STATE OF MICHIGAN

COURT OF APPEALS

SCOTT W. PERRIEN,

Plaintiff-Appellant/Cross-Appellee,

v

GARR TOOL, JOHN LEPPIEN, ROBERT POBANZ, and RAYMOND K. WILCOX,

Defendants-Appellees/Cross-Appellants,

and

ATT INVESTIGATIONS, INC., HOWARD MASTROBERTI and STT, INC.,

Defendants-Appellees.

UNPUBLISHED
November 26, 2002

No. 229388
Isabella Circuit Court
LC No. 98-000365-NZ

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals by leave granted two orders granting summary disposition to defendants based on plaintiff's non-joinder of claims in a previous action in Gratiot County and on res judicata. Defendant Garr Tool[1] cross-appeals, challenging the court's award of attorney fees as a discovery sanction. We reverse the trial court's grant of summary disposition and affirm the award of discovery sanctions.

Plaintiff alleges the trial court erred when it granted summary disposition to Garr Tool under MCR 2.116(C)(8), finding plaintiff failed to join his claims in the Gratiot County action, and thus was barred by MCR 2.203, the compulsory joinder rule. Plaintiff also challenges the trial court's grant of summary disposition for the remaining defendants, under MCR 2.116(C)(7), based on res judicata, relating back to the Gratiot County action, and on the trial court's interpretation of Gratiot County Judge Randy L. Tahvonen's scheduling conference order. Plaintiff argues that res judicata and compulsory joinder do not apply to the causes of action

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

[1] "Garr Tool" in this opinion collectively refers to Garr Tool and defendants Leppien, Pobanz, and Wilcox, who are officers and employees of Garr Tool.

presently alleged because they are separate and distinct from the claims raised in the Gratiot County action. We agree.

We review de novo the trial court's grant of summary disposition based on plaintiff's failure to state a claim, MCR 2.116(C)(8). *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). The application of res judicata and the construction of a court rule are both questions of law, also reviewed de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999); *CAM Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim solely by the pleadings, and the motion need not be supported with documentary evidence. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

At the time the Gratiot County case was brought, MCR 2.203(A)(1) provided: [2]

> In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the same transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

Thus, for compulsory joinder to apply, two requirements must be met: the pleader must have a claim, and the pleader must join the claim if it arises out of the "same transaction or occurrence." The trial court concluded that plaintiff was required to join the claims because plaintiff asserted the claims arose out of the same transaction when he made a related discovery request in the Gratiot County action, because plaintiff became aware of the potential claims during the pendency of the original matter, and because Judge Tahvonen's order set a six-month time limit on any claims to be joined.

However, we conclude that the first requirement is not met because plaintiff's cause of action did not accrue at the time of the underlying pleading, nor did it arise out of the same transaction or occurrence. Plaintiff's request to explore the possibility that his telephone records were being fraudulently acquired came after the original claims and counter-claims had been filed: during the discovery process. Consequently, that claim could not be alleged in the initial complaint because not all the elements had yet occurred. MCL 600.5827; see also *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995). Accrual of a cause of action may be postponed until the plaintiff discovers or reasonably should discover the existence of the cause of action. *Stephens, supra* at 540. The court also incorrectly interpreted Judge Tahvonen's scheduling order. The order did not require plaintiff to amend his complaint to include specific claims; rather, it set a maximum time limit: the parties could not join claims after that date. Because plaintiff's new claims had not yet accrued, plaintiff could not be required to join them.

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[2] The 1999 amendment does not change this portion of the rule, now found at MCR 2.203(A).

Second, the trial court erred in concluding that the claims arose from the "same transaction or occurrence." Ordinarily, the issues raised by the pleadings are an important guide to the subjects presented for adjudication, even where raised as cross-claims or counter-claims. *McCormick v Hartman*, 306 Mich 346, 351; 10 NW2d 910 (1943); *Jones v Chambers*, 353 Mich 674, 679; 91 NW2d 889 (1958). The transaction that precipitated plaintiff's present cause of action was the allegedly fraudulent surveillance and misappropriation of personal records after his employment relationship with Garr Tool had been dissolved. This is quite different from the claims underlying the Gratiot County case, where plaintiff's alleged misconduct while employed by Garr Tool, along with his "secret business," formed the basis of the action.

Furthermore, the trial court misconstrued the purpose of discovery and apparently viewed plaintiff's discovery request as an admission rather than a procedure designed to gather information to clarify the issues. *Domako v Rowe*, 438 Mich 347, 360; 475 NW2d 30 (1991). Plaintiff's assertion during discovery that the telephone records were relevant to his claim of business interference was an attempt to preserve his legal claims; his opinion, at that time unsupported by facts, should not be taken as a legal conclusion that his claims *required* joinder.

The trial court based its decision, in part, on the doctrine of bar, which precludes re-litigating the same cause of action between the same parties, citing *Rogers v Colonial Fed Sav & Loan Ass'n*, 405 Mich 607; 275 NW2d 499 (1979). See also *Union Guardian Trust Co v Rood*, 308 Mich 168, 172; 13 NW2d 248 (1944). However, plaintiff was not re-litigating the same cause of action; any decision concerning misconduct in surveillance or misappropriation of plaintiff's records would not be inconsistent with the result of the Gratiot County action, regardless of its outcome. Given the distinct differences in subject matter (business interference versus fraudulent investigation) and the time each claim accrued (during the employment relationship versus the 1996 investigation), we conclude that the claims were not required to be joined because they did not arise out of the "same transaction or occurrence."

Likewise, the trial court improperly granted summary disposition under MCR 2.116(C)(7) to the remaining defendants based on res judicata and the same misinterpretation of Judge Tahvonen's scheduling order. The facts required to prove the first action – for example, that Garr Tool made disparaging remarks about plaintiff and otherwise interfered with his business contacts – are substantively different from those required to prove the second action – that defendants fraudulently obtained plaintiff's telephone records and otherwise invaded his privacy. Furthermore, the outcomes of the two claims were not dependent on each other; that is, a trier of fact would not have to find defendants violated plaintiff's privacy in order to find that they had interfered with his business, and it could find that plaintiff's records were misappropriated even if there was no interference with his business. Thus, the two claims were not sustained by the same facts or evidence. *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 197-198; 590 NW2d 747 (1998). We therefore find the grant of summary disposition was inappropriate.

On cross-appeal, defendant Garr Tool argues that the trial court's imposition of discovery sanctions pursuant to MCR 2.313(D)(1) was premature and contrary to law. We disagree.

Interpretation of court rules present a question of law that we review de novo. *CAM Construction, supra* at 553. Ordinarily, discovery may be had "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." MCR

2.302(B). We apply the rules of statutory construction to interpret the relevant court rules. *CAM Construction, supra* at 553.

The court rules on discovery rules relate to the same subject and share a common purpose and, therefore, should be read together as one law. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Discovery is a sequential process that involves the reasonable diligence of all parties in ensuring its effectiveness and imposes sanctions for failure to do so. Therefore, construction should give effect to each rule, without repugnancy, absurdity, or unreasonableness. *Michigan Humane Society v Natural Resources Comm*, 158 Mich App 393, 401; 404 NW2d 757 (1987).

A party served with a discovery request must specifically respond or object to each request and, in the event of an objection, "the reasons for objection must be stated. If objection is made to part of an item or category, the part must be specified." MCR 2.310(C)(2). If the discovery request is not answered, if the answer is evasive of incomplete, or if an objection is made, then the requestor may move for an order compelling discovery. MCR 2.313(A). If the requesting party is granted a motion to compel, the clear language of MCR 2.313(A)(5) allows recovery of reasonable expenses incurred in obtaining the order. Even if the requestor does not move for an order to compel, a court can order sanctions for a party's failure to answer a discovery request. MCR 2.313(D)(1).

In this case, the trial court granted plaintiff's costs as sanctions under MCR 2.313(D)(1), essentially finding that defendants' vague response was equivalent to a failure to respond. Defendant argues that, unlike subsection (A) of that rule, subsection (D) does not expressly equate a vague response with no response. However, we need not here decide if both subrules permit imposing sanctions where a party has responded evasively because the trial court could just as well have awarded sanctions under MCR 2.313(A). See *Detroit v Presti*, 240 Mich App 208, 214; 610 NW2d 261 (2000) ("This Court will not reverse a trial court's order if it reached the right result for the wrong reason.").

Thus, contrary to Garr Tool's position, MCR 2.313(A)(5)(a) allows a trial court to order the party whose conduct necessitated the motion to compel discovery to pay the moving party the reasonable expenses incurred in obtaining the order.[3] Plaintiff sought and was granted a motion to compel discovery, and at the same time was awarded "sanctions." From the record, it is apparent that the amount awarded was based on the court's determination of reasonable expenses; also, at the hearing, the court referred to the award as "costs" rather than "sanctions." We agree with the lower court's ruling that defendants' responses were "vague and interposed to stall discovery." Accordingly, the award was appropriate under MCR 2.313(A), irrespective of whether it is called "sanctions" or "costs"; we need not determine if they were also appropriate under MCR 2.313(D).

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[3] In contrast, MCR 2.313(B) allows sanctions for failure to comply with an existing discovery order. That subrule does not apply in this case because the sanctions were awarded at the same time the order to compel was issued. Therefore, Garr Tool's reliance on *Brenner v Kolk*, 226 Mich App 149, 158-159; 573 NW2d 65 (1997) is misplaced because that decision addresses MCR 2.313(B).

We reverse the lower court's grants of summary disposition for all defendants. The court's award of expenses is affirmed. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Robert J. Danhof