STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY L. STERNIK,

Plaintiff/Counterdefendant,

v

PROFESSIONAL UNDERWRITERS INC,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellant,

and

ALVIN REIFMAN and ROBERT L. COLEMAN,

Defendants-Appellants,

v

BENCHMARK PROFESSIONAL INSURANCE SERVICES INC,

Third-Party Defendant-Appellee,

and

DAWN HENSON, a/k/a DAWN DURHAM, and PROFESSIONAL LIABILITY MARKETING INC,

Third-Party Defendants Not Participating.

UNPUBLISHED
December 6, 2002

No. 226468
Wayne Circuit Court
LC No. 97-740970-CK

JEFFREY L. STERNIK,

Plaintiff/Counterdefendant,

v

No. 227503;
227664;

228955
Wayne Circuit Court
LC No. 97-740970-CK

PROFESSIONAL UNDERWRITERS INC,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee,

and

ALVIN REIFMAN and ROBERT L. COLEMAN,

Defendants,

v

BENCHMARK PROFESSIONAL INSURANCE SERVICES INC,

Third-Party Defendant-Appellant,

and

DAWN HENSON, a/k/a DAWN DURHAM, and PROFESSIONAL LIABILITY MARKETING INC,

Third-Party Defendants Not Participating.

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

This consolidated case concerning tortious interference of business relations and civil conspiracy consists of four separate appeals stemming from a single action in the Wayne Circuit Court. In Docket No. 226468, Professional Underwriters, Inc., Alvin Reifman, and Robert L. Coleman appeal as of right and Benchmark Professional Insurance Services, Inc., is the appellee. In Docket No. 227503, Benchmark appeals by delayed leave granted and Professional Underwriters is the appellee. In Docket Nos. 227664 and 228955, Benchmark appeals as of right and Professional Underwriters is the appellee. Jeffrey L. Sternik, Dawn Henson, also known as Dawn Durham, and Professional Liability Marketing, Inc., do not participate in any of these appeals. Reifman and Coleman do not participate in any of Benchmark's appeals. We affirm.

I. Basic Facts And Procedural History

Reifman and Coleman each own fifty percent of Professional Underwriters, an independent Michigan insurance agency or "producer" serving architects, engineers, and other

design professionals. Coleman is Professional Underwriters' chief executive and operating officer. He controls the business's daily operations. Reifman, who describes himself as semi-retired, is not involved in Professional Underwriters' daily operations, and restricts his involvement to acting as the chairman of Professional Underwriters' board of directors. Reifman and Coleman also own a business in Colorado, which, at least in the 1980s, was called Professional Liability Marketing, Inc.

Professional Underwriters hired Sternik in 1977. Ten years later, Sternik moved to Colorado to work for Professional Liability Marketing, Inc. When Sternik returned to Michigan to work for Professional Underwriters in 1989, he was promoted to the position of executive vice president. Sternik then handled a variety of Professional Underwriters' clients. MAS Associates, one of Sternik's clients, purchased insurance from Gulf Insurance. Because Benchmark, which operates out of Illinois, exclusively underwrites Gulf Insurance's policies in Michigan, when one of Professional Underwriters' clients sought a Gulf Insurance plan, Professional Underwriters had to apply directly to Benchmark. Coleman had a difficult relationship with Benchmark's president and owner, Richard O'Gorman. O'Gorman attributed these difficulties to Coleman's failure to carryout his verbal promises to channel more business to Benchmark, but Coleman blamed what he perceived to be O'Gorman's virtually limitless desire for increased business.

For unknown reasons, in January 1996, Benchmark omitted MAS Associates' amount due from the premium invoice it prepared for Professional Underwriters on a monthly basis. In other words, MAS Associates had already paid Professional Underwriters its $22,525 premium for Benchmark, but Benchmark did not inform Professional Underwriters in writing to forward that payment. Though Diane Ordiway, a Professional Underwriters accountant, noticed the omission, Sternik allegedly ordered her not to pay Benchmark for the MAS Associates policy until the premium appeared due on an invoice. Ordiway did not pay Benchmark, and the premium did not reappear on any of the subsequent invoices Benchmark submitted to Professional Underwriters in 1996.

This situation repeated itself in January 1997 when Benchmark failed to bill Professional Underwriters for MAS Associates' policy and Professional Underwriters failed to forward the premium to Benchmark. Whether Benchmark billed Professional Underwriters for MAS Associates' 1997 premium and failed to list the 1996 premium as unpaid, or whether Benchmark failed to bill Professional Underwriters for MAS Associates' 1997 and 1996 premiums is unclear. In any event, when Benchmark failed to include MAS Associates' 1996 premium on the January 1997 invoice, Sternik again reportedly told Ordiway not to pay Benchmark until Professional Underwriters received a bill. He also inquired about the possibility of writing-off the payments owed. Coleman and Reifman were not aware of what was happening with the MAS Associates account at this time.

1997 proved to be the end of Sternik's long relationship with Professional Underwriters, Coleman, and Reifman. After returning to Michigan from Colorado, Sternik had been interested in becoming a partner in Professional Underwriters. Coleman, Reifman, and Sternik had negotiated extensively over making Sternik a partner because Sternik was valuable to Professional Underwriters' business. The sticking point in their negotiations revolved around Coleman's insistence that he (Coleman) retain a controlling share of Professional Underwriters' class A stock. At different times, Coleman and Reifman proposed that Sternik take class B

stock, which evidently did not yet exist, but would give him equity in the business without voting rights. Alternatively, Coleman had suggested that he retain his fifty percent share of the class A voting stock, and that Sternik take a small percentage of Reifman's class A stock. Sternik, however, had been receiving a portion of his compensation on the basis of the business's income, as if he were already an equity owner. Sternik wanted class A stock from both Coleman and Reifman so that he, along with one of the other partners, could make decisions for the business. Coleman evidently feared that Sternik was planning to oust him from the business. In the end, Coleman and Reifman did not bring Sternik into their partnership under any of the plans proposed. As their relationship began to disintegrate in spring 1997, Sternik spent more time away from the office. He also began contemplating opening his own insurance agency.

In early July 1997, while still working for Professional Underwriters, Sternik registered his new company and filed its articles of incorporation. He named his new business Professional Liability Marketing, Inc., the very same name that Coleman and Reifman used for their Colorado business. Sternik also acquired a federal tax identification number for his new business and began making inquiries at Benchmark about whether he might become an insurance agent for Gulf Insurance. If accepted as an agent for Gulf Insurance, Sternik would have to work with Benchmark because of its exclusive dealings in Michigan. The person Sternik contacted at Benchmark was its vice-president, Katherine Dimitrakopoulos, universally referred to as Kitty Dimit. Sternik reportedly told Dimitrakopoulos that he had resigned from Professional Underwriters. Dimitrakopoulos referred Sternik to David Jaffa at Gulf Insurance. When Sternik wrote Jaffa on July 11, 1997, to submit his application to have Professional Liability listed as a Gulf Insurance agent, he told Jaffa that, should he have any further questions, Jaffa could contact "Kitty Dimit or myself," listing his telephone number. Allegedly, Sternik then began soliciting some of Professional Underwriters' customers, asking them to move their business to Professional Liability, even though Reifman had convinced him to stay longer at Professional Underwriters. In his last week on the job for Professional Underwriters, Sternik made a backup tape of Professional Underwriters' computer system, which he took home. This had been a regular part of his job, aimed at protecting Professional Underwriters' data in the case of a catastrophe.

There can be little doubt that Sternik's departure from Professional Underwriters on July 17, 1997, was at least somewhat unpleasant for all parties involved. Apparently, Sternik, who had already been boasting about the success he would have if he left Professional Underwriters, revealed his new business plans and threatened to take all of Professional Underwriters' customers. That night, Sternik contacted Professional Underwriters employee Dawn Henson to tell her about his departure. Henson then also left Professional Underwriters and went to work for Professional Liability. Together, Sternik and Henson began contacting Professional Underwriters' clients to ask them to move their business to Professional Liability. Though Sternik had Professional Underwriters' backup tape, he later claimed that he did not use the tape in this solicitation effort, at least in part because he did not have the computer system that would be able to read the tape. Rather, he said, he and Henson consulted the business listings in telephone books at the public library, in which they recognized the names of Professional Underwriters clients.

When Sternik failed to convince MAS Associates to do business with Professional Liability in November 1997, he told Dimitrakopoulos about Professional Underwriters' failure to

forward the premiums for that account to Benchmark in 1996 and 1997. Dimitrakopoulos then contacted Ordiway at Professional Underwriters. Ordiway, who had already informed Coleman about the late payment, then paid the bill.

Between later summer 1997 and winter 1998, Benchmark did business with Professional Underwriters *and* Professional Liability. However, in February 1998, Benchmark ended its relationship with Professional Underwriters, citing Professional Underwriters' failure to pay what it clearly owed to Benchmark for the MAS Associates policy. As Dimitrakopoulos wrote in a message she sent by facsimile to Coleman:

> We have checked into the matter of the 1996 withheld premium payment on MAS Associates, and we are convinced that you acted *intentionally*. We simply will not deal with a broker who does not conduct business in a proper manner. This, of course, will require the cancellation of your Gulf appointment in Michigan.
>
> We regret that is [sic] has come to this, but we will no longer accept any (new or renewal) submissions from your office.

Benchmark then sent letters to Professional Underwriters' clients with Gulf Insurance policies to inform them that it had ceased doing business with Professional Underwriters. Benchmark, however, continued to do business with Professional Liability and some businesses outside Michigan, also called Professional Underwriters, in which Reifman and Coleman had ownership interests, but which they did not manage.

Meanwhile, in December 1997, Sternik sued Professional Underwriters, Coleman, and Reifman on a variety of theories related to his factual claim that Coleman and Reifman, following negotiations, had agreed to make him a partner, but had failed to transfer to him the 15.5 percent of Professional Underwriters' stock that they had promised. Sternik asked to be compensated for the value of this stock and for the emotional distress he claimed that Coleman and Reifman inflicted on him intentionally.

Sternik's lawsuit prompted Professional Underwriters, but not Reifman and Coleman individually, to file a counterclaim against Sternik and a third-party complaint against Henson and Professional Liability in February 1998. Professional Underwriters alleged that Sternik, Henson, and Professional Liability had tortiously interfered with Professional Underwriters' contractual and business relationships with its clients, misappropriated trade secrets, committed conversion with respect to those trade secrets, and had engaged in a civil conspiracy. Additionally, Professional Underwriters claimed that Sternik and Henson had breached their fiduciary duties to Professional Underwriters, which they held as agents and employees of that business. When Professional Underwriters amended the original counterclaim and third-party complaint against Professional Liability, including Sternik and Henson, it added Benchmark as a third-party defendant solely for the tortious interference and civil conspiracy counts.

The ensuing litigation was enormously complicated. The parties settled the original lawsuit and counterclaims between Sternik and Professional Underwriters, and the trial court entered a stipulated order of dismissal with prejudice on April 4, 2000. The dispute between Sternik and Professional Underwriters, like the claims against Professional Liability and Henson,

is not at all involved in this appeal. However, as becomes relevant later in our discussion of the issues, the trial court struck Coleman's deposition testimony and entered a default against him as a sanction for his failure to appear as ordered at a deposition scheduled for August 1999, after discovery had been extended several times, trial rescheduled, and he (and Reifman) failed to appear at three previously scheduled depositions. The litigation between Professional Underwriters and Benchmark essentially ended in a draw when the trial court granted Benchmark's two motions for summary disposition, but denied its motions for other sanctions. As a result, Professional Underwriters challenges the trial court's decision to grant the motions for summary disposition, and Benchmark challenges the trial court's refusal to award it sanctions.

II. Summary Disposition

A. Standard Of Review

Professional Underwriters contends that disputed issues of material fact existed with respect to its tortious interference and civil conspiracy claims against Benchmark. Professional Underwriters also contends that the trial court erred when it granted summary disposition to Benchmark at the same time it dismissed Professional Underwriters' motion to compel or show cause regarding discovery of Benchmark's records. Professional Underwriters asserts that the trial court should have granted the motion to compel or show cause before ruling on Benchmark's motions for summary dispositions. Had the trial court followed this sequence, Professional Underwriters claims, it would have had additional evidence with which to defeat the motions for summary disposition. This Court reviews de novo a trial court's decision to grant a motion for summary disposition.[1]

B. Claims Against Benchmark

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record.[2] The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt.[3] Only if there is no factual dispute would summary disposition be appropriate.[4] However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary.[5]

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[1] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[2] MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[3] *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

[4] See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999).

[5] MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

In considering any motion for summary disposition, it is important to understand the legal claims because they define the material issues that must be in dispute for a party to survive summary disposition.

> 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.[6]

Tortious interference can consist of "'inducing or otherwise causing a third person not to enter into or continue the prospective relation,'" or "'preventing the other from acquiring or continuing the prospective relation.'"[7] No matter its form, this interference must be "improper," which means that it is a "per se wrongful act."[8] In other words, the intentional act that the defendant committed must lack a "justification" and have "the purpose of interfering with plaintiff's contractual rights or plaintiff's business relationship or expectancy."[9] In contrast, "[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."[10]

In this case, these two torts are inextricably linked. Under Professional Underwriters' theory, Benchmark intentionally acted to prevent it from continuing to serve its clients who had Gulf Insurance policies by helping Sternik to create Professional Liability, encouraging Professional Underwriters' clients to go to Professional Liability, and then by preventing Professional Underwriters from acting as an agent for Gulf Insurance when Benchmark severed its relationship with Professional Underwriters. Benchmark's alleged tortious interference with Professional Underwriters' relationships with its clients and Gulf Insurance was the unlawful purpose of its purported conspiracy with Sternik, Professional Liability, and Henson. This overlap between the two tort claims raised in the amended third-party complaint explains why, in their briefs in the trial court and on appeal, the parties do not differentiate between the evidence used to support the two claims.

Turning to the evidence in the record, although not specifically named, the parties do not dispute that Professional Underwriters had a business relationship with several clients, as well as with Gulf Insurance through Benchmark.[11] They do not dispute that those relationships ended

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[6] *BPS Clinical Laboratories v Blue Cross and Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996).

[7] *Winiemko v Valenti*, 203 Mich App 411, 417; 513 NW2d 181 (1994), quoting 4 Restatement of Torts 2d, § 766B, p 20.

[8] *Patillo v Equitable Life Assurance*, 199 Mich App 450, 457; 502 NW2d 696 (1993).

[9] *Winiemko, supra* at 418, n 3, quoting the language that was eventually adopted in SJI2d 126.04.

[10] *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992).

[11] The parties never explicitly argued that Benchmark interfered with Professional Underwriters' relationship with Gulf Insurance, but that is the only logical way to interpret Professional

(continued…)

after Sternik left Professional Underwriters to start Professional Liability and Benchmark ceased doing business with Professional Underwriters. They do not challenge that Benchmark was aware that Professional Underwriters had these clients and relationship with Gulf Insurance; the very nature of the relationship between Benchmark and Professional Underwriters made it aware of which Professional Underwriters clients had Gulf Insurance policies. Nor do they contest that Professional Underwriters suffered damage when it lost clients and its ability to serve as an agent for Gulf Insurance. In effect, the motion for summary disposition concerned only whether there was a factual dispute concerning two narrow issues: (1) whether there was at least one per se wrongful act Benchmark committed that was aimed at interfering in the relationship between Professional Underwriters and its clients and Professional Underwriters and Gulf Insurance and (2) whether Benchmark committed this wrongful act or acts in combination with Sternik, Henson, and Professional Liability.

In his deposition, Sternik admitted most, if not all, the conduct that Professional Underwriters claimed was improper, such as working on Professional Liability projects while at Professional Underwriters and soliciting Professional Underwriters clients for Professional Liability. Though Sternik did not freely concede that these acts were wrongful, in this context there is no reason to doubt that they were actually improper because the Court views the evidence in the light most favorable to Professional Underwriters.[12] Nevertheless, there are critical deficiencies in Professional Underwriters' evidence that attempts to impute Sternik's conduct to Benchmark and the evidence of Benchmark's supposed conspiracy with Sternik, Professional Liability, and Henson.

For instance, with respect to the connection between Benchmark and Sternik's wrongful acts, Professional Underwriters claims that O'Gorman, Benchmark's owner and president, made threats about helping Sternik leave Professional Underwriters with Professional Underwriters' clients, ostensibly to force Professional Underwriters to give Benchmark more business. However, most of the portions of Reifman's deposition testimony attached to Professional Underwriters' brief opposing summary disposition do not suggest that O'Gorman was threatening to help Sternik take Professional Underwriters' business to coerce Professional Underwriters into giving Benchmark additional business. In one place, Reifman said that in the winter of 1996 or spring of 1997 O'Gorman stated, "'You will have no business left if Jeff [Sternik] leaves because Coleman doesn't work and he's a buffoon and Jeff is going to take all the business.'" On another occasion, O'Gorman reportedly warned Reifman that it would be a bad idea to let Sternik leave Professional Underwriters. These statements appear to be O'Gorman's opinion that Sternik did the lion's share of Professional Underwriters' work and that he would naturally attract Professional Underwriters' clients if he left Professional Underwriters, which would then disadvantage Professional Underwriters. These statements do not imply that O'Gorman and Benchmark intended to help Sternik leave Professional Underwriters and steal Professional Underwriters' clients.

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Underwriters' factual claim that Benchmark committed tortious interference when it ended its relationship with Benchmark in February 1998.

[12] See *Atlas Valley*, *supra* at 25.

Apparently aware of the deficiencies in his deposition testimony, Reifman also prepared an affidavit in which he averred that before Sternik left Professional Underwriters, he (Reifman), spoke with O'Gorman:

> 3. During these conversations, O'Gorman stated to me that he was fully aware that Jeffrey Sternik was planning to leave PUI and to take with him the customers and trade secrets of PUI [Professional Underwriters]. O'Gorman demanded that PUI give him more business. O'Gorman threatened that if PUI did not give him more business, he would assist Sternik to leave PUI and to misappropriate the business of PUI.
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> 4. I [Reifman] informed Mr. O'Gorman that it was not possible for PUI to give Benchmark more business. O'Gorman indicated that in that case, he would "sell PUI short," meaning that PUI would lose all of its value because Sternik would leave and misappropriate all of PUI's business with Benchmark's assistance.
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> 5. During my conversation with O'Gorman, O'Gorman made it clear that Benchmark would assist Sternik in leaving PUI and in misappropriating PUI's customers and trade secretes, unless PUI gave Benchmark more business.
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> 6. Benchmark's actions in assisting Sternik to get licensed and to open his business were done with full knowledge by Benchmark that Sternik was an officer and employee of PUI, and that Sternik had no right to misappropriate Benchmark's [sic: PUI's] customers and trade secrets.
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> 7. I can only conclude that O'Gorman, dissatisfied with the results that his threats obtained, made good on his promise and assisted Sternik in the misappropriate of PUI's trade secrets. As examples of this assistance, I note that Benchmark assisted Sternik to become licensed to Gulf Insurance, and accepted orders for insurance from Sternik, knowing that Sternik had misappropriated these customers from PUI. Moreover, on more than one occasion, Benchmark refused to accept policy renewals from PUI, claiming that Sternik had filed a prior broker of record letter, when, to the best of my knowledge and belief, no such prior letter was filed.
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> 8. Moreover, Benchmark terminated its relationship with PUI in a clear and malicious effort to harm PUI and to benefit Sternik. The termination of the relationship between Benchmark and PUI was not done for any business reason. Benchmark had always been paid premiums according to the statements that it issued on a monthly basis. PUI paid all statements promptly and in full. Benchmark's error in not listing the MAS premium on its statements was an error attributable solely to Benchmark. The termination of the relationship between Benchmark and PUI was clearly not done for the stated reason, but rather was done in an effort to assist Sternik in his misappropriation of PUI customers and trade secrets.

This affidavit, however, does not support Professional Underwriters' claims for a variety of reasons.

First, it is not at all clear that Professional Underwriters submitted this affidavit to the trial court before the trial court made its decision regarding the motion for summary disposition. Reifman, though stating that he was making "this affidavit in opposition to Benchmark's Motion for Summary Disposition" in the first paragraph, did not date the affidavit. Even assuming that Reifman actually submitted the affidavit in time for the trial court to consider it when deciding the motion for summary disposition, not all of O'Gorman's statements can be construed as threats, and there is no evidence tying the single threat to any wrongful action. For instance, in his deposition, Reifman said that O'Gorman had "warned" him about what would happen if Sternik left. At one point Reifman said that O'Gorman stated, "'Look, Jeff is already making this company [Professional Liability].' He made – he said, 'We want to do business with you.' He said, 'Okay. You got to give me first crack at all your business and I'll cut . . . . .'" The excerpt of the transcript ends at this point. From this piece of testimony, however, it appears that O'Gorman was negotiating with Professional Underwriters following Sternik's departure or in light of his imminent departure. This passage does not convey a threat to act wrongfully. More importantly, though Reifman did not remember whether O'Gorman made this statement before or after Sternik had left Professional Underwriters, the content of O'Gorman's statement suggests that he made the statement *after* Sternik had left or had informed Coleman and Reifman of his decision to leave. This timing is important because, if Sternik had already left or had decided to leave, it would have been unlikely that O'Gorman threatened to "assist Sternik to leave PUI," as Reifman said in his affidavit.

Reifman also testified that, while Professional Underwriters' relationship with Sternik was in turmoil, O'Gorman "kept stating" that Benchmark would "bury" Professional Underwriters and will "sell Professional Underwriters stock short because" that would take care of Professional Underwriters. Reifman went on to explain these threats:

> Mr. O'Gorman kept telling me basically *if you don't do what we* [Benchmark] *want you to do by giving us more business and a first look at business*, et cetera et cetera, *that we're going to take care of you, we'll get Jeff and he'll get all of the business from PUI*. And as I said before, his comment was I'd sell PUI stock short right now.[13]

This is the single strongest piece of evidence favoring Professional Underwriters' tortious interference claim. However, Reifman conceded that at least part of O'Gorman's statements were pure puffery. Because Professional Underwriters was not a publicly traded company, O'Gorman could not sell Professional Underwriters' stock short, which diminishes the value of this evidence even if viewed in the light most favorable to Professional Underwriters. The law also emphasizes that, to be liable for tortious interference, a defendant must truly commit a wrongful act.[14] Yet, O'Gorman's statement was only a threat about Benchmark's future

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[13] Emphasis added.

[14] See *BPS Clinical Laboratories, supra* at 698-699; *Winiemko, supra* at 417.

relationship with Professional Underwriters, not an admission that Benchmark had done anything to entice Sternik to leave Professional Underwriters and take Professional Underwriters' clients.

If Professional Underwriters had any evidence that Benchmark committed a wrongful act, O'Gorman's threat would be relevant to proving that that act was intended to interfere with Professional Underwriters' business relations.[15] However, the record, including Reifman's affidavit, consists solely of unsupported allegations of wrongdoing. For instance, Dimitrakopoulos severed Benchmark's relationship with Professional Underwriters in writing, leaving no doubt that that happened. But Professional Underwriters never presented any evidence, such as a contract, proving that Benchmark had a legal obligation to continue its business with Professional Underwriters absent good cause, as Reifman claimed in his affidavit. In the absence of an explicit agreement to continue their relationship for some period, this relationship was terminable at will by Professional Underwriters or Benchmark.[16] Nor is there any evidence that Benchmark's relationship with Professional Underwriters was exclusive, which would have precluded Benchmark from doing business with Professional Liability.

Professional Underwriters insists that Benchmark helped Sternik in establishing Professional Liability, and that doing so was wrongful, but fails to provide any supporting evidence. There is no dispute that Dimitrakopoulos gave Sternik the name and telephone number of the person to contact at Gulf Insurance. According to O'Gorman, this sort of referral was a typical way for individuals to start a business relationship with Gulf Insurance. Deposition testimony from both O'Gorman and Dimitrakopoulos strongly suggest that Sternik said that he had resigned from Professional Underwriters at the time he was seeking the name of the contact at Gulf Insurance, even if he returned to work at Professional Underwriters for a short while. As early as June 1997, when Coleman and Reifman met with O'Gorman and Dimitrakopoulos, Coleman also said that Sternik was leaving Professional Underwriters, over Reifman's protests that Sternik should stay. The Supreme Court held long ago that an employee may properly plan to engage in a business that competes with his employer following discharge from employment.[17] With evidence indicating that Sternik had already resigned at the time he sought the information from Benchmark about Gulf Insurance, it hardly seems possible that giving that information to him was wrongful, especially in the absence of any agreement barring Sternik from establishing Professional Liability to compete with Professional Underwriters.

Nor was there any evidence that there was an agreement that barred Sternik and that new business from working with Benchmark and Gulf Insurance. Though O'Gorman and Dimitrakopoulos were both aware that Sternik had worked for Professional Underwriters, there is no evidence in the record suggesting that they had any reason to suspect that he might be interfering with Professional Underwriters' relationship with its clients by starting his own agency, much less that Benchmark might be assisting him in a wrongful endeavor by giving him Jaffa's name and telephone number at Gulf Insurance. Thus, even if giving this name and telephone number to Sternik was some meaningful form of assistance, there is no evidence that

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[15] See *Winiemko*, *supra* at 418, n 3.

[16] See *Lichnovsky v Ziebart International Corp*, 414 Mich 228, 236; 324 NW2d 732 (1982).

[17] See *Meyers v Roger J Sullivan Co*, 166 Mich 193, 196; 131 NW 521 (1911).

the assistance was wrongful or intended to interfere with Professional Underwriters' business relations.

As a practical matter, the record also lacks evidence of what Benchmark specifically did to help Sternik. Benchmark did not obtain an office for Professional Liability or acquire its federal tax number, pay any of its bills, arrange meetings for Sternik with Professional Underwriters' clients, or share its resources with Professional Liability. Though Reifman believed that it would have been impossible for Sternik and Henson to contact so many Professional Underwriters clients so quickly without help from Benchmark, Professional Underwriters offered no support for this suspicion. In contrast, Sternik and Dimitrakopulos both denied that Benchmark shared any of its information concerning Professional Underwriters clients with Professional Liability. O'Gorman and Dimitrakopoulos noted that they considered this sort of information confidential and proprietary. Sternik and Henson also said that they went to a public library, consulted telephone books, and copied names from the sections concerning the types of individuals and businesses Professional Liability, like Professional Underwriters, would have as clients. That Sternik waited until four months after leaving Professional Underwriters to inform Benchmark about the MAS Associates problem, and only did so when MAS Associates refused to do business with Professional Liability, suggests that Benchmark was not helping Sternik.

Additionally, though Reifman said that he believed that Benchmark had refused to offer policies to Professional Underwriters customers even when Professional Liability was not the first broker of record, he had no documentation contradicting Benchmark's claim that it simply accepted the first broker of record, which was Professional Liability in some instances. Similarly, Reifman attempted to suggest that Benchmark favored Professional Liability over other producers like Professional Underwriters because it did not require Sternik to file a profile. However, Reifman did not present any evidence that being excused from filing this sort of profile gave Professional Liability any advantage over any other producer. O'Gorman also testified that filing a profile was routine, but not mandatory.

Nor is it possible to infer from the record that, when Benchmark severed its relationship with Professional Underwriters, it did so in a manner that benefited Professional Liability, whether intentionally or unintentionally. For instance, when Benchmark wrote the letter to Professional Underwriters' clients to inform them that Professional Underwriters was no longer its agent, nothing in the letter referred to Professional Liability, asked the insured to obtain services from any particular agent, or told the insured to find a new agent. *Woodruff v Auto Owners Ins Co*[18] suggests that a letter that simply informs clients of the end of an agency relationship is not a per se wrongful act. The Supreme Court in *Woodruff* held that that the insurance company "not only had a right to advise these policyholders of the termination" of its relationship with the agency, but that it was the insurance company's "legal duty to do so[.]"[19] If the insurance company did not inform the insured of this change, the Supreme Court noted, it risked being "bound by any action of [the agent] within the scope of his former agency; and this

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[18] *Woodruff v Auto Owners Ins Co,* 300 Mich 54; 1 NW2d 450 (1942).

[19] *Id*. at 63.

after his agency had been terminated."[20] The letters Benchmark sent Professional Underwriters' clients after Benchmark severed its relationship with Professional Underwriters did nothing more than what *Woodruff* said was proper.[21]

As for Professional Underwriters' claim that Benchmark used the MAS Associate account problem as a pretext to harm Professional Underwriters, the record does not indisputably support Reifman's assertion in his affidavit that "Professional Underwriters paid all statements promptly and in full." Plainly, though Sternik may have been responsible for the original failure to pay Benchmark for the MAS Associates account, that failure was effectively Professional Underwriters' failure because the business retained the premium. Just as O'Gorman testified, Professional Underwriters had a statutory duty to forward MAS Associates' premium to Benchmark. The insurance code, MCL 500.1207(1), states in part:

> An agent shall be a fiduciary for all money received or held by the agent in his or her capacity as an agent. Failure by an agent in a timely manner to turn over the money which he or she holds in a fiduciary capacity to the persons to whom they are owed is prima facie evidence of violation of the agent's fiduciary responsibility.

Because "[t]he first and paramount duty of an agent is loyalty to his principal,"[22] when the agent violates a fiduciary duty, the principal, in this case Benchmark, is allowed to end the agency relationship. As the Restatement of Agency 2d, § 112, p 291, states, "Unless otherwise agreed, the authority of an agent terminates if, without knowledge of the principal, he [the agent] acquires adverse interests or if he is otherwise *guilty of a serious breach of loyalty to the principal.*"[23] Even if Coleman did not know about the problem until after Sternik left Professional Underwriters, Ordiway said that she brought the issue to his attention before Dimitrakopoulos called Coleman. She said that Coleman did not order her to pay the bill immediately, but to wait to see what would happen. There was no evidence rebutting Ordiway's testimony concerning when she informed Coleman of this deficiency. Consequently, even if Benchmark's relationship with Professional Underwriters were not terminable at Benchmark's will, Benchmark provided unchallenged evidence that it was justified in terminating its relationship with Professional Underwriters for its failure to pay this account.

Viewed as a whole, there is no evidence in the record that demonstrates a factual dispute concerning whether Benchmark committed a wrongful act intending to interfere with Professional Underwriters' relationship with its clients or whether Benchmark committed this intentional interference in combination with Sternik, Henson, and Professional Liability. At best, the record suggests, as Professional Underwriters argues in its brief on appeal, that Benchmark had a *motive* to interfere with Professional Underwriters' relationship with its clients by joining

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[20] *Id*.

[21] See also *Prysak v RL Polk Co*, 193 Mich App 1, 14; 483 NW2d 629 (1992) (letter that expressed concern but did not call for the plaintiff's discharge was not a wrongful act).

[22] *Stephenson v Golden*, 279 Mich 710, 735; 276 NW 849 (1937).

[23] Emphasis added.

forces with Sternik, Henson, and Professional Liability. Though Professional Underwriters correctly argues that it may prove these claims with circumstantial evidence, the problem is that the evidence it points to consists largely of unsupported assumptions, suspicions, and allegations, which are insufficient to defeat a motion for summary disposition.[24] On the basis of the record as it existed at the time the trial court granted Benchmark's motion for summary disposition, it did not err in granting the motion.

C. Timing Of Summary Disposition

Next, we turn to Professional Underwriters' argument that the trial court erred when it denied the motion to compel or show cause at the same time it granted Benchmark summary disposition. Technically, though the January 27, 2000, order was on a standard praecipe form, the trial court denied the motion to compel or show cause two weeks *before* it ruled on Benchmark's motions for summary disposition. Professional Underwriters' attorney conceded this point at the February 10, 2000, motion hearing. The trial court merely confirmed its ruling on the record at the hearing. Thus, Professional Underwriters' factual argument that the trial court decided the motions for summary disposition at the same time it ruled on the motion to compel or show cause is meritless.

With respect to Professional Underwriters' contention that summary disposition was premature because it had yet to get copies of the documents that were the subject of the motion to compel or show cause, that argument is also unavailing. MCR 2.116(B)(2) allows a party to file a motion for summary disposition "at any time" as long as the motion is consistent with MCR 2.116(D) and (G)(1). Benchmark's motions for summary disposition invoked MCR 2.116(C)(10), which MCR 2.116(D)(3) confirms can be "raised at any time." MCR 2.116(G)(1) solely concerns the timing of the briefs and hearing, and does not substantively define when a party can bring a motion for summary disposition, much less state that a trial court must rule on all pending motions before ruling on a motion for summary disposition. Clearly, then, nothing in the court rule bars bringing a motion for summary disposition before a trial court rules on a separate motion, regardless of the pending motion's substance.

Case law also establishes that a trial court may grant a motion for summary disposition even before discovery closes if further discovery would be futile.[25] Though Professional Underwriters ignores this point, discovery actually closed in mid-December 1999, a few weeks before it filed the motion to compel or show cause and almost two months before the hearing on the motion. Professional Underwriters' argument may be interpreted to mean that the objects of discovery not been fulfilled, as if discovery were not yet complete. Nevertheless, Professional Underwriters' attorney had personally reviewed the documents at Benchmark's offices. Though he argued that the documents would provide evidence of the commissions Professional Underwriters lost when Sternik left and allegedly stole its clients, the attorney never cited a single example of that being evident in any of the documents he reviewed. Benchmark also specifically claimed that the documents would not be relevant because they only contained

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[24] See MCR 2.116(G)(4); *Etter, supra* at 555.

[25] See *CMI Internat'l, Inc v Intermet Internat'l Corp*, 251 Mich App 125, 134-135; 649 NW2d 808 (2002).

pricing information. Thus, there is no reason to believe that, had the trial court required Benchmark to give these documents to Professional Underwriters, Professional Underwriters would have found sufficient evidence in the documents to survive Benchmark's motions for summary disposition. Accordingly, the trial court did not err as Professional Underwriters claims.

III. Default And Other Sanctions Against Coleman

A. Standard Of Review

Professional Underwriters argues that entering a default against Coleman and barring his testimony was a sanction too severe for the circumstances. According to Professional Underwriters, Coleman did not miss the deposition voluntarily, but rather because he was ill, and there was no pattern of misconduct by Professional Underwriters, Coleman, and Reifman, while Benchmark committed flagrant violations of discovery orders. This Court applies the abuse of discretion standard of review to questions concerning a trial court's decision to enter an order sanctioning a party for a discovery violation.[26]

B. Analysis

As part of the broad discovery the court rules allow,[27] parties may depose witnesses.[28] A party does not need to obtain leave from the trial court to conduct a deposition as long as the "the defendant has had a reasonable time to obtain an attorney."[29] MCR 2.306(A)(1)(a) through (e) specifically defines what constitutes a reasonable time to obtain an attorney.

> A party desiring to take the deposition of a person on oral examination must give reasonable notice in writing to every other party to the action. The notice must state
>
> (a) the time and place for taking the deposition, and
>
> (b) the name and address of each person to be examined, if known, or, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.[30]

Nothing in the court rules require a party to consult with a deponent to schedule a deposition, though that is largely a matter of good practice.

Though the deposition process can largely occur without the trial court's involvement, MCR 2.306(B)(2) permits a trial court to "regulate the time and order of taking depositions to

[26] See *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999).

[27] See MCR 2.302(B)(1).

[28] See MCR 2.306.

[29] MCR 2.306(A)(1).

[30] MCR 2.306(B)(1).

best serve the convenience of the parties and witnesses and the interests of justice." If the parties fail to abide by a discovery order, such as an order to submit to a deposition, MCR 2.313(B)(2) permits a trial court to order a variety of "just" sanctions, "including but not limited to"

> (a) an order that the matters regarding which the order was entered or other *designated facts may be taken to be established* for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (b) *an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence*;
>
> (c) *an order striking pleadings or parts of pleadings*, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or *rendering a judgment by default against the disobedient party*;
>
> (d) in lieu of or in addition to the foregoing orders, an order treating as a contempt of court the failure to obey an order, except an order to submit to a physical or mental examination;
>
> (e) where a party has failed to comply with an order under MCR 2.311(A) requiring the party to produce another for examination, such orders as are listed in sub rules (B)(2)(a), (b), and (c), unless the party failing to comply shows that he or she is unable to produce such person for examination.
>
> *In lieu of or in addition* to the foregoing orders, the court *shall require* the party failing to obey the order or the attorney advising the party, or both, to pay the *reasonable expenses*, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.[31]

Plainly, MCR 2.313(B)(2) provides a trial court with a spectrum of sanctions from which the trial court is expected to choose the most appropriate to fit the circumstances of the discovery violation. This is why the trial court, which "is in the best position to know the severity of the discovery abuses," has discretion when ordering sanctions.[32] However, this Court has cautioned that a trial court must consider other options and take particular care when ordering extreme sanctions permitted under this court rule, such as a default judgment.[33]

> Before imposing the sanction of a default judgment, a trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the

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[31] Emphasis added.

[32] See *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 88; 618 NW2d 66 (2000); see, generally, *Bass, supra* at 26.

[33] See *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994).

> amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to [the party moving for sanctions], and whether wilfulness has been shown.[34]

Uncontrovertibly, the trial court in this case was aware of its discretion to order a sanction for Coleman's failure to appear at the August deposition, having stated more than once on the record that it was exercising its discretion. The trial court knew of its obligation to consider Coleman's pattern of conduct and alternative sanctions, which it also examined on the record. Nor can there be any doubt that, other than dismissing the countersuit altogether, the trial court could not have ordered sanctions any more severe than it actually ordered. However, the record makes it difficult to say that these sanctions were unwarranted.

The trial court explicitly found that Coleman had willfully violated the July 1999 order setting a fourth date for his deposition. Coleman attempts to justify his failure to attend the August deposition by citing his illness, and now claims that the trial court improperly minimized his health problems by referring to them as a "stomachache." Though the trial court did refer to his condition as a stomachache, Coleman had testified that he was having stomach cramps, making this an accurate, if only partial, description of the gastrointestinal symptoms of his illness. In all probability, the trial court was using this term as a euphemism for the rather unpleasant symptoms Coleman claimed to have experienced.

Moreover, the trial court carefully questioned Coleman about this illness, evidently finding his testimony incredible because he had not seen a physician, had driven himself to fill a prescription, and was videotaped going to work the next day, all when he was supposedly too ill to go to the deposition. There was also what appeared to be a slight contradiction in Coleman's testimony. At the outset, he seemed to suggest that he had suffered from similar gastrointestinal maladies for "many, many years," but later said that he had never suffered anything like this illness, which his physician attributed to a virus. Given the lack of independent verification of his illness and this conflict in his testimony, the trial court was entitled to evaluate Coleman's credibility when he testified at the hearing to determine whether to believe him.[35]

Coleman argues that the trial court was patently unreasonable in demanding that he attend the August deposition unless someone was "dying." Yet, Coleman has not presented an issue arguing that the notice of the depositions was unreasonable.[36] His pattern of skipping scheduled depositions was ample reason for the trial court to issue a stern warning. As the court rules states, "If a party or an officer . . . of a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may order such sanctions as are just[.]"[37] A warning is hardly a sanction; it is a second, or in this case a third or fourth, opportunity to comply with the trial court's orders.

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[34] *Id.* at 632-633.

[35] See, generally, MCR 2.613(C).

[36] See MCR 7.212(C)(5).

[37] MCR 2.313(B)(2).

Further, the trial court's statements on the record contradict Professional Underwriters' argument that the trial court did not find that Coleman had disobeyed previous court orders. The trial court noted that the parties, including Coleman, had an ongoing pattern of obstructing progress in the case. The trial court had made its expectation that Coleman facilitate discovery clear in a number of ways. The trial court, in its earlier scheduling orders, set discovery deadlines. After a number of delays, the trial court had the parties' respective attorneys sign a "certificate" in which they formally acknowledged that there would be "no postponements, no adjournments and no delays" and that there would be "strict compliance" with this condition. Additionally, the trial court entered the July 1999 order setting the date for Coleman's deposition.

The trial court's frustration with Coleman was understandable. After all, Coleman was not a minor witness. He was a principal player in the underlying facts and owned the named plaintiff in the countersuit. It may be that Benchmark engaged in its share of misbehavior and dilatory tactics during the twenty months the case had been pending by the time the trial court decided this motion. Still, Benchmark had a significant interest in securing Coleman's deposition testimony in order to prepare for trial, which Coleman directly impeded by failing to appear at any of the scheduled depositions. If Coleman would not submit to discovery even though his company was suing Benchmark, then it was hardly reasonable to expect Benchmark to submit to the lawsuit. Coleman may have quickly volunteered to sit for his deposition on a fifth date after his illness, but the offer may have been motivated by the motion for sanctions. Under all these circumstances, it is impossible to say that the trial court abused its discretion in ordering sanctions explicitly permitted in MCR 2.313(B)(2) for Coleman's misconduct during discovery, even if those sanctions were drastic.

IV. Sanctions

A. Standard Of Review

Benchmark raises nine separate issues regarding sanctions, which the trial court denied, in its three appeals. Sanctions under MCR 2.114, when appropriate at all, are mandatory.[38] Accordingly, because this Court must rely on the trial court's factual findings that Professional Underwriters' claims were *not* frivolous, MCR 2.613(C) prescribes clear error as the proper standard of review.[39] Because MCL 600.2591 and MCR 2.313(C) are also mandatory,[40] it stands

[38] See *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

[39] See *Contel Systems Corp v Gores*, 183 Mich App 706, 710-711; 455 NW2d 398 (1990); see also *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997).

[40] We previously applied the abuse of discretion standard of review for the question of sanctions under MCR 2.313(B). MCR 2.313(B) is distinguishable from MCR 2.313(C) because subsection (B) incorporates language that makes the sanctions decision discretionary, while subsection (C) uses mandatory language by stating that the trial court "shall" award sanctions under certain situations. There is case law applying the abuse of discretion standard of review to motions for sanctions under MCR 2.313(C), but it obviously overlooks the mandatory language in the court rule. See, e.g., *Phinisee v Rogers*, 229 Mich App 547, 563; 582 NW2d 852 (1998). To the extent that none of these other opinions address, as a primary matter, what the appropriate standard of review should be, those references to the trial court's discretion in deciding whether
(continued…)

to reason that the same clear error standard of review applies to the trial court's decision that Benchmark was not entitled to sanctions under either this statute or this court rule.[41]

B. Sanctions Generally

Benchmark refers to a number of court rules and statutes governing sanctions in making its arguments. Below, we give a brief overview of the way the court rules deal with sanctions. MCR 2.114 guards against frivolous "papers," including pleadings and motions[42] by requiring that every document submitted to a court must be signed by the party or, if represented by counsel, the party's attorney.[43] The court rule then proceeds to outline the effect of the signature, stating in MCR 2.114(D):

> The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (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
>
> (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.

If the party or attorney signs a document

> 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.[44]

(…continued)

sanctions are appropriate are mere dicta. Trial courts do have discretion in crafting the appropriate sanction, such as determining what attorney fees are reasonable. However, given the trial court's decision to deny all sanctions in this case, the trial court never had to exercise discretion in that area.

[41] See *Carpenter v Consumers Power Co*, 230 Mich App 547, 555-556; 584 NW2d 375 (1988), rev'd on other grounds sub nom *Case v Consumers Power Co*, 463 Mich 1; 615 NW2d 17 (2000).

[42] See MCR 2.114(A).

[43] MCR 2.114(C).

[44] MCR 2.114(E) (emphasis added).

MCR 2.114(F) also provides that, "[i]n 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." MCR 2.625(A)(2) is not, however, a substantive rule. Rather, it refers a trial court awarding sanctions for a frivolous defense or action to MCL 600.2591. MCL 600.2591, in turn, provides:

> (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.
>
> (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.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (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.[45]

Thus, MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591 work with each other in a seamless manner to prevent parties from abusing the courts by filing frivolous actions, motions, or other papers.

MCR 2.313(C) plays a similar role in attempting to assure that the parties not abuse the discovery process, stating:

> If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. The court *shall enter the order unless* it finds that

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[45] Emphasis added.

(1) the request was held objectionable pursuant to MCR 2.312,

(2) the admission sought was of no substantial importance,

(3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or

(4) there was other good reason for the failure to admit.[46]

C. Docket No. 227503
Motion for Summary Disposition

Benchmark claims that it was entitled to sanctions under MCR 2.114(F), MCR 2.625(A)(2), and MCL 600.2591 because there was no merit to Professional Underwriters' tortious interference and conspiracy claims, making them frivolous. Substantively, Benchmark's brief is little more than its brief in response to Professional Underwriters' challenge the trial court's decision granting Benchmark summary disposition, albeit with an overview of the grounds for sanctions. Though not overly illuminating, Benchmark's brief suggests that it is arguing that it is entitled to these sanctions because Professional Underwriters had "no reasonably basis to believe that the facts underlying" its "legal position were in fact true," and because Professional Underwriters' "legal position was devoid of arguable legal merit."[47]

Benchmark's arguments lack merit. Virtually all the factual allegations Professional Underwriters made about events were undisputed. No one disputed the difficult relationship between the parties, the failed stock negotiations, the circumstances surrounding Sternik's departure from Professional Underwriters, the problem with the MAS Associates premium, or that Dimitrakopoulos gave Sternik Jaffa's contact information. Rather, with the exception of how Sternik solicited Professional Underwriters' clients so quickly after he left Professional Underwriters, the parties disputed the inferences that could be drawn from these facts and the legal effect of those inferences. Further, in light of O'Gorman's threats and Sternik's speedy transformation from loyal employee to fierce competitor, Professional Underwriters had reason to believe that Benchmark had a motive to commit these torts, and that discovery would bear out those suspicions. Though the discovery process ultimately failed to yield the evidence that Professional Underwriters expected, that is a far cry from saying that its "legal position" in these two claims "was devoid of *arguable* legal merit"; before discovery was complete, and before Coleman's testimony was barred, it certainly was arguable that the evidence was likely to support these claims. Thus, it is impossible to say that these claims, from their inception, completely lacked a legal basis. Accordingly, there is no basis in the record to conclude that the trial court clearly erred when it found that, though resting on a somewhat questionable foundation, these claims were not frivolous.

Additionally, in this and each of its other issues concerning sanctions, Benchmark's underlying premise is that when a trial court orders summary disposition for a defendant, that is

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[46] Emphasis added.

[47] See MCL 600.2591(3)(a)(ii) and (iii).

tantamount to a finding that the lawsuit was frivolous. Consequently, under those circumstances, Benchmark would have the defendant be entitled to sanctions automatically. Benchmark, however, provides no authority for this proposition. Nor do any of the court rules or MCL 600.2591 suggest that a party awarded summary disposition is always entitled to sanctions for being required to defend a frivolous action or claim, or face a frivolous defense. Certainly, there are any number of reasons why, though a party may have good reason to believe that there is a basis for an action, claim, or defense, the trial court may nevertheless grant summary disposition adverse to that party's interests. To paraphrase the Michigan Supreme Court in *Kitchen v Kitchen*,[48] "[t]he mere fact that" a party's action, claim, or defense "did not ultimately prevail does not render" the action, claim, or defense frivolous. Thus, to the extent that Benchmark advocates summary disposition as an automatic trigger for sanctions, we reject that proposition.

D. Docket No. 227664
Improper Purpose

Benchmark argues that it was entitled to sanctions because Professional Underwriters sued it for "improper purposes." Benchmark, which uses the same overview of the various grounds for sanctions in each of its appellant's briefs, does not pinpoint the legal basis on which the trial court should have granted sanctions for this improper purpose. Though MCR 2.114(D)(3) talks about imposing sanctions for an "improper purpose," that rule as a whole and that subrule in particular both revolve around the effect of signing a document. Because Benchmark's argument is that the suit as a whole was filed for an improper purpose, not a particular document, it must be arguing that it was entitled to sanctions under MCL 600.2591(3)(a)(i) because Professional Underwriters' "primary purpose in initiating the action . . . . was to harass, embarrass, or injure" it.

Factually, Benchmark refers to O'Gorman's deposition testimony in which he reported that Reifman said that the lawsuit was "just a game" and Benchmark had "deep pockets." Reifman admitted that he "[m]ight have" made the game comment when speaking with O'Gorman. Hastings, who had worked for the Ohio Professional Underwriters agency, also stated that Reifman had talked about Benchmark's deep pockets. However, it is not entirely clear that gamesmanship or Benchmark's financial resources were the only reasons Professional Underwriters filed the third-party complaint against Benchmark. Rather, as Hastings explained in his deposition, Reifman said that Professional Underwriters

> had discovered a letter . . . in their computer, that . . . was generated by Jeff Sternik, and he felt that was important to the lawsuit. And, also, the fact that they had – they being Benchmark – had cancelled the PUI Agency, and that they had deep pockets.

Hastings added that when he asked why Reifman was willing to sacrifice his twenty-year friendship with O'Gorman for this lawsuit, Reifman answered "[d]eep pockets." Read in context, Hasting's recollection of Reifman's statement shows that he believed that Professional Underwriters had evidence to support suing Benchmark in the form of Sternik's letter to Jaffa

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[48] *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002).

and Benchmark's subsequent decision to cancel its relationship with Professional Underwriters. Even assuming that gamesmanship and Benchmark's ability to pay an award were per se improper reasons for Professional Underwriters to sue, those were not the only reasons why Professional Underwriters sued. Though the discovery process failed to yield the evidence that Professional Underwriters had hoped to find directly tying Sternik's wrongful conduct to Benchmark, the trial court evidently noticed the kernel of appropriate motivation in Professional Underwriters' claims. The record, even with these statements from Reifman, does not provide a reason to conclude that the trial court clearly erred in denying sanctions.

E. Docket No. 227664
Paper Trail and the Tortious Interference and Conspiracy Claims

On October 13, 1999, the trial court held a hearing to resolve a number of problems with discovery. Benchmark's counsel indicated that it had asked Professional Underwriters to provide more specific information concerning which trade secrets Professional Underwriters was alleging that it had stolen. Professional Underwriters' attorney responded that Professional Underwriters

> answered that those [secrets] are the customers and the customer list and the proprietary information about the customers. I don't know what else I can say beyond that. That's the answer to the interrogatory, but I will . . . supplement the witness list interrogatories as soon as we have that information.

Benchmark's attorney was not satisfied with that response, and told the trial court:

> I want to know exactly what trade secrets he [Sternik] took so that we can find out exactly what their claim is. That's all I'm asking for and in addition Mr. Reifman has testified at his deposition that there's a *paper trail* that PUI has. I want the *paper trail*. The only reason for me to depose him again is [if] I want him to bring the paper trail.
>
> I'm entitled to know what their claim is against Sternik so that I know how it effects my client. I only want the paper trail. It could also be called the smoking gun. They think they have something in their computer system. That's a smoking gun. I want that.[49]

The trial court then asked Professional Underwriters' attorney why he could not provide more specific answers, prompting Professional Underwriters' attorney to say that

> [t]he trade secrets are the identity of the customers and the details of the relationship with PUI with the customers sufficient to enable Sternik to steal them
>
> We don't know specifically what documents Sternik stole. We don't know specifically what information he stole. The trade secrets are, [sic] our customers, our customer list and our relationship with the customers. I can't be

[49] Emphasis added.

any more specific.

Professional Underwriters' attorney said that he had given Benchmark the list of Professional Underwriters clients it was claiming that Sternik stole and that he had turned over the letter, evidently the letter to Jaffa. The trial court said that it was "satisfied" with Professional Underwriters' explanation of the responses to the interrogatories, but that it wanted "all information pertaining to a paper trail turned over to the other side because I think they're entitled to it." Professional Underwriters' attorney protested that that was fair, but "[a]ll that information has been turned over to them." There was nothing left for Professional Underwriters to give Benchmark. The trial court ended the argument by informing Professional Underwriters' attorney that

> you understand that come twenty-eight days or whatever, that that's it. You aren't going to say, Judge, oh, by the way, Judge, I happen to have just found this the other day in the file, and Lord behold, I'm sorry. The answer is going to be no. All right. No surprises. That's what's nice about discovery here in Michigan. . . .

Benchmark now argues that because "this alleged 'paper trail' failed to establish a claim against Benchmark for tortious interference . . . and/or civil conspiracy . . ., these claims are frivolous and without merit in violation of MCR 2.114, MCR 2.625 and MCL 200.2591." This argument is virtually indistinguishable from its argument that the tortious interference and conspiracy claims were frivolous, and therefore we reject it for the same reasons.

Nor does it escape our attention that, in the motion hearing, Professional Underwriters' attorney never represented that it had a "paper trail." Rather, Benchmark's attorney used that term. Professional Underwriters' attorney was forthright about the documentary evidence it had, and did not represent that it had additional papers that would prove its claim. The trial court, to protect Benchmark's interests in appropriate discovery, also informed Professional Underwriters' attorney that any evidence not shared during discovery would likely be barred at trial. Thus, the trial court did not clearly err when it denied Benchmark sanctions for Professional Underwriters' failure to provide sufficient evidence to overcome the motion for summary disposition.

F. Docket No. 227664
Professional Underwriters Improperly Denied Request For Admission

Before trial, Benchmark asked Professional Underwriters to admit in request 4 "that [t]here is no duty under the law for Benchmark Professional Insurance Services, Inc. to continually offer Professional Underwriters, Inc. a producer[']s agreement to sell Gulf Insurance in the State of Michigan[.]" Professional Underwriters responded that it denied

> the Request to Admit as they [Professional Underwriters] believe that Benchmark Professional Insurance Services, Inc. had a duty to continue to offer PUI the opportunity to sell Gulf in the State of Michigan. However, in the manner and form in which the Request to Admit is put forward, it requests a legal conclusion. Accordingly, the Request to Admit is objectionable in the manner and form presented. However, without waiving such objection, . . . [Benchmark expects] to determine a legal precedent for the claim once discovery is completed with

> respect to Benchmark. Its concerns will center on Michigan anti-trust and/or unfair trade practices law as well as other areas of law that may be pinpointed as a result of discovery.

Benchmark challenged this response in its first motion for summary disposition. At the February 10, 2000, hearing on the two motions for summary disposition, Professional Underwriters' attorney conceded that he had never developed claims for antitrust violations or unfair trade practices. The trial court concluded that, to the extent any such claims may have existed, summary disposition was appropriate, and that Professional Underwriters' attorney should have informed Benchmark about its decision to drop these issues, but that its failure to alert Benchmark did not make the manner in which Professional Underwriters raised these two areas of law frivolous.

Benchmark now argues that it was entitled to sanctions under MCR 2.313(C) for Professional Underwriters' failure to admit that it had no legal basis for an antitrust or unfair trade practices claim. Professional Underwriters responds that, as it noted in its response to the request for admission, the request asked it to give a legal, not a factual conclusion, which was objectionable.

There is little published case law interpreting MCR 2.313(C), and none that specifically says that a failure to admit a legal conclusion is sanctionable. However, MCR 2.312(A) states that a request for an admission must concern "statements or opinions of fact or the application of law to fact . . . ." The court rule appears to intertwine a factual matter in all requests for admissions. Whether a request to admit that there is "no duty under the law" is predominantly a legal question is not very clear. On one hand, the request for admission could be interpreted as asking, albeit ambiguously, whether there was some agreement between Professional Underwriters and Benchmark to continue their relationship for some period, which would be factual in nature. On the other hand, duty is plainly a question of law for a court, not the parties, to resolve.[50] Overall, the legal nature of the request for admission predominates over any unspoken reference to the facts.

Greenspan v Rehberg[51] sheds a little light on this issue. In *Greenspan*, the trial court ordered the plaintiffs to pay costs pursuant to GCR 1963, 312.1, the predecessor to MCR 2.312, because it found that the plaintiffs' claims were frivolous.[52] This Court, after examining the record, concluded that "the demands for admission of fact submitted to the plaintiffs discloses that the 'facts' which the defendants sought to have the plaintiffs admit were, in reality, not 'facts' but were elements of the defendants' claim."[53] The trial court explained that the fact that the defendants proved their case at trial did not mean that the plaintiffs improperly denied the admission.[54] This Court applied *Greenspan's* holding on this point in *Richardson v Ryder Truck*

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[50] See *Smith v Jones*, 246 Mich App 270, 274; 632 NW2d 509 (2001).

[51] *Greenspan v Rehberg*, 56 Mich App 310; 224 NW2d 67 (1974).

[52] *Id*. at 327-328.

[53] *Id*. at 328.

[54] *Id*. at 329.

Rental, Inc,[55] concluding that, even though the jury found the defendant negligent, the trial court erred in sanctioning the defendant for failing to admit that its agent was negligent when the evidence of negligence was disputed.

This case is not exactly like *Greenspan* and *Richardson* because Professional Underwriters never pleaded any antitrust or unfair trade practices claims, much less submitted them to a jury. Nor do either of those cases precisely answer whether a purely legal question is a proper subject for a request for admissions. Rather, it is the subtle hint in *Greenspan*, also incorporated in *Richardson*, that only genuinely factual matters are subject to a request for an admission, and therefore other matters, such as questions of law, are objectionable. This hint comes from the quotation marks the *Greenspan* Court placed around the word facts twice in the opinion.[56] Had the Court accepted that the subject of the admissions was actually factual, then it would not have used the quotation marks. Those question marks indicate to readers that the plaintiff had argued that the topic of the request for admissions was factual, and the Court was willing to repeat that argument, but was unwilling to accept that as true. In this case, because Benchmark's request for admission was focused almost exclusively on a legal matter, and its factual component was difficult or impossible to decipher, the request for admission was objectionable, and the trial court did not err in refusing to sanction Professional Underwriters for objecting and denying.[57]

G. Docket No. 228955
UTPA And Antitrust Claims Frivolous

Benchmark claims that it was entitled to sanctions under MCR 2.114 because Professional Underwriters' unfair trade practices and antitrust claims were frivolously asserted in Professional Underwriters' responses to the interrogatories and request for admissions. The problem with this argument is that Professional Underwriters never actually asserted these as claims. Instead, Professional Underwriters claimed tortious interference and civil conspiracy. Benchmark, however, pushed Professional Underwriters to think about what, in the universe of possible theories of civil liability, other possible causes of action might exist. Professional Underwriters did not cite the unfair trade practices act (UTPA), MCL 500.2001 *et seq*., or any particular antitrust statute in its answers to the interrogatories or request for admissions because those were not theories it was choosing to pursue. Professional Underwriters also specifically informed Benchmark that, because discovery was ongoing, it would reserve the right to supplement its answers to both discovery tools. Discovery simply did not give Professional Underwriters the evidence it expected to find, and therefore Professional Underwriters had no reason to refine these theories or explore them further. Though Professional Underwriters did not supplement its answers in writing, it freely admitted at the hearing on the motions for summary disposition that it was not pressing any such claims. Thus, it is difficult to say that, at the time Professional Underwriters answered the interrogatories and requests for admissions, that Professional Underwriters' attorney believed that the answers were *not* "well grounded in fact

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[55] *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 457-458; 540 NW2d 696 (1995).

[56] See *Greenspan, supra* at 328, 329.

[57] See MCR 2.313(C)(1).

and . . . warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law."[58]

Further, the trial court mentioned at the February 10, 2000, hearing that it saw "no legal basis nor factual basis for any alleged action pertaining to the violation of the antitrust laws, nor is there a private cause of action" under the UTPA. However, the trial court made this remark in the context of ruling on the motion for summary disposition, *not* sanctions. The trial court also made this comment with the benefit of hindsight that Professional Underwriters did not have when it was answering the interrogatories and request for admissions. In other words, by the time the trial court decided the motion, discovery had closed, Professional Underwriters realized it had no additional causes of action, and admitted as much at the hearing. Therefore, the trial court did not clearly err in refusing to order sanctions on these grounds.

H. Docket Nos. 227664 And 228955
Frivolous Claims And Request For Admissions Denial

Benchmark presents four additional issues in which it claims that the trial court should have awarded it sanctions because the tortious interference, civil conspiracy, UTPA, and antitrust claims were frivolous and Professional Underwriters improperly denied a request for admission. These, however, are the same matters addressed in the five other sanctions issues, even if the arguments implicate sanctions under court rules different from the court rules discussed in the preceding sections. Thus, for the same reasons that we decide that the trial court did not clearly err in denying sanctions in the previous five issues, we also conclude that the trial court did not clearly err in denying sanctions as alleged in these four issues.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly

[58] MCR 2.114(D)(2).