

STATE OF MICHIGAN
COURT OF APPEALS

FILOMENA LINDROS,

Plaintiff-Appellant,

v

MARILYN SANDERSON, individually, and ALL
QUALITY CORPORATION, a Michigan
corporation, jointly and severally,

Defendants-Appellees.

UNPUBLISHED
September 2, 2003

No. 237568
Wayne Circuit Court
LC No. 00-019344-CZ

Before: Talbot, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Plaintiff Filomena Lindros appeals as of right from a judgment of no cause of action entered after a jury trial. Plaintiff had sought to recover from defendants Marilyn Sanderson and All Quality Corporation under account stated and abuse of process theories. She appeals as of right. We affirm.

I

Plaintiff contends that the trial court erred in denying her motion to strike defendants' answer, affirmative defenses and affidavit.¹ We review a motion to strike a pleading for an abuse of discretion. *Belle Isle Grille Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

The gravamen of plaintiff's challenge to the affidavit is that certain portions were "false." In support of this contention, plaintiff references, as she did below, several paragraphs that

¹ Plaintiff confines her argument on appeal to the affidavit; therefore, we deem plaintiff's challenge to defendants' answer and affirmative defenses abandoned on appeal. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

purportedly conflicted with Sanderson's testimony during the grievance proceedings. However, we are not persuaded that the paragraphs necessarily conflicted with her earlier testimony. Instead, the paragraphs were consistent with defendants' legal position that plaintiff was not owed additional legal fees. Accordingly, we believe that the trial court was well within its discretion to deny plaintiff's motion to strike and to allow the jury to resolve any questions of fact arising out of possible inconsistencies. *Belle Isle, supra* at 469.

Plaintiff also contends that the trial court erred in denying her motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). We review de novo a trial court's ruling on a motion for summary disposition. *Haliw v Sterling Heights*, 464 Mich 297, 301; 627 NW2d 581 (2001). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Id.* at 302. "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

MCR 2.116(C)(9) provides for summary disposition where the "opposing party has failed to state a valid defense to the claim asserted against him or her." A motion under this subrule is "tested by the pleadings alone, with the court taking all well-pleaded allegations as true and determining whether the defenses are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery." *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 245-246; 590 NW2d 586 (1998).

Here, plaintiff sought to recover under an account stated theory. An account stated is "a balance struck between the parties on a settlement." *Keywell & Rosenfield v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002), quoting *Watkins v Ford*, 69 Mich 357, 361; 37 NW 300 (1888). "Where a plaintiff is able to show that the mutual dealings which have occurred between two parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance." *Keywell, supra* at 331, quoting *Watkins, supra* at 361. We further note that, to prove that an account stated had been created, a plaintiff must demonstrate that the defendant "either expressly accepted the bills by paying them or failed to object to them within a reasonable time." *Keywell, supra* at 331.

Plaintiff contends that the trial court erred in denying her motion for summary disposition because defendants failed to plead fraud, mistake, omission, or other inaccuracy. Indeed, our Supreme Court opined that a "settled account is conclusive between the parties unless some fraud, mistake, omission or inaccuracy is shown . . . and if the party seeking relief was aware of the facts at the time of the settlement of the account, then the subsequently sought relief will be refused." *Davis v Kramer Bros Freight Lines, Inc*, 373 Mich 594, 599; 130 NW2d 419 (1964), quoting *McDannel v Black*, 270 Mich 305, 311-312; 259 NW 40 (1935). However, the *Davis* case involved an account that had been paid, not an issue of whether a party had failed to timely object. See *id.* at 598-600. Here, in contrast, defendants did not pay the final bill. Thus, we are not persuaded that they were necessarily required to plead one of the above "defenses." Instead, defendants could rely on their contention that they objected to the final bill in a reasonably timely manner by filing a grievance against plaintiff. See *Keywell, supra* at 331. To be sure, plaintiff contends that the filing of a grievance against plaintiff was an insufficient method of challenging the final bill. But we agree with the trial court's decision to allow the jury to resolve

that issue.² Accordingly, the trial court did not err in denying plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). *Haliw, supra* at 301. Moreover, having rejected plaintiff's challenge to the trial court's denial of her motion to strike, we conclude that the trial court did not err in denying plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9). *Alcona, supra* at 245-246.

II

Next, plaintiff contends that the trial court erred in granting defendants' motion for summary disposition on her abuse of process claim. In *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992), we explained as follows: "To recover pursuant to a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding." We noted that a claim will be meritorious where the defendant "used a proper legal procedure for a purpose collateral to the intended use of that procedure." *Id.* However, "[a] bad motive alone will not establish an abuse of process." *Id.*

Plaintiff argued below that Sanderson's ulterior purposes in filing the grievance against plaintiff were to avoid paying legal fees and damaging plaintiff's professional reputation. In regard to the improper act, plaintiff alleged that Sanderson made false allegations in filing that grievance. During the trial, plaintiff also attested that Sanderson lied during the grievance proceedings. Thus, at first glance, it would appear that plaintiff sufficiently pleaded a prima facie case of an abuse of process, that is, an ulterior purpose and an improper act. *Bonner, supra* at 472.

But in granting defendants' motion for summary disposition, the trial court observed that MCR 9.125 states that a "person is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement." Indeed, MCR 9.125 would seem to provide Sanderson absolute immunity for her statements to the grievance commission.

To be sure, our Supreme Court has left open the possibility that MCR 9.125 may not prevent a person from facing disciplinary proceedings for making false statements to the grievance commission. *In re Hocking*, 451 Mich 1, 20 n 26; 546 NW2d 234 (1996). In *Hocking*, a judge was disciplined by the Judicial Tenure Commission for allegedly abusing the attorney grievance process. *Id.* at 2-3. Our Supreme Court reversed the disciplinary order on other grounds, and did not reach the question of whether MCR 9.125 provided the judge with absolute immunity. *Id.* at 19-20. In the instant matter, however, Sanderson was not subject to professional disciplinary proceedings, but was a defendant in a civil lawsuit. Accordingly, the

² Therefore, we also reject plaintiff's assertion that the trial court erred in submitting this question to the jury. See *Keywell, supra* at 332-333.

general rule of absolute immunity plainly controlled, and the trial court did not err in finding *Hocking* distinguishable.

We have also recognized that MCR 9.125 does not apply to a statement made to “any tribunal,” but only to statements made to the grievance commission. *Colista v Thomas*, 241 Mich App 529, 536; 616 NW2d 249 (2000). Here, Sanderson’s statements were made to the grievance commission—either through her filings or her testimony. Accordingly, the trial court did not err in distinguishing *Colista*.

Plaintiff also contends that MCR 9.125 only applies to “statements” and “communications” made to the grievance commission, and does not apply to testimony under oath. Instead, plaintiff contends that testimony under oath is controlled by MCL 600.908(8), which states that a “witness who willfully swears falsely under oath in regard to any matter upon which he or she is being examined under a grant of immunity commits perjury and is guilty of a felony, punishable by imprisonment for not more than 15 years.” Although MCL 600.908(8) allows for criminal prosecution for perjury, this does not mean that MCR 9.125 no longer applies to prevent a civil suit arising out of the same conduct.

Thus, we conclude that MCR 9.125 applied to the facts of the instant matter, providing Sanderson absolute immunity for her statements and testimony made to the grievance commission. The trial court did not err in ruling that plaintiff could not rely on those statements and testimony to establish an “improper act,” as necessary to support plaintiff’s abuse of process claim. In the absence of any other allegation of an improper act, we conclude that the trial court did not err as a matter of law in dismissing plaintiff’s abuse of process claim.³ *Haliw, supra* at 301.

III

Plaintiff contends that the trial court erred in allowing defendants to relitigate issues litigated and dismissed by the grievance commission. Plaintiff essentially contends that the grievance commission’s rejection of defendants’ grievance barred, under the doctrine of res judicata, defendants from raising similar issues as a defense to plaintiff’s claim. As a question of law, we review de novo the applicability of the res judicata doctrine. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

³ Plaintiff also suggests that the trial court improperly granted defendants’ motion for summary disposition because the motion was not filed more than twenty-one days before trial, MCR 2.116(G)(1)(a)(i). However, this issue is abandoned because plaintiff has failed to cite any authority in support of her contention of error. *Etefia, supra* at 471. Regardless, we note that MCR 2.116(I)(1) allows the trial court to sua sponte rule that a party is entitled to judgment as a matter of law.

Generally, the doctrine of res judicata “bars relitigation of claims that are based on the same transaction or events as a prior suit.” *Stoudemire, supra* at 334. The doctrine applies where: “(1) the prior action was decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first.” *Id.*

Here, the primary issue for the jury to resolve was whether defendants’ filing of the grievance constituted a sufficient objection to plaintiff’s final bill to prevent it from ripening into an account stated. There is absolutely no indication that this question could have been resolved by the grievance commission. Accordingly, res judicata was inapplicable as a matter of law. *Stoudemire, supra* at 332, 334.

IV

Plaintiff also contends that the trial court erred in denying plaintiff’s motion for a general verdict form. A trial court’s decision to use a special verdict form is reviewed for an abuse of discretion. *Wengel v Herfert*, 189 Mich App 427, 435; 473 NW2d 741 (1991), lv den 439 Mich 964 (1992); *State Hwy Comm v Abood*, 83 Mich App 612, 620-621; 269 NW2d 247 (1978); MCR 2.514(A) (“The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict.”). Here, the trial court opted for a special verdict form to facilitate our review of the jury’s findings. In light of the relatively few number of decisions construing the “account stated” cause of action, we are not persuaded that the trial court’s ruling was an abuse of discretion. Regardless, plaintiff’s contention of error was rendered moot by the jury’s finding that defendants objected to plaintiff’s final bill in a reasonably timely manner.

Plaintiff also contends that the jury instructions were ambiguous and contradictory. However, plaintiff expressly indicated her approval of these jury instructions. Accordingly, plaintiff waived any objection to the jury instructions. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *Chastain v GMC*, 254 Mich App 576, 591-592; 657 NW2d 804 (2002). Similarly, plaintiff waived any objection to the trial court’s instruction regarding the “order of dismissal.” Consequently, these contentions of error are without merit.

V

We note that plaintiff raises several additional issues. However, plaintiff has failed to cite any authority in support of these contentions of error. It is well established that “[i]nsufficiently briefed issues are deemed abandoned on appeal.” *Etefia, supra* at 471. Indeed, a party may not merely announce his or her position “and leave it to us to discover and rationalize the basis for his [or her] claim.” *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Accordingly, we reject plaintiff’s contentions of error.

Finally, plaintiff contends that the trial court erred in denying her motion for either a new trial or judgment notwithstanding the verdict (JNOV). We review de novo a trial court’s ruling

on a motion for JNOV. *Wiley v Henry Ford Cottage Hosp*, __ Mich __; __ NW2d __ (Docket No. 233220, issued 07/10/2003), slip op p 2. But we review a trial court's ruling on a motion for a new trial for an abuse of discretion. *Id.* at 5. Here, having rejected all of plaintiff's contentions of error, we are not persuaded that the trial court erred in denying either of plaintiff's motions.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly