STATE OF MICHIGAN

COURT OF APPEALS

ABBY DUNCAN and SAMANTHA SUMMERFIELD, Plaintiffs-Appellants,	UNPUBLISHED December 6, 2011
v	No. 300446 Oakland Circuit Court
TRICHO SALON AND SPA, LLC and MICHAEL STEIN, Defendants-Appellees.	LC No. 2009-105759-CD

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this action for fraud, conversion, unjust enrichment, and a declaratory judgment, plaintiffs Abby Duncan and Samantha Summerfield appeal as of right the trial court's order, granting summary disposition for defendants Tricho Salon and Spa, LLC ("Tricho Salon") and Michael Stein. We affirm in part and reverse in part.

I. PERTINENT FACTS

Tricho Salon is a Michigan limited liability company operating in Ann Arbor. Stein owns Tricho Salon. Stein is also the CEO of Tricho of Novi, LLC ("Tricho of Novi"), which is located in Novi. Plaintiffs began working for Tricho Salon as hair stylists, Duncan in 2006 and Summerfield in 2007. Plaintiffs entered into noncompetition agreements, which provided that plaintiffs' employer was "Tricho Salon and Spa of Novi, Inc." In the agreements, plaintiffs agreed not to work as hair stylists within ten miles of "Tricho" for a period of 120 days after leaving "Tricho." In consideration for their promises not to compete, "Tricho" agreed to pay them each $500 per week for 12 weeks.

During plaintiffs' employment with defendants, Tricho of Novi had a group health insurance policy with Blue Cross Blue Shield of Michigan ("Blue Cross"). Plaintiffs authorized defendants to deduct health insurance premiums from their earnings and forward them to Blue Cross. Plaintiffs' insurance premiums renewed and also increased in December 2008. In an effort to "keep his rates down," Stein attempted to demonstrate to Blue Cross through letters from a certified public accountant that Tricho Salon and Tricho of Novi were under "common control." Blue Cross, however, rejected Stein's attempts to establish "common control." "[A]t some point, . . . Stein or someone else issued a check to Blue Cross . . . to pay for premiums" for

December 25, 2008, through February 25, 2009. But, in March 2009, Blue Cross terminated the group policy retroactive to February 25, 2009, because of "nonpayment," i.e., because the check issued to Blue Cross was not sufficient to pay for plaintiffs' premiums. Stein learned of the policy cancellation in March 2009 and contacted Robert Koski, Tricho of Novi's Blue Cross insurance agent. Koski informed Stein that a "bureaucratic snafu" had occurred and assured him that he would work to reinstate the group policy back to the date of cancellation so that all claims during the period of cancellation would be honored. Koski also told Stein not to forward plaintiffs' premiums to Blue Cross during the period of cancellation because Blue Cross would not accept the premiums until the group policy was reinstated. Blue Cross sent a refund to Stein on April 20, 2009, for the check it received for premiums for the period of December 25, 2008, through February 25, 2009. Defendants contacted Koski "numerous times" for updates regarding the reinstatement of the group policy. Koski said that reinstatement was "in progress" and "imminent" and instructed Stein to continue deducting plaintiffs' premiums.

Defendants insist that they explained the cancellation to plaintiffs and that plaintiffs agreed to the continued deduction of their premiums. But, according to plaintiffs, they learned that Blue Cross terminated their insurance coverage when they attempted to obtain health care and were denied. Furthermore, no one told them that their premiums were being deducted but not sent to Blue Cross. They reported the "matter" to Koski and Stein "months" before August 2009. Plaintiffs insist that they did not consent to defendants' retention of their premiums during the cancellation period. Plaintiffs demanded that defendants return the premiums that they deducted during the cancellation period, but defendants refused.

On August 3, 2009, plaintiffs called Blue Cross's antifraud hotline and claimed that defendants continued to deduct premiums from their earnings when they did not have insurance coverage. Lee Juarez, a fraud investigator for Blue Cross, began investigating plaintiffs' allegations on August 7, 2009. According to plaintiffs, they "began to be singled out for selective treatment at work" after they made the complaint to Blue Cross. Defendants diverted their clients to other hairdressers by misleading the clients into believing that plaintiffs no longer worked at the salon or were otherwise unavailable. Additionally, Stein moved Summerfield to a work station by the front window of the salon because he "liked the way [she] look[ed]." Furthermore, Stein referred to people of Indian descent as "Dots" and instructed plaintiffs to charge African Americans more than customers who were not African American.

From March 2009 until August 2009, defendants did not pay premiums to Blue Cross for the group policy. On August 25, 2009, Blue Cross received a certified check from defendants for eight months of insurance premiums on the group policy, payable through October 25, 2009. Blue Cross reinstated the group policy without lapse back to the date of cancellation. Juarez informed plaintiffs of the reinstatement, ended his investigation, and decided not to refer the matter to law enforcement. Plaintiffs requested a release from their noncompetition agreements so that they could work at a friend's salon within the agreements' geographic restriction. Defendants denied the request.

On November 25, 2009, plaintiffs filed the instant action against defendants, alleging four claims: (1) a declaratory judgment that the noncompetition agreements were "unconscionable and unenforceable as a matter of law"; (2) fraud; (3) unjust enrichment; and (4) conversion of money. In April 2010, Summerfield ended her employment with defendants.

Plaintiffs moved to amend their complaint to both add Lynn McMullin and Tricho of Novi as defendants and to allege additional causes of action.[1] The trial court denied the motion. Defendants moved for summary disposition under both MCR 2.116(C)(8) and MCR 2.116(C)(10) and also for sanctions under MCR 2.114(E)-(F), MCR 2.625, and MCL 600.2591. Plaintiffs then moved to amend their complaint under MCR 2.116(I)(5) to allege additional causes of action.[2] Defendants responded to plaintiffs' motion to amend under MCR 2.116(I)(5) and requested that plaintiffs be ordered to pay $1,250 in sanctions under "MCR 2.313(D)(b)" for the motion to amend. On September 10, 2010, the trial court issued an opinion and order, granting defendants' motion for summary disposition and denying both defendants' initial motion for sanctions and plaintiffs' motion to amend their complaint. The trial court determined that plaintiffs' motion to amend under MCR 2.116(I)(5) was "not substantially justified" because "[a]ll of the proposed claims [were] legally and factually insufficient." Therefore, under "MCR 2.313(D)(b)," the trial court granted defendants' request for sanctions regarding the amended complaint and ordered plaintiffs' attorney to pay $1,200 in sanctions to defendants.

II. SUMMARY DISPOSITION

Plaintiffs contend that the trial court erroneously granted summary disposition in favor of defendants for two reasons: (1) summary disposition was premature because defendants refused to cooperate during discovery and discovery was incomplete and (2) defendants failed to sustain their burden of proving that they were entitled to judgment as a matter of law. We disagree.

We review a trial court's summary disposition ruling de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants moved for summary disposition under both MCR 2.116(C)(8) and (C)(10). In its opinion and order granting defendants' motion for summary disposition, the trial court stated that it "reviewed the motion pursuant to MCR 2.116(C)(10). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers

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[1] The proposed amended complaint alleged the following causes of action: (1) fraud—misrepresentation; (2) silent fraud—nondisclosure; (3) fraud based on bad faith promise; (4) innocent misrepresentation; (5) promissory estoppel; (6) conversion; (7) violation of Michigan's Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; (8) retaliatory discharge; (9) tortious interference with a business relationship or expectancy; (10) constructive discharge; (11) hostile work environment; and (12) declaratory judgment that plaintiffs' agreements not to compete are unenforceable.

[2] The proposed amended complaint under MCR 2.116(I)(5) alleged the following causes of action: (1) fraud—misrepresentation; (2) silent fraud—nondisclosure; (3) fraud based on bad faith promise; (4) innocent misrepresentation; (5) intentional infliction of emotional distress; (6) conversion; (7) trespass to chattels; (8) tortious interference with a business relationship or expectancy; (9) breach of fiduciary duty; (10) negligence; (11) breach of express contract; (12) breach of implied contract; (13) breach of implied bailment contract; (14) promissory estoppel; (15) unjust enrichment; (16) violation of the WPA; (17) retaliatory discharge; (18) constructive discharge; (19) hostile work environment; and (20) declaratory judgment that plaintiffs' agreements not to compete are unenforceable.

the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Human Servs Dep't*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

With respect to plaintiffs' argument regarding defendants' refusal to cooperate during discovery, plaintiffs do not present this Court with any legal authority for the proposition that a trial court erroneously grants summary disposition when it does so in favor of a party who does not cooperate during discovery. "An appellant may not merely . . . leave it to this Court to . . . search for authority for its position." *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). Thus, we decline to address this abandoned issue.

Plaintiffs do argue with appropriate legal authority that the trial court prematurely granted summary disposition for defendants because discovery had not been completed and further discovery stood a reasonable chance of uncovering factual support for their position. Generally, a "motion for summary disposition under MCR 2.116(C)(10) is premature if discovery has not closed." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 271; 715 NW2d 914 (2006). "However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006).

Here, the trial court granted summary disposition for defendants on September 10, 2010, after both the time for discovery ended on June 14, 2010, and the trial court denied plaintiffs' motion to compel discovery on June 16, 2010. See *St Clair Med*, 270 Mich App at 271. Plaintiffs assert that "[m]uch needed discovery remained to be had in this matter" and that a reasonable chance of uncovering "factual support" for their position remained. But, plaintiffs do not state what "[m]uch needed discovery" or "factual support" allegedly remained when the trial court granted summary disposition. Summary disposition is not prematurely granted where the party who opposed the motion fails to identify specific facts or independent evidence that he or she anticipated discovering to support his or her position. *Id.*; see also *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004) ("Without any assertion regarding what facts are . . . likely to be uncovered by further discovery, allegedly incomplete discovery will not bar summary disposition."). Therefore, we decline to reverse the trial court's grant of summary disposition to defendants on this basis.

Furthermore, we find that the trial court properly concluded that there was no genuine issue as to any material fact and defendants were entitled to judgment as a matter of law on all of plaintiffs' claims. See *Campbell*, 286 Mich App at 235.

With respect to the enforceability of the noncompetition agreements, plaintiffs argue that the agreements are unenforceable because "Tricho Salon and Spa of Novi, Inc." is not an

existing legal entity.[3] We initially note that this argument is not properly before this Court because the argument "was neither the basis for [plaintiffs'] claim of [declaratory judgment] in [their] complaint nor the reason given by the trial court for dismissal." *Check Reporting Servs, Inc v Mich Nat'l Bank-Lansing*, 191 Mich App 614, 625; 478 NW2d 893 (1991). Nevertheless, we find that the argument fails. "It is an old rule, and a sensible one, that the misnomer of a person or corporation in a written instrument will not defeat a recovery thereon, if the identity sufficiently appears from the name employed in the writing or is satisfactorily established by proof." *St Matthew's Evangelical Lutheran Church v United States Fidelity & Guaranty Co*, 222 Mich 256, 262; 192 NW 784 (1923); see also *PIM, Inc v Steinbichler Optical Technologies USA, Inc*, 468 Mich 896; 660 NW2d 73 (2003) ("The misnomer of a person or corporation in a written instrument will not defeat a recovery thereon if the identity sufficiently appears from the name employed in the writing or is satisfactorily established by proof."). Moreover, our Supreme Court has determined that the misnomer of a business entity in a contract is immaterial when "[i]t does not appear that any fraudulent intent was involved or that anyone was in any way deceived." *PIM, Inc*, 468 Mich at 896; see also *Bil-Gel Co v Thoma*, 345 Mich 698, 704-705; 77 NW2d 89 (1956). Here, the noncompetition agreements provided that "Tricho Salon and Spa of Novi, Inc." was plaintiffs' employer. However, "Tricho Salon and Spa of Novi, Inc." is neither plaintiffs' employer nor a legal entity. Nevertheless, the misnomer does not defeat the enforceability of the agreements. The identity of plaintiffs' employer sufficiently appears from the name employed in the agreements, and it does not appear that any fraudulent intent was involved or that the parties were deceived. See *St Matthew's*, 222 Mich at 262; *PIM, Inc*, 468 Mich at 896; *Bil-Gel*, 345 Mich at 704-705.

Accordingly, defendants were entitled to judgment as a matter of law on plaintiffs' claim that the noncompetition agreements are not enforceable.

For their claim of fraud, plaintiffs must have established the following: (1) defendants made a material misrepresentation; (2) the representation was false; (3) when defendants made the representation, defendants either knew that the representation was false or recklessly lacked knowledge of its truth as a positive assertion; (4) defendants intended plaintiffs to act upon the representation; (5) plaintiffs relied on the representation; and (6) plaintiffs suffered damages. *Cummins v Robinson Twp*, 283 Mich App 677, 695-696; 770 NW2d 421 (2009). The fraud must have proximately caused the damages. See *Rosenblatt v John F Ivory Storage Co*, 262 Mich 513, 516-517; 247 NW 733 (1933); *Findlater v Dorland*, 152 Mich 301, 307-308; 116 NW 410

[3] In their complaint, plaintiffs alleged that the noncompetition agreements were "unconscionable and unenforceable as a matter of law as they place unreasonable time and place restrictions on the Plaintiffs and act as an unreasonable restraint on the Plaintiffs' ability to practice their trade and make a living." Plaintiffs also alleged that the agreements were unenforceable because defendants materially breached the agreements by creating a hostile work environment and failing to provide plaintiffs medical insurance coverage. Plaintiffs, however, do not argue to this Court that the noncompetition agreements are unenforceable for these reasons. Therefore, plaintiffs have abandoned these arguments. See *Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681, 686; 600 NW2d 339 (1999).

(1908). In a claim for silent fraud, "[t]he false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts the defendant has a [legal or equitable] duty to disclose." *Clement-Rowe v Mich Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995); *M&D, Inc v W B McConkey*, 231 Mich App 22, 32-33; 585 NW2d 33 (1998).

We find that plaintiffs failed to establish the damages element of their fraud claim. In their complaint, plaintiffs requested "reimbursement for all monies deducted for premiums and reimbursement for all uncovered medical expenses incurred by Plaintiffs . . . ." However, our Supreme Court has held that an insured may not recover premiums paid to an insurer for an insurance policy when the insured was covered by the policy and "had the benefits of the policy." *Warren v Fed Life Ins Co*, 198 Mich 342, 354-355; 164 NW 449 (1917); *Anderson v Conductors' Protective Assurance Co*, 266 Mich 471, 478-479; 254 NW 171 (1934). It is undisputed that defendants paid Blue Cross plaintiffs' premiums for the period of cancellation. Blue Cross reinstated the group policy to the date of cancellation. And, Blue Cross would accept claims incurred by plaintiffs during the period of cancellation. Moreover, plaintiffs did not submit any evidence to the trial court illustrating that they incurred uncovered medical expenses. Indeed, plaintiffs do not contest that Blue Cross would accept claims incurred by plaintiffs during the period of cancellation.

In their appellate brief, plaintiffs assert that they incurred additional damages not alleged before the trial court: the inability to afford to obtain medical care from February 25, 2009, until August, 25, 2009, and the denial of the opportunity to invest the insurance premiums as they saw fit. We reject this unpreserved argument. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005) (argument not preserved if not raised before trial court). The alleged fraud in the present case did not proximately cause these alleged damages. See *Rosenblatt*, 262 Mich at 516-517; *Findlater*, 152 Mich at 307-308. An inability to afford health care and a loss of opportunity to invest the premiums could not be the natural and probable result of either defendants' alleged misrepresentation to plaintiffs that they were insured or defendants' failure to disclose both the cancellation of the policy and defendants' retention of the premiums. See *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 625; 769 NW2d 911 (2009). Rather, the alleged damages would only be the natural and probable result of defendants' alleged refusal of plaintiffs' demand to return the premiums that defendants withheld from plaintiffs' earnings, i.e., the alleged conversion. Thus, the trial court did not plainly error in failing to find that plaintiffs suffered damages in this respect. See *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000).

Accordingly, we conclude that the trial court did not err by granting summary disposition for defendants on plaintiffs' fraud claim.

We also conclude that the trial court did not err by granting summary disposition for defendants on plaintiffs' claim of unjust enrichment. "Unjust enrichment is . . . the unjust retention of money or benefits which in justice and equity belong to another." *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260 (2010) (quotations omitted). "The elements of a claim of unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *B & M*

Die Co v Ford Motor Co, 167 Mich App 176, 181; 421 NW2d 620 (1988). Although defendants retained plaintiffs' premiums during the period of cancellation and plaintiffs assert that they demanded that defendants return the premiums to them, there is no evidence that defendants retained or used the premiums for their own benefit. Defendants were not unjustly enriched because they ultimately forwarded the premiums to Blue Cross for plaintiffs' benefit in August 2009. See *Tkachik*, 487 Mich at 48. There is no restitution to be made. See *B & M Die Co*, 167 Mich App at 181.

We also conclude that the trial court did not err by granting summary disposition for defendants on plaintiffs' claim of conversion. "The tort of conversion is any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). "To support an action for conversion of money, the defendant must have an obligation to return *the specific money entrusted in his care*." *Id.* (emphasis added); see also *Garras v Bekiares*, 315 Mich 141, 148-149; 23 NW2d 239 (1946) ("Money in any form is generally regarded and treated as property, and it is well settled that an action will lie for the conversion thereof, where there is an obligation to keep intact or deliver the specific money in question, and where such money can be identified."). Here, plaintiffs did not entrust defendants with a specific, identifiable cache of money for which defendants were obligated to return the identical money. See *Head*, 234 Mich App at 111; *Garras*, 315 Mich at 147; *AFSCME v Bank One*, 267 Mich App 281, 295 n 6; 705 NW2d 355 (2005). Rather, defendants withheld an amount of money from plaintiffs' paychecks for purposes of paying insurance premiums to Blue Cross. Thus, because defendants did not have an obligation to return "specific and identical" money to plaintiffs, defendants were entitled to judgment as a matter of law on plaintiffs' conversion claim.[4] See *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 437-438; 683 NW2d 171 (2004), rev'd on other grounds 472 Mich 192 (2005); see also *Head*, 234 Mich App at 111.

Accordingly, we affirm the trial court's grant of summary disposition for defendants.

III. MOTION TO AMEND

Plaintiffs contend that the trial court abused its discretion when it denied their motion to amend their complaint under MCR 2.116(I)(5) on the basis of undue prejudice and futility. We disagree.

We review a trial court's decision on a motion to amend a pleading for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A trial court abuses

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[4] The trial court granted summary disposition in favor of defendants on plaintiffs' conversion claim for two reasons: (1) "there [was] no evidence that the subject deductions were converted by Defendants for their own use" and (2) "Plaintiffs suffered no damage since [defendants] paid for coverage." "[W]e will not reverse the [trial] court's order when the right result was reached for the wrong reason." *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

its discretion when it reaches a decision that falls outside the range of principled outcomes. *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009).

If a trial court grants summary disposition under MCR 2.116(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." MCR 2.116(I)(5); *Weymers*, 454 Mich at 658. Our Supreme Court has opined that a trial court should ordinarily grant a motion to amend a pleading and deny it only for the following reasons: (1) undue delay; (2) bad faith or dilatory motive of the movant; (3) repeated failure to cure deficiencies in previous amendments; (4) undue prejudice to the opposing party; or (5) futility. *Weymers*, 454 Mich at 658; see also *Boylan v Fifty Eight LLC*, 289 Mich App 709, 727-728; ___NW2d___ (2010). "Prejudice exists if the amendment would prevent the opposing party from receiving a fair trial . . . ." *Decker v Rochowiak*, 287 Mich App 666, 682; 791 NW2d 507 (2010) (quotations omitted). In *Weymers*, our Supreme Court held that a trial court may find undue prejudice in the following situation:

> when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial. [*Weymers*, 454 Mich at 659-660.]

The *Weymers* Court recognized that "parties ought to be afforded great latitude in amending their pleading before trial, however, that interest must be weighed against the parties' and the public's interest in the speedy resolution of disputes." *Id.* at 660. Thus, the Court emphasized the following:

> "A party is not entitled to wait until the discovery cutoff date has passed and a motion for summary disposition has been filed on the basis of claims asserted in the original complaint before introducing entirely different legal theories in an amended complaint. . . . Putting the defendants through the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would be manifestly unfair and unduly prejudicial." [*Id.* at 661, quoting *Priddy v Edelman*, 883 F2d 438, 446-447 (CA 6, 1989).]

We conclude that the trial court's decision to deny plaintiffs' motion to amend their complaint on the basis of undue prejudice did not fall outside the range of principled outcomes. See *Auto-Owners*, 284 Mich App at 612. Plaintiffs moved to amend on July 12, 2010, after discovery closed on June 14, 2010. Case evaluation was conducted in July 2010. Plaintiffs' motion to amend sought to add 15 new claims on the basis of the same set of facts. Of the 15 new claims that plaintiffs alleged, eight were made in plaintiffs' prior motion to amend, which the trial court denied; defendants certainly relied on the trial court's denial of plaintiffs' motion to conclude that plaintiffs would not rely on these new claims at trial. The other seven new claims were not made in plaintiffs' prior motion to amend, and it does not appear that defendants had reasonable notice of these claims.

Moreover, having reviewed each of the 20 claims in plaintiffs' proposed amended complaint, we conclude that the amendment was not justified for the additional reason of futility. See MCR 2.116(I)(5); *Weymers*, 454 Mich at 658. The claims are legally insufficient on their face and, in some cases, conclusory and unsupported by factual allegations. See *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003); *Wormsbacher v Phillip R Seaver Title Co*, 284 Mich App 1, 8-9; 772 NW2d 827 (2009).

Accordingly, we affirm the trial court's denial of plaintiffs' motion to amend under MCR 2.116(I)(5).

IV. SANCTIONS

Plaintiffs' final contention is that the trial court abused its discretion when it awarded defendants sanctions under "MCR 2.313(D)(b)" because plaintiffs' motion to amend under MCR 2.116(I)(5) was "not substantially justified" and the proposed claims were "legally and factually insufficient." We agree.

We review a trial court's imposition of discovery sanctions for an abuse of discretion. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 697; 662 NW2d 804 (2003) (citations omitted). We review "for clear error [a] trial court's determination whether to impose sanctions under MCR 2.114." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). A decision is clearly erroneous when this Court is "left with a definite and firm conviction that a mistake has been made." *Id.* We review de novo a trial court's interpretation of the court rules. *In re Brown*, 229 Mich App 496, 500; 582 NW2d 530 (1998).

Under MCR 2.313(A), a party may move for an order compelling discovery. "The provisions of MCR 2.313(A)(5) apply to the award of expenses incurred in relation to the motion." *Marketos v American Employers Ins Co*, 185 Mich App 179, 197-198; 460 NW2d 272 (1990). More specifically, MCR 2.313(A)(5)(a) applies to the award of expenses if the trial court grants a motion to compel discovery. See MCR 2.313(A)(5)(a). And, MCR 2.313(A)(5)(b) applies to the award of expenses if the trial court denies a motion to compel discovery. See MCR 2.313(A)(5)(b). MCR 2.313(A)(5)(b) reads as follows:

> If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion, or both, to pay to the person who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

In this case, the trial court sanctioned plaintiffs under "MCR 2.313(D)(b)." However, MCR 2.313(D)(b) does not exist. Rather, it appears that the trial court relied upon MCR 2.313(A)(5)(b) to sanction plaintiffs. Indeed, defendants cited the language of MCR 2.313(A)(5)(b) when they requested sanctions in their response to plaintiffs' motion for leave to amend. And, the trial court's use of the words "substantially justified" illustrates its reliance on MCR 2.313(A)(5)(b) to award the sanctions to defendants. The trial court's reliance on MCR 2.313(A)(5)(b) was misplaced. The trial court did not sanction plaintiffs after denying a motion

to compel discovery; rather, the court sanctioned plaintiffs for their motion to amend their complaint under MCR 2.116(I)(5). Thus, MCR 2.313(A)(5)(b) did not provide the trial court with a basis to sanction plaintiffs. See *Marketos*, 185 Mich App at 197-198; MCR 2.313(A).

We reject defendants' contention that the trial court did not abuse its discretion because they sought sanctions under MCR 2.625(A)(2), the authority to grant sanctions under MCR 2.313(A)(5)(b) and MCR 2.625(A)(2) is the same, and the trial court correctly found that plaintiffs' motion to amend was "legally and factually devoid of merit." The trial court did not conclude that plaintiffs' proposed amended complaint was frivolous, i.e., "devoid of arguable legal merit," but, rather, "legally and factually insufficient." See MCR 2.114(F), MCR 2.625(A)(2); MCL 600.2591(3)(a)(iii). On its face, the standard "devoid of arguable legal merit" is a more demanding than "legally and factually insufficient." Therefore, the trial court's conclusion that plaintiffs' proposed amended complaint was "legally and factually insufficient" was legally insufficient to justify sanctioning plaintiffs under MCR 2.114(F) and MCR 2.625(A)(2). See MCR 2.114(F); MCR 2.625(A)(2); MCL 600.2591(3)(a)(iii).

Accordingly, we reverse the trial court's award of $1,200 in sanctions related to plaintiffs' motion to amend.

We note that, in their appellate brief and during oral argument, defendants requested sanctions for having to defend a vexatious appeal. However, defendants did not file the required motion pursuant to MCR 7.211(C)(8). See MCR 7.216(C)(1); see also *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 182; 761 NW2d 784 (2008). Nonetheless, we have considered the issue and decline to award sanctions under MCR 7.216(C)(1). See *Bonkowski*, 281 Mich App at 182 (appeal not vexatious where appellant prevails in part).

Affirmed in part and reversed in part.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause