STATE OF MICHIGAN

COURT OF APPEALS

KLARICH ASSOCIATES, INC., a/k/a KLARICH ASSOCIATES INTERNATIONAL, Plaintiff-Appellant/Cross-Appellee, v DEE ZEE, INC. and DEE ZEE MANUFACTURING, Defendants, and EDWARD WATERMAN and JOEL GRANDELIUS, Defendants-Appellees/Cross-Appellants.	UNPUBLISHED May 10, 2012 No. 301688 Oakland Circuit Court LC No. 09-104305-CK

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Klarich Associates, Inc., a/k/a Klarich Associates International (Klarich), challenges the trial court's grant of summary disposition in favor of defendants, Edward Waterman and Joel Grandelius (defendants). On cross-appeal, defendants assert that the trial court erred in denying their motion for sanctions. We affirm in part, reverse in part, and remand for further proceedings.

Klarich represents various independent automobile part manufacturers for the sale of their products to larger companies such as Ford Motor Company, General Motors and Chrysler. Klarich employed defendants as sales agents to promote and sell products manufactured by Dee Zee, Inc. (Dee Zee) to the automakers. As part of its agreement with Dee Zee, Klarich received a three percent commission on sales Klarich procured for Dee Zee products. The agreement between Klarich and Dee Zee was reduced to a written contract that permitted either party to terminate their commercial relationship, at will, with 30 days notice. The contract also provided that if Dee Zee terminated the contract with Klarich, Dee Zee would remain obligated to pay "life of the program" commissions for the sale of all products previously obtained by Klarich for Dee Zee.

Dee Zee forwarded a letter, dated October 27, 2008, to Klarich notifying it that Dee Zee wished to terminate their contract, effective December 1, 2008. In turn, Klarich notified defendants that the need for their services would also be terminated on December 1, 2008. Defendants thereafter began working directly for Dee Zee. Approximately three months after termination of its contract with Klarich, Dee Zee terminated its payment of "life of the program" sales commissions to Klarich. The gist of the complaint filed by Klarich in the lower court alleged tortious interference by defendants in its contract and business relationship with Dee Zee. Specifically, Klarich asserted that defendants induced Dee Zee to terminate its contract and payment of "life of the program" commissions to Klarich. Klarich further alleged that defendants, as its agents, breached their fiduciary duties by competing with Klarich for Dee Zee's business while still engaged in an agency relationship with Klarich.

In granting summary disposition in favor of defendants on Klarich's tortious interference claims, the trial court indicated that defendants were permitted to compete with Klarich in the marketplace and noted the absence of evidence to suggest "wrongful or malicious activity" by defendants. The trial court dismissed Klarich's claim for breach of fiduciary duty based on its determination that the relationship between Klarich and defendants did not give rise to such a duty. The trial court also denied defendants' request for sanctions finding that Klarich's claims were neither frivolous nor imposed for an improper purpose.

On appeal, in addition to challenging the trial court's grant of summary disposition in favor of defendants, Klarich further alleges error by the trial court in improperly restricting the scope of discovery only to events occurring before December 1, 2008. Further, defendants' cross-appeal the trial court's denial of their request for sanctions.

As discussed previously by this Court in *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007):

> Summary disposition under . . . [MCR 2.116](C)(10) presents an issue of law for [the Court's] determination and, thus, [the Court] review[s] a trial court's ruling on a motion for summary disposition de novo. . . .
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> A motion made under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ.
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> When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. But such materials "shall only be

> considered to the extent that [they] would be admissible as evidence. . . ." [Quotation marks and citations omitted.]

In contrast, this Court reviews a trial court's decision to deny discovery for an abuse of discretion. *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Further,

> This Court reviews a trial court's decision to deny sanctions for clear error. A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. Sanctions are warranted under MCR 2.114 where a plaintiff asserts claims without any reasonable basis in law or fact for those claims, or where the claims are asserted for an improper purpose. The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted. And, [n]ot every error in legal analysis constitutes a frivolous position. [*Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 485-486; 760 NW2d 526 (2008) (internal citations and quotation marks omitted).]

Klarich first contends the trial court erred in dismissing its claims against defendants for tortious interference with its contract and business relationship with Dee Zee. In asserting these claims, Klarich alleged both that defendants induced Dee Zee to terminate its contract with Klarich and that defendants also induced Dee Zee to cease paying "life of the program" sales commissions to which Klarich was entitled under its contractual agreement with Dee Zee. As Klarich's claim of tortious interference with a contract involves two separate components regarding prospective or future sales and ongoing commissions for past sales, each component of the claim must be evaluated separately.

To establish a claim for tortious interference with a contract, a plaintiff is required to demonstrate "(1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005). Addressing first Klarich's tortious interference with a contract claim as it pertains to future sales we note that the sales agency agreement with Dee Zee provided, "Either party may terminate this Agreement at any time by giving thirty (30) days notice to the other party in writing of their intent to so terminate." There is no dispute that Dee Zee provided Klarich with the requisite 30 days notice before terminating its contract for prospective sales. Because the contract was properly terminated there was no breach of contract, which is a necessary component to a successful claim of tortious interference with a contract. See *id.* Thus, Klarich's assertion of tortious interference with a contract pertaining to future sales cannot be sustained.

An alternative outcome is necessary premised on Klarich's assertion of tortious interference with a contract regarding past performance and the contractual agreement for continuation for "life of the program" sales commissions. In accordance with the sales agency agreement executed between Klarich and Dee Zee, "In the event that DEE ZEE terminates KLARICH, KLARICH shall be entitled to commission payment for the remainder of the life of the programs. . . ." Arguably, Klarich has asserted a claim for tortious interference with a

contract for improper termination of the "life of the program" commissions. In raising this claim, Klarich is required to establish all of the elements of a valid contract, *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990), including (1) the participation of parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation, *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Although Dee Zee properly terminated the prospective aspect of its sales agency agreement with Klarich, a genuine issue of fact remains regarding the premature termination of the "life of the program" commissions, which remained an ongoing contractual obligation. To prove tortious interference with this aspect of the contract, Klarich must demonstrate that (1) it had a contract with a third party, (2) defendants were aware of the existence of the contract, (3) defendants intentionally interfered with the contract; (4) defendants improperly interfered with the contract, (5) defendants' conduct caused the third party to breach the contract, and (6) damages resulting from defendants' conduct. SJI2d 125.01. The record currently before this Court is insufficient to determine whether this continuing aspect of the sales agency agreement between Klarich and Dee Zee has been breached and that the breach is attributable to the conduct of defendants. Consequently, the trial court erred in granting summary disposition in favor of defendants on this aspect or component of Klarich's claim for tortious interference with a contract.

As an alternative, Klarich has alleged tortious interference with a business relationship, which comprises a broader and distinct cause of action. To establish tortious interference with a business relationship or expectancy, a plaintiff is required to demonstrate:

> (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. [*Health Call of Detroit*, 268 Mich App at 90.]

In contrast to Klarich's claim of tortious interference with a contract, a claim of interference with a business relationship or expectancy is not predicated on a breach of contract. Klarich and Dee Zee entered into their sales agency agreement on July 1, 2003. Defendants entered into sales agency agreements with Klarich in February 2008. By September 2008, Dee Zee had indicated dissatisfaction with Klarich's services and implied an intent to discontinue their prospective sales relationship, which was confirmed in October 2008 and implemented by December 1, 2008. Based on this timeline, it is undeniable that Klarich had a business relationship or expectancy with Dee Zee, premised on an enforceable contract and that defendants were aware of this relationship. As Klarich's contract with Dee Zee was in effect until December 1, 2008, and the expectancy for continuing payment of "life of the program" commissions extended beyond that date, Klarich should have been afforded the opportunity to demonstrate defendants' tortious interference. Specifically, during the period spanning February 2008, when Klarich hired defendants, to September 2008 when it received notification of dissatisfaction by Dee Zee regarding its contractual performance, Klarich was permitted to pursue proofs to establish that defendants intentionally interfered with its relationship with Dee Zee, resulting in termination of the contract with regard to prospective sales. Even though Klarich was aware as of October 27,

2008, that Dee Zee intended to terminate the prospective component of its sales agreement, defendants continued to work for Klarich until December 1, 2008. Klarich was precluded, however, by the trial court from engaging in discovery of actions occurring after December 1, 2008, in support of his claim that defendants improperly induced Dee Zee to prematurely terminate payments for "life of the program" commissions. As such, both the limitation on discovery and the dismissal of Klarich's tortious interference with a business relationship or expectancy was in error.

We acknowledge that to prove tortious interference with a contractual relationship required Klarich to demonstrate "the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Wood v Herndon*, 186 Mich App 495, 500; 465 NW2d 5 (1990). Further, a claim for tortious interference may fail if the actions of defendants were taken for a legitimate personal or business interest. *Id.* at 500. The reach of this rule is, however, limited as although a legitimate personal or business interest may preclude the imposition of liability for tortious interference, it does not comprise an absolute defense. *Id.* at 500-502. Application of such a rule is complicated by the erroneous determination of the trial court that defendants had no fiduciary duty to Klarich and the restrictions imposed on discovery.

Whether an agency relationship exists comprises a question of fact. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995). An agency relationship is deemed to arise when there is "a manifestation by the principal that the agent may act on his account. The test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992) (citations omitted). While the designation or characterization of the relationship by the parties is not deemed to be controlling, *Van Pelt v Paull*, 6 Mich App 618, 624; 150 NW2d 185 (1967), "if an act done by one person in behalf of another is in its essential nature one of agency, the one is the agent of such other notwithstanding he is not so called." *Id.* (citation omitted).

Klarich came forward with sufficient evidence to demonstrate the existence of an agency relationship with defendants. Defendants acknowledged that they felt they owed Klarich certain "obligations" and maintained a sense of loyalty in representing Klarich to third parties. The agreements executed between Klarich and defendants explicitly referred to defendants as its agents for the purpose of representations to automobile manufacturers. Within these agreements, defendants also agreed to refrain from working for other companies while under contract with Klarich. These facts are, at the very least, sufficient to raise a factual issue regarding the existence of an agency relationship and commensurate fiduciary obligations between defendants and Klarich.

If an agency relationship is found, fiduciary responsibilities also exist. Specifically, "[a]n agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position." 2 Restatement Agency, 3d, § 8.11, p 369. In other words:

> [A]s to engaging in other business, it is an elemental rule of agency that his duties required his efforts and activities in the line of his employment should be for the benefit of his principal, and he was not at liberty to deal in the business

> of his agency for his own benefit. It was his duty to communicate to his principal facts relating to the business which ought in good faith be made known to the latter. . . . The corollary to that fundamental rule is thus concisely stated in 1 Mechem on Agency (2d Ed.), § 1224:
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> > The well settled and salutary principle that a person who undertakes to act for another shall not, in the same matter, act for himself, results also in the other rule, that all profits made and advantage gained by the agent in the execution of the agency belong to the principal. And it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent if it be the fruit of the agency. [*Production Finishing Corp v Shields*, 158 Mich App 479, 486-487; 405 NW2d 171 (1987), quoting *Salvador v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1978) (internal quotation marks omitted).]

This is not in conflict with the premise that defendants were free to establish themselves, absent a legitimate non-competition agreement, as competitors of Klarich following the termination of their relationship. The problem that exists, based on the evidence available, suggests that defendants began working on their own behalf in procuring business for Dee Zee while still working for Klarich and before the expiration of Klarich's contract with Dee Zee. This fact is integral to Klarich's tortious interference and breach of fiduciary duty claims and precluded the trial court's grant of summary disposition.

The trial court also erred in unreasonably restricting the scope of Klarich's discovery. MCR 2.302(B)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

It is well recognized that Michigan "follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998) (citation omitted).

By limiting Klarich to discovery only to actions or events occurring before December 1, 2008, the trial court did not recognize the full scope of Klarich's claims. In restricting discovery, the trial court focused solely on the claim of tortious interference with regard to the prospective nature of the contract and did not acknowledge that to establish tortious interference pertaining to the "life of the program" commissions that the actions of defendants and Dee Zee after December 1, 2008, were also relevant.

Finally, on cross-appeal, defendants assert error by the trial court in the denial of their request for sanctions pursuant to MCR 2.114 and MCL 600.2591, for the filing of a frivolous action and improper purposes. Specifically, MCR 2.114 provides in pertinent part:

> **(D) Effect of Signature.** The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
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> (1) he or she has read the document;
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> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
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> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
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> **(E) Sanctions for Violation.** If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.
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> **(F) Sanctions for Frivolous Claims and Defenses.** In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

Similarly, MCL 600.2591 states:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
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> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
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> (3) As used in this section:
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> (a) "Frivolous" means that at least 1 of the following conditions is met:
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> (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.

(b) "Prevailing party" means a party who wins on the entire record.

Because the majority of Klarich's claims have arguable legal merit and necessitate that the trial court conduct further proceedings, defendants' request for sanctions is unavailing at this time.

We affirm the trial court's dismissal of Klarich's tortious interference with a contract claim regarding any prospective sales for Dee Zee and the denial of defendants' request for sanctions. We reverse the grant of summary disposition on the remaining claims and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan