STATE OF MICHIGAN

COURT OF APPEALS

WALTER E. DOUGLAS, SR., THEODORE E. MARTIN, and DEREK A. HURT,

Plaintiffs-Appellees/Cross-Appellants,

V

GLOBAL VISION COMMUNICATIONS, LLC, KIRKLAND DUDLEY, GVC HOLDINGS, INC., and GVC NETWORKS, LLC,

Defendants,

and

COMERICA BANK and HUBERT WILEY,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
March 14, 2013

No. 294808
Wayne Circuit Court
LC No. 05-531462-NZ

WALTER E. DOUGLAS, SR. and THEODORE E. MARTIN,

Plaintiffs,

and

DEREK A. HURT,

Plaintiff-Appellee/Cross-Appellant,

and

JANE KENT MILLS,

Appellee/Cross-Appellant,

V

GLOBAL VISION COMMUNICATIONS, LLC, KIRKLAND DUDLEY, GVC

No. 299440
Wayne Circuit Court
LC No. 05-531462-NZ

HOLDINGS, INC, GVC NETWORKS, LLC,

Defendants,

and

COMERICA BANK and HUBERT WILEY,

Defendants-Appellants/Cross-Appellees.

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM.

This consolidated appeal involves allegations of breach of contract, fraud, breach of fiduciary duty and negligence against Comerica Bank and its employee, Hubert Wiley, by Walter E. Douglas, Sr., Theodore E. Martin and Derek A. Hurt ("the investors").[1]

In docket number 294808, Comerica and Wiley appeal as of right the trial court's October 5, 2009, consent judgment entered in favor of the investors, and against Global Vision Communications, LLC, GVC Networks, and GVC Holdings, Inc. (hereinafter the entities will be collectively referred to as "GVC"). The issues on appeal relate to the trial court's findings that Douglas and Martin did not file frivolous claims for fraudulent misrepresentation. The investors cross-appeal regarding the trial court's grant of summary disposition of their claims for negligence, silent fraud, and the sua sponte dismissal of Comerica.

In docket number 299440, Comerica and Wiley appeal as of right the trial court's June 30, 2010, opinion and order regarding the monetary sanctions that Hurt and his attorney, Jane Kent Mills, are required to pay Comerica and Wiley. Hurt and Mills cross-appeal regarding the court's calculation of sanctions and the trial court's determination that Hurt's claim for fraudulent misrepresentation was frivolously filed. In all appeals, we affirm.

I. MOTIONS FOR SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

"Appellate review of a motion for summary disposition is de novo."[2] "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the

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[1] While Douglas, Martin and Hurt allege that they were not investors, but instead claim that they agreed to provide a loan to GVC, for ease of reference they will be referred to collectively as "the investors."

[2] *Gyarmati v Bielfield*, 245 Mich App 602, 604; 629 NW2d 93 (2001).

pleadings alone."[3] "A court may grant summary disposition under MCR 2.116(C)(8) if '[t]he opposing party has failed to state a claim on which relief can be granted.'"[4] Summary disposition under this subsection is proper "when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery."[5] "[I]f it is determined that, as a matter of law, the defendant owed no duty to the plaintiff" then "[s]ummary disposition of a negligence claim is properly granted pursuant to MCR 2.116(C)(8)."[6]

A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.[7] "The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court" "in the light most favorable to the nonmoving party."[8] Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "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."[9]

"[W]hen a court reviews a motion for summary disposition, MCR 2.116(I)(1) provides that '[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.'"[10] Accordingly, "[u]nder this rule, a trial court has authority to grant summary disposition sua sponte[.]"[11]

B. DOCKET NO. 294808

Douglas and Martin argue on cross-appeal that the trial court erred when it found that they failed to state a claim for negligence.[12] We disagree.

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[3] *Averill v Dauterman*, 284 Mich App 18, 21; 772 NW2d 797 (2009) (citation and quotations omitted).

[4] *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010), quoting MCR 2.116(C)(8).

[5] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[6] *Otero v Warnick*, 241 Mich App 143, 147; 614 NW2d 177 (2000).

[7] *Sprague v Farmers Ins Exch*, 251 Mich App 260, 264; 650 NW2d 374 (2002).

[8] *Steinmann v Dillon*, 258 Mich App 149, 152; 670 NW2d 249 (2003) (citation and internal quotation marks omitted).

[9] *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[10] *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009).

[11] *Id*.

[12] MCR 2.116(C)(8).

To establish a cause of action for negligence, a plaintiff must demonstrate "duty, breach of that duty, causation, and damages."[13] "Duty is 'the legal obligation to conform to a specific standard of conduct in order to protect others from unreasonable risks of injury.'"[14] "A duty of care may arise from a statute, a contractual relationship, or by operation of the common law, which imposes an obligation to use due care or to act so as not to unreasonably endanger other persons or their property."[15]

> At common law, "[t]he determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person." "[T]he ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." Factors relevant to the determination whether a legal duty exists include [] "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." We have recognized, however, that "[t]he most important factor to be considered [in this analysis] is the relationship of the parties" and also that there can be no duty imposed when the harm is not foreseeable. In other words, "[b]efore a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable." If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors.[16]

Douglas and Martin did not cite any binding case law in their response to Comerica and Wiley's second motion for summary disposition to support their assertion that Comerica and Wiley had a legal duty. Nor did they cite any additional case law in their appellate brief. Rather, Douglas and Martin cite the non-binding case of *Fragin v Fleet Bank*,[17] a case from the New York State Supreme Court Appellate Division.

Additionally, while *Fragin* involved a bank and the establishment of an escrow account, the facts of the case are distinguishable. *Fragin* involved a bank employee who allegedly promised "to establish an attorney escrow account [for the plaintiff] requiring dual signatures for withdrawals."[18] The account, however, was opened as a checking account.[19] The bank employee was later fired for his alleged involvement in a fraudulent scheme related to the money

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[13] *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 85; 761 NW2d 832 (2008) (citation and quotations omitted).

[14] *Id*., quoting *Lelito v Monroe*, 273 Mich App 416, 419; 729 NW2d 564 (2006).

[15] *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009).

[16] *Hill v Sears, Roebuck & Co*, 492 Mich 651, 661; 822 NW2d 190 (2012) (citations omitted).

[17] *Fragin v Fleet Bank*, 787 NYS2d 278; 14 AD3d 312 (2005).

[18] *Id*. at 279.

[19] *Id*.

contained in the account at issue.[20] The issue was whether the bank breached a duty it owed to the plaintiff to inform the plaintiff that it had fired the bank employee.[21] Here, there was no alleged promise by Comerica or Wiley to Douglas and Martin to create an escrow account before the GVC account was created as a checking account. Nor does the duty alleged by Douglas and Martin relate to notifying the investors of Comerica employee discipline. Thus, we find *Fragin* unpersuasive.

Here, there is no duty imposed on Comerica or Wiley by statute, and Douglas and Martin do not assert that a duty resulted from a contractual relationship with Comerica. Therefore, the common law must be examined. Douglas and Martin inartfully argue that because of their relationship with Comerica as either past or present Comerica customers, a legal duty should be imposed. Douglas and Martin, however, fail to cite to any case law in support of this proposition and also fail to analyze the other considerations for establishing a common law legal duty.[22] Because a party's failure "to adequately brief a position, or support a claim with authority" constitutes abandonment of the issue,[23] summary disposition was proper.

The investors argue on cross-appeal that the trial court erred when it granted summary disposition regarding their claims for silent fraud.[24] We disagree.

"Silent fraud or fraudulent concealment has . . . long been recognized in Michigan."[25] To demonstrate silent fraud a plaintiff must demonstrate that the defendant "suppress[ed] a material fact that he or she was legally obligated to disclose, rather than making an affirmative misrepresentation."[26] It must also be established that a duty was owed to the investors by Comerica and Wiley.[27] First, as explained above, it has not been established that Comerica and Wiley owed the investors a duty. Second, the investors represented in their first amended complaint, their affidavits provided with their response to their second motion for summary disposition, and during their depositions that Wiley advised them that the account at issue was an escrow account. While in the same breath the investors attempt to assert that Wiley failed to disclose that the account was not an escrow account, it is clear from the record that the investors' assertions below were that Wiley made an "affirmative misrepresentation," rather than

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[20] *Id*. at 280.

[21] *Id*. at 280-281.

[22] *Hill*, 492 Mich at 661.

[23] *Moses, Inc v Southeast Mich Council of Gov'ts*, 270 Mich App 401, 417; 716 NW2d 278 (2006).

[24] MCR 2.116(C)(10).

[25] *Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008).

[26] *Alfieri v Bertorelli*, 295 Mich App 189, 193; 813 NW2d 772 (2012).

[27] *Id*.

suppressing a fact that he was obligated to disclose.[28] Accordingly, under the facts of this case, claims for both fraudulent misrepresentation and silent fraud cannot survive.

The investors also assert on cross-appeal that the trial court's sua sponte dismissal of Comerica warrants reversal.[29] We disagree.

