STATE OF MICHIGAN

COURT OF APPEALS

NOVUS CENTURIAE REINSURANCE COMPANY, Plaintiff-Appellant, v SMITH & ASSOCIATES INSURANCE AGENCY, INC., and GREGORY J. SMITH, Defendants-Appellees.	UNPUBLISHED November 18, 2010 No. 292161 Genesee Circuit Court LC No. 07-086789-CK
NOVUS CENTURIAE REINSURANCE COMPANY, Plaintiff-Appellant/Cross-Appellee, v SMITH & ASSOCIATES INSURANCE AGENCY, INC., and GREGORY J. SMITH, Defendants-Appellees/Cross-Appellants.	No. 295922 Genesee Circuit Court LC No. 07-086789-CK

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

These consolidated appeals arise from an alleged misrepresentation on an insurance application that defendants submitted to an insurance broker. In Docket No. 292161, plaintiff appeals by right the trial court's grant of summary disposition in favor of defendants. In Docket No. 295922, plaintiff appeals by right the trial court's imposition of sanctions against plaintiff

and Robert Feala.[1] Defendants cross-appeal the trial court's denial of sanctions against plaintiff's counsel. We affirm the summary disposition in Docket No 292161, on the ground that plaintiff failed to establish any cognizable relationship between plaintiff and defendants as of the time of the alleged misrepresentation. We also affirm the sanctions order against plaintiff and Robert Feala in Docket No. 295922. We reverse the denial of sanctions against plaintiff's counsel, on the ground that MCL 600.2591 required the imposition of sanctions against plaintiff and plaintiff's attorney.

We review de novo the trial court's summary disposition decision. *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483, 492; 776 NW2d 387 (2009). The parties present several arguments concerning standing, the Surplus Lines Insurance Act, MCL 500.1901 *et seq*., the wrongful-conduct doctrine, and other factual and legal theories. We need not address those arguments, because we find the trial court properly granted summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact).

Each of the four counts that plaintiff asserted against defendants required plaintiff to establish a cognizable relationship between the parties. On the fraud count, plaintiff had to establish that it relied on a misrepresentation by defendants. *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Generally, a misrepresentation made to a third party is insufficient to establish a fraud claim. *Int'l Brotherhood of Electrical Workers, Local Union No. 58 v McNulty*, 214 Mich App 437, 447; 543 NW2d 25 (1995). On the innocent/negligent misrepresentation count, plaintiff had to establish that defendants made a false representation "in connection with the making of a contract" and that the parties were in privity of contract. *Id*. at 28, citing *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 118-119; 313 NW2d 77 (1981). On the negligence count, plaintiff had to establish that defendants owed a duty to plaintiff. *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). The actionable duty "may arise from a statute, a contractual relationship, or by operation of the common law." *Id*. As for the contract count, plaintiff had to establish an enforceable contract between the parties. See *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 357; 657 NW2d 759 (2002).

As the trial court found, the undisputed facts demonstrate that plaintiff had no cognizable relationship with defendants during the relevant occurrences, because plaintiff was not in existence at the time of the alleged misrepresentation.[2] The record establishes that defendants submitted the allegedly inaccurate insurance application to the insurance brokerage Whitcomb & Company in late December 2001. In January 2002, Whitcomb & Company sent defendants an insurance quotation, listing Core States Insurance Company Ltd as the liability carrier. In February 2002, Whitcomb & Company issued an insurance binder to defendants. The binder identified Core States as the liability insurance carrier and stated that the policy was effective as of February 1, 2002.

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[1] The trial court found Robert Feala to be plaintiff's alter ego.

[2] At oral arguments, the attorneys for both plaintiff and defendants admitted that plaintiff Novus Centuriae Reinsurance Company does not exist and has never existed as a legal entity.

In contrast, Novus Centuriae, Inc. was not incorporated until June 2002. Shortly thereafter, Novus Centuriae took over all of Core States Insurance Company's insurance business in Michigan. In mid-June 2002, more than six months after the initial application, Whitcomb & Company mailed the insurance policy to the insured, now stating that the insurer was Novus Centuriae Reinsurance.

Given the lack of any relationship that could support plaintiff's claims, the trial court properly granted summary disposition in favor of defendants. Similarly, the trial court properly imposed sanctions against plaintiff. The trial court found that plaintiff's claims were devoid of legal merit under MCL 600.2591. We must affirm the trial court's sanctions ruling unless we find the ruling clearly erroneous. *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 533; 773 NW2d 57 (2009).

Plaintiff contends that the fact that Novus was not in existence at the time of the application is irrelevant to the sanctions ruling, because Novus issued the controlling insurance policy and validly backdated the policy to confirm that the policy period began in February 2002. Plaintiff further contends that the trial court's ruling is inconsistent with statements and rulings the court had previously made. In addition, plaintiff argues that the trial court was "distracted" by apparent concern that the injured party had not yet recovered the damages for her injuries. Lastly, plaintiff argues that the trial court's conclusion is inconsistent with its ruling in the underlying coverage dispute.

Plaintiff's contentions are unfounded. The sanctions issue does not turn upon whether plaintiff was a valid entity at the time it issued the insurance policy, or upon whether plaintiff must cover the insured's loss in the underlying action. The sanctions issue turns upon whether plaintiff was an entity at the time of the alleged misrepresentations. Plaintiff did not come into existence until months after the alleged misrepresentations, so plaintiff had no legal basis to assert a relationship with defendants. All of plaintiff's claims required the existence of some relationship between the parties. Absent that relationship, plaintiff's claims were devoid of legal merit. The trial court correctly determined that the filing of the claims warranted the imposition of sanctions against plaintiff.

Plaintiff next contends the trial court erred in imposing sanctions against Robert Feala, a non-party that the trial court found to be an alter ego of plaintiff. A challenge to personal jurisdiction is a question of law which this court reviews de novo. *Poindexter v Poindexter*, 234 Mich App 316, 319; 594 NW2d 76 (1999). MCR 2.111(F) requires that defenses other than subject matter jurisdiction or failure to state a claim must be asserted in the first responsive pleading to a claim. The failure to assert the defense in the first responsive pleading waives the defense. MCR 2.111(F)(2). Here, neither plaintiff nor Robert Feala challenged the trial court's jurisdiction over Robert Feala, nor did they raise the jurisdictional defense in the trial court. Accordingly, Robert Feala's challenge to personal jurisdiction is waived.

In the cross appeal, defendants contend the trial court erred by denying sanctions against plaintiff's counsel. We agree. The trial court's order specifically stated that the court found plaintiff's civil action frivolous pursuant to MCL 600.2591(3)(a)(*iii*) (devoid of arguable legal merit). The plain language of MCL 600.2591 requires that the sanction be assessed against the party and the party's attorney: "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." MCL 600.2591(1) (emphasis added). Once a trial court determines that an action is frivolous, the court must impose sanctions; a trial court does not have the discretion to decline to impose sanctions. *Cvengros v Farm Bureau Ins,* 216 Mich App 261, 268; 548 NW2d 698 (1996).[3]

We affirm the summary disposition in favor of defendants, and we affirm the imposition of sanctions against plaintiffs and Robert Feala. We reverse the denial of sanctions against plaintiff's attorney. We remand for entry of an order specifying the amount of sanctions against plaintiff, Robert Feala, and plaintiff's attorneys. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray

[3] Once a trial court determines that an action is frivolous, the court must impose sanctions, but we note that the amount of the sanction imposed is discretionary with the trial court and may be minimal depending on the trial court's determination of the frivolousness of the complaint.