STATE OF MICHIGAN

COURT OF APPEALS

PATRICK MCCARTHY,

Plaintiff-Appellant,

v

EDWARD SOSNICK, WENDY L. POTTS, KEVIN M. OEFFNER, RICHARD M. LYNCH, OAKLAND COUNTY CIRCUIT COURT, JEANNE STEMPIEN, KATHLEEN J. MCCANN, THOMAS J. RYAN, BARRY M. GRANT, MICHAEL J. TALBOT, DIANE M. GARRISON, NANCY J. DIEHL, RONALD F. ROSE, NANCI J. GRANT, and JUDICIAL TENURE COMMISSION,

Defendants-Appellees.

UNPUBLISHED
September 22, 2011

Nos. 293482; 294385
Oakland Circuit Court
LC No. 2008-089426-NO

PATRICK MCCARTHY,

Plaintiff-Appellant,

v

EDWARD SOSNICK, WENDY L. POTTS, KEVIN M. OEFFNER, RICHARD M. LYNCH, OAKLAND COUNTY CIRCUIT COURT, JEANNE STEMPIEN, KATHLEEN J. MCCANN, THOMAS J. RYAN, BARRY M. GRANT, MICHAEL J. TALBOT, DIANE M. GARRISON, NANCY J. DIEHL, RONALD F. ROSE, NANCI J. GRANT, JUDICIAL TENURE COMMISSION, JENNIFER M. GRANHOLM, and MIKE COX,

Defendants-Appellees.

Nos. 293483; 294383
Oakland Circuit Court
LC No. 2008-094425-NO

PATRICK MCCARTHY,

Plaintiff-Appellee/Cross-Appellee,

v

EDWARD SOSNICK,

No. 295782
Oakland Circuit Court
LC No. 2008-094425-NO

Defendant-Appellant,

and

WENDY L. POTTS, KEVIN M. OEFFNER, RICHARD M. LYNCH, and OAKLAND COUNTY CIRCUIT COURT,

Defendants-Cross-Appellants,

and

JEANNE STEMPIEN, KATHLEEN J. MCCANN, THOMAS J. RYAN, BARRY M. GRANT, MICHAEL J. TALBOT, DIANNE M. GARRISON, NANCY J. DIEHL, RONALD F. ROSE, NANCI J. GRANT, JENNIFER M. GRANHOLM, and MICHAEL COX,

Defendants.

PATRICK MCCARTHY,

Plaintiff-Appellee/Cross-Appellee,

v

EDWARD SOSNICK,

No. 295784
Oakland Circuit Court
LC No. 2008-089426-NO

Defendant-Appellant,

and

WENDY L. POTTS, KEVIN M. OEFFNER, RICHARD M. LYNCH, and OAKLAND COUNTY CIRCUIT COURT,

Defendants-Cross-Appellants,

and

JEANNE STEMPIEN, KATHLEEN J. MCCANN, THOMAS J. RYAN, BARRY M. GRANT, MICHAEL J. TALBOT, DIANE M. GARRISON, NANCY J. DIEHL, RONALD F. ROSE, NANCI J. GRANT, JENNIFER M. GRANHOLM, and MIKE COX,

Defendants.

Before: JANSEN, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

In Docket Nos. 293482 and 293483, plaintiff, proceeding *in propria persona*, appeals as of right from the trial court's orders granting summary disposition in favor of the various defendants in two related lower court actions, LC No. 2008-089426-NO ("case I") and LC No. 2008-094425-NO ("case II"), respectively. In Docket Nos. 294385 and 294383, plaintiff appeals as of right from the trial court's subsequent order in each case awarding costs and attorney fees to defendants Wendy L. Potts, Kevin M. Oeffner, Richard M. Lynch, and the Oakland Circuit Court (collectively referred to as the "OCC defendants") and to defendant Edward Sosnick, on the ground that plaintiff's claims were frivolous. In Docket Nos. 295784 and 295782, defendant Sosnick appeals by delayed leave granted, and the OCC defendants cross appeal, from the trial court's orders denying their motions for entry of judgment on the orders awarding costs and attorney fees. We affirm.

I. BACKGROUND

Plaintiff was the subject of both an Oakland Circuit Court child protection proceeding filed by the Department of Human Services (DHS), and criminal charges brought by the Oakland Country Prosecutor after plaintiff's children accused him of inappropriate sexual conduct. After the children recanted their allegations, the child protection proceeding and criminal charges were dismissed. Plaintiff later filed an action against the DHS and other defendants in the Oakland Circuit Court (the "DHS action"). That case was assigned to Oakland Circuit Court Judge Edward Sosnick, who granted summary disposition in favor of the defendants and dismissed plaintiff's claims.[1] Plaintiff thereafter filed the two cases that are the subject of these appeals.

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[1] This Court affirmed Judge Sosnick's decisions in *McCarthy v Scofield*, unpublished opinion per curiam of the Court of Appeals, issued October 8, 2009 (Docket No. 284129), lv den 486 Mich 939 (2010), reh den 488 Mich 1030 (2011); cert den ___ US ___; ___ S Ct ___; ___ L Ed 2d ___ (June 27, 2011).

In February 2008, plaintiff, proceeding *in propria persona*, filed his complaint in case I against defendant Sosnick and the OCC defendants,[2] asserting claims against them in their various individual, official, and governmental capacities. Also named as defendants were the Judicial Tenure Commission and its commission members (the "JTC defendants"). The ten-count complaint included claims based on 42 USC 1983 (counts I to IV), 42 USC 1985 (count V), the Civil Rights Act (CRA), MCL 37.2201 *et seq.* (count VI), "concert of action" (count VII), civil conspiracy (count VIII), fraud committed on January 8, 2008 (count IX), and intentional infliction of emotional distress (count X).

In September 2008, plaintiff, again proceeding *in propria persona*, filed his complaint in case II against the same defendants named in case I and two additional defendants, then Governor Jennifer Granholm and then Attorney General Michael Cox. Plaintiff's complaint in case II incorporated the complaint in case I. Plaintiff alleged that the conduct that formed the basis for the complaint in case I was continuing and set forth five counts, namely, misconduct in office (count I), professional malpractice (count II), "concert of action" (count III), civil conspiracy (count IV), and intentional infliction of emotional distress (count V).

The trial court granted defendants' motions for summary disposition in case I on June 22, 2009. It thereafter granted motions for summary disposition brought by defendant Sosnick and the OCC defendants in case II on June 24, 2009, and granted a joint motion for summary disposition brought by the JTC defendants and defendants Granholm and Cox in case II on August 7, 2009. The trial court also granted requests for sanctions by defendant Sosnick and the OCC defendants in each case pursuant to MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591. Following further proceedings with respect to sanctions, the trial court entered an opinion and order awarding sanctions in each case on September 25, 2009. The court awarded defendant Sosnick costs and reasonable attorney fees of $15,339.85 in case I and $9,087.80 in case II. The OCC defendants were awarded costs and reasonable attorney fees of $9,331 in case I and $5,873 in case II.

Defendant Sosnick and the OCC defendants later moved to reduce the September 25, 2009, opinions and orders awarding sanctions to a judgment, but the trial court denied their motions, initially without prejudice and then with prejudice.

II. DOCKET NOS. 293482 AND 293483

In Docket Nos. 293482 and 293483, plaintiff challenges the trial court's decisions granting defendants' motions for summary disposition in each case and dismissing all of plaintiff's claims. A trial court's decision on a motion for summary disposition is reviewed de novo. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). Issues involving the application or interpretation of a statute or court rule, or the applicability of a legal doctrine, are also reviewed de novo as questions of law. *Estes v Titus*, 481 Mich 573, 578-579;

[2] The OCC defendants are comprised of the Oakland Circuit Court, its Chief Judge Wendy Potts, its court administrator Kevin Oeffner, and the manager of the court's civil and criminal divisions, Richard Lynch.

751 NW2d 493 (2008), *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A trial court's decision concerning the meaning and scope of pleadings are reviewed for an abuse of discretion. *Taxpayers of Mich Against Casinos v State of Mich*, 478 Mich 99, 105; 732 NW2d 487 (2007). A trial court's decision on a motion to amend pleadings is also reviewed for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

A. CRIMINAL ACTIONS

We reject plaintiff's argument that the trial court should have treated his various claims, particularly the misconduct in office claim in case II, as criminal causes of action within the scope of MCL 760.1 *et seq.* A court is not bound by a party's choice of labels for a cause of action because this would place form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). The gravamen of a claim is determined by considering the complaint as a whole. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007).

The common-law offense of misconduct in office is recognized in Michigan as an indictable criminal offense punishable under MCL 750.505 where a public officer engages in corrupt behavior in the exercise of the duties of office or while acting under color of office. *People v Milton*, 257 Mich App 467, 470-471; 668 NW2d 387 (2003); see also *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003). But the one-person grand jury statute, MCL 767.3, only permits a crime to be investigated if there is probable cause to believe that a crime has been committed. *People v DiPonio*, 20 Mich App 658, 662-663; 174 NW2d 572 (1969). It requires "the order authorizing the inquiry, and the complaint upon which such order is based, to 'be specific to common intent of the scope of the inquiry.'" *In re Colacasides*, 379 Mich 69, 99; 150 NW2d 1 (1967), quoting MCL 767.3.

While a complaint may be based on information and belief under MCL 767.3, a "complaint" is defined as "a written accusation, under oath or upon affirmation, that a felony, misdemeanor, or ordinance violation has been committed and that the person named or described in the accusation is guilty of the offense." MCL 761.1(n). A judge has discretion in determining whether to issue the order and, "[i]n any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court." MCL 767.3. Oakland Circuit Court Local Court Rule 6.107 provides:

> Petitions for a grand jury shall be presented to the chief judge and submitted to him or her to the bench for decision. No such petition shall be granted except by affirmative majority of the bench. If a one-man grand jury is called, the judges of the circuit, by majority action, shall designate the judge who shall act as the grand juror.

In this case, plaintiff's complaint for money damages and injunctive relief in case I cannot be viewed as an attempt to invoke a one-person grand jury to investigate an alleged crime in accordance with MCL 767.3 and the rules of the Oakland Circuit Court. The complaint in

case II, while containing a count labeled "misconduct in office," similarly sought relief in the form of money damages and injunctive relief. It is clear from the trial court's decision granting summary disposition in favor of the JTC defendants and defendants Granholm and Cox that it treated the entire complaint in case II as a civil action and determined that the alleged "tort" of misconduct in office was not legally recognized in Michigan. The court stated that plaintiff's "tort claim for misconduct of office under Count I should be dismissed under MCR 2.116(C)(8) since it is not recognized in this jurisdiction."

A "civil action" is "[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation." *Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 554; 652 NW2d 851 (2002), quoting Black's Law Dictionary (7th ed), p 30. Even assuming that it would be permissible for a person to combine a civil action with a complaint under MCL 767.3, plaintiff's complaints in case I and case II sought to redress alleged private or civil rights. The gravamen of plaintiff's claims in both cases were civil in nature. Moreover, plaintiff failed to comply with Local Court Rule 6.107 by petitioning the chief judge for a one-person grand jury. Accordingly, the trial court did not abuse its discretion by treating the complaint in each case as a civil action. We will not disturb a trial court's ruling when the right result is reached. *Klooster v City of Charlevoix*, 488 Mich 289, 312; 795 NW2d 578 (2011); *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

B. DEFENDANT SOSNICK

Although the trial court granted summary disposition in favor of defendant Sosnick in case I pursuant to MCR 2.116(C)(7), based on judicial immunity, it failed to specifically address each count. Nonetheless, it reached the right result in dismissing plaintiff's claims. *Klooster*, 488 Mich at 312; *Taylor*, 241 Mich App at 458.

With respect to the tort claims in case I, the general rule is that individual immunity, as distinguished from sovereign or governmental immunity, is an affirmative defense to a tort claim that is properly raised under MCR 2.116(C)(7). *Canon v Thumudo*, 430 Mich 326, 344; 422 NW2d 688 (1988); see also *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008). A motion under MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence, provided the evidence is substantively admissible. MCR 2.116(G)(6); *Odom*, 482 Mich at 466. All well-pleaded factual allegations are accepted as true and construed in favor of the nonmoving party, unless contradicted by the admissible evidence. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009); *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Conclusory statements in a complaint, unsupported by factual allegations, are inadequate. See *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). If there is no genuine issue of material facts, or reasonable minds could not differ with respect to the effect of the facts, whether a claim is barred may be decided as a question of law. *Willett*, 271 Mich App at 45.

Here, plaintiff has not established that the trial court erred in granting summary disposition in favor of defendant Sosnick with respect to the claims for fraud and intentional infliction of emotional distress, which were factually based on defendant Sosnick's judicial actions in the DHS action. Under MCL 691.1407(5), a judge is absolutely immune from tort

liability when acting in the scope of his or her judicial authority. See also *Odom*, 482 Mich at 479.

We reject plaintiff's argument that the trial court was required to determine whether defendant Sosnick should have been disqualified from adjudicating cases involving the DHS pursuant to MCR 2.003 before deciding if he was entitled to judicial immunity. There is no merit to this argument because the decision whether a judge should be disqualified is itself a judicial act that is part of the case-deciding process. See *Barrett v Harrington*, 130 F3d 246, 258 (CA 6, 1997). In Michigan, the initial decision on a request for disqualification is to be made by the trial judge whose disqualification is requested. MCR 2.003(D)(3). The court rule does not void a trial court's orders preceding a disqualification decision or deprive the court of jurisdiction to act. See generally *S & S Excavating Co v Monroe Co*, 37 Mich App 358, 364-365; 194 NW2d 416 (1971), in which this Court observed that even the act of disqualification does not preclude a judge from performing ministerial acts that do not involve judicial discretion. See also *Hull & Smith Horse Vans, Inc v Carras*, 144 Mich App 712, 719; 376 NW2d 392 (1985) (rejecting a defendant's claim that all orders entered by a judge before disqualification were void).

Further, it is well established that a trial court has authority to make a mistake in the exercise of its jurisdiction. Where jurisdiction has attached, mere errors in the proceedings, no matter how grave, cannot be collaterally attacked. *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544-546; 260 NW 908 (1935). A plaintiff must pursue such matters in the proceedings themselves. See *Brill v Brill*, 75 Mich App 706, 711; 255 NW2d 739 (1977) (plaintiff should have raised allegations regarding possible grounds for disqualifying a judge in a motion for a new trial). Because MCR 2.003 cannot be used to collaterally attack defendant Sosnick's judicial acts in the DHS action, or to retroactively strip defendant Sosnick of judicial authority, plaintiff's argument based on MCR 2.003 is without merit.

Plaintiff's tort claims against defendant Sosnick were based on his decisions in the DHS action. Because defendant Sosnick was acting within the scope of his judicial authority when deciding the motions in the DHS action, he was entitled to judicial immunity under MCL 691.1407(5) with respect to the tort claims. Accordingly, the trial court properly granted summary disposition under MCR 2.116(C)(7).

It is unclear from plaintiff's complaint in case I whether the "concert of action" and civil conspiracy counts were intended to apply to defendant Sosnick. But any civil conspiracy must be accompanied by a separate, actionable tort. *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). "A civil conspiracy is a combination of two or more persons, by some concerned action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 507; 686 NW2d 770 (2004). Because the trial court properly dismissed plaintiff's tort claims, plaintiff's conspiracy claim cannot succeed.

Although plaintiff also relies on the doctrine of vicarious liability to support his allegations of a concerted action or conspiracy, a claim of vicarious liability is based on derivative liability, which may arise either by statute, *Kaiser v Allen*, 480 Mich 31, 37-38; 746 NW2d 92 (2008), or common law, *Haring v Myrick*, 368 Mich 420, 422-423; 118 NW2d 260

(1962). Plaintiff has not established the relevancy of this doctrine to his claims against defendant Sosnick. Similarly, plaintiff has not established the relevancy of the doctrine of res ipsa loquitor to his tort claims against defendant Sosnick. The purpose of this doctrine is to "create an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). The only allegation of negligence in plaintiff's complaint in case I is an allegation that "defendants" were not entitled to immunity under MCL 691.1407(2) because they acted with gross negligence. But because defendant Sosnick is entitled to judicial immunity from tort liability under MCL 691.1407(5), this doctrine does not provide any basis for disturbing the trial court's summary disposition decision.

Plaintiff has also failed to establish any error in the trial court's grant of defendant Sosnick's motion for summary disposition under MCR 2.116(C)(7) with respect to the claims based on 42 USC 1983 in case I. The trial court properly rejected plaintiff's claim that injunctive relief and attorney fees were available remedies against defendant Sosnick. See 42 USC 1983 and 42 USC 1988. Further, to the extent that plaintiff seeks to negate defendant Sosnick's judicial capacity on the basis of MCR 2.003, his claim lacks merit. A judge will not be deprived of immunity from suit simply because the action taken was in error or exceeded his or her authority. *Mireles v Waco*, 502 US 9, 12-13; 112 S Ct 286; 116 L Ed 2d 9 (1991). The appropriate focus is on how the particular act relates to the general function normally performed by a judge. *Id*. at 13. Here, plaintiff's claims against defendant Sosnick relate to general functions normally performed by a judge. Accordingly, the trial court did not err in granting summary disposition under MCR 2.116(C)(7) in favor of defendant Sosnick on the basis of judicial immunity.

Although the trial court did not expressly address plaintiff's claim based on 42 USC 1985, the doctrine of judicial immunity applicable to a 42 USC 1983 claim also applies to an action under 42 USC 1985. See *Gross v Rell*, 585 F3d 72, 83-84 (CA 2, 2009), and *Van Sickle v Holloway*, 791 F2d 1431, 1435 (CA 10, 1986). Therefore, defendant Sosnick was entitled to dismissal of the 42 USC 1985 claim under MCR 2.116(C)(7) based on judicial immunity.

The trial court also reached the right result in dismissing plaintiff's CRA claim against defendant Sosnick. Plaintiff correctly observes that the immunity afforded by MCL 691.1407 does not apply to the CRA. See *Diamond v Witherspoon*, 265 Mich App 673, 691; 696 NW2d 770 (2005). The material question is whether the CRA was intended to apply to the type of activity that is the basis for plaintiff's claim that he was discriminated against because of his marital and sex status.

The "public service"[3] provision that is the basis for plaintiff's claim provides that, except where permitted by law, a person[4] shall not "[d]eny an individual the full and equal enjoyment of

[3] The CRA defines "[p]ublic service" as "a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to

the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status." MCL 37.2302(a). This provision is intended to prohibit "unlawful discrimination against any individual's full and equal enjoyment of the goods, services, facilities, privileges, or accommodations of a place of public accommodation." *Haynes v Neshewat*, 477 Mich 29, 40; 729 NW2d 488 (2007). For instance, discriminatory behavior that deprives a doctor of an opportunity to use a hospital's medical facilities falls within this statutory provision. *Id*. at 31, 40.

While this case involves the "public service," and not the "public accommodation" component of the statute, the gravamen of plaintiff's discrimination claim with respect to defendant Sosnick is not that plaintiff was denied the full and equal enjoyment of goods, services, facilities, privileges, and accommodations at the court because of his sex or marital status, but rather relates to Judge Sosnick's judicial decisions in the DHS action that led to adverse summary disposition rulings. A claim of discriminatory conduct in a judicial proceeding can provide a means for invaliding the outcome of a particular aspect of the proceeding. *In re AMB*, 248 Mich App 144, 197; 640 NW2d 262 (2001). But judicial decision-making does not fall within the scope of MCL 37.2302(a). A court may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from words of the statute itself. *People v Breidenbach*, 489 Mich 1, 10; 798 NW2d 738 (2011). Thus, plaintiff's complaint failed to state a legally cognizable action for violation of the CRA. Accordingly, summary disposition of the CRA claim should have been granted pursuant to MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Therefore, the trial court reached the right result in dismissing the CRA claim. *Klooster*, 488 Mich at 312.

To the extent plaintiff argues that the trial court lacked jurisdiction over his "official capacity" claims, and thus the merits of those claims should not have been considered, it is unclear whether plaintiff intends that argument to apply to defendant Sosnick. In any event, a party may raise an issue of subject-matter jurisdiction at any time. *Adams*, 276 Mich App at 708. "Subject-matter jurisdiction involves the power of a court to hear and determine a cause or matter." *Reed v Yackell*, 473 Mich 520, 546-547; 703 NW2d 1 (2005). The Court of Claims has exclusive jurisdiction to "hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies." MCL 600.6419(1)(a); see also *Manuel v Gill*, 481 Mich 637, 649; 753 NW2d 48 (2008). That jurisdiction extends to state officers for acts committed in an official capacity, where the real party is the governmental entity. *Carlton v Dep't of Corrections*, 215 Mich App 490, 500-501; 546 NW2d 671 (1996). The Court of Claims has exclusive jurisdiction over claims for money damages that the plaintiff seeks to recover from

actions and decisions regarding an individual serving a sentence of imprisonment." MCL 37.2301(b).

[4] A "[p]erson" is defined in the CRA as "an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other legal or commercial entity." MCL 37.2103(g).

the governmental entity itself. *Id.* at 501. Under MCL 600.6419(4), the circuit court is not deprived of jurisdiction in certain statutory actions or "proceedings for declaratory or equitable relief." But "[a] complaint seeking money damages from the state as well as equitable or declaratory relief against the state may only be filed in the Court of Claims, because that is the sole forum that is capable of deciding the whole case." *Silverman v Univ of Mich Bd of Regents*, 445 Mich 209, 217; 516 NW2d 54 (1994), overruled in part on other grounds in *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763; 664 NW2d 185 (2003).

Because a CRA action properly may be brought in circuit court, plaintiff has not established any jurisdictional defect with respect to that claim. MCL 37.2801; see also *Neal v Dep't of Corrections*, 232 Mich App 730, 742; 592 NW2d 370 (1998). In addition, defendant Sosnick is a judge of the Oakland Circuit Court. While courts have always been regarded as part of state government, they operate historically on local funds and resources. *Cameron v Monroe Co Probate Court*, 457 Mich 423, 427; 579 NW2d 859 (1998); see also MCL 600.591(1). Where a county is responsible for the payment of a money judgment against a court, the circuit court has jurisdiction. *Cameron*, 457 Mich App at 428-429. Because plaintiff's complaint in case I indicates that plaintiff was seeking to hold defendant Sosnick personally liable for damages, we conclude that plaintiff has not established any cause of action for which jurisdiction was lacking. Even assuming that plaintiff also intended to treat his claim for monetary damages against defendant Sosnick as an "official capacity" claim, his jurisdictional argument fails because there has been no showing that the state would be responsible for paying a judgment against a circuit court. Cf. *Cameron*, 457 Mich at 424-428.

In sum, we find no basis for disturbing the result reached by the trial court in granting summary disposition in favor of defendant Sosnick with respect to case I.

With respect to case II, we likewise find no basis for disturbing the trial court's grant of summary disposition in favor of defendant Sosnick. Contrary to plaintiff's argument on appeal, it was not improper for the trial court to rely on its reasoning in case I even without the two cases having been joined. Indeed, a circuit court judge may take judicial notice of the files and records of the court in which he or she sits. *Knowlton v City of Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959). In addition, the complaint in case II incorporated the complaint in case I. The only additional causes of action alleged in case II were misconduct in office and professional malpractice. Even assuming that misconduct in office constitutes a legally cognizable tort, defendant Sosnick was entitled to dismissal of that claim pursuant to MCR 2.116(C)(7) on the basis of the absolute immunity afforded by MCL 691.1407(5). *Odom*, 482 Mich at 479.

Professional malpractice is also a tort claim. See *Stewart v Rudner*, 349 Mich 459, 468; 84 NW2d 816 (1957). Essential to the cause of action is whether the defendant owes a duty, professional and actionable, to the plaintiff. See *Friedman v Dozorc*, 412 Mich 1, 22-23; 312 NW2d 585 (1981). Even assuming that plaintiff could establish the requisite duty, defendant Sosnick is entitled to absolute judicial immunity under MCL 691.1407(5). Therefore, regardless of how plaintiff restates his tort claims against defendant Sosnick for his judicial actions in the

DHS action, the trial court properly granted defendant Sosnick's motion for summary disposition under MCR 2.116(C)(7).[5]

C. THE OCC DEFENDANTS

Plaintiff has not established any basis for disturbing the trial court's grant of summary disposition in favor of the OCC defendants in case I or case II. With respect to each of these defendants, we reject plaintiff's challenges to the trial court's subject-matter jurisdiction over the "official capacity" claims for the same reasons previously discussed with respect to defendant Sosnick. We also uphold the trial court's dismissal of the CRA claim in case I with respect to the OCC defendants because plaintiff failed to plead any conduct by the OCC defendants that falls within the "public service" provision in MCL 37.2302(a).

We shall separately address plaintiff's tort and federal claims against the OCC defendants. Plaintiff's complaint in case I contains only vague allegations concerning defendant Potts, who was functioning as the chief judge of Oakland Circuit Court at the times relevant to this case. The letter evidence submitted by the OCC defendants supports the trial court's determination that plaintiff's claims are based on defendant Potts's failure to strike defendant Sosnick's decision in the DHS action and her failure to remove defendant Sosnick from that action. Although plaintiff opposed summary disposition on the ground that he brought claims against defendant Potts in an administrative capacity, a mere attempt to invoke action by a judge as an administrator does not render the action administrative in nature because this would place form over substance. "An act by a judicial official need not be formal for it to constitute a judicial act." *Huminski v Corsones*, 396 F3d 53, 75 (CA 2, 2004).

Because plaintiff's tort claims in case I are based on actions involving defendant Potts's authority as chief judge of the Oakland Circuit Court, she is entitled to absolute judicial immunity pursuant to MCL 691.1407(5). *Odom*, 482 Mich at 479. Further, plaintiff's claims under 42 USC 1983 and 42 USC 1985 are barred by judicial immunity because they relate to the general function normally performed by a judge. *Mireles*, 502 US at 13. To the extent that plaintiff sought to disqualify defendant Sosnick in the DHS action, a chief judge's review is a judicial act invoked under MCR 2.003(D)(3). *Barrett*, 130 F3d at 258. To the extent that plaintiff sought to have defendant Sosnick's summary disposition order stricken as part of this process, this too would involve a judicial act, even if doing so would be in error, because it is part of the case-deciding process. *Mireles*, 502 US at 12-13; *Barrett*, 130 F3d at 258. For these

[5] We note that plaintiff also sought to hold defendant Sosnick in contempt for allegedly violating a local administrative order, LOA 1987-1, which requires a judge to disclose certain relationships with attorneys who appear before him or her, but requires a party seeking disqualification to follow the procedures in MCR 2.003. Plaintiff also sought to enjoin defendant Sosnick from presiding in cases involving the DHS in which plaintiff was not a party. Plaintiff's standing to seek such relief is not before us, see *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010), and because we have determined that plaintiff's pleaded causes of action are either barred by judicial immunity or legally insufficient, it is not necessary to address the issue of standing.

reasons, we uphold the trial court's dismissal of plaintiff's tort and federal claims against defendant Potts pursuant to MCR 2.116(C)(7) in case I, as well as the dismissal of the added misconduct in office and professional malpractice claims in case II.

We also find no basis for disturbing the trial court's grant of summary disposition in favor of defendants Oeffner and Lynch in case I and case II. To the extent plaintiff alleges a claim for "gross negligence" in case I, an essential element of this tort claim is the existence of a duty, i.e., an obligation by defendants to act for the benefit of a particular plaintiff. *Maiden*, 461 Mich at 131-132. To qualify for immunity under MCL 691.1407(2)(c), the individual employee's conduct must not amount to gross negligence, which is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7); see also *Odom*, 482 Mich at 469.

Here, plaintiff's complaint in case I does not contain well-pleaded factual allegations regarding the nature of his claims against defendants Oeffner and Lynch. It contains only conclusory allegations with respect to their status as court administrators and "manifest duties." The submitted evidence shows that defendants Oeffner and Lynch were named in the same letter as defendant Potts, in which plaintiff requested reassignment of the DHS action to a different judge and requested that defendant Sosnick's decision in the DHS action be stricken. The procedures for disqualifying a judge are prescribed in MCR 2.003. Because plaintiff offered no evidence or legal authority in opposition to the OCC defendants' evidence to establish that defendants Oeffner and Lynch had any authority, let alone a duty, to act on a letter request that substantively sought judicial action, plaintiff failed to establish a genuine issue of material fact with respect to any claim of gross negligence. Therefore, any negligence claim was barred as a matter of law. Summary disposition was proper under MCR 2.1169C)(7). *Willett*, 271 Mich App at 45.

To the extent that plaintiff's complaint in case I alleges intentional torts against defendants Oeffner and Lynch, the trial court reached the right result in dismissing those claims pursuant to MCR 2.116(C)(7). Although the trial court focused on the gross negligence claim and MCL 691.1407(2), where an intentional tort is involved, a lower-level employee is immune from liability if (1) he acted during the course of employment, (2) he acted or reasonably believed that he acted within the scope of his authority, (3) he acted in good faith, and (4) the acts were discretionary. *Odom*, 482 Mich at 473-476. A lack of good faith has been described as "malicious intent, capricious action or corrupt conduct or willful and corrupt misconduct." *Id.* at 475. It may be established by showing a failure to act where there is an intent to harm or indifference to whether harm will result so as to be equal to a willingness that harm will result. *Id*.

There is no indication that plaintiff's fraud claim involves defendants Oeffner and Lynch. That leaves plaintiff's claim for intentional infliction of emotional distress. The elements of this tort are "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). Plaintiff's intentional infliction of emotional distress claim is based on conclusory factual allegations. Even assuming that the complaint is legally sufficient to state a claim for intentional infliction of emotional distress with respect to defendants Oeffner and Young, the trial court reached the right result in granting summary disposition pursuant to MCR

2.116(C)(7) in favor of these defendants based on individual immunity. Plaintiff offered no evidence in opposition to the OCC defendants' evidence to establish that defendants Oeffner and Lynch had any authority, let alone a ministerial duty, to act on a letter that, in substance, requested judicial action. Any deliberate act of omission is subject to the qualified immunity for intentional torts. *Odom*, 482 Mich at 473-476. In addition, considering plaintiff's failure to establish an actionable tort for his "concert of action" and civil conspiracy claims in case I, we find no error in the trial court's grant of summary disposition in favor of defendants Oeffner and Lynch with respect to these claims. *Early Detection Ctr, PC*, 157 Mich App at 632.

Turning to plaintiff's claims under 42 USC 1983 and 42 USC 1985 in case I, we uphold the trial court's grant of summary disposition under MCR 2.116(C)(7) based on its application of quasi-judicial immunity. Quasi-judicial immunity attaches to public officials who have roles that are functionally comparable to a judge. *Keystone Redevelopment Partners, LLC v Decker*, 631 F3d 89, 95 (CA 3, 2011). It "extends to those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune." *Bush v Rauch*, 38 F3d 842, 847 (CA 6, 1994). The appropriate focus in determining whether quasi-judicial immunity applies is the general nature of the challenged action. *Keystone Redevelopment Partners, LLC*, 631 F3d at 95.

While there was no factual development regarding the duties of defendants Oeffner and Lynch, considering that the general nature of the challenged action substantively involves judicial acts, and that plaintiff was attempting to hold defendants Oeffner and Lynch to the same standards as defendant Potts, it is logical to conclude that they may be considered an arm of the judicial officer who is immune. Accordingly, the trial court did not err in granting summary disposition in favor defendants Oeffner and Lynch based on quasi-judicial immunity. Simply put, to the extent that plaintiff can establish that defendants Oeffner and Lynch had some duty to act on his demand that defendant Sosnick be removed from the DHS action, they were entitled to quasi-judicial immunity. Therefore, summary disposition under MCR 2.116(C)(7) was proper. In light of this decision, it is unnecessary to consider the OCC defendants' argument that the doctrine of qualified immunity also applies.

Lastly, as indicated previously, the trial court did not err in relying on its reasoning in case I to grant summary disposition in favor of defendants Oeffner and Lynch in case II. The additional claims for misconduct in office and professional negligence in case II do not affect our conclusion that summary disposition was proper under MCR 2.116(C)(7). If anything, the OCC defendants further established that case assignments are judicial acts that are not performed by defendants Oeffner and Lynch. According to local administrative orders LAO 2007-2 and LAO 2006-1, which were presented by the OCC defendants in support of their joint motion for summary disposition, judicial assignments for civil cases are made by a blind draw performed by the county clerk. The assignment is made at the time a case is filed, unless otherwise provided by court rule, administrative order, or the chief judge's directive. As part of the case-deciding process, the assignment constitutes a judicial act. *Barrett*, 130 F3d at 258.

Finally, with regard to plaintiff's claims against the Oakland Circuit Court, we have reviewed the trial court's summary disposition decision in case I and case II under MCR 2.116(C)(8) because, unlike individual immunity, a plaintiff filing a tort claim against a governmental agency must plead the claim in avoidance of governmental immunity. *Odom*, 482

Mich at 478-479. Further, there is no indication that the trial court looked beyond the pleadings to resolve this issue. *Spiek v Dep't of Transp*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). Because plaintiff failed to plead any facts indicating that the Oakland Circuit Court was not engaged in a governmental function, see *Tate v City of Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003), or any exception to its immunity established by MCL 691.1407(1), the trial court properly granted summary disposition in favor of the Oakland Circuit Court.

With respect to plaintiff's claim based on 42 USC 1983 in case I, we agree that the trial court incorrectly decided this claim by determining whether plaintiff identified a court custom, policy, or practice that resulted in a constitutional violation. The federal statute provides "a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 30; 703 NW2d 822 (2005). But the requirement of a custom, policy, or practice that results in an alleged constitutional violation only applies to local governmental units that are not considered part of the state for Eleventh Amendment purposes. *Monell v Dep't of Social Servs*, 436 US 658, 690-691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Courts have always been regarded as being part of state government. *Cameron*, 457 Mich at 427. A state agency is not a "person" for purposes of an action under 42 USC 1983, even where the action is brought in state court rather than federal court. *Hardges v Dep't of Social Servs*, 201 Mich App 24, 27; 506 NW2d 532 (1993). Although we do not agree with the trial court's application of the standards for local governmental units, we conclude that it reached the right result. Its decision granting summary disposition in favor of the Oakland Circuit Court may be upheld under MCR 2.116(C)(8) because plaintiff failed to state a claim and no factual development could possibly justify recovery. *Maiden*, 461 Mich at 119; see also *Klooster*, 488 Mich at 312; *Taylor*, 241 Mich App at 458. We reach this same conclusion with respect to plaintiff's claim under 42 USC 1985, although this cause of action was not expressly addressed by the trial court. See *Bryant v Military Dep't of State of Mississippi*, 381 F Supp 2d 586, 592 (SD Miss, 2005), aff'd 597 F3d 678 (2010) (claims under 42 USC 1985 barred against state).

D. THE JTC DEFENDANTS

Plaintiff does not dispute the trial court's determinations in case I and case II that it lacked subject-matter jurisdiction to consider his claims against the Judicial Tenure Commission and its members in an "official capacity," because the Court of Claims has exclusive jurisdiction over those claims. Nonetheless, the commission members "official capacity" is only relevant to the extent that the real party underlying plaintiff's claim is the Judicial Tenure Commission. To the extent that plaintiff seeks to hold the commission members personally liable for alleged torts, violations of the CRA, and actions under 42 USC 1983 and 42 USC 1985, the Court of Claims's jurisdiction is not affected. See *Carlton*, 215 Mich App at 500-501. Once again, however, the trial court reached the right result in granting summary disposition in favor of the individual commission members.

Plaintiff's failure to plead any conduct by the commission members that falls within the "public service" provision in MCL 37.2302(a) is fatal to his CRA claim in case I. Accordingly, the dismissal of that claim may be upheld pursuant to MCR 2.116(C)(8).[6]

The trial court also correctly determined in case I that the individual commission members were absolutely immune because plaintiff's claims were based on their conduct in the course of their official duties pursuant to MCR 9.227. The Judicial Tenure Commission was created pursuant to Const 1963, art 6, § 30*(1)*, to assist the people of Michigan and our Supreme Court evaluate a judge's conduct. See *In re Servaas*, 484 Mich 634, 661; 774 NW2d 46 (2009) (Markman, J., dissenting). Its powers are established by constitution and Supreme Court rule. MCR 9.203(A). It may not function as an appellate court to review a court's decision, but may make recommendations to our Supreme Court regarding whether a judge should be censured, suspended, retired, or removed for various reasons. MCR 9.203(B) and Const 1963, art 6, § 30.

Under MCR 9.227, commission members have absolute immunity "from civil suit for all conduct in the course of their official duties." This broad grant of immunity is consistent with the doctrine of quasi-judicial immunity that attaches to functions within the auspices of our Supreme Court. See *Lepley v Dresser*, 681 F Supp 418, 423 (WD Mich, 1988). And while plaintiff's claims in case I are based on the commission members' alleged failure to act on his grievances, a failure to act does not render an act ultra vires in nature. See *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989). Therefore, plaintiff has failed to establish any basis for disturbing the trial court's grant of summary disposition under MCR 2.116(C)(7) in case I with respect to the tort and federal claims.

Lastly, considering that absolute immunity set forth in MCR 9.227 would also apply to plaintiff's additional claims in case II that attempt to hold the commission members personally liable for damages, summary disposition was also proper under MCR 2.116(C)(7) in case II. In sum, we affirm the trial court's decision because it reached the right result in finding that the commission members were entitled to absolute immunity with respect to plaintiff's claims for personal liability. *Klooster*, 488 Mich at 312; *Taylor*, 241 Mich App at 458.

E. DEFENDANTS GRANHOLM AND COX

Plaintiff has not established any basis for concluding that the trial court erred in granting summary disposition in favor of defendants Granholm and Cox with respect to plaintiff's claims in case II. In considering this issue, we limit our review to plaintiff's "personal liability" claims, inasmuch as plaintiff does not dispute the trial court's jurisdictional ruling with respect to the "official capacity" claims.

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[6] Despite plaintiff's apparent agreement with the trial court's jurisdictional ruling in case II, considering that a CRA action may be brought in circuit court, MCL 37.2801, we would reach this same conclusion with respect to plaintiff's CRA claim against the Judicial Tenure Commission itself.

For the reasons discussed previously, the trial court did not err in relying on its reasoning in case I and, in particular, its decision denying plaintiff's motion to amend his complaint in case I, to support its assessment of defendant Granholm's and defendant Cox's entitlement to immunity. We also find no error in the trial court's determination that misconduct in office is not a legally cognizable tort.

But even assuming that each of the pleaded counts in count II could be considered legally cognizable, the trial court's decision may be upheld on the basis that defendants Granholm and Cox, as a highest elective official, were each entitled to absolute immunity under MCL 691.1407(5) for activities within the scope of their executive authority. See *American Transmissions v Attorney General*, 454 Mich 135, 144; 560 NW2d 50 (1997) (attorney general); Const 1963, art 5, § 1 (executive power is vested in the governor). A failure to act does not render an act ultra vires in nature. *Richardson*, 432 Mich at 387. Therefore, even accepting as true plaintiff's allegation that these defendants did not perform duties within the scope of their authority, they are still entitled to absolute immunity from tort liability. The fact that defendant Granholm's alleged duties arise under Const 1963, art 5, § 10, does not provide a basis for personal liability because a damages remedy is not available against an individual governmental employee for a violation of the Michigan Constitution. *Jones v Powell*, 462 Mich 329, 335; 612 NW2d 423 (2000). Accordingly defendants Granholm and Cox were both entitled to summary disposition pursuant to MCR 2.116(C)(7).

F. AMENDMENT PURSUANT TO MCR 2.116(I)(5)

Plaintiff argues that he was entitled to amend his complaints pursuant to MCR 2.116(I)(5), which provides that if summary disposition is sought "based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." For the most part, plaintiff's reliance on MCR 2.116(I)(5) is misplaced because it does not apply to a motion for summary disposition that is based on MCR 2.116(C)(4) or (7). Regardless, the trial court's summary disposition rulings indicate that it considered whether plaintiff should be afforded an opportunity to amend his complaints, and the court determined that amendment would not be justified. We find no reason to disturb that decision. *Ormsby*, 471 Mich at 45. Plaintiff has not identified any basis for amendment that would not be futile.

III. DOCKET NOS. 294383 AND 294385

Plaintiff raises various challenges to the trial court's decision to award sanctions to defendant Sosnick and the OCC defendants pursuant to MCL 600.2591 in each case, and the framework in which the court determined the amount of sanctions to award.

As indicated previously, issues involving the proper application or interpretation of a statute or court rule, or the applicability of a legal doctrine, are reviewed de novo. *Estes*, 481 Mich at 578-579, *Coblentz*, 475 Mich at 567. MCR 2.114(F) and MCR 2.625(A)(5) allow a court to award costs as provided in MCL 600.2591 where a party pleads a frivolous claim or defense. A trial court's finding that a claim is frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "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." *Id*. at 661-662. A trial court's decision regarding the amount of reasonable attorney fees to include in an award of sanctions is reviewed for an abuse of discretion. *In re Attorney Fees & Costs*, 233 Mich App 694, 704-705; 593 NW2d 589 (1999).

Initially, the record does not support plaintiff's claim that the trial court rendered different or inconsistent rulings on the same material facts by awarding sanctions to defendant Sosnick and the OCC defendants, and denying a request for sanctions by the JTC defendants and defendants Granholm and Cox. Contrary to what plaintiff asserts, the trial court did not deny a request for sanctions by the latter parties, but simply was not presented with a request in the first instance.

We also find no merit to plaintiff's contention that the sanction awards constituted an improper award of punitive damages or an unlawful tax. As plaintiff correctly observes, MCR 2.114(F) precludes an award of sanctions as punitive damages. This is consistent with the general rule in Michigan that damages, even where they are awarded in the form of attorney fees, are compensatory in nature. *Rafferty v Markovitz*, 461 Mich 265, 270-271; 602 NW2d 367 (1999). When sanctions are awarded, MCL 600.2591(2) specifies that "[t]he 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." A "[p]revailing party" is "a party who wins on the entire record." MCL 600.2591(3)(b).

Plaintiff's mere status as a taxpayer does not transform the sanction awards into punitive damages or an unlawful tax. A "tax" is designed to raise revenue. *Bolt v City of Lansing*, 459 Mich 152, 161; 587 NW2d 264 (1998). The sanctions authorized by MCL 600.2591 are not taxes. The purpose of imposing sanctions is to deter parties and their attorneys from advancing frivolous claims and defenses, without stifling good-faith efforts to pursue novel or arguable legal theories. *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 719; 591 NW2d 676 (1998).[7] Plaintiff misuses the doctrine of judicial estoppel in his attempt to estop defendant Sosnick and the OCC defendants from denying their requests for costs and attorney fees. "Judicial estoppel prevents a party from taking a position in a later proceeding that is inconsistent with a position that the party took successfully in a prior proceeding." *Dykema Gossett, PLLC v Ajluni*, 273 Mich App 1, 16; 730 NW2d 29 (2006), vacated in part on other grounds 480 Mich 913 (2007). It is an equitable doctrine that is applied at a court's discretion based on the particular facts of the case. *Opland v Kiesgan*, 234 Mich App 352, 365-366; 594 NW2d 505 (1999). The doctrine has no application to this case, where only plaintiff is arguing that he is being asked to pay a tax.

Further, MCL 600.2591 makes no distinction based on the source of the funds that would otherwise be used to pay a prevailing party's actual costs and reasonable attorney fees. It is the existence of an attorney-client relationship, not whether the attorney pursues compensation from

[7] Considering the purpose of sanctions, we also reject plaintiff's contention that he had a right to bring federal claims without the possibility of sanctions. An action under 42 USC 1983 does not preclude an award for sanctions under a different statute or court rule. See *Dubay v Wells*, 506 F3d 422, 432-434 (CA 6, 2007).

the client, that is essential in determining whether attorney fees are incurred. *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 12; 564 NW2d 457 (1997). Therefore, contrary to plaintiff's argument on appeal, the mere fact that a public source was being used to fund the cost of defendant Sosnick's and the OCC defendants' legal representation did not preclude an award of sanctions under MCL 600.2591.

Plaintiff also argues that an award of sanctions was precluded by the definitional provisions in MCL 600.2421b. However, those definitional provisions do not apply to an award of sanctions under MCL 600.2591. Accordingly, there is no merit to plaintiff's argument.

Plaintiff also argues that the sanction awards were improper because defendant Sosnick and the OCC defendants failed to comply with a court order requiring an affidavit of their out-of-pocket costs and fees. Plaintiff has not identified the court order that allegedly contained this requirement. Nonetheless, the record indicates that the trial court provided plaintiff with an opportunity for an evidentiary hearing on August 7, 2009, to contest the reasonableness of the attorney fees sought by defendant Sosnick and the OCC defendants. An evidentiary hearing is an appropriate means for a court to determine the reasonableness of attorney fees that are challenged by a party. *John J Fannon Co v Fannon Prods, LLC*, 269 Mich App 162, 171; 712 NW2d 731 (2005); *Miller v Meijer, Inc*, 219 Mich App 476, 479-480; 556 NW2d 890 (1996). We reject any suggestion that the trial court erroneously determined the amount of attorney fees by using the framework prescribed in the plurality opinion in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). The factors considered by the trial court were appropriate, see *In re Attorney Fees & Costs*, 233 Mich App at 705, and the approach used by the court was also appropriate because attorney fees were sought on an hourly basis. Cf. *Augustine v Allstate Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 296646, issued April 26, 2011), slip op at 9 n 2.

Plaintiff also questions whether the trial court could properly order the payment of sanctions to the "Michigan General Fund." However, the orders awarding sanctions do not contain such an order, but rather award the sanctions to the named prevailing parties, defendant Sosnick and the OCC defendants. This is consistent with MCL 600.2591(1), which provides that costs and attorney fees are to be awarded to the prevailing party. Accordingly, we find no error.

Plaintiff also challenges the trial court's findings that his civil actions against defendant Sosnick and the OCC defendants were frivolous. MCL 600.2591(3)(a) provides that a civil 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.

Whether a claim is frivolous depends on the facts of the case. *Kitchen*, 465 Mich at 662. The claim is evaluated at the time the plaintiff filed the lawsuit. *In re Attorney Fees & Costs*, 233 Mich App at 702. We find no basis for concluding that the trial court clearly erred in finding plaintiff's claims to be frivolous. The mere fact that a case evaluation award was issued in case I

does not establish that the actions were not frivolous, or preclude the trial court from properly making such a finding.[8] *John F Fannon Co*, 269 Mich App at 170 n 7.

In sum, we find no error in the trial court's orders awarding sanctions to defendant Sosnick and the OCC defendants and, accordingly, affirm those orders.[9]

IV. DOCKET NOS. 295782 AND 295784

In Docket Nos. 295782 and 295784, defendant Sosnick and the OCC defendants challenge the trial court's refusal to reduce the September 25, 2009, orders awarding sanctions to a judgment.

Although defendants contend that a judgment was necessary to take action under MCR 3.101 and MCL 600.6101 *et seq.* to collect the awarded sanctions, the trial court was not presented with any particular enforcement action that was impeded by the trial court's use of the September 25, 2009, opinions and orders to award sanctions to defendant Sosnick and the OCC defendants. Rather, the question presented to the trial court was whether it was required to enter a judgment under MCR 2.602, which provides:

> (A) Signing; Statement; Date of Entry.
>
> (1) Except as provided in this rule and in MCR 2.603, all judgments and orders must be in writing, signed by the court and dated with the date they are signed.
>
> (2) The date of signing an order or judgment is the date of entry.
>
> (3) Each judgment must state, immediately preceding the judge's signature, whether it resolves the last pending claim and closes the case. Such a statement must also appear on any other order that disposes of the last pending claim and closes the case.
>
> (B) Procedure of Entry of Judgments and Orders. An order or judgment shall be entered by one of the following methods:

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[8] The trial court indicated in its September 25, 2009, opinion and order awarding sanctions in case II that a case evaluation was conducted only for case I. Plaintiff has not established any error in this determination.

[9] In their briefs on appeal, defendant Sosnick and the OCC defendants request that this Court award additional sanctions under MCR 7.216(C), which authorizes sanctions for vexatious proceedings on appeal. However, a request for sanctions under MCR 7.216(C) must be made in a motion filed in accordance with MCR 7.211(C)(8). *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005). Accordingly, we deny defendants' request without prejudice to them raising the issue in a proper motion under MCR 7.211(C)(8).

(1) *The court may sign the judgment or order at the time it grants the relief provided by the judgment or order.*

(2) The court shall sign the judgment or order when its form is approved by all the parties and if, in the court's determination, it comports with the court's decision.

(3) Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the original of the proposed judgment or order and proof of its service on the other parties.

(a) If no written objections are filed within 7 days, the clerk shall submit the judgment or order to the court, and the court shall then sign it if, in the court's determination, it comports with the court's decision. If the proposed judgment or order does not comport with the decision, the court shall direct the clerk to notify the parties to appear before the court on a specified date for settlement of the matter.

* * *

(4) A party may prepare a proposed judgment or order and notice it for settlement before the court. [MCR 2.602 (emphasis added).]

It is apparent that the September 25, 2009, opinions and orders were entered in accordance with the procedure in MCR 2.602(B)(1). Therefore, defendant Sosnick and the OCC defendants were neither required nor entitled to proceed under MCR 2.602(B)(2) or (3) to obtain entry of a judgment or order in a different form. It is immaterial that the September 25, 2009, opinions and orders are not labeled a "judgment." When a court renders a judgment, it is entering an order based on previously decided issues of fact or making a decision on a case as a matter of law. *Anzaldua v Band*, 457 Mich 530, 536-537; 578 NW2d 306 (1998). Further, the label attached to the document is not controlling. In *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 220 n 4; 625 NW2d 93 (2000), this Court observed:

> We note that the $57,000 damages award was contained in a document entitled an "opinion and order." The "opinion and order" stated as follows: "Judgment should be entered for plaintiff against defendant . . . in the amount of $57,000. It is so ordered." While the document was not entitled a "judgment," it functioned, for all intents and purposes, as a judgment. Indeed, "judgment" is defined as "[a] court's final determination of the rights and obligations of the parties in a case." See Black's Law Dictionary (7th ed), p 846. There is no requirement that this determination be contained in a document entitled a "judgment." Such a requirement would elevate form over substance.

Moreover, the trial court speaks through its orders, decrees, and judgments, not its oral pronouncements or its opinions. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). A party may seek a writ for nonpayment of a judgment *and costs*, but the writ provisions and any bond must comply with applicable law. See *Behrens v Chevrie*, 255 Mich 79, 79-81; 237 NW 551 (1931). In the present case, the trial court chose to enter a monetary award in the opinion *and order* addressing the issue of costs and attorneys fees for the frivolous filing. The trial court's disposition in this manner was proper. *Tiedman*, 400 Mich at 576; *In re Contempt of Henry*, 282 Mich App at 678. [10]

Here, the trial court's September 25, 2009, opinions and orders contain both the amount of sanctions awarded to defendant Sosnick and the OCC defendants, and the language of finality in MCR 2.602(A)(3). Each opinion and order is, in substance, a judgment. Neither defendant Sosnick nor the OCC defendants have established any particular enforcement action that requires presentation of a document labeled "judgment." Accordingly, the trial court did not err in determining that it was not necessary to reduce the enforceable orders awarding sanctions to a "judgment."

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

[10] Defendants contends that a "judgment" is required, citing MCL 600.6104. However, pursuant to MCL 600.6104, Michigan courts are given extremely broad authorization to aid in the execution of monetary judgments. *In re John Richards Homes Bldg Co, LLC*, 298 BR 591, 609 (Bankr ED MI, 2003). MCL 600.6104 provides for supplementary proceedings after judgment for money has been rendered and entrusts the judge with various options to allow for execution. Those powers include compelled discovery, limitations on property or monetary transfers, appointment of a receiver, and any other order to allow for execution on an outstanding monetary award. MCL 600.6104(1)-(5). In the present case, the trial court has concluded that the opinion and order is a sufficient means of awarding sanctions to defendants. In light of the fact that the remedies for execution will be brought before the judge that has concluded that the opinion and order is an appropriate mechanism for obtaining sanctions, defendants' contention is without merit. The trial court may choose to dispose of the case through judgment or order. *Tiedman*, 400 Mich at 576; *In re Contempt of Henry*, 282 Mich App at 678.