STATE OF MICHIGAN

COURT OF APPEALS

COMPLETE ANIMAL CONTROL SOLUTIONS, LLC, Plaintiff-Appellant, and PARKER & PARKER, Appellant, v ALIDA WOLNEY and JAMES WOLNEY, Defendants-Appellees.	UNPUBLISHED April 30, 2013 No. 310535 Livingston Circuit Court LC No. 12-026534-CK

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

In this case concerning an alleged breach of contract by defendants, James and Alida Wolney, for failing to pay plaintiff, Complete Animal Control Solutions LLC, for services performed at defendants' bat-infested home, plaintiff and plaintiff's counsel, Parker & Parker, appeal as of right from the trial court's order granting sanctions under MCL 600.2591 against plaintiff and Parker & Parker. The court had previously granted summary disposition under both MCR 2.116(C)(5) (lack of capacity to sue) and (C)(8) (failure to state a claim) in favor of defendants. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In June 2011, defendants' residence in Howell, Michigan was severely infested with bats, so they filed a claim with their insurer, State Farm. State Farm recommended that defendants hire plaintiff to provide bat remediation services. Plaintiff's owner, Kathleen Ellis, inspected defendants' residence. The attic was filled with bats, bat feces and urine, and debris. Bat excrement had destroyed the roof and siding, which necessitated repair.

Plaintiff and defendants agreed in July 2011 that plaintiff would provide labor and material for bat remediation and restoration of the residence. Plaintiff initiated bat remediation services and work on defendants' roof, but bats were still entering the home. The damage to the home from bat excrement and debris was so extensive that it was determined that the home had to be "gutted." At the end of July 2011, rain water contaminated with bat feces and urine leaked into the home because the roof was not properly covered. Because the home was uninhabitable, defendants stayed on their property in a trailer provided by State Farm. Plaintiff provided pods to store defendants' personal property. In early August 2011, bats still remained in defendants' home. The remainder of the roof to the home was removed, and water began flooding into the basement. The home's carpeting was soaked with water and feces.

Plaintiff and defendants agreed on August 8, 2011, to an initial contract price of $81,388.37 and a scope of work that was approved by State Farm. The State Farm scope-of-work documentation provided for extensive restoration services and remodeling of defendants' home, including demolition, floor covering (carpet and ceramic tile), carpentry trimwork, framing and rough carpentry, painting, insulation work, siding for the home, tiling, and work with cabinetry, doors, drywall, and the soffit, fascia, and gutters of the home. The documentation did not reference bat removal or remediation. On August 13, 2011, plaintiff and defendants entered into a one-page handwritten "Contractor's Contract" on an invoice form. This handwritten contract included a description of work that plaintiff was to perform, incorporating by reference the scope of work approved by State Farm. The contract stated that all work would be "done to Applicable Builders Code." The contract referenced "Bat Activity in Attic" but did not provide for bat removal or remediation.

Although the parties dispute the reason for plaintiff doing so, plaintiff stopped working on defendants' home on August 29, 2011. On September 15, 2011, defendants sent plaintiff a letter notifying it that its services were terminated effective immediately. In November 2011, Mission Carpentry LLC recorded a claim of lien regarding defendant's property, and plaintiff recorded a construction lien on the property.

Plaintiff sued defendants on February 3, 2012, alleging claims for breach of contract, quantum meruit, open account, and fraud. Plaintiff alleged that the amount due to it under the contract that defendant breached was $81,388.37 and, thus, requested a judgment against defendants for $81,388.37 plus costs, interest, and attorney fees. Plaintiff also requested that the court appoint a receiver for insurance funds and order that defendants provide the receiver with any funds that they had already received from their insurance carrier for labor or materials provided to their home for their claim of loss. On the same day, plaintiff recorded a notice of lis pendens concerning defendants' property.

The trial court appointed a receiver. Defendants moved for summary disposition under MCR 2.116(C)(5) (lack of legal capacity to sue) and (C)(8) (failure to state a claim). Defendants argued that plaintiff's claims were barred because plaintiff, an unlicensed residential builder, lacked the legal capacity to sue. Defendants also argued that plaintiff's construction lien and notice of lis pendens were invalid and constituted slander of title and that the receivership should be terminated. Defendants insisted that they were entitled to sanctions under MCR 2.114(D)-(E); MCR 2.625(A)(2), and MCL 600.2591(3)(a)(iii) because plaintiff filed frivolous claims. Plaintiff responded that it was licensed by the state of Michigan to engage in "damage control

and nuisance caused by wild animals, and to use non-pesticide methods to control and remove wild animals." Plaintiff argued that its work at defendants' residence did not require a building permit. Plaintiff also argued that it was exempt from licensure requirements under MCL 339.2403(e) because "it was working under contract with a licensed residential builder," Mission Carpentry LLC.

On April 19, 2012, the trial court granted defendants' motion for summary disposition and dismissed each count of plaintiff's complaint. The court explained that the Residential Builders Act, MCL 339.2401 *et seq.*, required plaintiff to maintain a residential maintenance and alteration contractor's license to perform the contracted work and that plaintiff's failure to do so precluded it from obtaining relief either in law or equity. The court dismissed the receivership and ordered that both the claim of lien and the lis pendens be discharged within 14 days. The court ordered that plaintiff would be responsible for defendants' costs following defendants' submission of a bill of particulars for February 28, 2012, to April 19, 2012. It noted that there was no legal merit to the arguments that plaintiff made in defending the motion for summary disposition.

On May 3, 2012, defendants moved the trial court to award $8,688.50 in sanctions against plaintiff and its counsel, jointly and severally. Plaintiff moved the trial court for reconsideration and, in response to defendants' motion for sanctions, objected to various fees and expenses requested by defendants. Parker & Parker argued that defendants were prohibited from obtaining fees from it under res judicata because the court had previously ruled that plaintiffs were responsible for defendants' attorney fees. The court granted defendants' motion for sanctions under MCL 600.2591 but struck several of the fees and costs from defendants' bill of particulars, awarding $5,676 in sanctions against plaintiff and Parker & Parker, jointly and severally. The court denied plaintiff's motion for reconsideration.

II. SUMMARY DISPOSITION

Plaintiff first argues that the trial court erred by granting summary disposition in favor of defendants. We disagree.

We review de novo a trial court's summary-disposition ruling. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Here, the trial court granted summary disposition in favor of defendants under both MCR 2.116(C)(5) and (C)(8). However, the parties and the trial court relied on matters outside of the pleadings for defendants' motion for summary disposition. Therefore, MCR 2.116(C)(5) is the appropriate basis for review. Cf. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008) (explaining that MCR 2.116(C)(10), which requires consideration of documentary evidence beyond the pleadings, is the appropriate basis for review when the parties and the trial court relied on matters outside of the pleadings for summary disposition). "In reviewing a trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(5), this Court reviews the entire record to determine whether the moving party was entitled to judgment as a matter of law." *Edgewood Dev, Inc v Landskroener*, 262 Mich App 162, 165; 684 NW2d 387 (2004) (citation omitted).

Plaintiff first argues that the trial court erred by concluding that MCL 339.2412 precludes his claims. Plaintiff insists that the work it performed at defendants' residence did not require licensure. We reject this argument.

Under the Occupational Code, MCL 339.101 *et seq.*, "[a] person shall not engage in or attempt to engage in the practice of an occupation regulated under this act . . . unless the person possesses a license or registration issued by the department for the occupation." MCL 339.601(1). Article 24 of the Occupational Code (often referred to as the Residential Builders Act), MCL 339.2401 *et seq.*, "contains language that describes the scope of a builder's license, application procedure, qualifications, and process for suspension of a license." *Stokes v Millen Roofing Co*, 466 Mich 660, 664; 649 NW2d 371 (2002). A residential maintenance and alteration contractor's license "includes the following crafts and trades: *carpentry*; concrete; swimming pool installation; waterproofing a basement; excavation; *insulation work*; masonry work; *painting and decorating*; *roofing*; *siding and gutters*; screen or storm sash installation; *tile and marble work*; and *house wrecking*." MCL 339.2404(3) (emphasis added).

MCL 339.2412 provides as follows, in pertinent part:

> (1) A person or qualifying officer for a corporation or member of a residential builder[1] or residential maintenance and alteration contractor[2] shall

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[1] A "residential builder" is

> a person engaged in the construction of a residential structure or a combination residential and commercial structure who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, construction, replacement, repair, alteration, or an addition to, subtraction from, improvement, wrecking of, or demolition of, a residential structure or combination residential and commercial structure; a person who manufactures, assembles, constructs, deals in, or distributes a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing; or a person who erects a residential structure or combination residential and commercial structure except for the person's own use and occupancy on the person's property. [MCL 339.2401(a).]

[2] A "residential maintenance and alteration contractor" is, subject to several exceptions,

> a person who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another for the repair, alteration, or an addition to, subtraction from, improvement of, wrecking of, or demolition of a residential structure or combination residential and commercial structure, or building of a garage, or laying of concrete on residential property, or who engages in the purchase, substantial rehabilitation or

> not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.
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> * * *
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> (3) A person or qualifying officer for a corporation or a member of a residential builder or residential maintenance and alteration contractor shall not impose or take any legal or other action to impose a lien on real property unless that person was licensed under this article during the performance of the act or contract. [MCL 339.2412(1), (3).]

In this case, each count of plaintiff's complaint requests $81,388.37 in relief for materials and labor provided to defendants. The $81,388.37 figure corresponds with the parties' August 13, 2011, contractor's contract, which incorporates by reference the State Farm scope-of-work documentation that the parties agreed on August 8, 2011, would become part of their contract. There is no other written contract in this case. The scope-of-work documentation provided for extensive restoration services and remodeling of defendants' home, including the following, among other things: demolition; floor covering (ceramic tiling); various carpentry work; insulation work; painting; siding work; and work with cabinetry and the soffit, fascia, and gutters of the home. Plaintiff also worked on defendants' roof. Under the Occupational Code, a license is required for this work. See MCL 339.601(1); MCL 339.2404(3). There is no factual dispute that plaintiff did not have a license for this work. Indeed, plaintiff did not even allege in its complaint that it was licensed. Thus, MCL 339.2412(1) precludes plaintiff from bringing an action for the collection of compensation for the performance of the contract. Moreover, MCL 339.2412(3) prohibited plaintiff from imposing a lien on defendants' property.

Plaintiff insists that it was exempt from licensure under MCL 339.2403(e) because the acts that required licensure were performed by its licensed subcontractor, Mission Carpentry LLC. We conclude that plaintiff has abandoned this argument by presenting it in a cursory fashion with no citation to legal authority to illustrate that the trial court erred by failing to apply MCL 339.2403(e) to plaintiff. See *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). Regardless, plaintiff's argument lacks merit. MCL 339.2403(e) provides as follows:

> improvement, and resale of a residential structure, engaging in that activity on the same structure more than twice in 1 calendar year . . . . [MCL 339.2401(b).]

> Notwithstanding [MCL 339.301 to 339.317,] a person may engage in the business of or act in the capacity of a residential builder or a residential maintenance and alteration contractor or salesperson in this state without having a license, if the person is 1 of the following:
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> * * *
>
> (e) A person other than the salesperson who engages solely in the business of performing work and services under contract with a residential builder or a residential maintenance and alteration contractor licensed under this article.

In this case, there is no documentary evidence that plaintiff entered into a contract with Mission Carpentry LLC. And there is no documentary evidence that Mission Carpentry LLC was properly licensed. Furthermore, plaintiff made neither allegation in its complaint. Thus, plaintiff's argument fails on this basis alone. But, even assuming that plaintiff contracted with Mission Carpentry LLC and that Mission Carpentry LLC was licensed, plaintiff does not engage "*solely* in the business of performing work and services under contract with a residential builder or a residential maintenance and alteration contractor," MCL 339.2403(e) (emphasis added); plaintiff also contracted with defendants, who are neither a residential builder nor a residential maintenance and alteration contractor.

Plaintiff also insists that the parties' contract should be bifurcated because the initial and primary purpose of the contract was bat remediation. Plaintiff, thus, asserts that it is entitled to relief for the materials it provided and the services in the contract that do not require licensure. This argument lacks merit for two reasons. First, the August 13, 2011, contract for which plaintiff seeks to recover $81,388.37 did not provide for bat remediation services, the provision of storage pods, or for affording defendants a mobile home. The primary purpose of the contract was plainly for residential construction, demolition, and remodeling. Second, the Michigan Supreme Court in *Stokes*, 466 Mich at 667, explicitly held that MCL 339.2412 prohibits bifurcation.

Accordingly, MCL 339.2412(1) precludes plaintiff from bringing an action for the collection of compensation. Moreover, MCL 339.2412(3) prohibited plaintiff from imposing a lien on defendants' property. The trial court did not err by granting summary disposition in favor of defendants.

III. SANCTIONS

Plaintiff and Parker & Parker argue that the trial court abused its discretion by awarding sanctions against them. We disagree.

A. STANDARD OF REVIEW

We review for an abuse of discretion the trial court's decision to impose sanctions. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 450; 540 NW2d 696 (1995). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Kalaj v Khan*, 295 Mich App 420, 425; 820 NW2d 223 (2012). We review for clear error a trial court's determination that an action is frivolous. *BJ's & Sons Constr*

Co v Van Sickle, 266 Mich App 400, 405; 700 NW2d 432 (2005). A finding is clearly erroneous if this Court is "left with a definite and firm conviction that a mistake has been made." *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 133; 506 NW2d 556 (1993).

B. DECISION TO AWARD SANCTIONS

Plaintiff contends that the trial court abused its discretion because it neither identified under what authority it was awarding sanctions nor made a specific finding of frivolousness. Plaintiff insists that its civil action was not frivolous and contends that the court improperly relied on a communication between the parties' attorneys to conclude that plaintiff knew its complaint lacked merit.

MCL 600.2591 provides that "if a court finds that a civil action . . . was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." MCL 600.2591(1). A "prevailing party" is "a party who wins on the entire record." MCL 600.2591(3)(b). "Frivolous" means any of the following:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
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> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
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> (iii) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a)(i)-(iii).]

We conclude that the trial court did not clearly err by finding that plaintiff's civil action was frivolous. Although the trial court neither expressly stated that plaintiff's complaint was frivolous nor specifically cited one of the definitions of frivolous under MCL 600.2591(3)(a), it is evident from the record that the court determined that plaintiff's civil action was frivolous because plaintiff's legal position was devoid of arguable legal merit, MCL 600.2591(3)(a)(iii).[3] Plaintiff's legal position in the trial court was that it was entitled to compensation in the amount of $81,388.37 for materials and services that it provided defendants under the August 13, 2011,

[3] In their motion for summary disposition, defendants' sole basis for arguing that plaintiff's claim was frivolous was that plaintiff's position was devoid of arguable legal merit. During the April 12, 2012, hearing, defendants argued that plaintiff's claims were "filed directly in the face of unequivocal statutory authority" and that the case was "one of the most egregious examples of a case where there's no legal basis for recovery." During the hearing, the court noted that plaintiff moved for sanctions under "MCR 2.114, MCR 2.625 and MCL 600.25913(iii) [sic]." The court opined that that there was no legal merit to the arguments that plaintiff made in defending against the motion for summary disposition. The court also opined that it was clear that plaintiff did not have a case because plaintiff was not licensed. And in its May 12, 2012, order, the trial court ordered sanctions under MCL 600.2591.

contract. This position was devoid of arguable legal merit because MCL 339.2412(1) clearly prohibited plaintiff from maintaining its claims because it was not licensed. Plaintiff's legal position that it was exempt from licensure pursuant to MCL 339.2403(e) was also devoid of arguable legal merit. Given that plaintiff contracted with defendants—who are neither residential builders nor residential maintenance and alteration contractors—plaintiff clearly did not engage "*solely* in the business of performing work and services under contract with a residential builder or a residential maintenance and alteration contractor." MCL 339.2403(e) (emphasis added). Moreover, plaintiff did not even allege in its complaint that it subcontracted with Mission Carpentry LLC and that Mission Carpentry LLC was properly licensed. Finally, plaintiff's legal position that the August 13, 2011, contract could be bifurcated was plainly contrary to the Michigan Supreme Court's holding in *Stokes*. See *Stokes*, 466 Mich at 667.

We reject plaintiff's contention that the trial court improperly relied on a communication between the attorneys after the complaint was filed to conclude that plaintiff's civil action was frivolous. In support of its argument, plaintiff relies on *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003) (emphasis added), where this Court stated that "[t]he determination *whether a claim or defense is frivolous* must be based on the circumstances at the time it was asserted." However, plaintiff's reliance on *Jerico Construction* is misplaced because the record does not illustrate that the communication served as a basis for the court's *finding that plaintiff's civil action was frivolous.* See *id.* Rather, the record only shows that the court considered the communication when discussing what the sanction would be. Specifically, the court stated that defendants were entitled to sanctions "from the point of the time that the lawyers had the conversation that the law was brought forward to Plaintiff not to bring this case forward because the Plaintiff was unlicensed . . . ." The court ordered that defendants provide a bill of particulars starting with February 28, 2012, the day of the communication between the attorneys.

Accordingly, the trial court did not abuse its discretion by awarding sanctions to defendants on the basis that plaintiff's civil action was frivolous under MCL 600.2591.

C. PARKER & PARKER'S LIABILITY FOR SANCTIONS

Parker & Parker argues that the trial court erred by amending its April 19 order to award sanctions against Parker & Parker. Parker & Parker insists that there was no legal basis for the amendment.

We conclude that Parker & Parker has abandoned this issue. Parker & Parker has not provided this Court with any legal authority to support its position that the trial court erred by amending its April 19 order to award sanctions against Parker & Parker. An appellant may not simply announce its position without providing citation to supporting authority and, thus, leave it to this Court to discover and rationalize the legal basis for its claims. *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 530; 730 NW2d 481 (2007). Notwithstanding Parker & Parker's abandonment of this issue, we conclude that the trial court did not abuse its discretion by awarding sanctions against Parker & Parker. MCL 600.2591(1) required the trial court to award sanctions against both plaintiff and plaintiff's attorney. Thus, the court's amendment to its April 19 order inserted language mandated by statute, which the court was free to do on its own initiative. See MCR 2.612(A)(1) ("Clerical mistakes in . . . orders . . . and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on

motion of a party and after notice, if the court orders it."); *Delamielleure v Belote*, 267 Mich App 337, 344; 704 NW2d 746 (2005) (holding that the insertion of language mandated by statute into a one-year-old judgment constitutes a correction of an error arising from oversight, which may be corrected at any time).

Affirmed.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan