

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ZAYO GROUP, LLC,

Plaintiff/Counterdefendant-Appellee,

v

KEPS TECHNOLOGIES, INC., doing business as  
ACD.NET,

Defendant/Counterplaintiff-Appellant.

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UNPUBLISHED

May 27, 2021

No. 353506

Ingham Circuit Court

LC No. 10-000274-CB

Before: SHAPIRO, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant/counterplaintiff, KEPS Technologies, doing business as ACD.net (ACD), appeals as of right the order granting summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in favor of plaintiff/counterdefendant, Zayo Group, LLC (Zayo), of ACD's counterclaims for breach of contract and tortious interference with a business relationship or expectancy/trade libel, and granting summary disposition under MCR 2.116(C)(10) in favor of Zayo with respect to its complaint for declaratory relief. We conclude that the trial court properly granted Zayo's renewed motion for summary disposition; however, we believe that the parties' agreement included the four additional spurs identified in Exhibit A of the 2006 Extended Network Agreement because those spurs existed as of November 1, 2006. Therefore, we affirm in part, reverse in part, and remand for further proceedings as set forth in this opinion.

**I. FACTS AND PROCEDURAL HISTORY**

This case involves a dispute between telecommunications providers over the use of a fiber optic cable network called the Lansing Fiber Ring (the LFR). The LFR was built in 2002 and 2003 by Waypoint Fiber Networks, LLC (Waypoint). ACD had a membership interest in Waypoint. On June 1, 2002, Waypoint and ACD executed an Indefeasible Rights of Use (IRU) Agreement (the 2002 IRU Agreement) that granted ACD the right of use to 12 fibers on the LFR. After completion of the LFR, Waypoint and ACD executed another IRU Agreement on April 1, 2003 (the 2003 IRU Agreement), which provided that the LFR had been completed and again granted ACD the right of use to 12 fibers on the LFR "to be specifically identified."

Various disputes arose between Waypoint and ACD. On May 9, 2006, Waypoint and ACD executed an agreement to restructure their business relationship.<sup>1</sup> Section 3.b of the Reconciliation Agreement expressed the parties' intent to execute an IRU agreement granting ACD an IRU for 12 fibers on all of the existing spurs. The term "existing spurs" was defined as "those fiber spurs owned by Waypoint as of *November 1, 2006, including but not limited to those described on the attached Exhibit B.*" (Emphasis in original.) Exhibit B contained a list of 31 existing spurs, and provided that "[s]uch agreement will be amended for any other existing or pending spurs as of November 1, 2006." Waypoint and ACD executed an "Extended Network IRU Agreement" in connection with section 3.b of the Reconciliation Agreement on June 15, 2006. The Extended Network IRU Agreement granted ACD the right of use to 12 fibers contained within the extended network described in "Exhibit A." Exhibit A listed the 35 spurs in existence, and again provided that the agreement would be amended for any other existing or pending spurs as of November 1, 2006.

On August 8, 2008, Waypoint sold the LFR to Control Room Technologies, LLC (Control Room) by executing an Asset Purchase Agreement. Schedule 2.1 of the Asset Purchase Agreement identified the 12 fibers on the LFR lines assigned as "13 thru 24" to ACD as a purchased asset. It also identified the associated contract as an assumed liability. On September 11, 2008, Waypoint and Control Room executed a Supplemental Agreement to "set forth certain supplemental agreements and undertakings that further define the terms and conditions between them and their respective rights and obligations." The Supplemental Agreement provided that the "IRU and Agreement Schedule attached as [Schedule] 2.1 to the Closing Documents is complete and accurately reflect[s] the IRUs and other assets . . . ." In addition, Waypoint warranted the accuracy of ACD's IRU "in the form of the Standard Waypoint IRU, a copy of which is attached as Exhibit WPIRU." Exhibit WPIRU included the Reconciliation Agreement and the 2002 IRU Agreement.

A dispute arose over ACD's rights of use in the LFR. Control Room believed that ACD was submitting requests to use spurs that had not been assigned to ACD before November 1, 2006. ACD believed that the Extended Network IRU Agreement obligated Control Room to provide ACD access to 12 fibers on all spurs, including any new spurs built after November 1, 2006. ACD relied on the definition of "system route" in the Extended Network IRU in support of its position. On March 10, 2006, Control Room filed a complaint seeking, among other things, a declaratory judgment regarding the scope of ACD's rights. On August 30, 2010, ACD filed a counterclaim against Control Room, alleging breach of contract and tortious interference with a business relationship or expectancy/trade libel. ACD alleged that Control Room breached the 2003 IRU Agreement by refusing to provide ACD reasonable access to the LFR. It also alleged that Control Room made knowingly false defamatory statements regarding ACD's scope of access to the LFR to third parties.

Over the next decade, settlement negotiations failed and extensive discovery took place. In 2012, Zayo acquired Control Room and stepped into its shoes for purposes of this litigation.

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<sup>1</sup> Among other things, the Reconciliation Agreement involved Waypoint's buyout of ACD's interest in Waypoint.

On February 12, 2019, Zayo moved for summary disposition of ACD's counterclaims, arguing that it did not assume the 2003 IRU Agreement on which ACD based its breach of contract claim. Zayo argued that the IRU Agreement assumed by Control Room in the Asset Purchase Agreement was for 12 fibers on the LFR and that the Supplemental Agreement clarified that the 2002 IRU Agreement governed ACD's right to those fibers. Zayo argued that ACD had presented no evidence that Zayo had refused to honor a request from ACD for access to a spur existing before November 1, 2006, to which ACD had a right of use. Zayo also argued that ACD had presented no evidence of any statements on behalf of Control Room or Zayo regarding ACD's access to the LFR, or that any action by Control Room or Zayo caused ACD to lose a business relationship or have a business expectancy terminated. Zayo also moved for summary disposition of its claim for a declaratory judgment, arguing that its obligations to ACD were strictly limited to those assumed in the Asset Purchase Agreement for access to 12 fibers on the LFR and on the spurs in existence on November 1, 2006, under the terms and conditions of the 2002 IRU Agreement attached to Exhibit WPIRU of the Supplemental Agreement.

ACD, on the other hand, argued that the 2002 IRU Agreement was subject to a number of amendments, including the 2003 IRU Agreement, the Reconciliation Agreement, and the Extended Network IRU Agreement. ACD argued Control Room assumed the 2003 IRU Agreement and the Extended Network IRU Agreement and that the Extended Network IRU Agreement governed ACD's rights. ACD also argued that the Extended Network IRU Agreement included an expansion of the system route to include any fiber capacity obtained by Control Room. ACD asserted that Zayo's failure to fully comply with discovery thwarted its efforts to determine which requests had been improperly denied.

The court found that the allegations in ACD's counterclaim for tortious interference were sufficient to put Zayo on notice of the claim it had to defend and, therefore, the court denied Zayo's motion for summary disposition of the tortious interference claim under MCR 2.116(C)(8). The court found that additional discovery was needed and, therefore, denied Zayo's motion for summary disposition under MCR 2.116(C)(10) and gave ACD additional time for discovery.

After the extended period for discovery ended on November 22, 2019, Zayo renewed its motion for summary disposition. The trial court found that ACD failed to present any evidence to support its counterclaim for tortious interference and granted summary disposition of the counterclaim in favor of Zayo. The trial court also granted summary disposition of Zayo's request for a declaratory ruling. The court found that under the Asset Purchase Agreement, Control Room expressly assumed the obligation to provide ACD with access to 12 ring fibers on rings 13 through 24. The court found that the 2002 IRU Agreement and the Reconciliation Agreement, attached to the Supplemental Agreement as exhibit WPIRU, together established that Waypoint assigned to Control Room its contractual obligation to provide ACD access to 12 ring fibers on 31 existing or pending spurs, subject to the terms of the 2002 IRU Agreement. The trial court also granted summary disposition to Zayo with respect to ACD's counterclaim for breach of contract, finding that ACD produced no evidence that it made a splice request to access a spur in existence on November 1, 2006, or that the request was denied.

## II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). The moving party has the initial burden to identify issues about which it believes there is no material factual dispute, MCR 2.116(G)(4), and to support the grounds asserted in its motion with “[a]ffidavits, depositions, admissions, or other documentary evidence,” MCR 2.116(G)(3). The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. See MCR 2.116(G)(5); *Joseph*, 491 Mich at 206. It must also draw all reasonable inferences in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010). When opposing a properly asserted and supported motion for summary disposition under MCR 2.116(C)(10), the nonmoving party cannot rely on mere allegations or denials in his or her pleadings to establish a question of fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Rather, the nonmoving party must present evidence that establishes that there is a genuine issue of disputed fact on the issue raised by the moving party. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 374-375; 775 NW2d 618 (2009). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

This Court also reviews de novo a decision to grant or deny declaratory judgment, and reviews for clear error the trial court’s factual findings regarding such decision. *Ter Beek v City of Wyoming*, 297 Mich App 446, 452; 823 NW2d 864 (2012), *aff’d* 495 Mich 1 (2014). Clear error occurs “when this Court is left with a definite and firm conviction that a mistake has been made.” *Hardrick v Auto Club Ins Ass’n*, 294 Mich App 651, 660; 819 NW2d 28 (2011) (quotation marks and citation omitted).

Questions of contract interpretation are issues of law that this Court reviews de novo. *Skanska USA Building, Inc v MAP Mech Contractors, Inc*, 505 Mich 368, 377; 952 NW2d 402 (2020).

### III. ANALYSIS

ACD argues that the trial court erred by granting Zayo’s renewed motion for summary disposition. Initially, we note that ACD’s brief on appeal does not address the portion of the trial court’s order granting summary disposition of ACD’s counterclaim for tortious interference. Therefore, we will not disturb the trial court’s dismissal of the counterclaim for tortious interference. See *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008) (explaining that an appellant’s failure to properly brief “the merits of [an] alleged assertion of error constitutes abandonment of the issue”).

ACD contends that the trial court erred by granting summary disposition of Zayo’s claim for declaratory judgment on the ground that Control Tower did not assume the 2003 IRU Agreement. ACD argues that the court erroneously found that Control Tower assumed the Reconciliation Agreement, along with an IRU for 12 fibers on the LFR pursuant to the terms and conditions of the 2002 IRU Agreement, which were collectively attached as Exhibit WPIRU to the Supplemental Agreement. It asserts that the Reconciliation Agreement specifically contemplated an amendment, and that the amendment materialized in the Extended Network IRU,

which in turn stated that it was an expansion of the 2003 IRU Agreement. It argues that the 2003 IRU Agreement is the governing agreement.

Under MCR 2.605(A)(1) a court “may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” In a declaratory action, the plaintiff generally has the burden to prove each fact alleged. *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978). The corporate law concept of successor liability provides that when a successor corporation purchases the assets of its predecessor corporation for cash,<sup>2</sup> the successor does not assume the predecessor’s liabilities. See *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 96; 684 NW2d 296 (2004). There are exceptions, one of which being that the successor does assume its predecessor’s liabilities “where there is an express or implied assumption of liability.” *Id.*

Under the Asset Purchase Agreement, Control Room purchased the assets listed in Schedule 2.1. Schedule 2.1 included the 12 ring fibers assigned to ACD on fibers 13 through 24. Control Room also assumed identified liabilities, including those listed in Schedule 2.4. Schedule 2.4(2) defined the assigned liabilities, which included those liabilities on the assumed contracts listed in Schedule 2.4. Schedule 2.4 was limited to those contracts assumed in Schedule 2.1. To clarify which obligations Control Room assumed, Waypoint and Control Room executed a Supplemental Agreement to the Asset Purchase Agreement. In the Supplemental Agreement, Waypoint specifically warranted the accuracy of the ACD IRU as follows: “The IRU is in the form of the standard Waypoint IRU, a copy of which is attached hereto as Exhibit WPIRU.” Exhibit WPIRU to the Supplemental Agreement contained a copy of the Reconciliation Agreement between Waypoint and ACD with an unsigned copy of the 2002 IRU Agreement attached. The plain language of the Supplemental Agreement supports the trial court’s finding that Control Room expressly assumed both the 2002 IRU Agreement and the Reconciliation Agreement.

The Reconciliation Agreement expressly provided that Waypoint and Control Room agreed to execute an IRU Agreement for 12 fibers on all existing spurs—which would include any spurs in existence or pending as of November 1, 2006. Although the June 15, 2006 Extended Network IRU Agreement was not attached to exhibit WPIRU of the Settlement Agreement, the Extended Network IRU was “entered in connection with the Reconciliation of Business Terms” to provide ACD access to 12 fibers on all existing spurs in existence or pending as of November 1, 2006. And the Assignment of IRUs that was executed on the same date as the Supplemental Agreement stated, “The Seller, as Grantor, and its Grantees, have entered into a series of IRUs as amended, modified, or extended, . . . with respect to certain fibers located on the Lansing Metro Ring which fibers are more particularly described in the IRUs and are the subject of” the Asset Purchase Agreement. Under these circumstances, Control Room expressly assumed the Extended Network IRU Agreement because, absent the Extended Network IRU Agreement, there would

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<sup>2</sup> A cash sale is distinguishable from a merger in which stock is exchanged as consideration and one in which the successor corporation “generally assumes all its predecessor’s liabilities.” *Craig*, 471 Mich at 96.

have been no IRU Agreement granting ACD the right of use to the 12 fibers on the spurs.<sup>3</sup> Indeed, the trial court's declaratory ruling determined that ACD's rights to access the LFR included fibers 13 through 24 on the LFR and 12 fibers on the spurs existing on November 1, 2006, "identified in Exhibit B to the Reconciliation Agreement." However, the declaratory ruling failed to include the four additional spurs pending or existing on November 1, 2006, that were identified in Exhibit A to the Extended Network IRU Agreement. Contrary to ACD's argument, however, the Extended Network IRU Agreement did not give ACD the right to "any expansion of the route system." ACD relies on § 2.01 of the Extended Network IRU Agreement, which merely defines the term "system route." This section did not grant ACD any rights. Rather, it defined the scope of Waypoint's network. Section 3.01 contained the "Grant of IRU," and gave ACD the "right of use in twelve (12) fibers contained within the extended network described in Exhibit 'A.'" Exhibit A identified the spurs that made up the extended network, which were the spurs existing or pending as of November 1, 2006.

In sum, with respect to Zayo's request for a declaratory ruling, we conclude that Control Tower expressly assumed the 2002 IRU Agreement that granted ACD the right to access rings 13 through 24 on the LFR. We also find that Control Tower also expressly assumed the Extended Network IRU that granted ACD the right to access the spurs and laterals associated with the LFR. ACD's rights to access the LFR and spurs are limited to fibers 13 through 24 on the LFR, and 12 fibers on the spurs associated with the LFR and existing on November 1, 2006, as identified in Exhibit A to the Extended Network IRU Agreement. The terms of these IRUs govern the parties' rights. On remand, the trial court shall revise its order to comport with our ruling.

With respect to the breach of contract claim, the primary task in interpreting a contract "is to give effect to the parties' intention at the time they entered into the contract." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014). "A party claiming breach of contract must establish (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Dunn v Bennett*, 303 Mich App 767, 774; 846 NW2d 75 (2013) (quotation marks and citation omitted).

Here, Zayo presented documentary evidence in support of its motion for summary disposition that ACD did not know whether any of its splice requests involved access to a spur that existed on November 1, 2006. The burden then shifted to ACD to produce specific facts showing that there was a genuine issue of material fact with respect to whether a particular splice request was denied, and that the request was for access to a line or spur pending or in existence on November 1, 2006. *Barnard Mfg*, 285 Mich App at 374-375.

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<sup>3</sup> Independent of the Extended Network IRU Agreement, the four additional spurs identified in Exhibit A to the agreement should have been included in the court's declaratory ruling with respect to ACD's rights because these additional spurs were pending or in existence as of November 1, 2006.

On appeal, ACD does not address the trial court's finding that ACD "has not produced any evidence whatsoever that it made a splice request to something that they were entitled to from Zayo, and that request was denied."<sup>4</sup> A party abandons an issue by failing to address the merits of his or her assertions. *Woods*, 277 Mich App at 626. In the absence of evidence establishing a genuine issue of material fact with respect to whether Zayo failed to comply with a splice request to which it was contractually entitled, ACD did not meet its burden to establish an essential element of its claim, and Zayo was entitled to summary disposition as a matter of law. *Bennett*, 303 Mich App at 774. The trial court properly granted summary disposition of ACD's counterclaim for breach of contract in favor of Zayo.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro  
/s/ Kathleen Jansen  
/s/ Jane M. Beckering

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<sup>4</sup> Rather, ACD implicitly argues in its brief that the trial court erred by dismissing the breach of contract claim on the basis of the court's finding that the 2003 IRU Agreement on which the claim was based did not apply. To the extent ACD's counsel brought evidence to the Court's attention during oral argument, claiming it establishes that ACD made requests for rightful access to spurs that were denied, this Court located Mr. Steven Schoen's deposition as an attachment to appellee's brief, and in his deposition, Mr. Schoen admits that ACD's response to Interrogatory number 6 remained accurate that ACD was without complete information necessary to formulate an answer to the applicable inquiry, and in reference to a December 23, 2009 letter to Jonathan Raven, Mr. Schoen admitted that he did not know whether each of the six requests referenced were for access to a spur that existed on November 1, 2006.