STATE OF MICHIGAN

COURT OF APPEALS

VARIOUS MARKETS, INC., d/b/a AMERICAN YACHT SOCIETY,

Plaintiff-Appellant,

v

MARK YEARN and UNIVERSAL INSURANCE SERVICES, INC.,

Defendants-Appellees.

UNPUBLISHED
May 22, 2001

No. 215231
Oakland Circuit Court
LC No. 97-542627-CK

VARIOUS MARKETS, INC., d/b/a AMERICAN YACHT SOCIETY,

Plaintiff-Appellee,

v

MARK YEARN,

Defendant-Appellant,

and

UNIVERSAL INSURANCE SERVICES, INC.,

Defendant.

No. 218307
Oakland Circuit Court
LC No. 97-542627-CK

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

In docket no. 215231, plaintiff Various Markets, Inc, doing business as American Yacht Society, appeals as of right from the trial court's order granting summary disposition in favor of defendants Mark Yearn and Universal Insurance Services, Inc. (Universal), and denying plaintiff's motion to disqualify the law firm Hyman Lippitt, P.C. from its representation of Yearn

because of an alleged conflict of interest. In docket no. 218307, defendant Yearn appeals by leave granted from the trial court's order denying his request for attorney fees and costs under MCR 2.405. We affirm in docket no. 215231 and remand in docket no. 218307.

Plaintiff is an insurance agency which provides insurance in the boating and marina industry. Mark DuPuis is plaintiff's president. Defendant Mark Yearn worked for plaintiff as an insurance agent until July 1996, at which time he began to work for defendant Universal, one of plaintiff's competitors. In its complaint filed in October 1997, plaintiff alleged breach of contract, negligence, misrepresentation, fraud, defamation, conversion, tortious interference with business relations, conspiracy, breach of fiduciary duties, and exemplary damages. Plaintiff specifically alleged in its complaint that Yearn had been assigned to secure a written agreement with an off-shore insurance company, Tangent Insurance Company, under which all yacht and marina insurance to be placed with Tangent would be placed through plaintiff. Plaintiff alleged that Yearn was to secure, manage, and market the program with Tangent, while Tangent would underwrite the insurance policies. Plaintiff further asserted that Yearn was to negotiate a joint marketing venture with Universal for use with the Michigan Boating Industries Association. Apparently, while this joint venture was discussed between plaintiff and Universal, no agreement ever came to fruition. Plaintiff, however, asserts that Yearn represented that he secured a written exclusivity agreement with Tangent, managed the program, and protected plaintiff's interests upon which plaintiff relied by continuing to sell insurance policies underwritten by Tangent. Plaintiff maintains that Yearn's representations were false, and that plaintiff did not discover this until Yearn left his employment with plaintiff and became employed with Universal.

Docket No. 215231

I

Plaintiff first argues that the trial court erred in granting summary disposition to defendants under MCR 2.116(C)(8) and (10). This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden, supra,* p 119. Only the pleadings may be considered when ruling on a motion brought under subrule (C)(8). MCR 2.116(G)(5). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden, supra,* p 119. A motion under MCR 2.116(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. *Maiden, supra,* p 119. A motion under MCR 2.116(C)(10), on the other hand, tests the factual sufficiency of the claim. In evaluating a motion for summary disposition brought under this subsection, a court considers the pleadings, affidavits, depositions, admissions, and any other evidence submitted by the parties or filed in the action, MCR 2.116(G)(5), in a light most favorable to the party opposing the motion. *Harts v Farmers Ins Exchange,* 461 Mich 1, 5; 597 NW2d 47 (1999). The motion is properly granted if the documentary evidence shows that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*, pp 5-6.

A. Plaintiff's Claims Against Defendant Yearn

With respect to defendant Yearn, plaintiff argues that the trial court erred in dismissing plaintiff's claims of conversion, breach of fiduciary duty, tortious interference with a business relationship, fraud and misrepresentation, breach of contract, and negligence.

