STATE OF MICHIGAN

COURT OF APPEALS

DONNA STANTON, TERRY STANTON, TODD STANTON, GREG STANTON, and STANTON ORCHARDS, Plaintiffs-Appellants,	UNPUBLISHED October 25, 2016
v AUTO OWNERS INSURANCE COMPANY, Defendant-Appellee.	No. 327007 Grand Traverse Circuit Court LC No. 2014-30444-CZ

DONNA STANTON, TERRY STANTON, TODD STANTON, GREG STANTON, and STANTON ORCHARDS, Plaintiffs-Appellees,	
v AUTO OWNERS INSURANCE COMPANY, Defendant-Appellant.	No. 327644 Grand Traverse Circuit Court LC No. 2014-30444-CZ

Before: STEPHENS, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

These are consolidated appeals stemming from plaintiffs' action against defendant regarding its handling of a Leelenau Circuit Court civil action that had been brought against plaintiffs, and Auto Owners' earlier Leelenau Circuit Court declaratory action challenging its duty to defend and indemnify plaintiffs in that underlying civil action. In Docket Number 327007, plaintiffs appeal as of right from an order granting summary disposition to defendant under MCR 2.116(C)(7) (res judicata), and (C)(8) (failure to state a claim upon which relief can be granted). In Docket Number 327644, defendant appeals as of right from an order denying its motion for sanctions under MCR 2.625(A)(2) (frivolous claim) and MCL 600.2591 (frivolous civil action). We affirm in part, reverse in part and remand to the trial court for further proceedings consistent with this opinion.

I. BACKGROUND

On July 21, 2011, Colton Brooks, a minor, was injured while operating a "cherry catcher" at Stanton Farms. While Brooks was operating the cherry catcher it began rolling backward downhill and struck a tree. The "chair" broke away from the cherry catcher and Brooks' leg was crushed between the machine and the tree. The impact broke several bones in his leg and damaged his knee ligaments.

Brooks sued Stanton Farms, Terry Stanton, Greg Stanton, and Todd Stanton in Leelanau Circuit Court. In the initial complaint, Brooks stated that he was injured "during the scope and course of his employment as an orchard laborer." In an amended complaint, Brooks added Stanton Orchards and Donna Stanton as party defendants, and stated that he was a "volunteer and/or employee."

Plaintiffs requested coverage and a defense for the claims against them in Brooks' suit under their "farm-pak" insurance policy issued by defendant. Defendant provided a defense for plaintiffs in the personal injury case under a reservation of rights. Meanwhile, defendant Auto Owners filed a declaratory judgment action in Leelanau Circuit Court seeking a declaration that the insurance policy did not provide coverage or impose a duty to defend on Auto Owners with respect to the underlying personal injury action. Auto Owners alleged that Mr. Brooks was the Stantons' employee on the date of the injury and that the policy's coverage for personal injury expressly excluded coverage for injuries to employees. The Stantons answered the complaint stating that Mr. Brooks was not an employee and that the exclusion was inapplicable. They also stated this as an affirmative defense. The Stantons also asserted as an affirmative defense that defendant waived or was estopped from denying coverage "due to its prejudicial actions to establish a policy defense, in contravention of its duty of loyalty to its insureds."

On January 15, 2013, a jury found in favor of Brooks in the underlying lawsuit and awarded him $397,490 in damages. Following an offer of judgment, on August 21, 2013, the Leelenau Circuit Court entered a "stipulation and order of dismissal" in Auto Owners' declaratory judgment action. The record does not disclose the details of the parties' negotiations, but the parties eventually came to an agreement whereby Auto Owners was to pay $300,000 to Brooks and the case would be dismissed. The offer of judgment stated:

> Defendants Stanton Orchards [*et al*.] . . . pursuant to MCR 2.405, hereby offer to stipulate to settle and to the entry of a judgment that Plaintiff is obligated to defend and indemnify Defendant, and each of them, with respect to their liability to Colton Brooks, by virtue of the March 6, 2013 Judgment in Leelanau County Circuit Court case number 12-8743-NI.

The order of dismissal states that the case is "dismissed with prejudice and without costs to either party." The stipulation is signed by attorneys representing plaintiffs, defendant, and Brooks.

On July 22, 2014, plaintiffs filed the instant lawsuit in Grand Traverse Circuit Court. They alleged that "[i]nstead of performing its obligations to defend and indemnify the Stantons," defendant Auto Owners had "breached its legal and contractual obligations to [plaintiffs] by engaging in the fiction that the injured person was an 'employee' within the meaning of

Defendant's policy and that Defendants supposedly had no obligation to defend or indemnify the Stantons even though Defendant knew or should have known that the injured person was an uncompensated volunteer." The complaint alleged that defendant's breach caused plaintiffs to incur "loss of income, out-of-pocket expenses to retain their own counsel to defend themselves, and other losses, e.g., anxiety, humiliation and embarrassment."

On October 30, 2014, defendant moved for summary disposition under MCR 2.116(C)(7) arguing that plaintiffs' claim was barred by res judicata. Defendant argued that the elements of res judicata were met because (1) the Leelanau declaratory action it filed against plaintiffs involved the same parties as the instant suit, (2) the Leelanau declaratory action was resolved on the merits, and (3) the instant lawsuit arose out of the same set of operative facts as the Leelanau declaratory action. Defendant asserted that under Michigan's broad transactional approach to res judicata, all issues regarding defendant's coverage and duty to defend should have been raised as a counterclaim in the prior declaratory action. Plaintiffs asserted that "Michigan is not a 'compulsory counterclaim' state," and that a subsequent lawsuit was not precluded by the previous declaratory action filed by defendant. Plaintiffs also filed a motion to amend their complaint.

The trial court entered an order stating that it would grant defendant's motion for summary disposition regarding res judicata if it decided to deny the motion to amend the complaint. Defendant argued that leave to amend should not be granted because the claims in the amended complaint were invalid under Michigan law. The trial court later granted the motion to amend stating that it would not "use a motion to amend as a substitute for summary disposition," but cautioned plaintiffs that "they may be heading down a road that is not going to prove fruitful" and could expose them to sanctions.

The amended complaint asserted that defendant breached its duty of loyalty to plaintiffs by failing to inform them that the farm-pak policy did not cover liability to employees (which plaintiff's asserted is one of the greatest liability risks faced by small farmers). Specifically, plaintiffs alleged:

> Although Defendant's so-called "Farm Pak" policy would lead one to believe it protected farmers, like Plaintiffs, it purportedly excluded insurance for liability to farm employees but did not contain a conspicuous warning to that effect, nor did Defendant require agents to warn insureds to the effect that, if read with a fine toothed comb, an insured might discern that an insured was not covered . . . for injuries to farm employees . . . .

The amended complaint also asserted that plaintiffs had advised defendant that the claim was by a minor volunteer, that defendant wrongfully claimed it was brought by an employee, and that defendant knew the policy "did not exclude an obligation to defend and indemnify Plaintiffs as to their alleged liability to minors, illegal employees, volunteers and the like." Further, it asserted that defendant's delay in selecting counsel to represent plaintiffs caused significant prejudice to their defense of the claim, that defendant hired counsel to defend only some of the plaintiffs at trial and that defendant brought the Leelenau declaratory action. In Count II of the amended complaint, plaintiffs specifically alleged that defendant breached its obligations to plaintiffs by: selecting attorneys to represent them that had a conflict of interest because those

attorneys also represented defendant in matters relating to coverage of defendant's insureds; not undertaking to defend some plaintiffs until after a verdict was reached; and, obtaining confidential information about plaintiffs without their consent that defendant then used in the Leelenau declaratory action against them.

Defendant again moved for summary disposition. It restated its arguments regarding res judicata, and further argued that both counts in the amended complaint were without merit and should be dismissed under MCR 2.116(C)(8) and (C)(10).

The trial court granted summary disposition on Count I of the amended complaint on the basis of res judicata. The trial court agreed with plaintiffs that counterclaims are not compulsory under Michigan law. The trial court noted that "a party may litigate a counterclaim in a separate action, however, claims brought as affirmative defenses or previously raised as counterclaims are barred by res judicata." It then held that because plaintiffs raised breach of legal and contractual obligations as affirmative defenses in the prior action, the claims in Count I were barred by res judicata.

Regarding the motion under (C)(8) as to Count I, the trial court stated:

> The rights and duties of parties are derived from the terms of the agreement, therefore, one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms. Moreover, the failure to read a contract is not a defense in an action to enforce the terms of the contract. Insurers are free to define or limit the scope of their coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy.

The trial court addressed plaintiffs' claim that Auto Owners failed to include a "conspicuous warning" that the policy did not cover injury to employees, stating, "Michigan law does not require insurers to provide explicit warnings of policy exclusions, therefore Defendant cannot have breached such a duty as implied by the Plaintiffs. Thus, the Plaintiffs have failed to state a claim on which relief can be granted."

Regarding Count II, the court stated as follows:

> In Count II, Plaintiffs claim that Defendant intentionally delayed in retaining counsel to defend Stanton Farms and Terry Stanton, however, the initial complaint filed in Case No. 2012008743NI indicated that Colton Brooks was employed as an orchard laborer for Stanton Farms and Plaintiffs' Farm Pak policy excluded liability coverage for bodily injury to employees. The Second Amended Complaint, filed January 9, 2013, states that Brooks was merely a volunteer, and was not an employee of Stanton Farms. Defendant counters that counsel was retained on behalf of Stanton Farms and Terry Stanton immediately after it was made aware that Brooks was a volunteer, not an employee. Pursuant to the language of the pleadings and the Farm Pak policy, the claim that Defendant delayed in retaining counsel is without merit.

Regarding the claim that the attorney provided by Auto Owners acted improperly, the trial court noted that no attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured, and that the attorney's sole loyalty and duty is owed to the client. The trial court further stated that it would not presume that an attorney failed to carry out his responsibilities to his client in the absence of any record showing that the attorney, did, in fact act against the interests of the client.

Defendant subsequently moved for sanctions citing MCR 2.114(E), MCR 2.625(A)(2) and MCL 600.2591. The trial court denied the motion, pointing out that res judicata is a complex doctrine, and concluding that plaintiffs' attorney did not engage in the kind of "repetitive, mindless" litigation the sanctions rules were intended to address. These appeals followed.

II. RES JUDICATA

The trial court correctly granted defendant's motion under MCR 2.116(C)(7) with respect to Count I.

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). "Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id*.

"This Court has held that a voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata purposes." *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). Accordingly, the first res judicata element is satisfied. The third element is also met because there is no dispute that these cases involve the same parties. Accordingly, any "matter contested in the second action [that] was or could have been resolved in the first" is barred by res judicata. *Dart*, 460 Mich at 586. The question in this case is whether the claims in plaintiffs' amended complaint were, or could have been, resolved in the declaratory action.

The declaratory action sought a judgment that defendant was not required to indemnify plaintiffs because Mr. Brooks was an employee and the insurance policy specifically excluded employees from coverage. Plaintiffs controverted this claim both in answer to the complaint and as an affirmative defense. Plaintiffs also asserted as an affirmative defense that defendant waived or was estopped from denying coverage because it breached its duty of loyalty to plaintiffs. The gravamen of Count I in the amended complaint in the instant case is that plaintiffs expected to be covered for their liability to Mr. Brooks and defendant denied them coverage, violating a "duty of loyalty" to them. Count I is barred by res judicata because it is part of the same transaction or occurrence that gave rise to defendant's claim for declaratory relief (i.e., defendant's relationship to plaintiffs as an insurer and the issue of their liability in the Brooks lawsuit). "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin

or motivation, and whether they form a convenient trial unit." *Adair v State*, 470 Mich 105, 125; 680 NW2d 386 (2004), quoting 46 Am Jur 2d Judgments 533, p 801. Here, the underlying facts in both cases are the same: defendant was plaintiffs' insurer; plaintiffs were sued by a third party and sought a defense and indemnity under the insurance contract; defendant disputed coverage. "The failure to assert a counterclaim stemming from the same issues or subject matter in a prior suit will estop a defendant from afterwards maintaining a separate action on that counterclaim against the plaintiff in the prior suit." *Sahn v Brisson's Estate*, 43 Mich App 666, 671; 204 NW2d 692 (1972). "Generally, a counterclaim arising out of the same transaction or occurrence as the principal claim must be joined in one action." *Salem Indus, Inc v Mooney Process Equip Co*, 175 Mich App 213, 215-16; 437 NW2d 641 (1988).

We acknowledge that MCR 2.203 does not include a compulsory counterclaim rule; however, the doctrine of res judicata will still operate to bar a subsequent claim that could have been raised as a counterclaim in the first action. In *Sprague v Buhagiar*, 213 Mich App 310; 539 NW2d 587 (1995), the plaintiff sued the defendants seeking rescission of a land contract for six rental units on the basis of fraud, misrepresentation, and innocent misrepresentation for their failure to inform her of code violations that led to two of six units being condemned. *Id*. at 312. In a previous lawsuit against the plaintiff to which she did not respond, the defendants obtained an order of forfeiture and a writ of restitution conveying the property back to them. *Id.* This Court held that the defendants were entitled to summary disposition in plaintiff's rescission lawsuit based on res judicata, stating:

> The alleged fraud and misrepresentation clearly could have been raised as a counterclaim to the summary possession proceedings in the district court. MCR 4.201(G)(1)(a)(ii). Further, as defenses or affirmative defenses, plaintiff's claims must have been raised in the earlier proceeding or are waived. MCR 2.111(F)(2) and (F)(3)(a). Thus, under this state's broad rule of res judicata, plaintiff's claims are barred. [*Id*. at 313]

Plaintiffs nevertheless assert that the doctrine of res judicata should not apply when the first case is a dismissed declaratory action. They argue that this Court should adopt § 33 of the Restatement (Second) of Judgments, which states as follows:

> A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

However, the majority opinion in *Adair*, 470 Mich 105, suggests that this approach should be rejected. There, the plaintiff school districts and taxpayers sought a declaratory judgment that the state had failed to meet its funding obligations under Const 1963, art 9, § 29, commonly referred to as the Headlee Amendment. *Id.* at 109. As to the plaintiffs who had brought allegations of underfunding in earlier suits, the Michigan Supreme Court held that their present lawsuits were barred by res judicata. *Id*. at 126. The Court noted, "were this Court to adopt the approach of Justice Kelly's dissent, which essentially removes Headlee declaratory judgment actions from the general rules of res judicata, we would be subjecting the state to litigate and relitigate a potentially endless barrage of repetitive claims with only the plaintiffs changing." *Id*.

Justice Kelly's dissent regarding res judicata relied in part on § 33 of the Restatement (Second) of Judgments and would have held "that the general rule concerning declaratory relief is that res judicata applies only to 'matters declared' and 'any issues actually litigated . . . and determined in the action.' " *Id.* at 137 (KELLY, J., concurring in part and dissenting in part).

In *Adair*, the Court held that a declaratory action under the Headlee amendment would bar future declaratory actions by the same parties. It appears that the Court assumed, without deciding, that res judicata applies when the first case is a declaratory action. Other Michigan cases also assume, without deciding, that res judicata applies when the first case is a declaratory action. See e.g., *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90; 535 NW2d 529 (1995) (because Michigan courts are "empowered to grant money damages as are necessary or proper in a declaratory judgment action," it makes little sense to distinguish declaratory actions from any other civil action for the purposes of waiver or res judicata); *Schwartz v City of Flint*, 187 Mich App 191; 466 NW2d 357 (1991)(claim for money damages for an unconstitutional taking of property through application of the defendant's zoning ordinance should have been raised in an earlier action for a declaratory judgment seeking to have the land use ordinance declared unconstitutional).

Although plaintiffs argue that the Restatement approach is the "enlightened" view and cite a long list of cases from sister jurisdictions following this view, we conclude that this approach was rejected in *Adair*. While it did not directly address the same issue, the Court did consider and reject application of the same Restatement section that plaintiff urges this Court to apply. Thus, we conclude that res judicata applies with equal force when the first case at issue is an action for declaratory relief. This logically comports with Michigan's broad approach to res judicata and Michigan's rules of pleading and joinder. The important consideration for res judicata analysis is whether the claims subject to preclusion could have been raised in the first lawsuit. Because the court rules allow a party to seek both declaratory relief and money damages in the same lawsuit, there is no logical reason to distinguish these types of actions for res judicata purposes. In other words, where a plaintiff brings a declaratory action, the defendant can raise any counterclaims it has against that plaintiff in the same action. Claims arising from the same transaction or occurrence that could have been raised but were not are barred by operation of the doctrine of res judicata.

III. SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) AND (10)

Since we conclude that Count I was barred by res judicata, we decline to consider whether summary disposition would also have been proper pursuant to MCR 2.116(C)(8). Instead, we only consider whether Count II was properly granted under MCR 2.116(C)(8) or should have been granted under MCR 2.116(C)(10).

> 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. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). 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*. at 163. When deciding a motion brought under this section, a court considers only the

> pleadings. MCR 2.116(G)(5). [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).]

MCR 2.116(C)(10) generally provides for summary disposition where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Id*. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes when resolving a motion for summary disposition brought under MCR 2.116(C)(10). *Id*.

In Count II, plaintiff alleged that Auto Owners breached its contractual obligations by (1) selecting an attorney who was loyal to defendant and thus had a conflict of interest, (2) by withholding representation for some plaintiffs until after trial, and (3) by obtaining confidential information about plaintiffs that it used in its declaratory judgment action. With respect to (1), *Mich Millers Mut Ins Co v Bronson Plating Co*, 197 Mich App 482, 492; 496 NW2d 373 (1992), aff'd 445 Mich 558 (1994), overruled in part on other grounds in *Wilkie v Auto–Owners Ins Co*, 469 Mich 41, 63; 664 NW2d 776 (2003), stated as follows:

> An insurance company may tender a defense under a reservation of rights and retain independent counsel to represent its insured. *Frankenmuth Mutual Ins Co, Inc v Eurich*, 152 Mich App 683, 688; 394 NW2d 70 (1986). No attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured. The attorney's sole loyalty and duty is owed to the client, not the insurer. *Atlanta Int'l Ins Co v Bell*, 181 Mich App 272, 274; 448 NW2d 804 (1989), aff'd in part and rev'd in part 438 Mich 512 (1991); *American Employers' Ins Co v Medical Protective Co*, 165 Mich App 657, 660; 419 NW2d 447 (1988).

It does not necessarily appear that plaintiffs are asserting that defendant breached their contractual duty to defend plaintiffs, as defendant did, in fact, provide independent counsel to plaintiffs. And, as previously indicated, if the selected counsel were, in fact, loyal to defendant, rather than plaintiffs, this would be a breach of counsel's duty of loyalty to plaintiffs. Nevertheless, even if we accept that plaintiffs adequately plead a claim for a breach of defendant's duty to defend based upon an allegation of counsel's alleged loyalty to defendant, defendant also moved for summary disposition pursuant to MCR 2.116(C)(10). As indicated by the trial court, plaintiffs have not shown that the counsel provided by defendant in fact acted in the interests of defendant or against the interests of plaintiffs. Had the trial court not granted summary disposition pursuant to MCR 2.116(C)(8), summary disposition would have been appropriate under MCR 2.116(C)(10).

With respect to (2), the allegation in count II that defendant withheld representation of some plaintiffs until after trial was concluded. However, as pointed out by the trial court, the initial complaint filed by Colton Brooks in March 2012 indicated that he was employed as an Orchard laborer and plaintiffs' insurance policy excluded liability coverage for bodily injury to employees. A second amended complaint identifying Brooks solely as a volunteer was not filed

until January 9, 2013, after which defendant claims it retained counsel for all plaintiffs. A jury awarded damages to Brooks on January 15, 2013. Thus, the claim of untimely appointment of representation is without merit.

Finally, as to (3), the claim that defendant obtained confidential information about plaintiffs and used it against them in the declaratory action, in their complaint plaintiffs have identified no specific information purported used against them. Moreover, on appeal plaintiffs offer no argument or case law in this regard. Thus, summary disposition was appropriate on this claim.

IV. SANCTIONS

We conclude that, in denying sanctions, the trial court did not address the proper legal standard.

"We review for clear error the circuit court's decision to impose sanctions on the ground that an action was frivolous within the meaning of MCR 2.625(A)(2) and MCL 600.2591." *Ladd v Motor City Plastics Co*, 303 Mich App 83, 103; 842 NW2d 388 (2013). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *1300 LaFayette E Coop, Inc v Savoy*, 284 Mich App 522, 534; 773 NW2d 57 (2009). Applying the wrong legal standard constitutes clear error. See *City of Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 634; 583 NW2d 215 (1998).

MCR 2.625(A)(2) states:

> In 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 states:

> (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.

The trial court (by its own admission) digressed in discussing whether the claims were frivolous. The trial court stated, "Are [the claims] frivolous? That's another political discussion." The judge then told an anecdote about a lawyer he had encountered when he first became a judge who flooded opposing counsel with motions. The trial court ultimately concluded that the claims were "not repetitive" and "not mindless." However, repetitive and mindless are not part of the legal definition of frivolous under MCL 600.2591. The trial court also stated, "I don't have any desire to put any guild [sic] on the lily the Stantons have been handed . . . and the notion of putting guild [sic] on the lily that Auto-Owners is holding, I don't think so." It appears from the use of the metaphor of "gilding the lily" that the trial court was weighing the equities (i.e., whether either party deserved any extra award). This is not a proper consideration in a motion for sanctions. If the trial court finds that the claims were frivolous, the statute directs that the court "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. "The Legislature's use of the term 'shall' indicates a mandatory and imperative directive." *Stand Up v Secy of State*, 492 Mich 588, 601; 822 NW2d 159 (2012). Accordingly, the only relevant inquiry was whether the claims were frivolous.

Defendant is "the prevailing party." MCR 2.625(B)(2) states, "In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count . . . ." Accordingly, we remand for a determination on whether Count I or II was frivolous and if so, for a determination as to the sanction.

CONCLUSION AND RELIEF

We affirm the trial court's grant of summary disposition. We reverse the decision regarding sanctions and remand for a determination of whether Count I or II was frivolous and if so, the sanction to be awarded. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher