

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL P. MCMANAMON,
Plaintiff-Appellee,

FOR PUBLICATION
December 5, 2006
9:05 a.m.

v

REDFORD CHARTER TOWNSHIP,
Defendant-Appellant,

No. 262040; 263260
Wayne Circuit Court
LC No. 99-920173-CZ

and

Official Reported Version

KEVIN KELLEY and R. MILES HANDY II,
Defendants.

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

In Docket No. 262040, defendant Charter Township of Redford appeals as of right from a judgment for plaintiff in this action involving the Employee Right to Know Act (ERKA), MCL 423.501 *et seq.* In Docket No. 263260, defendant appeals as of right from an "Order Granting Plaintiff's Motion for Statutory Costs and Attorney Fees as Well as Case Evaluation Sanctions." We affirm the trial court's denial of defendant's motion for summary disposition, reverse the trial court's denial of defendant's motion for a new trial, vacate the trial court's order granting sanctions, and remand this case for further proceedings.

Defendant first argues that the trial court erred in denying its motion for summary disposition because plaintiff failed to show that defendant violated ERKA. We disagree.

This Court reviews *de novo* a trial court's grant or denial of summary disposition. *McManamon v Redford Charter Twp*, 256 Mich App 603, 610; 671 NW2d 56 (2003). Statutory construction is a question of law that we also review *de novo*. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 528; 676 NW2d 616 (2004).

A motion filed under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no

genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rely on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence filed in the action. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Section 6 of ERKA, MCL 423.506, provides, in pertinent part:

(1) *An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this section.*

(2) *The written notice to the employee shall be by first-class mail to the employee's last known address, and shall be mailed on or before the day the information is divulged from the personnel record. [Emphases added.]*

Thus, an employer cannot divulge a "disciplinary action" to a third party without mailing to the employee in question notice on or before the disclosure. Notably, the statute does not forbid the disclosure; it merely requires that the employee receive notice of the disclosure.

Section 11 provides remedies:

If an employer violates this act, an employee may commence an action in the circuit court to compel compliance with this act. . . . [T]he court shall award an employee prevailing in an action pursuant to this act the following damages:

(a) For a violation of this act, actual damages plus costs.

(b) For a wilful and knowing violation of this act, \$200.00 plus costs, reasonable attorney's fees, and actual damages. [MCL 423.511.]

Defendant argues that Redford Township Supervisor Kevin Kelley's statements to the *Redford Observer* newspaper did not "divulge" disciplinary information, because the reporter already had extensive information about plaintiff's case. We disagree.

"Well-established principles guide this Court's statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue." *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002). This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain

and ordinary meaning. *Willett v Waterford Charter Twp*, 271 Mich App 38, 48; 718 NW2d 386 (2006). When the language poses no ambiguity, this Court need not look beyond the statute or construe the statute, but need only enforce the statute as written. *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 279; 597 NW2d 235 (1999). This Court does not interpret a statute in a way that renders any statutory language surplusage or nugatory. *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002).

Because the statute at issue here does not define "divulge," we use a dictionary definition. *Pierce v City of Lansing*, 265 Mich App 174, 178; 694 NW2d 65 (2005). *Random House Webster's College Dictionary* (1997) defines "divulge" to mean "to disclose or reveal (something private, secret, or previously unknown)." Thus, to trigger the notice requirement, the employer must disclose or reveal something private, secret, or previously unknown.

The July 3, 1997, *Redford Observer* article quoted Kelley as stating that "[t]he issue [of the embezzlement] is under review" and stated: "McManamon was suspended due to problems in the performance of his day-to-day duties beyond the embezzlement charge, Kelley said." The fact that Kelley disclosed to the *Redford Observer* that plaintiff was suspended constitutes a disclosure of a "disciplinary action," MCL 423.506(1), because a suspension qualifies as a disciplinary action. There was no evidence that at the time Kelley spoke with *Redford Observer* reporter Bill Casper, plaintiff's suspension was already a matter of public record;¹ therefore, Kelley divulged that fact to Casper. Because there was no evidence that defendant complied with the notice requirements of ERKA, the divulging of a disciplinary action against plaintiff, without giving plaintiff notice, was a violation of the act. The trial court did not err in denying summary disposition to defendant.

Defendant argues that public policy favors allowing public officials to give the press and the public full and complete information regarding public acts of public officials that are of legitimate public interest. Defendant relies on the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* MCL 15.231(2) states that it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of public officials. However, Casper had not submitted an FOIA request to Kelley regarding plaintiff. Therefore it cannot be held that FOIA authorized Kelley's divulgence without notice.

Moreover, defendant's argument misconstrues plaintiff's claim. Plaintiff's ERKA claim is not that Kelley had no right to divulge to the press information regarding the disciplinary action taken against plaintiff. Rather, the claim is that Kelley had no right to divulge the information *without giving notice to plaintiff* in accordance with ERKA. MCL 423.506(1). In other words, Kelley was free to make the disclosure to the press and the public, but defendant

¹ By July 1, 1997, the embezzlement charge against plaintiff was a matter of public record. However, the indictment of plaintiff was a *reason* for his suspension; it was not the "disciplinary action" itself.

was required, before or on the same day as divulging the information, to mail notice to plaintiff. MCL 423.506(2).

Defendant next argues that Kelley's statements to the press were constitutionally protected under the First Amendment and that ERKA should not be construed to abrogate a constitutionally protected right. This argument lacks merit. Kelley's statements to the press may indeed be constitutionally protected, and it is assumed that they are. However, that is beside the point. Plaintiff's claim is not that Kelley had no right to make the statements, but that Kelley was required by ERKA to give plaintiff notice of the divulgence. MCL 423.506. Therefore, ERKA is not being interpreted to abrogate a constitutionally protected right. Rather, ERKA is being interpreted, in accordance with its plain language, to authorize plaintiff to receive damages for Kelley's failure to comply with the notice requirement.

Because (1) Kelley did not comply with ERKA's notice requirement, (2) Kelley divulged to a third party a "disciplinary action" taken against plaintiff (his suspension), and (3) ERKA does not abrogate Kelley's right of speech, the trial court correctly denied summary disposition for defendant regarding plaintiff's ERKA claim.

Defendant next argues that the trial court erred in denying its motion for a new trial because the jury's verdict was clearly excessive and unsupported by the evidence. We agree.

A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). An abuse of discretion occurs when a court chooses an outcome that is not within the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The abuse of discretion standard is more deferential than review de novo, but less deferential than the standard of review articulated in *Spalding v Spalding*, 355 Mich 382; 94 NW2d 810 (1959).² *Maldonado, supra* at 388.

MCR 2.611(A)(1) provides: "A new trial may be granted . . . for any of the following reasons: . . . (d) A verdict clearly or grossly inadequate or excessive." Defendant argues that the evidence failed to show that defendant's failure to provide notice of the divulgence of the disciplinary action caused plaintiff \$100,000 in damages.

Speculation in proving causation is prohibited. See, e.g., *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994), and *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 524-525; 687 NW2d 143 (2004). The proof must "amount to a reasonable likelihood . . . rather than a possibility. The evidence need not negate all other possible causes, but . . . must exclude

² In *Spalding, supra* at 384-385, the Supreme Court held that an abuse of discretion occurs when the result reached by a court is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

other reasonable hypotheses with a fair amount of certainty." *Skinner, supra* at 166 (citation omitted).

Plaintiff's evidence failed to exclude, to a reasonable amount of certainty, other reasonable hypotheses of causation of his damages. The evidence suggests that it was the *publication by the Redford Observer*, not the failure to give notice of the divulgence to the *Redford Observer*, that caused plaintiff (1) to receive no offer from the Livonia Hockey Association and (2) to feel devastated. Plaintiff testified that he felt upset "[b]ecause I was not notified that this was coming out in the paper." The article relating to his discharge made plaintiff "very upset," in particular because a front-page photograph depicted him in handcuffs. In our opinion, plaintiff simply never proved at trial that he was harmed *by failing to receive notice* of the divulgence to the *Redford Observer*. Indeed, plaintiff never testified at trial, with specificity, that he was harmed by not receiving notice of the divulgence to the *Redford Observer*.³

One of the articles about plaintiff was discussed by the board members of the Livonia Hockey Association before the board's job interview of plaintiff. The board did not feel comfortable offering plaintiff a job under the circumstances. The major deciding factors were the criminal charges "and the fact that he had been terminated by the township of Redford." The *Redford Observer* would nonetheless have published the fact of plaintiff's termination even if defendant had complied with the notice requirement of MCL 423.506(2).⁴ Therefore, plaintiff still would not have received an offer from the Livonia Hockey Association, even if defendant had complied with the notice requirement.

There was inadequate evidence that the failure to give notice of the divulgence caused the harm of which plaintiff complains. In other words, there was no evidence that, had defendant complied with MCL 423.506(2), plaintiff (1) would not have been rejected by the Livonia Hockey Association or (2) would not have felt devastated by the publications of the disciplinary action in the *Redford Observer*. The verdict was based on pure speculation and conjecture.

Because there was no evidence that the failure to give notice of the divulgence of the disciplinary action caused harm to plaintiff, the verdict lacked evidentiary support. Because the verdict was not supported by the evidence, the trial court abused its discretion in failing to grant defendant's motion for a new trial.

³ We note that in a prior appeal in this case, this Court stated that "the notice is intended to provide the employee with notice of the disclosure so that the employee can counter such reports with which there is disagreement." *McManamon, supra* at 613 n 5.

⁴ Indeed, there is no evidence that, had defendant complied with MCL 423.506(2), the *Redford Observer* would not have published the information about the disciplinary action or the criminal charges against plaintiff.

Defendant next argues that the trial court erred in denying its motion for a new trial because the trial court allowed the jury to assess damages, as opposed to the trial court doing so. This issue is largely mooted by our resolution of the prior issue. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992). However, because it may arise on remand, we will address the issue briefly. Contrary to defendant's argument, ERKA does not require that the trial court determine the amount of damages in an ERKA case. Instead, ERKA merely states that the court "shall award" damages. MCL 423.511. Making an award of damages is different from determining the amount of damages. Damages are an issue of fact, and questions of fact are, of course, generally decided by the trier of fact—in this case, the jury. See, e.g., *Ensink, supra* at 525. Given the lack of statutory language to the contrary, the amount of damages here is for the jury to decide.⁵

Defendant next argues that the trial court's award of case-evaluation sanctions cannot be sustained. Because defendant has prevailed, in pertinent part, in this appeal, we agree. "[I]t is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O)." *Keiser v Allstate Ins Co*, 195 Mich App 369, 374-375; 491 NW2d 581 (1992). Because we reverse the trial court's denial of defendant's motion for a new trial and remand for a new trial, we also vacate the trial court's award of case-evaluation sanctions.

We affirm the trial court's denial of defendant's motion for summary disposition, reverse the trial court's denial of defendant's motion for a new trial, vacate the trial court's order granting sanctions, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Pat M. Donofrio

⁵ Defendant also argues that the damages awarded in this case were not properly awardable because plaintiff did not first show that defendant failed to abide by a court order compelling compliance with ERKA and because the damages awarded were not incurred in connection with an action to compel compliance. However, this argument was rejected during the earlier appeal in this case. See *McManamon, supra* at 609-614.