1. Conversion

The tort of conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Plaintiff claims that Yearn wrongfully collected premiums on insurance policies identifying plaintiff as the producer, deposited the premiums into his own account without authority from plaintiff, and never paid plaintiff for the premiums collected. The first amended complaint further alleged that Yearn misappropriated property, confidential client information, and customer lists from plaintiff.

While these allegations set forth a claim of conversion, a review of the record reveals that plaintiff has failed to support these allegations with any documentary evidence. DuPuis testified at his deposition that plaintiff did not have a noncompete agreement with Yearn. Therefore, even if Yearn took information regarding clients, such conduct was not prohibited by contract. Moreover, with regard to the insurance premiums, plaintiff attaches a canceled check payable to Tangent Companies, in care of Yearn, and asserts that Yearn wrongfully deposited this money into his own account rather than turning over the money to plaintiff. Plaintiff has simply failed to provide any evidence that this canceled check shows that Yearn misappropriated plaintiff's money.

Accordingly, the trial court did not err in granting defendant Yearn's motion for summary disposition under MCR 2.116(C)(10) with respect to the claim of conversion.

2. Breach of Fiduciary Duty

Plaintiff's claim in this regard is entirely unclear. The trial court granted summary disposition with respect to the breach of fiduciary duty claim based on DuPuis' own testimony that plaintiff's claim against Yearn for breach of fiduciary duty was based solely upon the employment contract, as established by the employee handbook. Because the employee handbook expressly disclaimed any contractual relationship and disclaimed any legal obligations arising from it, plaintiff's reliance upon the handbook for duties owed by Yearn must fail. See *Heurtebise v Reliable Business Computers*, 452 Mich 405; 550 NW2d 243 (1996). Therefore, the trial court properly dismissed plaintiff's claim to the extent that Yearn's obligations arose from the employee handbook which disclaims the creation of any legal obligations.

Plaintiff, however, argues that Yearn was an independent contractor and not an employee, somewhat contrary to a position noting evidence that Yearn was indeed an employee in plaintiff's appellate brief. Regardless, we again find that plaintiff has failed to present documentary evidence to sustain the claim of breach of fiduciary duty. Plaintiff again asserts, without supporting documentary evidence, that Yearn assisted Universal in selling Tangent insurance premiums outside the scope of the relationship between plaintiff and Tangent, thereby taking profits away from plaintiff and ultimately placing the premiums in his own account. We note that the two exhibits relied on by plaintiff in support of this assertion (exhibits 18 and 19

attached to plaintiff's appellate brief) are dated December 1996, some six months *after* Yearn left his employ with plaintiff.

Accordingly, the trial court did not err in granting defendant Yearn's motion for summary disposition under MCR 2.116(C)(10) with respect to the breach of fiduciary duty claim.

3. Tortious Interference with a Business Relationship

In *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996), this Court set forth the elements of tortious interference with a business relationship:

> The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. . . . To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference.

Plaintiff now contends, contrary to the position it took with regard to the breach of fiduciary duty claim, that Yearn was its employee. Plaintiff contends that it expected Yearn to establish an exclusive arrangement with Tangent that insurance policies placed through Tangent would be placed through plaintiff so as to collect commissions. Plaintiff alleges that Yearn caused multiple polices written through plaintiff to be canceled and that the same policies were then rewritten by Yearn and Universal. Plaintiff claims that Yearn collected the premiums and deposited the money into his own account. However, DuPuis' deposition testimony was that plaintiff indeed received premiums from Tangent policies sold by plaintiff in 1995 and 1996. Consequently, plaintiff's claim of tortious interference with a business relationship again fails on the proofs because DuPuis' own testimony refutes any intentional interference by Yearn to induce or cause a breach or termination of the relationship between plaintiff and Tangent since plaintiff clearly received premiums from Tangent policies.

Accordingly, the trial court did not err in granting summary disposition under MCR 2.116(C)(10) to defendant Yearn on the claim of tortious interference with a business relationship.

4. Fraud and Misrepresentation

The elements of fraudulent misrepresentation are: (1) the defendant made a material representation, (2) the representation was false, (3) when the defendant made the representation, the defendant knew that it was false, or made recklessly without knowledge of its truth, (4) the defendant made the representation with the intention that the plaintiff act upon it, (5) the plaintiff acted in reliance upon it, and (6) the plaintiff suffered damage. *M&D, Inc v W B McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).

We agree with the trial court that plaintiff failed to prove the reliance element of this claim. Plaintiff alleges that Yearn made material misrepresentations to it regarding the exclusivity provision in the agreement between plaintiff and Tangent. DuPuis testified at his deposition that only he or his father had the authority to execute such an agreement on behalf of plaintiff and that he oversaw all aspects of the program with Tangent. Since only DuPuis or his father could actually bind plaintiff to an exclusivity agreement with Tangent, even if Yearn made any representations to the contrary, plaintiff could not have relied on any such agreement knowing that Yearn could not execute such an agreement. Consequently, plaintiff failed to present any evidence that it relied on any alleged misrepresentations made by Yearn.

Accordingly, the trial court did not err in granting summary disposition under MCR 2.116(C)(10) to defendant Yearn on the claim of fraudulent misrepresentation.

5. Breach of Contract

The breach of contract claim, as testified to by DuPuis, was premised on the employee handbook. Once again, plaintiff's claim must fail for the reason, as previously set forth, that the employee handbook specifically disclaimed any contractual relationship or legal obligations arising therefrom. *Heurtebise, supra*. Plaintiff has failed to show the existence of any other contract, and only asserts that Yearn assumed certain duties (forming an agreement between plaintiff and Tangent and increasing his sales commissions and sales market) that he did not perform. However, assuming a duty does not create a contract.

Accordingly, the trial court did not err in granting summary disposition in favor of defendant Yearn with respect to the breach of contract claim.

6. Negligence

"In a contractual setting, a tort action must rest on a breach of duty distinct from the contract; the mere failure to perform an obligation under a contract cannot support a negligence claim." *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 465; 531 NW2d 768 (1995). Plaintiff's complaint did not state a duty on the part of Yearn separate from the obligations set forth in the employee handbook, which plaintiff claimed created a contract. Because plaintiff's claim was that Yearn failed to perform his obligations under a contract, his negligence claim fails as a matter of law. Moreover, although the employee handbook does not create a contract, Yearn's assumption of certain duties as an employee of plaintiff does not create a relationship giving rise to a *legal duty* that is independent of a contractual obligation such that a tort action will lie. Cf. *Antoon v Community Emergency Medical Service, Inc*, 190 Mich App 592, 595; 476 NW2d 479 (1991).

Accordingly, the trial court did not err in granting summary disposition under MCR 2.116(C)(8) to defendant Yearn with respect to the negligence claim.

B. Plaintiff's Claims Against Defendant Universal

With respect to defendant Universal, plaintiff contends that the trial court erred in granting summary disposition on the claims of breach of contract, tortious interference with a business relationship, and conversion.

1. Breach of Contract

Regarding the breach of contract claim against Universal, plaintiff's claim fails because it has not shown the existence of any contract. DuPuis testified that the contract was an agency agreement, but plaintiff has failed to plead or prove with any specificity what term of that agreement was breached. DuPuis also testified to a joint marketing program to sell insurance through the Great Midwest Insurance Company, but this venture never came to fruition. Consequently, as correctly stated by the trial court, there is simply no contract identified by plaintiff that Universal purportedly breached.

Accordingly, the trial court did not err in granting summary disposition under MCR 2.116(C)(8) and (10) with respect to the breach of contract claim.

2. Tortious Interference with a Business Relationship

With regard to the claim of tortious interference with a business relationship, plaintiff claims that Universal interfered with the expectation that Yearn would secure an exclusive agreement between plaintiff and Tangent and that Universal interfered with plaintiff's exclusive arrangement that had been negotiated for the Great Lakes basin. However, plaintiff's proofs fail because there was no exclusivity contract between plaintiff and Tangent and the arrangement concerning the Great Lakes basin similarly never became a contract. As noted by the trial court, there was simply no evidence that Universal intentionally interfered and induced or caused a breach or termination of a relationship or expectancy that plaintiff had. Rather, Universal and plaintiff are competitors in the marketplace and the evidence appears to be nothing more than actions motivated by legitimate business reasons. *BPS Clinical Laboratories, supra,* p 699.

Accordingly, the trial court did not err in granting summary disposition under MCR 2.116(C)(10) to defendant Universal with respect to the tortious interference with business relations claim.

3. Conversion

As has been stated, conversion is any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights of that property ownership. *Foremost Ins Co, supra,* p 391. Plaintiff alleges in its appellate brief that Universal converted plaintiff's premiums by canceling the policies that had been written through plaintiff, rewriting the policies, listing plaintiff as the producer on the policy, and retaining the money. This allegation is different from that stated in plaintiff's complaint, and before the trial court, that Universal misappropriated files and customer lists.

Regardless, we agree with Universal that plaintiff has failed to sustain its allegations with any documentary evidence. DuPuis admitted that he had no evidence that Yearn took any files or information from plaintiff and gave the information to Universal. Moreover, plaintiff admitted

that there was no noncompete agreement with Yearn from competing with clients after Yearn left plaintiff's employ to work for Universal. Further, plaintiff's allegation with respect to the insurance premiums is just that, an allegation. There is no evidence that Universal converted money that was actually owed to plaintiff. In this regard, there was no exclusivity agreement between plaintiff and Tangent, thus, the fact that Universal directly issued Tangent policies to Universal's insureds cannot create a claim for conversion.

Accordingly, the trial court did not err in granting summary disposition under MCR 2.116(C)(10) to defendant Universal with regard to the claim of conversion.

C. Plaintiff's Claim of Civil Conspiracy Against Both Defendants

A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. *Admiral Ins Co v Columbia Casualty Ins Co,* 194 Mich App 300, 313; 486 NW2d 351 (1992). Plaintiff alleges that Yearn and Universal acted together to obtain plaintiff's proprietary information, to convert insurance premiums, to take plaintiff's customers, and to interfere with plaintiff's exclusive agreements. As has been noted, there was no exclusive agreement between plaintiff and Tangent. Further, there is no evidence that any files or information was misappropriated from plaintiff by Universal and Yearn. Consequently, there is no evidence that Universal and Yearn combined to accomplish a criminal or unlawful purpose or to accomplish a lawful purpose by criminal or unlawful means.

Accordingly, the trial court did not err in granting summary disposition under MCR 2.116(C)(10) to both defendants on the civil conspiracy claim.

D. Plaintiff's Claim of Exemplary Damages

Exemplary damages may be properly awarded if they compensate the plaintiff for humiliation, indignity, or a sense of outrage resulting from injuries maliciously, wilfully, and wantonly inflicted by the defendant. *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401, 419; 295 NW2d 50 (1980). Exemplary damages may not be awarded in an action asserting breach of contract unless there is an allegation and proof of tortious conduct existing independent of the breach. *Id.*, pp 420-421. The trial court, having properly dismissed the tort claims against defendants, properly dismissed the exemplary damages claim as well, there being no underlying tort action to support a claim for damages. Moreover, there is no proof of humiliation, indignity, or outrage resulting from injuries maliciously and wilfully inflicted by defendants.

Accordingly, the trial court properly dismissed the claim of exemplary damages.

E. Summary Disposition Granted Before Discovery Completed

Plaintiff also argues that the trial court prematurely granted summary disposition before discovery was completed. Plaintiff specifically notes that an employee of Universal had yet to be deposed, that other unspecified depositions had been noticed, and that plaintiff's damages expert had not been deposed. Summary disposition may be appropriate before the expiration of discovery if further discovery does not stand a fair chance of uncovering factual support for the

opposing party's position. *Crawford v Michigan*, 208 Mich App 117, 122-123; 527 NW2d 30 (1994). The party opposing summary disposition on the ground that discovery is incomplete must at least assert that a dispute does indeed exist and support that allegation by some independent evidence. *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). Plaintiff here has failed to show that the undeposed witnesses would have added any important evidence to sustain its myriad of claims. Consequently, summary disposition was not prematurely granted.

II

Next, plaintiff argues that the trial court erred in denying its motion to disqualify the law firm Hyman Lippitt, P.C., defendant Yearn's counsel, because of a conflict of interest. A trial court's failure to disqualify a law firm requires reversal only where the refusal to do so would be inconsistent with substantial justice. MCR 2.613(A); *Feaheny v Caldwell*, 175 Mich App 291, 309; 437 NW2d 358 (1989).

"The party seeking disqualification bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result." *Kubiak v Hurr*, 143 Mich App 465, 471; 372 NW2d 341 (1985). The Michigan Rules of Professional Conduct prohibit a lawyer from representing one client if the representation will be directly adverse to another client, or if that representation may be materially limited by the lawyer's responsibilities to another client or third person, or by the lawyer's own interests. MRPC 1.7; *Macomb Co Prosecutor v Murphy*, 233 Mich App 372, 386; 592 NW2d 745 (1999). MRPC 1.9(a) specifically states:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Plaintiff asserts that the law firm representing Yearn in this case previously represented plaintiff and its president, Mark DuPuis, relating to a matter in litigation in California. Apparently, in 1993, Yearn retained Hyman Lippitt, P.C. to represent his interests in a proposed transaction with Westrec Marine Underwriters and DuPuis. The transaction would have transferred name and customer lists of the American Yacht Society to Westrec. In furtherance of this goal, plaintiff and DuPuis were involved in the transfer of these assets from plaintiff to Yearn. Plaintiff attached to its motion to disqualify a canceled check indicating that plaintiff paid Brian O'Keefe, an attorney working for Hyman Lippitt, P,C., for his services. In opposition to plaintiff's motion, Yearn offered the affidavit of O'Keefe, in which O'Keefe stated that at all relevant times, he represented Yearn individually. This representation entailed discussions and correspondences with other parties to the proposed transaction, but O'Keefe never rendered legal services to any other party, "including Mark DuPuis."

The trial court relied heavily on O'Keefe's affidavit, averring that he never represented plaintiff or DuPuis, in denying the motion to disqualify. Further, plaintiff has failed to meet its burden of demonstrating how it was prejudiced as a result of O'Keefe's representation of Yearn in the previous matter. In fact, plaintiff states in its appellate brief that "[i]t is unknown what

knowledge defense counsel may have gained from its prior representation of plaintiff or how said knowledge may have affected the outcome of this litigation." In light of the evidence presented in opposition to the motion to disqualify, and the lack of evidence of prejudice, we do not find error requiring reversal.

III

Plaintiff next argues that the trial court abused its discretion in denying plaintiff's motion for reconsideration of the order of dismissal. *Cole v Ladbroke Racing Michigan, Inc,* 241 Mich App 1, 8; 614 NW2d 169 (2000). We find no abuse of discretion.

Pursuant to MCR 2.119(F)(3), a motion for reconsideration that merely presents the same issues ruled on by the court, either expressly or by reasonable implication, should not be granted. Rather, the moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion would result from correction of the error. Here, plaintiff's motion for reconsideration asserted the same arguments as in the response to the motions for summary disposition as previously ruled upon by the trial court. Furthermore, reconsideration was not warranted because plaintiff failed to demonstrate a palpable error of law. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

IV

To the extent that plaintiff argues that the trial court erred in awarding costs to defendant Yearn under the offer of judgment rule, MCR 2.405, because summary disposition was improperly granted, we reject that argument inasmuch as we are affirming the trial court's grant of summary disposition in favor of defendant Yearn.

Docket No. 218307

In this appeal, defendant Yearn challenges the trial court's decision to grant in part and deny in part Yearn's request for costs and fees under the offer of judgment rule, MCR 2.405. The trial court awarded costs of $525 for an expert witness fee and $40 for the filing of two motions for summary disposition. The trial court otherwise denied Yearn's request for a reasonable attorney fee and for the costs of deposition transcripts.

On November 19, 1997, Yearn filed an offer of judgment in the amount of $5,000. On December 1, 1997, plaintiff rejected the offer and filed a counteroffer of $100,000. After discovery and motions for summary disposition, the trial court ultimately granted summary disposition in favor of Yearn in an order entered on September 8, 1998. Under these circumstances,[1] plaintiff "must pay to the offeror the offeror's actual costs incurred in the . . . defense of the action." MCR 2.405(D)(1). Actual costs are defined as "the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." 2.405(A)(6). The trial court "shall" determine the actual

[1] See generally, MCR 2.405(A).

costs incurred and may, in the interest of justice, refuse to award an attorney fee. MCR 2.405(D)(3).

With respect to the costs for the deposition transcripts, the trial court denied an award of such costs because the transcripts were never used or read in evidence in a trial. We believe that the trial court erred in so ruling because the court rule mandates (*must* pay) the imposition of actual costs in defense of the action. MCR 2.405(D)(1). As stated in *Luidens v 63rd Dist Court*, 219 Mich App 24, 30; 555 NW2d 709 (1996), the interest of justice exception does not allow a court to refuse reimbursement of incurred costs, other than attorney fees, if the costs would be normally taxable under existing court rules and statutes. Pursuant to MCL 600.2549; MSA 27A.2549, actual fees paid for depositions are allowable if the depositions were filed in any clerk's office and the depositions were either read in evidence at trial or were necessarily used.

Here, the deposition transcripts were necessarily used in the context of Yearn's successful motion for summary disposition. However, it is not known whether the depositions were filed in any clerk's office. Consequently, we remand for the trial court to determine whether the depositions were filed in the clerk's office and, if so, then the court must award those costs to defendant Yearn. Otherwise, if the depositions were not filed in any clerk's office, the trial court properly denied costs in this regard.

With regard to the request for a reasonable attorney fee, a trial court may refuse to award an attorney fee in the interest of justice. MCR 2.405(D)(3). This Court has held that this "interest of justice" exception should be applied only in unusual circumstances and has noted that "the exception must not be read so broadly that it effectively nullifies the general rule favoring the award of offer of judgment sanctions." *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 472; ___ NW2d ___ (2000). If the trial court decides to refuse to award a reasonable attorney fee, the trial court must articulate why the interest of justice would be served by the refusal. *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 597; 543 NW2d 60 (1995).

Here, the trial court stated only that "[t]his Court, having considered carefully the arguments of counsel and the briefs submitted in this matter, does not believe that attorney fees should be awarded in this case." We do not find this to be a sufficient articulation of why the interest of justice would be served by the refusal to award a reasonable attorney fee. Therefore, we remand for the trial court to either articulate why the interest of justice would be served in light of the role of MCR 2.405 or, if the interest of justice would not be served, to award a reasonable attorney fee. We specifically advert to the circumstances as set forth in *Stitt, supra*, pp 473-476, *Reitmeyer v Schultz Equipment & Parts, Inc*, 237 Mich App 332, 338-345; 602 NW2d 596 (1999), and *Luidens, supra*, pp 31-37, as guidance to determine whether unusual circumstances are present to justify not awarding a reasonable attorney fee.

We affirm in docket no. 215231. We remand for further proceedings consistent with this opinion in docket no. 218307. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen