.

This exchange privilege effectively permitted the holders of NTQ policies to exchange their policies for TQ policies.

In 2003, defendant stopped selling long-term care insurance policies. According to the deposition testimony of defendant's vice president, certain of defendant's agents or representatives mistakenly concluded in December 2003 that the exchange privilege could no longer be honored because of the decision to discontinue selling the policies. Defendant's vice president attributed this mistake to a number of things, including mistaken verbal communications and a misunderstanding of a written bulletin that was sent out to field agents. Defendant's erroneous refusal to honor the policyholders' exchange privileges lasted for approximately six weeks.

Plaintiffs never attempted to invoke the exchange privilege and never indicated a desire to convert their NTQ policies into TQ policies during the abovementioned six-week period. Nevertheless, plaintiffs sued, alleging among other things that defendant had breached the insurance contracts by temporarily refusing to honor the exchange privilege. Plaintiffs sought not only traditional contract remedies, but also a declaration that defendant should "cease violating the law" and "allow [plaintiffs] to exercise the '[e]xchange [p]rivilege' as initially set forth in the insurance contracts." The trial court dismissed plaintiffs' claims on the basis of the doctrines of standing and ripeness.

The trial court did not specify the court rule on which it relied to dismiss plaintiffs' breach of contract claim. But a motion to dismiss for lack of standing is generally brought pursuant to MCR 2.116(C)(5). *Aichele v Hodge*, 259 Mich App 146, 152 n 2; 673 NW2d 452 (2003); *Dep't of Social Services v Baayoun*, 204 Mich App 170, 173; 514 NW2d 522 (1994). "'In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5), this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties.'" *Aichele*, 259 Mich App at 152, quoting *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000). "This Court reviews the trial court's ruling de novo and examines the entire record to determine whether the defendant is entitled to judgment as a matter of law." *Jones*, 242 Mich App at 718.[1]

The doctrine of standing deals with the plaintiff's interest in the litigation and "ensures that a genuine case or controversy is before the court." *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*, 479 Mich 280, 294; 737 NW2d 447 (2007). Standing is evaluated at the time the plaintiff seeks relief from the trial court. *Altman v Nelson*, 197 Mich App 467, 475; 495 NW2d 826 (1992). Our Supreme Court has adopted a three-part test to establish standing:

> "'[F]irst, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."'" [*Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001) (citations omitted).]

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[1] We acknowledge that the Supreme Court has differed with this Court concerning the applicability of MCR 2.116(C)(5) in the context of standing to sue. *Leite v Dow Chemical Co*, 439 Mich 920; 478 NW2d 892 (1992). However, even assuming that the trial court's grant of summary disposition in this case should be reviewed under MCR 2.116(C)(10), *id*., the standard applicable to motions brought under subrule (C)(10) is substantially similar to the standard applicable to motions brought under subrule (C)(5).

In this case, plaintiffs' failure to offer evidence that they suffered an injury in fact is fatal to their standing to pursue a breach of contract action. Michigan law requires that a party claiming a breach of contract prove the terms of the contract, that the defendant breached the terms, and that the breach caused an injury. See *In re Brown*, 342 F3d 620, 628 (CA 6, 2003); see also *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Plaintiffs assert that the exchange privilege offered by defendant in 1997, which provided plaintiffs the opportunity to exchange their NTQ policies for TQ policies, constituted a term of the parties' contract. But even if it did, we cannot agree that the unilateral action taken by defendant in 2003 to temporarily suspend or terminate the exchange privilege resulted in a concrete and particularized injury. In Michigan a contract modification requires a meeting of the minds in the same way that a meeting of the minds is necessary to create a binding contract in the first instance. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 326-327; 550 NW2d 228 (1996). "[T]he freedom to contract does not authorize a party to *unilaterally* alter an existing bilateral agreement." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003) (emphasis in original). Therefore, we find no merit to plaintiffs' claim of injury predicated on defendant's alleged unilateral action. Because defendant's unilateral action could not have altered the contract term as a matter of law, the value of the contract could not have been affected by defendant's unilateral conduct.

We also reject plaintiffs' reliance on the doctrine of anticipatory repudiation to establish an injury. Although plaintiffs failed to present this specific argument to the trial court, we consider it because it is an issue of law for which the necessary facts have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

Nonetheless, the doctrine does not aid plaintiffs in establishing an injury in this case. Under the doctrine of anticipatory repudiation,

> [I]f, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance. [*Stoddard v Manufacturers Nat'l Bank*, 234 Mich App 140, 163; 593 NW2d 630 (1999).]

Also under the doctrine of anticipatory repudiation, one party's breach can excuse the innocent party's obligation to perform. *Thomas Canning Co v Johnson*, 212 Mich 243, 252; 180 NW 391 (1920); see also 17A Am Jur 2d, Contracts, § 688, p 648. Moreover, "[i]t is well settled that a repudiation of the contract by one party relieves the nonrepudiating party of the duty to perform any conditions precedent that may exist to the performance of the repudiating party." 13 Williston, Contracts (4th ed), § 39:39, p 672.

However, even assuming arguendo that defendant breached the contract and that this breach relieved plaintiffs of their obligation to notify defendant of their intent to invoke the exchange privilege, the submitted evidence examined in a light most favorable to plaintiffs failed to establish that plaintiffs had ever articulated a past or present intention to exercise the exchange privilege in the first instance. Given this absence of evidence, coupled with the complete lack of evidence that defendant ever specifically indicated that it would not honor such a request by plaintiffs, the doctrine of anticipatory breach does not assist plaintiffs in establishing an injury in

this case. Plaintiffs failed to show a genuine issue of material fact regarding their standing to bring a breach of contract action against defendant. Accordingly, the trial court properly dismissed this claim.

Plaintiffs' claim also embodied a request for declaratory relief, requesting that the trial court declare that defendant was prohibited from unilaterally changing the insurance policies to eliminate the exchange privilege. However, we are not persuaded that plaintiffs have demonstrated any basis for disturbing the trial court's decision to dismiss the claim for declaratory relief.

MCR 2.605 governs a trial court's power to enter a declaratory judgment. The court rule provides in part that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). Because the language in this rule is permissive, the decision whether to grant declaratory relief is within the trial court's sound discretion. *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 126; 715 NW2d 398 (2006). But "the existence of an 'actual controversy' is a condition precedent to the invocation of declaratory relief." *Id*. at 127. The requirements of an "actual controversy" and an "interested party" in MCR 2.605 "incorporat[e] traditional restrictions on justiciability such as standing, ripeness, and mootness." *Associated Builders & Contractors v Dep't of Consumer & Industry Services*, 472 Mich 117, 125; 693 NW2d 374 (2005).

We agree with the trial court's decision to dismiss plaintiffs' request for declaratory relief on the basis of the doctrine of ripeness. Because plaintiffs' breach of contract claim rested on speculative and contingent future events—namely, defendant's hypothetical refusal to honor the exchange privilege upon plaintiffs' invocation of the privilege, which may never have occurred—it was not ripe for declaratory relief. *Huntington Woods v Detroit*, 279 Mich App 603, 615-616; ___ NW2d ___ (2008).

We note that whether defendant had breached the exchange privilege presented a distinct question from whether the exchange privilege was, in fact, a term of plaintiffs' contracts. Moreover, it is true that declaratory relief has been found appropriate where it will "'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.'" *Flint v Consumers Power Co*, 290 Mich 305, 310; 287 NW 475 (1939) (citation omitted).

However, while a court is not bound by a parties' choice of labels, *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989), the record supports the trial court's determination that plaintiffs sought declaratory relief with respect to the breach of contract claim only, and not with respect to the separate and distinct issue of whether the exchange privilege constituted a contract term. Indeed, given that the parties had agreed that plaintiffs had a contractual right to exercise the exchange privilege, any dispute concerning whether the exchange privilege constituted a term of plaintiffs' contracts was moot. A court will not reach moot issues or declare principles or rules of law that have no practical effect in a case, unless the issue is one of public significance that is likely to recur yet evade judicial review. *Federated Publications, Inc v Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), clarified in part on other grounds *Herald Co v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470-472 (2006).

Plaintiffs have not established that the issue of whether the exchange privilege constituted a contract term is likely to recur yet evade judicial review.

We will not disturb the trial court's decision when the court has reached the correct result. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). The substance of plaintiffs' request for declaratory relief related to their breach of contract claim, and any dispute over whether plaintiffs' insurance policies contained an exchange privilege term was moot. Moreover, plaintiffs' claims were not ripe for judicial review because they rested on contingent future events that might have never occurred. Therefore, plaintiffs failed to establish the requisite actual controversy to obtain declaratory relief in this case. The trial court reached the correct result by dismissing plaintiffs' claim in this regard.

Finally, we reject plaintiffs' newly raised argument that summary disposition was premature because discovery was incomplete. "Although incomplete discovery generally precludes summary disposition, summary disposition may nevertheless be appropriate if there is no disputed issue before the court or if further discovery does not stand a fair chance of finding factual support for the nonmoving party." *VanVorous v Burmeister*, 262 Mich App 467, 476-477; 687 NW2d 132 (2004). Michigan's discovery rules do not allow for "'fishing expedition[s].'" *Id*. at 477 (citation omitted). A party opposing summary disposition on the basis of incomplete discovery must comply with the requirements in MCR 2.116(H) by presenting affidavits to support its position. *Coblentz v Novi*, 475 Mich 558, 570-571; 719 NW2d 73 (2006). Because plaintiffs failed to offer the necessary affidavits to show that their position would be supported by additional discovery, they may not now complain that summary disposition under MCR 2.116(C)(10) was premature. *Coblentz*, 475 Mich at 571.

Having concluded that the trial court reached the correct result by dismissing plaintiffs' claims, we need not consider the remaining arguments raised on appeal.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood