STATE OF MICHIGAN

COURT OF APPEALS

GERALD H. STERNBERG

Plaintiff-Appellant,

v

MICHIGAN STATE UNIVERSITY AND THEIR BOARD OF TRUSTEES; LOU ANNA K. SIMON, PRESIDENT; RON MASON, ATHLETIC DIRECTOR; MR. POTERALA, GENERAL COUNSEL; FRED POSTON, VICE PRESIDENT FOR FINANACE AND OPERATIONS, AND TREASURER; in their official capacities at Michigan State University, and as individuals; and DOES 1 THROUGH 100, jointly and severally,

Defendant-Appellees.

UNPUBLISHED
January 20, 2009

No. 281521
Ingham Circuit Court
LC No. 02-1182-CP

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(8) in favor of defendant Michigan State University. We affirm.

Plaintiff, who was a student manager for defendant's football team in the 1960s, filed this action to pursue his concern over the arrangement between defendant and Nike, Inc. Plaintiff alleges that the arrangement resulted in the display of the Nike logo on some of defendant's student-athletes' uniforms. Plaintiff also alleges that the Nike logo appears on a replacement letter jacket plaintiff obtained in 1994, although it is unclear from the allegations whether the replacement jacket is a product of the arrangement between defendant and Nike. Plaintiff filed a six-count complaint challenging defendant's arrangement with Nike. Plaintiff sought declaratory relief, certification of a class action, and regular and punitive damages. In the complaint and an amended complaint, plaintiff asserted claims under the Michigan Consumer Protection Act [MCPA], MCL 445.903, a claim for intentional infliction of emotional distress, and a claim as a private attorney general under the United States and Michigan Constitutions for violation of the rights of freedom of speech and freedom of religion. US Const, Am I; Const 1963, art I, § 5; Const 1963, art I, § 4. On appeal, plaintiff pursues only the MCPA claim and the private attorney general claim (Counts II and V).

Plaintiff first argues that the trial court erred by denying leave to amend the private attorney general claim. We review a trial court's decision on leave to amend for abuse of discretion. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). We find no abuse of discretion in the trial court's decision, because we find that plaintiff failed to propose any amendment that would provide the requisite factual substance to his claims. To state a valid claim as a private attorney general, plaintiff would have to allege facts to establish constitutional standing. *Rohde v Ann Arbor Public Schools*, 479 Mich 336, 350-351; 737 NW2d 158 (2007). The record demonstrates that plaintiff lacks constitutional standing to pursue his claim, and plaintiff has not alleged or suggested the existence of any facts that would confer standing upon him. As our Supreme Court has explained, "citizen suits and actions by private attorneys general have always been grounded in a private injury, whether suffered directly or as a result of an assignment by another." *Rohde*, *supra*, 479 Mich at 350, quoting *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 646-647; 684 NW2d 800 (2004).

Here, plaintiff has failed to allege any injury to support his claim that defendant has deprived plaintiff or any of defendant's student-athletes of their constitutional rights to freedom of speech or freedom of religion. Plaintiff did not identify any student-athlete who objected to wearing a Nike logo, or who sought to object but was restrained by defendant from doing so. Plaintiff claims that he objects to the logo on his 1994 letter jacket, but fails to demonstrate that defendant required or coerced him to wear the jacket, that defendant restrained him from publicly objecting to the logo on the jacket, or that defendant's conduct imposed a burden upon plaintiff's sincerely held religious belief. Cf. *Champion v Secretary of State*, ___ Mich App ___; ___ NW2d ___; 2008 WL 4603398. Plaintiff recounts purported constitutional violations to individuals not linked to this action, but does not relate those purported violations to defendant's conduct or to plaintiff's rights.

Given the lack of a particularized injury and the dearth of any indication that an amendment would allege such an injury, we find that an amendment to Count V would have been futile. Accordingly, there was no error in denying plaintiff leave to amend the complaint. *Dowerk*, 223 Mich App at 75.

Plaintiff next argues that the trial court erred by failing to recognize constructive admissions on the part of defendant. This argument misconstrues the Michigan Court Rules. This Court reviews issues involving the application of court rules de novo. *Peters v Gunnell, Inc*, 253 Mich App 211, 225; 655 NW2d 582 (2002).

The plain language of MCR 2.108(C)(1) allows defendants to file a motion for summary disposition in lieu of filing an answer. Here, defendant filed motion to dismiss and a motion for summary disposition, thereby preserving the opportunity to answer the complaint once the trial court ruled on the motions. When the trial court dismissed the complaint, no further responsive pleading was required. *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 495-496; 591 NW2d 364 (1998).

Plaintiff also argues that the trial court erred by finding that plaintiff had failed to state a claim under the MCPA. This Court conducts a de novo review of the trial court's summary disposition decision. *Maiden v. Rozwood*, 461 Mich. 109, 118, 597 N.W.2d 817 (1999). The

Court will uphold the trial court's decision if no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

We find that the record supports the trial court's dismissal of plaintiff's MCPA claim. To state an MCPA claim, plaintiff would have to allege facts to demonstrate a loss as a result of the putative confusion over whether defendant's student-athletes were personally endorsing Nike products. See *Mayhall v AH Pond Co, Inc.* 129 Mich App 178, 181; 341 NW2d 268 (1983). Plaintiff does not identify any real or potential loss arising from the endorsement allegation. Accordingly, plaintiff failed to state a claim under the MCPA and the trial court properly dismissed the claim.

Lastly, plaintiff argues that the trial court erred by denying him the opportunity to pursue further discovery. We review a trial court's discovery rulings for abuse of discretion. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004). Generally, a party is entitled to pursue discovery before a trial court decides a motion for summary disposition. *Id*. However, the liberal discovery rules do not entitle a plaintiff to pursue discovery in an attempt to gain standing to sue, when the essence of the plaintiff's complaint fails to allege a particularized injury. *Moses, Inc v Southeast Council of Michigan Gov't*s, 270 Mich App 401, 422; 716 NW2d 278 (2006). Plaintiff has not met his burden of identifying the manner in which discovery would render his claims cognizable. Accordingly, the trial court was within its discretion in denying plaintiff the opportunity for further discovery.

Having decided that plaintiff lacks standing to pursue his claims, we need not consider defendant's contention that it is immune from plaintiff's claims.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey