STATE OF MICHIGAN

COURT OF APPEALS

BRUCE B. FEYZ, M.D.,

Plaintiff-Appellant,

v

MERCY MEMORIAL HOSPITAL and RICHARD HILTZ,

Defendant-Appellees,

and

JAMES MILLER, D.O., JOHN KALENKIEWICZ, M.D., J. MARSHALL NEWBERN, D.O., and ANTHONY SONGCO, M.D.,

Defendants.

UNPUBLISHED
January 5, 2010

No. 285880
Monroe Circuit Court
LC No. 02-014174-CZ

BRUCE B. FEYZ, M.D.,

Plaintiff/Appellant/Cross-Appellee,

v

MERCY MEMORIAL HOSPITAL, RICHARD HILTZ, JAMES MILLER, D.O., JOHN KALENKIEWICZ, M.D., J. MARSHALL NEWBERN, D.O., and ANTHONY SONGCO, M.D.,

Defendants/Appellees/Cross-Appellants.

No. 289226
Monroe Circuit Court
LC No. 02-014174-CZ

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

In Docket No. 285880, plaintiff appeals as of right an order granting defendants' motion for summary disposition of plaintiff's breach of contract and retaliation claims. In Docket No. 289226, plaintiff appeals as of right, and defendants cross-appeal, an order awarding sanctions to defendants under MCL 600.2591. For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

Both this Court and our Supreme Court have previously issued published opinions in this case. The relevant facts are gleaned from the Supreme Court's opinion:

> Plaintiff is a physician with staff privileges at defendant Mercy Memorial Hospital. Plaintiff was dissatisfied with defendant hospital's standard nursing policy requiring nurses to document patients' prescribed medications and dosages by either copying the label on their prescription containers or copying a list of medications carried by patients. As a consequence, plaintiff created his own specialized orders[[1]] directing the nursing staff to obtain very specific information from plaintiff's incoming patients about their prescription drug use. Plaintiff's orders directed the nursing staff, as part of the admissions process for his patients, to assume a far more aggressive investigative role regarding patient medication.
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> Defendants disapproved plaintiff's standing orders, and instructed the nursing staff to ignore them. In several cases where the nurses disregarded plaintiff's special orders and followed defendant hospital's nursing directives, plaintiff prepared "incident reports" referring such cases to peer review committees for investigation of "potential medical errors." Further, plaintiff began making notations in patient records that his disregarded orders were intended to "[p]revent serious medication errors in the past."

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[1] These standing orders are also referred to as plaintiff's orders A-D. These were specialized orders that plaintiff wrote and sought to have the nursing staff follow for his patients in an effort to reduce the possibility of medication errors for patients. According to plaintiff's complaint, his standing orders required nurses to:

A. Have the family bring in home medications.

B. Ask the patient (if alert) if the containers belong to the medications. If not, send the container(s) to the pharmacy for identification.

C. Ask the patient to look at his/her medications inside the container and tell how he/she has been taking them at home.

D. List the dose and frequency of medications taken on the nursing assessment form as the patient is actually taking them at home.

> Defendants initiated peer review proceedings against plaintiff based on plaintiff's failure to complete medical records and his insistence that the nursing staff follow his standing orders rather than comply with hospital policy. An ad hoc investigatory committee reviewed plaintiff's conduct and released its findings to the executive committee of defendant medical staff. Relying on the ad hoc committee's report, the executive committee referred plaintiff to the Health Professionals Recovery Program (HPRP) for a psychiatric examination. Plaintiff was placed on temporary probation.
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> Plaintiff alleges that he ceased writing his standard orders because, in compromise, defendant hospital gave plaintiff use of the pharmacy consult service to implement plaintiff's special orders. It appears that plaintiff's orders regarding patient medication overburdened the staff of the pharmacy consult service, so the hospital eventually discontinued this arrangement. Thereafter, plaintiff resumed placing his specialized orders in patients' medical charts. As a consequence, defendants took further action and placed plaintiff on indefinite probation. Plaintiff continues to practice medicine and retains privileges at defendant hospital, but is restricted from using defendant hospital's pharmacy consult service or insisting on compliance with his special orders. [*Feyz v Mercy Mem Hosp*, 475 Mich 663, 667-669; 719 NW2d 1 (2006) (*Feyz II*) (footnotes omitted).]

On about January 30, 2002, plaintiff filed suit[2] against defendants[3] as a result of disciplinary action (the above mentioned probation) taken against him in 1998 and in 2000 pursuant to peer review procedures.[4] The complaint alleged that in August 1998, defendant Hiltz wrote to defendant Dr. Miller requesting that the executive committee, of which Dr. Miller was the chairman, commence a formal investigation into charges against plaintiff. Thereafter, defendant Dr. Miller appointed defendant Dr. Kalenkiewicz to form an ad hoc committee to investigate the allegations against plaintiff; defendants Drs. Newbern and Songco also served on the ad hoc committee. Ultimately, plaintiff was disciplined in 1998 and 2000. In 1998, the

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[2] The trial court originally granted summary disposition for defendants based on "the doctrine of judicial nonreviewability of the staffing decisions of private hospitals, as well as statutory immunity arising from the referral of a physician for medical evaluation." *Feyz v Mercy Mem Hosp*, 264 Mich App 699, 702; 692 NW2d 416 (2005) (Murray, J., concurring in part and dissenting in part) (*Feyz I*), vacated 475 Mich 663 (2006) (*Feyz II*). This Court affirmed in part, reversed in part, and remanded. *Feyz I*, *supra* at 725. Our Supreme Court vacated this Court's opinion in *Feyz I* and remanded the case to the trial court. *Feyz II*, *supra* at 691. Plaintiff's current appeal stems from entirely different rulings made by the trial court on remand.

[3] In addition to defendant hospital, the other defendants in this case include Drs. John Kalenkiewicz, Anthony Songco and J. Marshall Newbern, who were all members of the ad hoc committee formed as part of the peer review process in 1998, as well as Dr. James Miller, the hospital's chief of staff and chairman of the executive committee, and Richard Hiltz, the hospital's president.

[4] Plaintiff claims these proceedings are properly characterized as disciplinary proceedings rather than peer review proceedings or procedures.

executive committee referred plaintiff to the Health Professional Recovery Program (HPRP)[5]; in addition, plaintiff was placed on probation. In 2000, plaintiff was again placed on "continuous and indefinite probation[.]"

Plaintiff's complaint included claims for violations of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. (Count I), the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*. (Count II) (against defendant hospital only), the Rehabilitation Act of 1973, 29 USC 794 (Count III) (against defendant hospital only), and the federal civil rights act, 42 USC 1983 and 42 USC 1985 (Count IV). The complaint also included claims of invasion of privacy (Count V), breach of fiduciary and public duties (Count VI) (against defendant hospital only), and breach of contract (Count VII).

Although plaintiff's complaint contains multiple counts, the only claims that are relevant to this appeal are his claims for retaliation based on his 2000 probation (which are encompassed in his claims for violation of the PWDCRA, the ADA, and the Rehabilitation Act of 1973 (Counts I, II and III))[6] and his claim for breach of contract. Plaintiff's remaining claims were dismissed on other grounds below and plaintiff is not appealing their dismissal. Plaintiff's breach of contract claim alleges that the medical staff bylaws constitute a contract and that defendants repeatedly breached that contract by ignoring unspecified procedural requirements of the bylaws and committing other unspecified violations of the bylaws. According to the complaint, plaintiff was damaged by defendants' breach of contract because his ability to provide quality care to his patients has been compromised and his reputation has been damaged.

Plaintiff's retaliation claims stem from plaintiff's allegation that he was retaliated against after counsel for plaintiff wrote and sent a letter to defendant Hiltz in which he protested the violation of his civil and constitutional rights and stated his intent to assert his rights under the Rehabilitation Act of 1973 and other statutes. According to plaintiff, shortly after he wrote the letter threatening to assert his rights, defendants began to dismantle the pharmacy consult process. Plaintiff alleges that, as instructed, he had been referring virtually all of his admitted patients for a pharmacy consult and that he had been assured that after-hours pharmacy consults would be available. He asserts that after the pharmacy consults became unavailable, he resumed writing his orders A-D. According to plaintiff, defendants hospital and Hiltz "were deliberately manipulating the Pharmacy Consult process in order to provoke a reaction by Plaintiff that would serve as a pretext to retaliate against Plaintiff and begin additional disciplinary proceedings against Plaintiff." Plaintiff alleges that he was thereafter placed on continuing probation and was banned from using the pharmacy consult; furthermore, if he writes orders A-D he is subject to

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[5] See MCL 333.16223.

[6] The trial court noted in its memorandum of law accompanying its order granting defendants' motion for partial summary disposition that plaintiff did not contest the dismissal of his claims under Counts I, II and III on the basis that the underlying events occurred more than three years before plaintiff filed his complaint. Thus, the trial court granted summary disposition of plaintiff's 1998 retaliation claims under MCR 2.116(C)(7), and the only issue on appeal regarding Counts I, II and III is whether there was an issue of material fact regarding plaintiff's claims of retaliation in 2000.

summary suspension or revocation of his hospital privileges. According to plaintiff, defendants hospital and Hiltz further retaliated against him "by refusing to renew a contract to provide EKG longstanding interpretive services at Mercy."

In March 2008, defendants moved for summary disposition. In relevant part, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that plaintiff was not discriminated against under the PWDCRA, the ADA, or the Rehabilitation Act of 1973. According to defendants, plaintiff sought special treatment in that he wanted to be able to write orders that violated the hospital's policies and that no other medical staff member was permitted to write. Thus, defendants contend, plaintiff was not treated any differently than any other members of the medical staff with regard to his ability to write orders that are prohibited by hospital or nursing policies. Furthermore, defendants argued that plaintiff was not disabled and that there was no genuine issue of material fact that none of the defendants regarded plaintiff as disabled. Defendants also argued that there was no evidence that plaintiff was retaliated against for asserting his civil rights. According to defendants, there was no evidence of any causal connection between the letter from plaintiff's counsel and any adverse action. Rather, defendants contended, plaintiff was placed on probation in 2000 because he had resumed writing orders that violated hospital policy.

Plaintiff submitted a brief in response to defendants' motion for summary disposition. In his brief, plaintiff noted his agreement with a separate motion for summary disposition filed by defendants based on the statute of limitations and agreed that Counts IV, V, and VI of his complaint should be dismissed on this basis. Furthermore, he conceded that with respect to his claims under the PWDCRA, the ADA, and the Rehabilitation Act, acts or events occurring more than three years prior to the filing of his complaint in January 2002 could not form the basis for his claims under these statutes. He further acknowledged that the 1998 acts and events, including the proceedings that resulted in his probation and the referral to HPRP, are time barred. According to plaintiff, the crux of his claim after January 1999 (acts not barred by the statute of limitations) is a claim that he was retaliated against after his attorney wrote the June 1999 letter asserting plaintiff's civil rights. Plaintiff asserted that he established a genuine issue of material fact in this regard.

In a separate motion, defendants moved for summary disposition of plaintiff's breach of contract claim under MCR 2.116(C)(8) and/or (10). Defendants argued, in relevant part, that the bylaws did not constitute an enforceable contract and that even if they did, defendants did not breach the bylaws. Plaintiff argued that the bylaws did create an enforceable contract and that the bylaws were breached in numerous specific respects.

The trial court addressed defendants' motions for summary disposition of plaintiff's discrimination and contract claims in the same order and memorandum of law and granted both motions. Regarding plaintiff's discrimination claims, the trial court first observed that because plaintiff agreed that claims based on events occurring more than three years before the filing of his complaint were time barred and because plaintiff conceded that he had no evidence to support any form of disability discrimination claim, the court was only considering whether plaintiff's retaliation claims under the PWDCRA, the ADA, and the Rehabilitation Act were viable. Furthermore, the trial court ruled that in light of plaintiff's concessions regarding the statute of limitations, it would only consider plaintiff's 2000 disciplinary proceedings regarding

the retaliation claim.[7] In granting summary disposition of plaintiff's retaliation claims, the trial court stated as follows:

> The Plaintiff contends that the Defendants took adverse action against him for asserting his civil rights in June of 1999. Specifically, the Plaintiff alleges that the Defendants removed the "pharmacy consult process" to "provoke" him into writing the notorious orders A-D, for which he had been disciplined in 1998. The Court finds that no reasonable jury could find the removal of a costly hospital service—i.e., the pharmacy consults—to have been calculated to provoke Plaintiff. Unlike in *Sumner v. Goodyear Tire & Rubber Co.*, 427 Mich 505 (1986) where the Court found substantial evidence to suggest that overt acts of managerial discrimination were perpetrated to provoke the plaintiff into action for which he could be disciplined, here the Plaintiff has failed to show any discriminatory treatment.
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> Granted, the Plaintiff is alleged to have been the only physician utilizing the pharmacy consult mechanism, but the Plaintiff bears the burden to show that the removal of this mechanism somehow constituted a plan or course of discriminatory treatment substantially contributing to his later discipline. The Plaintiff simply can make no such showing. The Defendants state the change in policy was driven by financial considerations involving pharmacy staffing; the Court finds this position persuasive. Additionally, the Court finds it appalling that the Plaintiff would even rely on a racial discrimination case in an attempt to justify his continued defiance of hospital policy applicable to <u>all</u> physicians. The fact is the Plaintiff's claim has nothing to do with discriminatory treatment, but rather the Defendants' refusal to grant him <u>special</u> privileges, and in a sense, the Defendants' refusal to discriminate against the rest of the medical staff for his benefit.
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> The Plaintiff also alleges that his ER referrals were reduced in retaliation for his "civil rights" assertion. This is similarly devoid of merit because the Plaintiff admitted in his deposition that his referrals were reduced in 1998, long before the letter from counsel was sent. Additionally, the ER referrals are made by individual ER doctors who are not alleged to have even been aware of his letter from counsel, and any suggestion of a more wide ranging conspiracy is simply without evidentiary support at this late, late date.

The trial court also granted summary disposition of plaintiff's breach of contract claim. In so doing, the trial court accepted plaintiff's contention that the bylaws constituted an

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[7] In the same order granting summary disposition of plaintiff's breach of contract and retaliation claims, the trial court also granted summary disposition under MCR 2.116(C)(7) of plaintiff's retaliation claims under the PWDCRA, the ADA, and the Rehabilitation Act related to his 1998 probation, his civil rights claims, his invasion of privacy claims, and his breach of fiduciary duties claims.

enforceable contract. In granting summary disposition of this claim, the trial court did not make a determination regarding each alleged violation of defendants' bylaws. Rather, the trial court assumed that defendants did violate the bylaws in the ways alleged by plaintiff in his brief opposing summary disposition, concluding that "[p]laintiff is unable to demonstrate the harm he has allegedly suffered" and that "even if the numerous procedural violations the Plaintiff complains of had not occurred, the Plaintiff would have suffered the same exact fate, albeit through a lengthier process." The trial court's ruling regarding plaintiff's breach of contract claim is as follows:

> Regarding the Plaintiff's 1998 probation, there is not a legitimate or any serious dispute that the Plaintiff's discipline was due to writing orders A-D and related annoyances to the nursing staff. While the Plaintiff alleges that his end of life care practices were also examined by the Executive Committee, there is absolutely no indication that proper notice to the Plaintiff of all the charges against him and a proper opportunity to respond would have, in any way, affected the outcome. The Hospital's exception to the Plaintiff's insubordination and continued refusal to follow protocol regarding orders A-D later resulted in his receipt of lifetime probation in 2000; accordingly, the Court finds that even if the Defendants had properly followed bylaw procedures, the Plaintiff's 1998 punishment would not have changed. Additionally, even if this Court were to assume that bylaw procedures would have led to a different result, unlike the Plaintiff's subsequent probation claim which is supposedly bolstered by pecuniary loss due to the non-renewal of his 2001 EKG contract, the Plaintiff has not shown any financial harm stemming from his 1998 probation.
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> Regarding the 2000 probation proceedings against the Plaintiff, again the Court assumes the existence of procedural irregularities; however, proper bylaw procedure would have resulted in the exact same punishment against the Plaintiff. The Plaintiff's problem is not that the hospital is refusing him a "fair shake"; his problem is that he continually demands special treatment for his orders A-D. The Plaintiff, in fact admitted in his deposition that if he were taken off probation tomorrow he would begin writing orders A-D again; this spirit of defiance is what has placed the Plaintiff in his current predicament, and though it is too bad he lost his 2001 EKG contract due to his probationary status and that he must endure the stigma of being a lifetime probationer, this Court will not change hospital policy nor will it rewrite the "contract" the Plaintiff shares with the medical staff. In any event, the Plaintiff cannot make out a *prima facie* case for breach of contract because under these circumstances, the Court finds that he would have suffered the exact same punishment even if the bylaw procedures had been followed.

After the trial court granted summary disposition and dismissed plaintiff's discrimination and contract claims, defendants moved for sanctions against plaintiff and his attorney based on MCR 2.625 and MCL 600.2591. The trial court granted the motion. Plaintiff appeals from both the order granting defendants' motions for summary disposition and the order granting defendants' motion for sanctions, and defendants cross-appeal the order awarding them sanctions.

II. Analysis

A. Docket No. 285880

1. Breach of Contract

The trial court properly granted summary disposition of plaintiff's breach of contract claim under MCR 2.116(C)(8). This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999). When an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. MCR 2.113(F); *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). The written contract then becomes part of the pleadings and can be considered for purposes of review under MCR 2.116(C)(8). *Laurel Woods Apts*, *supra* at 635. When deciding a motion brought under MCR 2.116(C)(8), a court considers only the pleadings. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden*, *supra* at 119. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

Plaintiff's entire breach of contract claim[8] consists of three paragraphs in his complaint:

Count VII – BREACH OF CONTRACT

> 155. The Medical Staff By-Laws are a contract under which members of the Medical Staff exercise staff privileges at Mercy.
>
> 156. Defendants Mercy and the Medical Staff have repeatedly breach [sic] and continue to breach that contract by ignoring procedural requirements and otherwise violating the By-Laws.
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> 157. Plaintiff has been and continues to be damaged by Defendants' breach of contract in that his ability to provide quality care to patients has been compromised and his reputation has been damaged.

To establish a breach of contract, a plaintiff must establish both the elements of a contract and a breach of the contract. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). A valid contract requires parties competent to contract, a proper subject matter, legal consideration, and mutuality of agreement and obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). The plaintiff must then establish the breach of the contract and

[8] In granting summary disposition of plaintiff's breach of contract claim, the trial court assumed, without deciding, that the medical staff bylaws constituted an enforceable contract. This opinion similarly assumes, without deciding, that the medical staff bylaws constituted an enforceable contract.

damages resulting from the breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

In this case, plaintiff failed to adequately plead a breach of contract claim. Specifically, he failed to sufficiently plead damages resulting from any alleged breach of the medical staff bylaws.[9] The party asserting a breach of contract has the burden of proving his damages with reasonable certainty and may recover only those damages which are the direct, natural and proximate result of the breach. *Id*. The only allegation plaintiff makes regarding damages in his breach of contract claim is that "his ability to provide quality care to patients has been compromised and his reputation has been damaged." Such damages are not a direct, natural and proximate result of any breach of defendants' bylaws. *Id*. Furthermore, plaintiff's complaint acknowledges that plaintiff is still a member of defendant hospital's medical staff notwithstanding his placement "on continuous and indefinite probation." Therefore, even accepting as true plaintiff's allegation that the care of his patients has been compromised and that his reputation has been damaged, plaintiff is still employed as a physician at defendant hospital and has therefore not adequately pleaded damages flowing from any alleged breach of contract.[10]

Plaintiff urges this Court to make findings regarding his specific allegations of breach. We decline to do so based on our conclusion that summary disposition is proper under MCR 2.116(C)(8); only the pleadings are considered in determining the propriety of granting such a

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[9] While we have independently reviewed plaintiff's breach of contract claim to determine whether summary disposition was proper under 2.116(C)(8), we note that the panel in *Feyz I* noted that it was "skeptical" regarding whether the "extremely vague" allegations in plaintiff's breach of contract claim could survive a motion for summary disposition under MCR 2.116(C)(8), *id.* at 708, and observed that "summary disposition of this count may ultimately prove appropriate . . . ." *Id.* at 709.

[10] Elsewhere in his complaint, plaintiff alleges that he suffered pecuniary harm in that defendants failed to renew his interpretive EKG contract after he was placed on probation in 2000. Specifically, the complaint alleges that defendants hospital and Hiltz "took further retaliatory action against Plaintiff by refusing to renew a contract to provide EKG longstanding interpretive services at Mercy." However, the allegations in his complaint regarding the nonrenewal of the EKG contract are made in the context of plaintiff's retaliation claims against defendants. If plaintiff had alleged the nonrenewal of his EKG contract as constituting damages resulting from defendants' alleged breach of the bylaws, his breach of contract count would have been sufficient to withstand a (C)(8) motion, at least with respect to the damages element of a breach of contract claim. However, plaintiff did not allege damages from the nonrenewal of his EKG contract in his breach of contract claim. Furthermore, plaintiff did not incorporate the other allegations in his complaint into his breach of contract claim. In his brief on appeal, plaintiff does argue that he was damaged by defendants' breach of the bylaws in that his EKG interpretive contract with defendant hospital was not renewed for the year 2001. However, this does not change the fact that plaintiff failed to allege damage based on the nonrenewal of the EKG in his claim for breach of contract in his complaint. A motion based on MCR 2.116(C)(8) tests the sufficiency of a complaint based on the pleadings alone. *Maiden*, *supra* at 119. Thus, plaintiff's reference to the nonrenewal of his EKG contract elsewhere in his thirty page complaint does not save his breach of contract claim from dismissal based on MCR 2.116(C)(8).

motion. Furthermore, the trial court did not decide or address plaintiff's specific allegations regarding defendants' breach of the bylaws, and issues not addressed by the trial court are generally not preserved for review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

2. Retaliation

The trial court also properly granted summary disposition of plaintiff's retaliation claim under the PWDCRA under MCR 2.116(C)(10). This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

Plaintiff's briefing of this issue is woefully inadequate. Plaintiff brought his retaliation claim under the PWDCRA, the ADA and the Rehabilitation Act. However, his brief on appeal does not articulate the elements of a retaliation claim under any of those statutes. The only case cited by plaintiff's briefing of this issue is a case involving a violation of the HCRA, now the PWDCRA. Therefore, our analysis of this issue will be limited to whether the trial court properly dismissed plaintiff's retaliation claim under the PWDCRA. Plaintiff has abandoned any argument that the trial court erred in dismissing his retaliation claims under the ADA and the Rehabilitation Act by failing to properly address the merits of his assertion of error. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *Id.*

The crux of plaintiff's retaliation claims, regardless of the statute under which it is asserted, is that defendants reduced the pharmacy consults, which only plaintiff was using, in an effort to provoke plaintiff to resume writing his orders A-D so that they could discipline him. Plaintiff contends that there are genuine issues of material fact regarding whether:

> 1) [defendants] improperly removed the pharmacy consults they had granted Appellant to resolve home medication issue in 1998; 2) [defendants] did so in a

> fashion calculated to provoke Appellant to resume writing Orders A-D so that further discipline could be imposed; 3) when [plaintiff] resumed writing the orders [defendants] violated their by-laws and imposed discipline using fundamentally unfair and *ultra vires* procedures; [4]) [defendants] imposed an unreasonable disciplinary sentence of probation *for life*; [5]) [defendants] used the probation as a pretext to not renew and [sic] EKG interpretation contract, costing [plaintiff] well over $100,000 to date, and 6) [defendants] stopped referring emergency room patients to [plaintiff] on the nights he was the designated on-call physician.

The PWDCRA provides that a person shall not "[r]etaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.1602(a). "The plaintiff bears the burden of proving a violation of the PWDCRA." *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004). "To establish a prima facie case of unlawful retaliation under § 602(a), a plaintiff must show: (1) that he engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action." *Aho v Dep't of Corrections*, 263 Mich App 281, 288-289; 688 NW2d 104 (2004). "To establish a causal connection, a plaintiff must demonstrate that his participation in the protected activity was a 'significant factor' in the employer's adverse employment action, not merely that there was a causal link between the two events." *Id.* at 289. "[M]ere discriminatory or adverse action will not suffice as evidence of retaliation unless the plaintiff demonstrates a clear nexus between such action and the protected activity. *Id.* If the plaintiff establishes a prima facie case of purposeful discrimination, "'the burden shifts to the defendant to articulate a legitimate business reason for discharge.'" *Id.*, quoting *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000). If the defendant articulates a legitimate business reason for discharging the plaintiff, "the burden shifts back to the plaintiff 'to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge.'" *Aho*, *supra* at 289, quoting *Roulston*, *supra* at 281.

Summary disposition of plaintiff's retaliation claim under the PWDCRA was proper based on plaintiff's inability to establish an issue of fact regarding causation. As noted by the trial court, the alleged protected activity was counsel for plaintiff's letter to defendant Hiltz stating plaintiff's intent to assert civil rights violations against defendants. This letter was dated June 4, 1999, and stated, in relevant part: "Now that his probation has ended, Dr. Feyz intends to pursue his claims against all involved in violating his civil rights. Be warned—any retaliation against Dr. Feyz for asserting his federal and state protected civil rights will be met with vigor." Assuming that this was a protected activity, and also assuming that plaintiff satisfied the other elements of his prima facie retaliation claim, there is no evidence that defendants' conduct of reducing the pharmacy consults, and the litany of adverse conduct that plaintiff alleges resulted from reducing the pharmacy consults, was caused by plaintiff's letter to defendant. To the contrary, there was evidence that the pharmacy consults were reduced for financial and staffing issues. It is apparent from a letter written by defendant hospital to plaintiff on August 31, 1998, that the hospital made the pharmacy consults available to plaintiff in an attempt to resolve plaintiff's concerns that led to his issuance of orders A-D. The minutes of defendant hospital's

Pharmacy and Therapeutics Committee Meeting on March 30, 2000, indicate that "due to a serious shortage of personnel, there was no choice but to decrease the hours of availability for pharmacy consultations." Furthermore, in a letter to plaintiff from defendant hospital's vice president of operations, the vice president wrote: "I am limiting pharmacist medication consults to weekdays. Additional staff for clinical consultations are not currently available on weekends, evenings, or holidays. The pharmacy department currently has three vacant full-time pharmacist positions and must keep coverage of the main pharmacy at acceptable levels to maintain a safe environment and provide necessary service to all patients." These documents negate plaintiff's claim that there was an issue of material fact regarding whether the pharmacy consults were reduced or eliminated to provoke plaintiff. The trial court properly concluded that "no reasonable jury could find the removal of a costly hospital service—i.e., the pharmacy consults—to have been calculated to provoke Plaintiff."

Furthermore, plaintiff has failed to establish an issue of fact regarding whether his counsel's letter of June 4, 1999, to defendant Hiltz caused defendants to place him on lifetime or permanent probation in 2000. Plaintiff acknowledges in his brief on appeal that the dispute over his writing of orders A-D led to his discipline in 1998 and that his resumption of writing orders A-D led to the imposition of lifetime probation in 2000. The fact that plaintiff was placed on probation in 1998, before the 1999 letter was ever written, for the same conduct that he was placed on probation for in 2000, refutes any claim that the letter was the cause of plaintiff's probation in 2000. Furthermore, plaintiff testified in his deposition that if he were removed from probation, and a patient came in for treatment and there was not a pharmacy consult available, he would write orders A-D for the patient. Thus, the imposition of lifetime probation was not unreasonable, but rather was justified by plaintiff's admission that he would resume writing orders A-D if he were removed from probation.

Plaintiff further argues that the nonrenewal of his EKG interpretation contract in 2000 was retaliatory. As stated above, the letter was written on June 4, 1999, and plaintiff received a letter dated December 26, 2000, informing him that defendant hospital did not plan to extend an agreement to him as a regular participant in the hospital's EKG interpretation panel during the year 2001. However, there was evidence that in 1999, plaintiff's EKG contract was renewed for the year 2000, after the letter from plaintiff's counsel was written. The fact that plaintiff's EKG contract was renewed at least one year after the letter is evidence that plaintiff's letter was not the cause of the nonrenewal of plaintiff's EKG contract. Furthermore, when asked during his deposition what evidence he had that his EKG contract was not renewed because of the letter sent by his attorney in June of 1999, plaintiff stated that he did not have any evidence "at the moment." Thus, plaintiff did not establish an issue of fact regarding whether his EKG interpretation contract nonrenewal was caused by the letter.

Finally, plaintiff argues that defendants retaliated against him because of the letter by not referring emergency room patients to him on the nights he was on call. However, plaintiff testified at his deposition that he stopped receiving ER referrals in 1998, which was even before the letter was written and delivered to defendants in June 1999. According to plaintiff, his ER referrals dropped to almost nothing in 1998 after he was on probation and then declined even more in 2000, when he received virtually no ER referrals. The fact that plaintiff was receiving decreased ER referrals before the letter negates any claim that any decline in or absence of ER referrals was caused by the letter. Furthermore, the manner in which ER referrals are made also

negates causation. According to plaintiff, the individual emergency room physicians made the decision to refer ER patients without physicians to an on-call physician. Furthermore, plaintiff admitted that he never asked any of the ER physicians why he was not receiving referrals when he was on call.

Plaintiff asserted in his complaint that defendants "began to dismantle the pharmacy consult process" "shortly after Plaintiff threatened to assert his rights under the law . . . ." However, "a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). "Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed." *Id.* In this case, the letter was written in June 1999, and the complained of conduct occurred in 2000. Plaintiff is unable to show anything more than a coincidence in time between the allegedly protected activity and the allegedly adverse employment action. The temporal connection alone does not establish a causal connection, and, as explained above, plaintiff has failed to establish a genuine issue of fact regarding causation for any of his claims of retaliatory conduct. In the absence of evidence that the alleged retaliatory conduct was causally related to the letter, summary disposition of plaintiff's retaliation claim under the PWDCRA was proper.

Plaintiff's reliance on *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), rev'd *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263 (2005), amended 473 Mich 1205 (2005), is unavailing because the case is both factually and legally inapposite. The legal issue in *Sumner* involved periods of limitations under various statutes and the application of the continuing violations doctrine. Furthermore, *Sumner* was a racial discrimination case. The trial court rejected plaintiff's reliance on *Sumner*, "find[ing] it appalling that the Plaintiff would even rely on a racial discrimination case in an attempt to justify his continued defiance of hospital policy applicable to all physicians." We similarly conclude that *Sumner* is factually and legally distinguishable from the present case.

In sum, the trial court properly granted summary disposition of plaintiff's retaliation claim under the PWDCRA based on MCR 2.116(C)(10) because plaintiff failed to establish a genuine issue of material fact regarding causation.

3. Motion to Compel

Because we have concluded that the trial court properly granted summary disposition of plaintiff's breach of contract and retaliation claims, we need not address plaintiff's arguments regarding the trial court's denial of his motion to compel the production of documents.

B. Docket No. 289226

The trial court did not err in awarding costs and sanctions to defendants under MCL 600.2591. Whether a claim is frivolous depends on the facts of the case; review of a trial court's finding of frivolity is for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

After the trial court granted summary disposition and dismissed plaintiff's retaliation and breach of contract claims, defendants moved for sanctions against plaintiff and his attorney, arguing that certain claims made by plaintiff were frivolous under MCR 2.625 and MCL 600.2591. Defendants contended that plaintiff's discrimination claims arising from his 1998 probation, his federal civil rights act claims, and his invasion of privacy and breach of fiduciary duty and public duties claims were barred by the statute of limitations and that plaintiff pursued them and refused defense counsel's request to voluntarily dismiss them. According to defendants, plaintiff scheduled and conducted depositions, resulting in significant time and expense for the defense, and then conceded during oral argument that his claims were time-barred and that he had no evidence to support any sort of disability discrimination because he was not disabled, was not regarded as disabled, and could show no acts of discrimination. Thus, defendants sought an order that the above-described claims were frivolous and imposing sanctions. Plaintiff argued that none of his claims were frivolous and that an intervening change in the law affected application of the statute of limitations and that once defendants raised the statute of limitations argument, plaintiff withdrew all time-barred claims. Specifically, plaintiff argued that once the Supreme Court invalidated the continuing violations doctrine, upon which plaintiff's discrimination claims depended, in *Garg, supra*, and defendants raised the issue, plaintiff withdrew all time-barred claims. According to plaintiff, the depositions that he scheduled and conducted were necessary for claims that were not barred by the statute of limitations.

The trial court granted defendants' motion. In so doing, the trial court ruled that "[b]ecause there was no evidence to which the Plaintiff could base his discrimination claim, there was no reason he should have assumed that the 'continuing violations' theory would be applicable to his case. As this doctrine did not apply, the Plaintiff's filing a suit based on it was without arguable legal merit." The trial court also rejected plaintiff's argument that certain depositions were necessary for his claims that were not time-barred:

> While the Plaintiff continued to schedule and depose individuals after the change in law had taken place, he alleges that the continued discovery was important for the claims that were not barred by the statute of limitations. The Defendants correctly point out, however, that the Plaintiff conceded Drs. Songco, Kalenkiewicz, and Newbern were only involved in one of the time-barred claims, yet their depositions were taken after the time the Plaintiff's counsel indicted to this Court that the claims were withdrawn. These depositions were unnecessarily taken, at additional cost to the Defendants. Therefore, the Plaintiff is responsible for all Defendants' costs and fees associated with the depositions of Drs. Feyz, Songco, and Newbern, and former hospital administrator Richard Hiltz.

In November 2008, the trial court entered a stipulated order regarding entry of costs. The order awarded costs to defendants in the amount of $7,912.69. This amount includes $1,540.27 in revised taxable costs and $6,372.42 in costs and fees associated with the depositions of defendants Hiltz and Drs. Newbern and Songco, who were both members of the ad hoc committee. The order did not order payment of costs associated with Dr. Kalenkiewicz's deposition, although he was a member of the ad hoc committee as well.

MCR 2.625(A)(2) provides that "[i]n an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 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.

Under MCL 600.2591(3), an action is "frivolous" if at least one 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.

At the time plaintiff filed his lawsuit in 2002, he had a legal basis for asserting the continuing violations doctrine to avoid the statute of limitations because the doctrine had not yet been eliminated in Michigan. However, once our Supreme Court eliminated the doctrine of continuing violations in *Garg* in 2005, plaintiff had no legal basis to continue to pursue his claims that were barred by the statute of limitations.[11] MCL 600.2591(3)(iii). Irrespective of the reasonableness of plaintiff's reliance on the continuing violations doctrine, however, plaintiff had no evidence to establish causation for his retaliation claims. Therefore, on this basis, plaintiff's retaliation claims were frivolous under MCL 600.2591(3)(i) or (iii). The trial court properly concluded that "[b]ecause there was no evidence to which the Plaintiff could base his discrimination claim, there was no reason he should have assumed that the 'continuing violations' theory would be applicable to his case."

Plaintiff argues that the legal theories supporting his discrimination claims have arguable legal merit. According to plaintiff, the legal theories supporting his discriminations claims regarding the HPRP referral and the medical examination is that "it is an act of discrimination

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[11] Plaintiff concedes as much in his brief on appeal, stating: "The *ad hoc* committee members were not involved in the subsequent 2000 disciplinary proceedings. Post-Garg there was no longer a basis to assert the discrimination claims against the *ad hoc* committee members."

under the Michigan statute for a place of public accommodation to require an unnecessary medical examination or to make determinations regarding access to the public accommodation on the basis of unnecessary medical examinations." If this argument was raised before the trial court, the trial court did not address it; therefore, it is not preserved for review. *Fast Air, Inc*, *supra* at 549. In any event, this argument ignores the fact that the HPRP referral occurred in 1998 and that plaintiff has conceded and the trial court ruled that the 1998 discrimination claims were barred by the statute of limitations. Thus, this argument is not persuasive.

Plaintiff does not dispute that even after the Supreme Court decided *Garg*, he continued to schedule and conduct depositions of ad hoc committee members defendants Newbern, Songco and Kalenkiewicz in April 2008. Plaintiff's only claims against these defendants were discrimination claims related to the 1998 peer review process and the resulting probation of plaintiff in 1998, and these claims were clearly time-barred. Plaintiff does not dispute this, but contends that the depositions of these defendants was necessary and appropriate because they were vital witnesses regarding plaintiff's breach of contract claim and their testimony was required to ascertain whether the medical staff bylaws had been violated. This argument is not persuasive. Plaintiff's breach of contract claim was only asserted against defendant hospital and defendant Hiltz, not against the ad hoc committee members. Furthermore, summary disposition of this claim was proper under MCR 2.116(C)(8) because plaintiff's pleading of this claim, which only contained three paragraphs, was so deficient that summary disposition was proper based on the pleadings alone. Thus, plaintiff's pleading of his breach of contract claim was so deficient that no amount of discovery could have saved it.

Once plaintiff became aware that his reliance on the continuing violations doctrine was legally invalid, he should have immediately ceased any discovery involving the time-barred claims. Instead, he scheduled and conducted depositions of ad hoc committee members Drs. Songco, Newbern and Kalenkiewicz three years after *Garg* overturned the continuing violations doctrine even though the only claim against these defendants involved the time-barred 1998 peer review proceedings and resulting probation. We find that the purpose of conducting these depositions was to harass, embarrass or injure defendants Drs. Songco, Newbern and Kalenkiewicz when the only claim against them was for discrimination of a time-barred claim. MCL 600.2591(3)(i). Thus, the trial court did not clearly err in concluding that plaintiff's conduct regarding the depositions was frivolous and in awarding sanctions to cover the cost of these depositions.

Defendants argue on appeal that "it is clear from the record and the trial court's opinion that sanctions were warranted and intended to be granted by the court as to the depositions of defendants Songco, Kalenkiewicz, Newbern and Miller, as the claims against these defendants were time-barred and without any factual support." The stipulated order awarded sanctions for the costs of the depositions of Drs. Songco and Newborn and defendant Hiltz. Defendants assert that the trial court actually intended to award sanctions for the costs and attorney fees associated with the depositions of defendants Drs. Kalenkiewicz and Miller (in addition to defendants Drs. Songco and Newbern). Thus, defendants suggest that the case should be remanded for the trial court to recalculate the costs based on the cost of the depositions of the proper individuals.

It is true that it appears that the trial court intended to grant sanctions for costs associated with the depositions of members of the ad hoc committee, since plaintiff conceded that his claims against those individuals were time-barred. The ad hoc committee included Drs. Songco

and Newbern and Dr. Kalenkiewicz. The trial court stated in its memorandum of law "that the Plaintiff conceded Drs. Songco, Kalenkiewicz, and Newbern were only involved in one of the time-barred claims, yet their depositions were taken after the time the Plaintiff's counsel indicated to this Court that the claims were withdrawn. These depositions were unnecessarily taken, at additional cost to the Defendants." Thus, it does appear, as defendants suggest, that the trial court intended to grant sanctions for the deposition of defendant Dr. Kalenkiewicz. What is less clear, however, is defendants' contention that the trial court intended to require plaintiff to pay costs associated with the deposition of defendant Dr. Miller, the president of the hospital. In fact, the trial court specifically stated in its memorandum of law that the cost associated with the deposition of defendant Dr. Miller could not be taxed to plaintiff (although the trial court also said this regarding the cost of the deposition of defendant Dr. Kalenkiewicz).

In any event, remand is not necessary because defendants stipulated to the order regarding entry of costs. If defendants had any issues with the identity of the individuals for whom deposition costs were to be paid, they should have raised those issues before the trial court and clarified the proper parties for whom deposition costs were proper rather than stipulating to the order. Any error regarding the proper individuals for whom deposition costs were due was caused, at least in part, by defendants' stipulation to the sanction order. A party cannot stipulate to a matter and then complain on appeal that the resultant action was in error. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 532; 695 NW2d 508 (2004). Thus, we decline to remand based on this issue.

III. Conclusion

In sum, in Docket No. 285880, we conclude that the trial court properly granted summary disposition of plaintiff's breach of contract and retaliation claims. In light of our decision in this regard, it is unnecessary for this Court to consider plaintiff's argument regarding the trial court's denial of his motion to compel. In Docket No. 289226, we conclude that the trial court did not err in awarding costs and sanctions to defendants under MCL 600.2591. Because remand is not necessary, we do not address plaintiff's argument regarding reassignment of the case to a different trial judge.

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

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello