STATE OF MICHIGAN

COURT OF APPEALS

JACK BOSS and MARI BOSS,

Plaintiffs/Cross-Defendants/Appellants,

v

LOOMIS, EWERT, PARSLEY, DAVIS, & GOTTING, PC, KELLY K. REED, CATHERINE A. JACOBS, KEVIN J. RORAGEN, WILLIAM CULBERTSON, S. WHITFIELD LEE, R. ANDREW GATELY,

Defendants-Appellees,

and

TALL GRASS INVESTMENT CORP,

Defendant/Cross-Plaintiff/Appellee,

and

EAGLE TRANSPORT SERVICES, INC.,

Defendant.

UNPUBLISHED
March 16, 2010

No. 287578 and 289438
Allegan County Court
LC No. 05-037882-CK

Before: Meter, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

In Docket No. 287578, plaintiffs Jack Boss and Mari Boss,[1] appeal a July 9, 2007 order granting the renewed motion for summary disposition of plaintiffs' legal malpractice claim brought by defendant law firm Loomis, Ewert, Parsley, Davis & Gotting, PC and by individual

[1] We were advised at oral argument that Mari Boss has been adjudged bankrupt and therefore, the appellee relinquish their claims against her.

attorneys within the law firm, Kelly K. Reed, Catherine A. Jacobs, Kevin J. Roragen, ("the Loomis defendants"). The trial court granted summary disposition pursuant to MCR 2.116(C)(7) on the ground that plaintiffs' claim was barred by the two-year statute of limitations applicable to claims of professional malpractice as set out in MCL 600.5805. The matter at issue involved the appropriate accrual date as determined under MCL 600.5838. Because we are precluded from readdressing this argument by the law of the case doctrine, we affirm.

In Docket No. 289438, plaintiffs appeal a post-judgment order granting sanctions pursuant to MCL 600.2591 to defendants Tall Grass Investment Corporation, William Culbertson, S. Whitfield Lee, and R. Andrew Gately, against plaintiffs, jointly and severally. Because plaintiffs have not sufficiently developed their arguments on appeal nor have they presented applicable legal authority for their arguments they have not established error, and we affirm.

I

This case arises out of the sale of 80% of defendant Eagle Transport Services, Inc. and related real estate from plaintiff Jack Boss, who retained the other 20%, to defendants Tall Grass Investment Corporation, Culbertson, Lee, and Gately. In the complaint, filed June 17, 2005, plaintiffs alleged a fraud claim against those defendants, specifically alleging that they raided the assets of Eagle, and caused Eagle to withhold payments for company cars, credit cards, and other business assets that caused plaintiffs to be personally responsible for those payments, thus destroying plaintiffs' credit rating. With regard to the Loomis defendants, in a count alleging legal malpractice, plaintiffs alleged that the documents for the transfer drafted by the attorneys at defendant Loomis firm were insufficient and failed to protect plaintiffs from the acts of the Tall Grass defendants.

Defendant Loomis firm represented plaintiffs beginning in 1992 in various matters both personal and business-oriented. Defendant Jacobs provided estate-planning services to plaintiffs, which were completed in April 1999. From March 2001 to November 2001, the Loomis firm represented Eagle and Jack Boss in facilitating the termination of Michael Dargis, a minority shareholder in Eagle. Plaintiff Jack Boss and defendant Jacobs agree that the Dargis termination matter ended in November 2001. Neither of those matters is involved in this action.

Defendant attorneys Jacobs, Reed, and Roragen each averred that Eagle and plaintiffs retained defendant Loomis firm on July 25, 2002, to represent their interests in the sale of Eagle to Tall Grass, that Tall Grass acquired a majority of Eagle's shares on March 13, 2003, and that "[t]he last date Loomis performed legal services for Jack and Mari Boss related to the Tall Grass Acquisition was on April 7, 2003." Also, April 7, 2003, is the date of the last service rendered by defendant Loomis firm on the Tall Grass acquisition as reflected in the firm billing invoice. Defendant attorneys Jacobs, Reed, and Roragen each averred that the Loomis firm continued to represent Eagle after the acquisition by Tall Grass, but did not represent plaintiffs "individually on any matter related to the sale of their interest in Eagle."

Defendant Roragen averred that after the Tall Grass acquisition, defendant Culbertson asked him to continue as legal counsel for Eagle, and that Roragen told him he would, but if a conflict of interest arose with Jack Boss, he would be unable to represent either without a signed waiver of conflict. Defendant Roragen also averred that in 1999, plaintiffs had entered into a

land contract for the purchase of a piece of property, and that around July 4, 2004, Eagle discovered that the property was listed as one of its assets. Defendant Roragen stated that defendant Culbertson asked him to represent Eagle in the quiet title action relative to that property and that he contacted plaintiff Jack Boss to ask him to waive any conflict of interest if the Loomis firm agreed to represent Eagle in that action, and that Jack Boss refused to do so.[2]

Defendants Jacobs and Reed each averred that on September 16, 2003, Jack Boss asked the firm to represent his wife, plaintiff Mari Boss, after Eagle terminated her employment, and that they explained that they could not represent Mari without obtaining a conflict of interest waiver from Eagle.

The Loomis defendants all moved for summary disposition on the ground that under MCL 600.5838, a claim of professional malpractice accrues "at the time that person discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose," and the matter out of which this claim arose – the Tall Grass acquisition – was completed on April 7, 2003. But plaintiffs did not file their complaint until June 17, 2005, beyond the two-year limitations period set out in MCL 600.5805(5).

In response to the Loomis defendants' motion for summary disposition, plaintiffs did not argue that representation on the Tall Grass acquisition continued beyond April 7, 2003. Instead, they argued that they had relied on the Loomis defendants for all their legal needs for many years and that the representation did not cease with the finalization of the Eagle/Tall Grass matter. Plaintiffs further argued that defendant Loomis firm continued to represent them on many other items, some related to Eagle, some not. Plaintiffs relied on an invoice from the Loomis firm to plaintiff Jack Boss for "Legal Services Rendered Through September 30, 2003." That invoice lists services for three dates. The first service was for September 3, 2003, and is described as follows: "Review file for creation of new LLC, forward LLC operating agreements and ancillary documentation to be signed by client as prepared by Catherine Jacobs in 2001." The second service date on the invoice is for September 8, 2003, which is described as, "Telephone conference with Kevin J. Roragen regarding Tall Grass' agreement to waive conflict of interest in MSA, LLC negotiation with Eagle." And the third service date is for September 16, 2003, and it is described as, "Telephone conference with Jack Boss regarding Mari being fired by Eagle; telephone conference with Jack Boss and Catherine A. Jacobs regarding ethical prohibition for Loomis to represent Mari with respect to her termination at Eagle without Eagle's waiver of the conflict of interest."

During oral argument on the summary disposition motion, plaintiffs argued that the Loomis defendants had not discontinued serving them as clients and invoked the "last treatment rule." In an apparent effort to clarify plaintiffs' argument, the trial court posited a scenario to plaintiffs' attorney:

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[2] See *Dargis v Boss*, Unpublished opinion of the Court of Appeals, issued September 16, 2008 (Docket No. 273473).

> Let's say a lawyer represents a client over a twenty year period in various matters. During the early part of the representation, the lawyer gives the client bad advice regarding one matter. Would the client still have a malpractice claim years later if the lawyer was still representing the client, but in a completely different matter?

Plaintiffs' attorney responded in the affirmative.

Ultimately the trial court granted the Loomis defendants' renewed motion for summary disposition with prejudice holding that:

> Here, the court takes note of Mr. Roragen's affidavit, which shows that he asked Mr. Boss for a waiver, but finds that there was no duty for the Defendants to send a letter terminating representation. Plaintiffs' legal malpractice claims arise out of the Tall Grass Acquisition matter and the last September billing regarding Mari Boss had nothing to do with this malpractice claim. The Court finds the Defendants discontinued serving Plaintiffs in the Tall Grass Acquisition matter in April 2003. Plaintiffs' legal malpractice claims are barred pursuant to the statute of limitations.

The trial court dismissed defendant law firm Loomis, Ewert, Parsley, Davis & Gotting, PC and defendant individual attorneys Reed, Jacobs, and Roragen for the reason that plaintiffs' claims were barred by the statute of limitations pursuant to MCR 2.116(C)(7). Plaintiffs sought delayed leave to appeal the trial court's ruling in this Court. This Court denied plaintiffs' delayed application for leave to appeal "for lack of merit in the grounds presented." *Boss v Loomis, Ewert, Parsley, Davis & Gotting, PC*, Unpublished order of the Court of Appeals, entered February 4, 2008 (Docket No. 280716).[3]

The matter proceeded against the remaining defendants. Defendant Eagle Transport apparently did not file an appearance in the matter because it was then defunct. Plaintiffs submitted a proposed default judgment against defendant Eagle Transport in the amount of $605,899.39. The trial court entered the default judgment on October 11, 2006. With regard to the remaining defendants, case evaluation was held in May 2007. Plaintiffs were awarded $125,000. The remaining defendants, Tall Grass, Culbertson, Lee, and Gately all filed an acceptance of the award. Plaintiffs rejected the case evaluation.

Jury trial commenced on May 5, 2008 and continued through May 16, 2008. The jury found no cause of action regarding any of plaintiffs' claims against the remaining defendants. The jury did, however, award a judgment in the amount of $64,114.54 in favor of defendant Tall Grass Investment Corp. against plaintiffs jointly and severally. The trial court entered a final

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[3] Plaintiffs filed an application for leave to appeal the Court of Appeals' order in the Supreme Court. Our Supreme Court denied plaintiffs' application for leave to appeal because it was "not persuaded that the question presented should be reviewed by this Court." *Boss v Loomis, Ewert, Parsley, Davis & Gotting, PC*, Order of the Supreme Court, entered May 27, 2008 (Docket No. 136038).

judgment in accordance with the jury verdict on August 14, 2008. With regard to case evaluation sanctions, on November 7, 2008, the trial court entered a stipulated order granting defendants, Tall Grass, Culbertson, Lee, and Gately, case evaluation sanctions in the amount of $133,275 in actual attorneys' fees against plaintiffs jointly and severally. The trial court also entered an Order for Sanctions pursuant to MCL 600.2591 on November 26, 2008 awarding defendants, Tall Grass, Culbertson, Lee, and Gately, $23,759 in sanctions against plaintiffs jointly and severally after finding that plaintiffs' defamation claim was frivolous. Plaintiffs now appeal as of right.

II

First, in Docket No. 287578, plaintiffs argue again on appeal that the trial court erred when it determined that the statute of limitations had run with regard to defendants Loomis, Ewert, Parsley, Davis & Gotting, PC and by individual attorneys within the law firm, Reed, Jacobs, and Roragen. Plaintiffs previously sought delayed leave to appeal the trial court's ruling regarding the statute of limitations in this Court immediately following the trial court's grant of summary disposition against the Loomis defendants in Docket No. 280716. At that time, this Court denied plaintiffs' delayed application for leave to appeal "for lack of merit in the grounds presented." *Boss v Loomis, Ewert, Parsley, Davis & Gotting, PC*, Unpublished order of the Court of Appeals, entered February 4, 2008 (Docket No. 280716). "Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue." *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997). Because this Court expressed an opinion on the merits of plaintiffs' arguments in denying the application for leave to appeal in Docket No. 280716, the law of the case doctrine precludes us from readdressing the arguments.

Were we to address the merits of the argument, we would find no merit to plaintiffs' argument on this issue. A legal malpractice claim must be brought within two years of the date the claim accrues, or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. MCL 600.5805(6); MCL 600.5838. In *Kloian v Schwartz*, 272 Mich App 232; 725 NW2d 671 (2006), this Court stated the two year limitations period and that accrual is at the time the attorney discontinues serving the plaintiff "as to the matters out of which the claim for malpractice arose." *Id*., 237. The *Kloian* Court also quoted *Gebhardt v O'Rourke*, 444 Mich 535, 543; 510 NW2d 900 (1994), for the proposition that "a legal malpractice claim accrues on the attorney's 'last day of professional service' in the matter out of which the claim for malpractice arose." *Kloian, supra* at 232, quoting *Gebhardt, supra* at 543. Moreover, the *Kloian* Court went on to explain,

> [W]hen an attorney is not dismissed by the court or the client, and substitute counsel is not retained, the attorney's service discontinues "upon completion of a specific legal service that the lawyer was retained to perform." [*Id*. (internal citations omitted).]

Plaintiffs here relied on the invoice captioned "Legal Services Rendered Through September 30, 2003." "The matter out of which the claim for malpractice arose," or put another way, "the specific legal service that the lawyer was retained to perform" was the acquisition of Eagle Transport by Tall Grass. None of the three services described in the invoice had anything to do with that transaction. The one for September 3, 2003, relates to the separate matter of the

formation of a limited liability company. The second one dated September 8, 2003, relates to a telephone conference in which Tall Grass's conflict of interest waiver is sought in regard to a negotiation with Eagle regarding an entity called MSA, LLC. Although Tall Grass is involved in the conference call, its acquisition of Eagle Transport is not at issue in any way. And finally, the third dated September 16, 2003, is a conference call regarding possible representation of Mari Boss after Eagle Transport terminated her employment. That too does not involve the Tall Grass acquisition.

Again on appeal, plaintiffs rely on the "last treatment rule" discussed in *Levy v Martin*, 463 Mich 478; 620 NW2d 292 (2001), and argue that it applies in the present case. In *Levy*, our Supreme Court considered a malpractice action against an accountant who prepared annual tax returns for the plaintiff. In that case, as the result of an IRS audit of 1991 and 1992 tax years, the plaintiff was required to pay additional taxes as well as interest and other legal and accounting expenses. The plaintiff brought a malpractice suit against the defendant accountants in 1997. *Id.* at 480-481. The *Levy* Court began its analysis by reviewing the application of "the last treatment rule" in *Morgan v Taylor*, 434 Mich 180; 451 NW2d 852 (1990), involving a malpractice claim in connection with a 1981 optometric examination. The plaintiff in *Morgan* had an examination less than two years earlier and the *Levy* Court said, "the issue in *Morgan* was whether 'routine, periodic examinations' extend the limitation period." *Id.*, 483. In *Morgan*, the Court stated that the "last treatment rule" applied in the context of routine, periodic examinations, holding that:

> It is the doctor's assurance upon completion of the periodic examination that the patient is in good health which induces the patient to take no further action other than scheduling the next periodic examination.
>
> Particularly in light of the contractual arrangement which bound defendant and entitled plaintiff to periodic eye examinations, it cannot be said that the relationship between plaintiff and defendant terminated after each visit. [*Levy, supra* at 483-484 quoting *Morgan, supra* at 194 (internal footnotes omitted).]

Turning to the facts in its case, the *Levy* Court adopted as its own, Judge Whitbeck's dissenting opinion in *Levy* that the "last treatment rule" applies in the context of routine and periodic services such as individual tax preparations. In that opinion as quoted in *Levy*, Judge Whitbeck wrote,

> A patient who attended a periodic examination and was not diagnosed with any medical problem was under the rationale of the last treatment rule provided with an "assurance" of good health that induced the patient to take no further action to investigate the pertinent health matters until the next periodic examination. Likewise, a client who entrusts preparation of annual tax returns to an accountant is provided with an assurance of professional preparation of the tax returns that induces the client to take no further action regarding those matters until it is time to prepare the next year's tax returns. [*Levy, supra* at 485.]

The "last treatment rule" thus applies in the context of routine and periodic services such as individual tax preparations. However, none of the services provided by the Loomis defendants to plaintiffs in September 2003 fall into that category. Instead, they involve separate, disparate matters wholly distinct from the legal services performed by the Loomis defendants for

plaintiffs related to the Tall Grass acquisition that was completed on April 7, 2003. For these reasons the "last treatment rule" is inapplicable and, were we to address plaintiffs' argument on this issue, we would conclude that it is without merit.

III

In Docket No. 289438, plaintiffs first argue that the trial court clearly erred in determining that their defamation claim in their complaint was frivolous. Whether a claim is frivolous depends on the facts of the case and review of a trial court's finding of frivolity is for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). MCL 600.2591 provides that costs and fees shall be awarded if a court finds that a party's claim or defense was frivolous. Frivolous is defined in MCL 600.2591(3)(a) as one or more of the following:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

Likewise, MCR 2.114(E) and MCR 2.625(A)(2) mandate an award of costs and fees on a finding of a frivolous claim. The sanctions may be levied against the attorney, the represented party, or both. MCR 2.114(E).

Here, plaintiffs voluntarily dismissed their defamation claim at the beginning of trial before any proofs went to the jury. In a post-trial motion, defendants Tall Grass, Culbertson, Lee, and Gately filed a motion for sanctions pursuant to MCL 600.2591 against plaintiffs on three counts of their seven-count complaint. The trial court denied the motion on the quantum meruit/unjust enrichment count and the tortious interference with business relationship count, but granted it with regard to the defamation count. The trial court stated as follows at the November 7, 2008 hearing on the matter:

> The defamation issue is different. First of all I didn't hear anything at all that would even come close to defamation. It was dismissed before we went to trial, or actually not before we went to trial but before we started submitting proofs.
>
> So, I think at best that the petitioners here would be entitled—and I think because of that meeting the criteria, and based on what the Court recalls the testimony was during the course of the trial, that there was absolutely nothing that would support that and never was, and there never was at any time. That there wasn't a good basis to proceed on a claim such as that.
>
> I would, since I understand the difficulty in attempting to break down in a multi-count suit, I'm going to just divide it equally and since there were 5 claims

> against these petitioner[s], award attorney fees on the basis of frivolous claims under the Statute of one-fifth of the total at the adjusted attorney fee rate.

The trial court then issued an order on November 26, 2008 granting sanctions pursuant to MCL 600.2591 in the amount of $23, 759 against plaintiffs to defendants Tall Grass, Culbertson, Lee, and Gately.

Plaintiffs present two arguments on appeal in support of their assertion that the trial court clearly erred when it determined that their defamation claim was frivolous. First, plaintiffs seem to contend that when the case went to case evaluation, the case evaluators did not find any portion of plaintiffs' claims to be frivolous, so the trial court should not have found the defamation claim to be frivolous. And secondly, plaintiffs seem to be arguing that because the trial court allowed some portion of their complaint to go to the jury, then the entire case, including the defamation claim, could not have been frivolous. Though, plaintiffs barely articulate their arguments well enough for us to understand what they are arguing. And plaintiffs provide absolutely no support for their arguments. A party may not merely announce his position and leave it to this Court to unravel and elaborate for him his arguments and search for authority to support or reject his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). We decline to address this argument due to plaintiffs' cursory treatment of the arguments. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

However, we do observe that the absence of factual support for plaintiffs' allegations support the conclusion that the defamation claim was frivolous pursuant to MCL 600.2591(3)(a)(iii). A suit for defamation must allege:

> 1) a false and defamatory statement concerning the plaintiff, 2) an unprivileged communication 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 or the existence of special harm caused by publication. [*Rouch v Evening News*, 440 Mich 238, 251; 487 NW2d 205 (1992).]

And, claims for defamation must be pleaded with specificity. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 52; 495 NW2d 391 (1992). A plaintiff must allege and identify specifically which statements he considers to be materially false. *Id*. at 52-53. With regard to their defamation claim, plaintiffs' complaint simply states, "[d]efendants [Lee], Culbertson, and Gately maliciously defamed the character of Plaintiffs by making untrue accusations of embezzlement against Plaintiffs to employees of Defendant Eagle and others after the termination of Plaintiffs' employment." The complaint does not identify specific statements, which defendants specifically made what statements, the content of the statements, and to whom the statements were directed. It is not enough that a plaintiff allege all the necessary elements. The complaint must be "well grounded in fact" and filed only after "reasonable inquiry." MCR 2.114(D)(2). In sum, were we able to review this argument fully, we would conclude that, based on the record presented, the trial court did not clearly err in finding plaintiffs' defamation claim frivolous because it was "devoid of arguable legal merit." MCL 600.2591(3)(a)(iii).

IV

Finally, in Docket No. 289438, plaintiffs set forth this question in their statement of questions presented:

> Did the Trial Court err in not allowing Plaintiffs/Appellants an offset of the Eagle judgment amount of $605,899.39 against the legal fee sanctions claim of $28,766.80 since the legal fee invoices were submitted to Eagle Transport Services, Inc.?

With regard to plaintiffs setoff request in the trial court at a hearing on October 3, 2008, the trial court held as follows:

> That's neither here nor there. He was sued individually. I don't want to mince words. Lets not play any games. I understand who everybody is, I heard 2 weeks of trial. I understand that and as far as I'm concerned it's clear from those billings, Wardrop and McQueen's, that they were for this lawsuit and for the defense and the prosecution of the claims of Culberston, Whitfield Lee and Gately. The Court makes that determination.
>
> To hold otherwise would be putting a strained interpretation on what was billed out and for why. Eagle wasn't even part of the lawsuit at the time that these billings occurred. So that's what the Court is holding. If Mr. Boss and Mrs. Boss disagree with it they certainly can have the Court of Appeals take a second look.
>
> So, you may enter an order that says you're entitled to the sanctions provided for as you requested, but the amount at this time is reserved for an evidentiary hearing as to the appropriateness of attorney fees only.

On the sixth and final page of their brief on appeal, plaintiffs' entire argument with regard to this issue is as follows:

> The Trial Court clearly erred in failing to recognize the [default] judgment in the amount of $605,899.39 to offset case evaluation sanctions especially since the attorney fee invoices which were the basis for sanctions were rendered in [sic] behalf of Eagle and sent to Eagle.

As can be seen by the dearth of analysis presented and absolutely no citation to authority, plaintiffs do not provide any factual or legal basis for why the trial court erred when it disallowed the setoff plaintiffs requested. In any event, we cannot analyze what plaintiffs have not presented. Again, "[i]t 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. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We do note, however, the general proposition that, "[t]he law treats a corporation as an entirely separate entity from its shareholders[.]" *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004). On this record, it appears that Eagle Transport was a separate entity from defendants Tall Grass Investment Corporation, Culbertson, Lee, and

Gately, and as such, plaintiffs, even had they been able to properly articulate their argument on this issue, would not have been able to establish error. *Id*.

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Patrick M. Meter
/s/ Brian K. Zahara
/s/ Pat M. Donofrio