Douglas and Martin rely on *Madison Nat'l Bank v Lipin*[30] in support of their assertion that the court's sua sponte dismissal of Comerica was improper because Wiley was acting in "the apparent scope of his duties" as a bank officer at the time of the alleged misrepresentations. Assuming but not deciding that Comerica could be held liable for Wiley's actions even if Comerica did not instruct or authorize Wiley to make the alleged misrepresentations, any error by the trial court in dismissing Comerica sua sponte was harmless. At the time the court dismissed Comerica, the court had properly granted dismissal of all of the investors' claims against Comerica except for the claim of fraudulent misrepresentation. The jury entered a verdict of no cause of action in favor of Wiley regarding the fraudulent misrepresentation claim. Because Comerica was sued based on a theory of respondeat superior based on Wiley's actions, any error by the trial court does not warrant relief.[31]

Hurt argues that because Comerica was dismissed sua sponte, his due process rights were violated. "Whether a party has been afforded due process is a question of law."[32] In a civil case due process requires "notice of the proceeding and a meaningful opportunity to be heard."[33] When the court "considers an issue sua sponte, due process can be satisfied by affording a party an opportunity for rehearing."[34] Whether "to grant rehearing or reconsideration of a decision on a motion" is within the trial court's discretion.[35] Here, Hurt failed to file a motion for rehearing or reconsideration. While Hurt claims that he did not have a "reasonable opportunity to file a motion to reconsider," we do not find any evidence in the record that Hurt was not permitted by the trial court to do so. Because Hurt did not exercise his right to move for reconsideration, his argument that he was denied due process must fail.[36]

Additionally, as explained above, assuming but not conceding that Comerica was improperly dismissed, because a judgment of no cause of action was found in favor of Wiley,

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[28] *Id*.

[29] MCR 2.116(C)(10), (I)(2).

[30] *Madison Nat'l Bank v Lipin*, 57 Mich App 706, 717; 226 NW2d 834 (1975).

[31] MCR 2.613(A).

[32] *Al-Maliki*, 286 Mich App at 485.

[33] *Id*.

[34] *Id*. at 485-486.

[35] *Id*. at 486, citing MCR 2.119(F).

[36] *Al-Maliki*, 286 Mich App at 485-486.

and Comerica was sued based on a theory of respondeat superior, any such error does not entitle Hurt to relief.[37]

II. FRIVOLOUSLY FILED CLAIMS

A. DOCKET NO. 294808

On appeal, Comerica and Wiley assert that the trial court erred when it failed to permit oral argument regarding whether the investors filed frivolous claims for fraudulent misrepresentation. We disagree. It is within the trial court's discretion to "dispense with or limit oral arguments on motions."[38] Thus, we review the issue for an abuse of discretion.[39] There is no abuse of discretion in dispensing with oral argument if the parties "thoroughly briefed the issues[.]"[40]

The trial court did not abuse its discretion when it failed to permit oral argument regarding whether the investors filed frivolous claims for fraudulent misrepresentation. The trial court denied oral argument because of its belief that oral argument is "redundant." The court did, however, permit Comerica and Wiley to submit supplemental briefing, which was filed. Additionally, the record demonstrates that the court had sufficient information to rule on the motion. As a result, Comerica and Wiley are not entitled to relief.[41]

Comerica and Wiley argue that their inability to file a reply brief, in conjunction with the trial court dispensing with oral argument, warrants reversal. Comerica and Wiley, however, "fail[ed] to cite authority for this position, and the [argument] is therefore deemed abandoned."[42]

Comerica and Wiley also claim that the trial court erred when it found that they did not brief the sanctions issues regarding the investors' claims for breach of contract, negligence and breach of fiduciary duty. We disagree. "A trial court's finding that an action is frivolous is reviewed for clear error."[43] "A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made."[44]

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[37] MCR 2.613(A).

[38] MCR 2.119(E)(3).

[39] *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000).

[40] *Id*.

[41] *Id*.

[42] *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

[43] *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

[44] *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002) (citation and quotations omitted).

The issue that went to trial was whether Wiley was liable to the investors for fraudulent misrepresentation. Review of Comerica and Wiley's motion for sanctions, supplemental brief regarding the motion for sanctions, and the evidence provided in support reveals that the motion for sanctions focuses on the frivolous nature of the investors' claims for fraudulent misrepresentation. The supplemental brief addresses the importance of the sequence between the investors' alleged conversations with Wiley and their transfers of funds into GVC's account. The motion and supplemental brief also discuss the evidence regarding the investors' purported knowledge of the type of account that they were transferring funds into and the implications of the fact that the account was a checking account.

Comerica and Wiley asserted in their pleadings that because Douglas and Hurt's transfers occurred before they spoke with Wiley, and Martin and Hurt allegedly were aware that they were transferring funds into GVC's checking account, which they understood could not be an escrow account, any alleged reliance on statements made by Wiley was unreasonable. The element of reliance is only an element in the fraudulent misrepresentation claim[45] and is not an element of the investors' claims for breach of contract,[46] breach of fiduciary duty,[47] or negligence.[48]

Comerica and Wiley allege that the motion for sanctions states that the investors "supported all of their theories for recovery" against Comerica by certain facts, and the supplemental brief references plaintiffs' counsel basing her "entire case" on falsified factual assertions. Thus, Comerica and Wiley argue that it was clear that the motion also pertained to the dismissed causes of action. In light of the remainder of the motion's briefing, however, it was not clearly erroneous for the trial court to conclude that fraudulent misrepresentation was the only claim for which sanctions were being sought.[49]

Comerica and Wiley also claim that the trial court clearly erred when it partially denied Comerica and Wiley's motion for sanctions based on their allegation that Douglas filed a frivolous claim for fraudulent misrepresentation. We disagree.

"Under Michigan law, a party that maintains a frivolous suit or asserts frivolous defenses is subject to sanctions under applicable statutes and court rules."[50] Under MCR 2.114(F) "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." Punitive damages may not be assessed by the court.[51] MCR 2.625(A)(2) provides that "[i]n an

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[45] *Roberts*, 280 Mich App at 403.

[46] *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012).

[47] *In re Duane v Baldwin Trust*, 274 Mich App 387, 401; 733 NW2d 419 (2007).

[48] *New Freedom Mtg Corp*, 281 Mich App at 85.

[49] *In re Costs & Attorney Fees*, 250 Mich App at 94.

[50] *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 404; 700 NW2d 432 (2005).

[51] MCR 2.114(F).

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." Pursuant to MCL 600.2591(3), a claim is frivolous if "[t]he party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party," "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true," or "[t]he party's legal position was devoid of arguable legal merit."[52] "The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted."[53]

> To prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew it was false, or make it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury.[54]

Comerica and Wiley argue that Douglas' cause of action for fraudulent misrepresentation was frivolous because Douglas had no reasonable basis to allege that his reliance on Wiley's purported statement "confirming the escrow agreement" for the account at issue caused his damage because Douglas transferred his funds hours before his conversation with Wiley. The documents provided by the parties regarding Comerica and Wiley's motion for sanctions demonstrate that on the morning of April 29, 2003, Douglas faxed his employee, Jim Witmer, to request that Witmer wire transfer, or deposit a cashier's check, in the amount of $500,000 drawn from Douglas' cash management account into Comerica Bank account number 1851702272. The name of the account holder was not noted nor was the type of account. On that same date, the $500,000 wire transfer occurred. Douglas called Wiley at 4:49 p.m. on April 29, 2003. Douglas testified at trial that the day after he spoke with Wiley, he called Witmer to confirm that he could send the funds to Comerica. Douglas submitted an affidavit regarding the motion for sanctions, which stated that he did not have any personal knowledge regarding when the funds were transferred.

The record shows that Douglas' funds transfer occurred before Douglas spoke with Wiley. We find, however, that it was not clear error for the trial court to conclude that Douglas had a reasonable basis to allege that he relied on Wiley's statement. The above evidence supports that Douglas had no personal knowledge of when the transfer actually occurred and that Douglas believed that the transfer occurred after he allegedly spoke with Witmer on April 30, 2003.[55]

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[52] *BJ's & Sons Constr Co, Inc*, 266 Mich App at 404.

[53] *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

[54] *Roberts*, 280 Mich App at 403.

[55] *In re Costs & Attorney Fees*, 250 Mich App at 94; *BJ's & Sons Constr Co, Inc*, 266 Mich App at 404; *Roberts*, 280 Mich App at 403.

Comerica and Wiley challenge the logicality of a statement made by Douglas in his affidavit regarding the motion for sanctions. Douglas' affidavit states that Douglas decided to transfer funds after he contacted Witmer and authorized the funds transfer, and after he discussed the account with Wiley. Because evidence was presented that Douglas had two conversations with Witmer, we find that it is possible that the decision to transfer funds occurred after Douglas' first conversation with Witmer and his discussion with Wiley. Thus, the statement made in Douglas' affidavit was not illogical and relief is not warranted.[56]

Comerica and Wiley further claim that the trial court clearly erred when it partially denied Comerica and Wiley's motion for sanctions based on their allegation that Martin filed a frivolous claim for fraudulent misrepresentation. We disagree.

Comerica and Wiley argue that Martin had no reasonable basis to allege that his reliance on Wiley's alleged statement that the account into which he was depositing funds was an escrow account caused his damage because the record demonstrates that Martin transferred funds to GVC rather than to Comerica as his escrow agent. Martin testified at his July 15, 2008, deposition that on May 8, 2003, he gave the name of the bank, routing and account numbers to his account executive at Northern Trust Bank to complete a wire transfer of $500,000. The account executive completed the necessary paperwork for the transfer and Martin signed the form. Martin indicated that he did not provide the account executive with GVC's name. Martin testified that as of May 8, 2003, it was his understanding that if money was wire transferred to a checking account held by GVC, then such money would not constitute an escrow fund over which Comerica would be escrow agent. At trial, Martin produced his Northern Trust bank statement, which showed that the wire transfer was made to an account belonging to GVC. Martin testified that he would not have knowingly sent money to a checking account.

As found by the trial court, there was no evidence presented that, at the time of the transfer, Martin was aware that his funds were being transferred into GVC's checking account. First, the transfer request that could have demonstrated Martin's knowledge of the recipient of the transfer was not presented as evidence to the motion for sanctions. Additionally, the Northern Trust bank statement identifying GVC as the recipient was not in existence at the time of the transfer. As such, the trial court did not clearly err when it found that Martin had a reasonable basis to allege that he relied on Wiley's statement and the claim was not frivolous.[57]

Comerica and Wiley's argument that the trial court failed to consider Martin's alleged concealment and misrepresentation of the content of his Northern Trust bank statement lacks merit as there was no evidence presented to support that assertion. Additionally, consideration of the bank statement fails to result in a finding that Martin filed a frivolous claim. As explained above, the bank statement was not in existence at the time of the transfer and does not establish

[56] *In re Costs & Attorney Fees*, 250 Mich App at 94.

[57] *Id*.

Martin's knowledge of the holder of the account or the type of account into which he was transferring funds at the time of the transfer. Therefore, reversal is not warranted.[58]

Comerica and Wiley also assert that the trial court clearly erred when it failed to determine that Mills was responsible for sanctions for her failure to conduct an independent reasonable investigation before filing Douglas and Martin's claims for fraudulent misrepresentation against Comerica and Wiley. We disagree.

The relevant court rule permits sanctions against an attorney that signs a pleading that is not "well grounded in fact" and requires that the attorney perform a "reasonable inquiry."[59] As explained above, based on the evidence Douglas and Martin had a reasonable basis to allege that their reliance on Wiley's purported statements regarding the account at issue caused their damage, thus supporting their claims of fraudulent misrepresentation. Accordingly, Comerica and Wiley have failed to establish that Douglas and Martin's claims were not "well grounded in fact" or that Mills failed to perform a "reasonable inquiry."[60] Therefore, their argument that Mills should have been independently sanctioned lacks merit.[61]

B. DOCKET NO. 299440

Hurt and Mills argue on cross-appeal that the trial court clearly erred when it partially granted Comerica and Wiley's motion for sanctions and found them liable for sanctions. We disagree.

The trial court found that Comerica and Wiley were entitled to sanctions from Hurt pursuant to MCL 600.2591, and that they were entitled to sanctions from Mills based on MCR 2.114(E). Pursuant to MCL 600.2591(3), a claim is frivolous if "[t]he party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party," "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true," or "[t]he party's legal position was devoid of arguable legal merit."[62] MCR 2.114(E), mandatorily imposes sanctions for signing a document without confirming through reasonable inquiry that the document was "well grounded in fact."

First, under the facts of this case, it was unreasonable for Hurt to believe that an escrow account may be in the form of a checking account. The deposit slip for the $15,000 that Hurt deposited at Comerica, after Wiley allegedly confirmed that the account was an escrow account, noted that the deposit was being made into GVC's checking account. Hurt testified that he completed the deposit slip in part at Wiley's direction.

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[58] *Id*.

[59] MCR 2.114(D)(2), (E).

[60] *Id*.

[61] *In re Costs & Attorney Fees*, 250 Mich App at 94.

[62] *BJ's & Sons Constr Co, Inc*, 266 Mich App at 404.

Hurt provided an affidavit regarding the motion for sanctions which stated that the fact that the account was in GVC's name was not significant to him because he "believed that GVC Networks was the entity that established the escrow account" and would have access to the account once the terms of the escrow agreement were satisfied. Hurt, however, previously testified during his deposition that it was his belief that if he were to deposit funds into an escrow account, the account would not be in GVC's name.

Second, Hurt's deposit of funds after he spoke with Wiley does not prevent a finding that the filing of his fraudulent misrepresentation claim was frivolous. Hurt testified at his deposition that he brought two cashier's checks totaling $15,000 with him when he met with Wiley at the Comerica branch at the Renaissance Center. Hurt explained that the purpose of going to see Wiley was to deliver the remaining funds of his $100,000 investment because the other funds had previously been wired. Hurt allegedly asked Wiley whether the account into which his funds were going to be deposited was an escrow account and asked whether the account was for purchasing the "Adelphia asset." According to Hurt, Wiley responded in the affirmative to both questions. Wiley also advised that $31,000 of the money that had been wired had arrived in the account, but $54,000 had not. Hurt claimed that had Wiley failed to indicate that the account was an escrow account, then he would have attempted to recover the money that he wired and would not have deposited the remaining $15,000.

As explained above, despite the $15,000 deposit occurring after the conversation with Wiley, based on the deposit slip that Hurt helped complete, Hurt was aware that his funds were being deposited into GVC's checking account. Hurt also believed at the time his deposit was made that if he were depositing funds into an escrow account, the account would not be in GVC's name. Accordingly, Hurt's fraudulent misrepresentation claim was not frivolous merely because some of the funds were transferred before he spoke with Wiley. Rather, based on Hurt's belief regarding escrow accounts, at the time the cause of action for fraudulent misrepresentation was filed, Hurt had no reasonable basis to allege that he relied on Wiley's statement that the account was an escrow account when he made his deposit.[63] Thus, the trial court's imposition of sanctions on Hurt for filing a frivolous claim was not clearly erroneous.[64]

Based on the above evidence, the trial court concluded that Mills filed a complaint at which time reasonable inquiry would have revealed that it was not well grounded in fact.[65] Because there was no evidence presented that the above evidence could not have been discovered upon reasonable inquiry before the complaint was filed, we find that the trial court did not clearly err in also finding Mills liable for sanctions.[66]

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[63] *BJ's & Sons Constr Co, Inc*, 266 Mich App at 404; *Roberts*, 280 Mich App at 403; *Jerico Constr, Inc*, 257 Mich App at 36.

[64] *In re Costs & Attorney Fees*, 250 Mich App at 94; *Roberts*, 280 Mich App at 403.

[65] MCR 2.114(D)(2), (E).

[66] *In re Costs & Attorney Fees*, 250 Mich App at 94; *Roberts*, 280 Mich App at 403.

While Hurt and Mills argue that the trial court clearly erred because its ruling was allegedly inconsistent with the trial court's partial grant of summary disposition, the question on summary disposition was not whether the claim was frivolous, but instead was whether there was a genuine issue of material fact. Therefore, the court's determination that it was proper to sanction Hurt and Mills was not inconsistent. Additionally, Hurt and Mills have provided no case law to support that a trial court cannot deny summary disposition or a motion for directed verdict, and later grant a motion for sanctions after a determination that filing the claim was frivolous. Moreover, Hurt and Mills cite no authority to support that the court's determination regarding sanctions must be consistent with that of the case evaluators. Thus, there was no clear error by the trial court.[67]

III. DETERMINATION OF THE AMOUNT OF SANCTIONS

A. DOCKET NO. 299440

Comerica and Wiley raise on appeal and Hurt and Mills raise on cross-appeal that the trial court inappropriately determined the amount of sanctions. Specifically, Comerica and Wiley assert that based on the plain language of the statute[68] they are entitled to all of the costs and fees for defending against the entire lawsuit. Hurt and Mills assert that Comerica and Wiley are only entitled to the costs and fees incurred in defending against the fraudulent misrepresentation claim. We disagree with both positions. The amount of an award of sanctions is reviewed by this Court for an abuse of discretion.[69]

First, Comerica and Wiley have failed to cite case law to support that they are entitled to the reasonable costs and fees incurred in defending against the entire lawsuit. Comerica and Wiley rely on *Maryland Casualty Co v Allen* in which this Court noted that "in a case where the prevailing party can show that an action or defense was meritless from the outset, a party would be better off filing for sanctions under MCR 2.625," "which through MCL 600.2591 . . . grants relief upon a finding that a civil action or defense as an entirety is frivolous," "and thereby be guaranteed reasonable costs and fees incurred as a result of the whole action."[70] *Maryland Cas Co v Allen*, however, did not involve a grant of sanctions pursuant to MCL 600.2591, but rather pursuant to MCR 2.114 and thus, the Court's comment is dicta.

Second, the case law fails to support either party's interpretation of MCL 600.2591. MCL 600.2591 states in pertinent part:

> (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

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[67] *In re Costs & Attorney Fees*, 250 Mich App at 94.

[68] MCL 600.2591.

[69] *In re Costs & Attorney Fees*, 250 Mich App at 104.

[70] *Maryland Cas Co v Allen*, 221 Mich App 26, 32 n 1; 561 NW2d 103 (1997).

> 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.

MCL 600.2591 was interpreted by this Court in a case similar to the instant case in which one of several defenses to a civil action was found to be frivolous. In *In re Costs & Attorney Fees*, defendants argued that MCL 600.2591 required that sanctions awarded pursuant to that statute be causally connected to the frivolous defense.[71] This Court, however, rejected the argument and found that the relevant case law "only" required that the sanctions award be "reasonable."[72] Here, the same analysis applies as *In re Costs & Attorney Fees* also supports the conclusion that the statute fails to require that the reasonable costs in defending against the entire lawsuit be awarded as sanctions, or that the sanctions are required to be causally connected to defending against the frivolous cause of action.

Hurt and Mills assert that the trial court's failure to properly calculate the costs and attorney fees related to the fraud claim violated the American rule. "Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award."[73] MCL 600.2591 permits the recovery of reasonable costs and attorney fees as sanctions and does not necessitate that they causally relate to the fraud claim.[74] Thus, so long as the costs and attorney fees are determined to be reasonable, which the record demonstrates and will be discussed below, the American rule has not been violated.

Further, Hurt and Mills' argument that MCL 600.2591 must be read *in pari materia* with MCR 2.114(E) must fail. "Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates."[75] The trial court determined that sanctions were appropriate against Mills pursuant to MCR 2.114(E). MCR 2.114(E), however, is a court rule and MCL 600.2591 is a statute. In addition, the relevant statute[76] pertains to sanctions related to frivolous filings, and the court rule[77] relates to sanctions based on an attorney

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[71] *In re Costs & Attorney Fees*, 250 Mich App at 104.

[72] *Id*.

[73] *Haliw v City of Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005).

[74] *In re Costs & Attorney Fees*, 250 Mich App at 104.

[75] *Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of Office of Fin & Ins Regulation*, 287 Mich App 326, 334; 788 NW2d 842 (2010) (citation and quotations omitted).

[76] MCL 600.2591.

[77] MCR 2.114(E).

signing a document without determining through reasonable inquiry that the document was grounded in fact in violation of MCR 2.114(D). Thus, the statute and court rule are not appropriately read *in pari materia*.

Moreover, we find that the sanctions awarded in the instant case were reasonable under the circumstances and thus, the trial court did not abuse its discretion. "[T]he burden of proving the reasonableness of the requested fees rests with the party requesting them."[78] Here, during numerous days of evidentiary hearings regarding the motion for sanctions, Mills testified that the pleadings that she filed on behalf of the investors referred to the investors collectively. Additionally, in the first amended complaint Mills made one collective prayer for relief for the three investors, requested one collective case evaluation award, and sent deposition notices and discovery requests on behalf of all of the investors collectively. Defense counsel Henry Stancato agreed that the claims of the investors were presented together from the outset of the litigation. Stancato explained at the evidentiary hearing that the defense of the fraudulent misrepresentation claim made by Hurt was integrated into his defense of the fraudulent misrepresentation claims raised by Douglas and Martin, as the investors used the alleged repeated misrepresentations by Wiley to "fortify" their misrepresentation claims. Stancato also explained at length how the facts underlying the other causes of action being raised by the parties were interrelated with the facts of the misrepresentation claims.

The parties stipulated to the total number of attorney and paralegal hours expended by defense counsel in defending against the entire action, as well as the total amount of costs for the entire defense. Because each of the three investors brought five causes of action; the investors asserted all claims together and filed all documents collectively; and the defense of the investors' claims proceeded similarly, it was reasonable for the trial court to conclude that one third of the costs and fees associated with defending against the entire action was related to the defense of Hurt's claims. Additionally, the evidence elicited at the evidentiary hearings supports that the other causes of action raised by Hurt were intertwined with his fraud claim, thus the trial court's finding that the costs of defending against Hurt's claims could not reasonably be divided was reasonable and was not an abuse of discretion.[79]

Comerica and Wiley's argument that the trial court's reliance on *Tinnin v Farmers Ins Exch*,[80] warrants reversal must fail. *Tinnin* is a no-fault case that involves an award of attorney fees under the no-fault act.[81] Although the statute at issue in *Tinnin* is not the same as in the instant case, the trial court found *Tinnin* instructive regarding the reasonableness of an award of attorney fees, which is at issue in this case.[82]

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[78] *Smith v Khouri*, 481 Mich 519, 528-529; 751 NW2d 472 (2008).

[79] *Smith*, 481 Mich at 528-529; *In re Costs & Attorney Fees*, 250 Mich App at 104.

[80] *Tinnin v Farmers Ins Exch*, 287 Mich App 511; 791 NW2d 747 (2010).

[81] *Id*. at 517.

[82] *In re Costs & Attorney Fees*, 250 Mich App at 104.

Comerica and Wiley assert that because *Tinnin* is not limited to situations where a single plaintiff brings multiple causes of action, but also applies to cases involving multiple plaintiffs, the trial court should have found that because the claims of the investors were so intertwined, it would be unreasonable to distinguish the costs associated with defending against Hurt's claims only. As explained above, the trial court properly found that Comerica and Wiley were not entitled to sanctions for the defense of the entire lawsuit and found a reasonable basis to conclude that defending against Hurt's claims comprised one third of Comerica and Wiley's total defense costs and fees.

Additionally, Hurt and Mills argue that the reasoning of *Hughes v Hall*[83] should apply and this Court should find that only the costs and fees causally connected to the defense of the frivolously filed cause of action can be awarded as sanctions. *Hughes* involves a situation where a single cause of action was found to be frivolous.[84] *Hughes* is an unpublished case which is not precedentially binding.[85] *Hughes* discusses the proper imposition of sanctions pursuant to MCL 600.2591, as well as MCR 2.114(E).[86] The *Hughes* Court noted that pursuant to MCL 600.2591 "the court must award the reasonable costs and fees incurred by the prevailing party[.]"[87] Pursuant to MCR 2.114(E), however, sanctions may "include payment to the opposing parties of the reasonable expenses incurred because of the filing of the pleading[.]"[88] The Court found that because the trial court "never conducted an evidentiary hearing to determine the reasonableness of the fees and costs or the proper allocation of fees and costs attributable to the frivolous quantum meruit claim alone[,]" remand to the trial court for a determination of both was warranted.[89] Because the *Hughes* Court never found that MCL 600.2591 necessitated that the costs and fees awarded as sanctions be causally connected to the frivolously filed cause of action, we find *Hughes* unpersuasive to Hurt and Mills' position.

Hurt and Mills challenge the trial court's purported consideration of various billing entries that allegedly were related to claims of Douglas and Martin, as well as issues regarding Mills. Hurt and Mills assert that the entries were improperly included in the one third of costs and fees that were awarded as sanctions. The parties stipulated to the total number of attorney and paralegal hours for the entire lawsuit. The parties did not stipulate to a document containing the billing entries that comprised the total stipulated hours, nor is there evidence that such a document exists. Therefore, any argument that certain entries were inappropriately included in

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[83] *Hughes v Hall*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket No. 235033).

[84] *Id*. at 2.

[85] MCR 7.215(C)(1).

[86] *Hughes*, unpub op at 6.

[87] *Id*.

[88] *Id*.

[89] *Id*.

the one third attributed to the defense of Hurt's claims must fail as it cannot be established by the record evidence.

Hurt and Mills also argue that the $200 an hour attorney rate that was determined by the trial court was unreasonable because it failed to consider the amount of work done by lower-cost and higher-cost attorneys. Hurt and Mills failed to include the issue in the statement of the questions presented. Because an appellant must identify its issues in its brief in the statement of the questions presented in order for them to be properly presented,[90] the reasonableness of the attorney rate should not be considered. That notwithstanding, the record demonstrates that defense counsel worked on a blended rate, which was a discounted rate for its client, that ranged from $150 to $165 an hour during the pendency of the case. The blended rate considered that work was done by both lower-cost and higher-cost attorneys. The trial court noted in its June 30, 2010, opinion and order that based on a review of the median attorney rates for the attorneys who defended the instant action and considering those attorneys' dates of admission to the state bar, the "market rate for the services provided by" defense counsel was $200 an hour. Thus, the record does not support that the trial court failed to consider the amount of work performed by the lower-cost and higher-costs attorneys in reaching its conclusion regarding the appropriate hourly rate. Based on the above, there was no abuse of discretion by the trial court in determining the total amount of sanctions.[91]

Comerica and Wiley also assert that based on the plain language of MCL 600.2591, the trial court erred when it failed to impose sanctions on Hurt and Mills jointly and severally. We disagree. "The legal issues underlying a trial court's decision to award sanctions are reviewed de novo."[92]

The main goal of statutory interpretation "is to give effect to the intent of the Legislature" by first "focus[ing] on the language of the statute itself."[93] The statute states 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."[94] This Court has acknowledged the statute's use of the word "shall" to mean that violation of the statute results in the mandatory award of sanctions.[95] Although the statute indicates that costs and fees must be imposed against the "nonprevailing party and their attorney," the statute fails to state that the sanctions must be imposed "jointly and severally." Because "the Legislature is presumed to have intended the meaning expressed in the statute[,]" "[i]f statutory language is unambiguous[,]"[96] adding the requirement that sanctions be imposed jointly and severally on the

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[90] MCR 7.212(C)(5).

[91] *In re Costs & Attorney Fees*, 250 Mich App at 104.

[92] *BJ's & Sons Constr Co, Inc*, 266 Mich App at 409 n 8.

[93] *Petersen v Magna Corp*, 484 Mich 300, 307; 773 NW2d 564 (2009).

[94] MCL 600.2591.

[95] *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996).

nonprevailing party and their attorney is improper. Moreover, the case law has held that "[t]he imposition of joint and several liability for attorney fees and costs is permissible under Michigan law."[97]

The relevant statute[98] and the court rule[99] fail to preclude apportionment of the sanctions award and permit apportioning sanctions to the nonprevailing party's attorney. Here, the trial court found that because Mills was responsible for filing one of five causes of action, in violation of the court rule,[100] she was responsible for one fifth of the sanctions award. Because the court rule indicates that the sanctions awarded for violation of the rule may include "the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees,"[101] the apportionment was reasonable and there was no error by the trial court.[102]

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto

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[96] *Petersen*, 484 Mich at 307.

[97] *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162, 172; 712 NW2d 731 (2005).

[98] MCL 600.2591.

[99] MCR 2.114(E).

[100] *Id*.

[101] *Id*.

[102] *BJ's & Sons Constr Co, Inc*, 266 Mich App at 409 n 8.