STATE OF MICHIGAN

COURT OF APPEALS

ANDRE B. DAVIS, Plaintiff-Appellant,	UNPUBLISHED November 27, 2012
v	No. 307014 Genesee Circuit Court
EDWIN L. GULLECKSON, DEBORAH PASCOL, and MCLAREN HOSPITAL, Defendants-Appellees.	LC No. 11-096525-AA

Before: FORT HOOD, P. J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, proceeding in propria persona, appeals as of right the circuit court's order granting defendants' motion for summary disposition under MCR 2.116(C)(8). Because plaintiff's complaint failed to allege a valid cause of action, we affirm.[1]

It appears that plaintiff is arguing that the trial court erred by dismissing his complaint without resolving whether defendant Dr. Edwin Gulleckson committed fraud when he made statements concerning his findings following a physical examination of plaintiff's children conducted pursuant to allegations of sexual assault. Plaintiff entered a plea of nolo contendere to a charge of felonious assault in exchange for the dismissal of multiple counts of criminal sexual conduct involving the children.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Id*. at 119. A motion

[1] We reject defendants' challenge to this Court's jurisdiction. Defendants assert that this Court lacks jurisdiction over plaintiff's appeal to the extent that it relates to the trial court's September 19, 2011, order denying plaintiff's motion for judicial review because plaintiff failed to timely appeal that order. Plaintiff timely filed his appeal from the October 17, 2011, opinion and order, however, and, contrary to defendants' contentions, plaintiff is permitted to raise issues related to prior orders. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). In any event, plaintiff's arguments do not relate to the September 19, 2011, order.

under subrule (C)(8) "may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotation marks and citation omitted).

Fraud must be pleaded with particularity. *Cooper v Auto Club Ins Ass'n,* 481 Mich 399, 414; 751 NW2d 443 (2008). In order to establish fraud, a plaintiff must show that:

> (1) the defendant made a material misrepresentation; (2) it was false; (3) when it was made, the defendant either knew it was false or made it recklessly without knowledge of its truth or falsity; (4) the defendant made it with the intent that the plaintiff would act upon it; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered damage. [*Int'l Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App 437, 447; 543 NW2d 25 (1995).]

"An allegation of fraud based on misrepresentations made to a third party does not constitute a valid fraud claim." *Id.*

Plaintiff's complaint does not refer to "fraud" or contain allegations that would support a claim of fraud. The complaint refers to Dr. Gulleckson's statements made in medical records. Although plaintiff's theories and assertions have varied at times, he did not plead and has not asserted that Dr. Gulleckson made a representation with the intent that plaintiff rely on it. Likewise, plaintiff did not plead and has not asserted that he acted in reliance on any representation that Dr. Gulleckson made.

Further, our Supreme Court has recognized that an action for fraud based on perjury committed in a previous suit "may not be filed against a person involved in a first suit[] if the statutes and court rules provide an avenue for bringing the fraud to the attention of the first court and asking for relief there." *Daoud v De Leau,* 455 Mich 181, 203; 565 NW2d 639 (1997). Here, although plaintiff entered a plea of nolo contendere and did not proceed to trial, he had an opportunity to contest the accuracy of the sexual abuse allegations in his criminal case. Moreover, if Dr. Gulleckson had testified at a trial, he would have been immune from suit.

> Witness immunity is [] grounded in the need of the judicial system for testimony from witnesses who, taking their oath, are free of concern that they themselves will be targeted by the loser for further litigation. Absent perjury of a character requiring action by the prosecuting attorney, the testimony of a witness is to be weighed by the factfinder in the matter at bar, not by a subsequent jury summoned to determine whether the first lawsuit was tainted by fraud. [*Id*. at 202-203.]

In *Maiden,* 461 Mich at 134, our Supreme Court further stated:

> Witnesses who are an integral part of the judicial process "are wholly immune from liability for the consequences of their testimony or related evaluations." [14 West Group's Michigan Practice, Torts], § 9:394, pp. 9-131 to 9-132, citing *Martin v Children's Aid Society,* 215 Mich App 88, 96; 544 NW2d 651 (1996). Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the

> issue being tried. See *Martin v Children's Aid Society, supra; Rouch v Enquirer & News*, 427 Mich 157, 164; 398 NW2d 245 (1986); *Meyer v Hubbell*, 117 Mich App 699, 709; 324 NW2d 139 (1982); *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695; 108 NW2d 761 (1961). Falsity or malice on the part of the witness does not abrogate the privilege. *Sanders, supra.* The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. *Id.*

We express no opinion whether plaintiff could plead a valid fraud claim. The trial court properly declined to rule on the viability of a claim that had not been pleaded and granted defendants' motion for summary disposition without prejudice to plaintiff filing a valid cause of action. There is no indication that plaintiff has attempted to do so.

Defendants argue that the trial court's dismissal of plaintiff's complaint was proper but that the court should have dismissed the action with prejudice. That issue is not properly before us, however, because defendants did not file a cross appeal. A cross appeal is necessary to obtain a decision that is more favorable than that rendered by the trial court. *Cheron, Inc v Dow Jones, Inc*, 244 Mich App 212, 221; 625 NW2d 93 (2000).

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

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio