

STATE OF MICHIGAN
COURT OF APPEALS

SAM SMITH, III,

Plaintiff-Appellant,

v

DEPARTMENT OF HUMAN SERVICES,

Defendant-Appellee.

UNPUBLISHED

March 27, 2014

No. 313612

St. Clair Circuit Court

LC No. 11-001123-AA

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In this action to establish paternity and alleging fraud, misrepresentation, or negligence by the Department of Human Services (DHS), plaintiff Sam Smith, III, appeals as of right the November 7, 2012 order of the trial court granting defendant DHS' motion for summary disposition pursuant to MCR 2.116(C)(7) and denying plaintiff's motion for leave to amend his complaint. We affirm.

In 2007, plaintiff and Christa Brinkmeier were engaged to be married, and Christa was pregnant. Plaintiff alleged that he and Christa were planning on raising the child together. However, before the child was born, both Christa and plaintiff were arrested. Plaintiff was sent to prison where he remained throughout the duration of these proceedings. While plaintiff was in prison, Christa cut off all ties with plaintiff. Plaintiff asserts that while he was in prison, he began searching for his child by writing letters to the Friend of the Court, the trial court, and representatives of defendant, among others.

In 2008, Christa had her rights to her child terminated. All putative fathers also had their parental rights terminated at that time. Plaintiff alleged that although he had written letters expressing interest in the child, he had not been notified of any proceedings. Indeed, plaintiff alleges that he was purposely misled and misinformed. As a result, plaintiff filed suit against Christa to establish paternity. Plaintiff's original suit against Christa was dismissed for lack of service. After plaintiff discovered Christa's current address, he filed another action against her to establish paternity. That claim was dismissed because plaintiff lacked standing to assert parental rights over the child because plaintiff's rights had been terminated as a putative father in the previous action.

Plaintiff then filed the instant suit, claiming that defendant had kept plaintiff from being involved in the termination proceedings, and requesting that he be granted parental rights to the

child. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), alleging that plaintiff's claim was barred under the doctrine of collateral estoppel – plaintiff having already litigated the issue of his paternity in the second case against Christa. In response, plaintiff agreed that any claim for parental rights by him was barred by law. He also moved the trial court for leave to amend his complaint. In the amended complaint, plaintiff simply sought a declaratory judgment that defendant had committed fraud and misrepresentation. The trial court granted defendant's motion for summary disposition, finding that collateral estoppel barred the instant suit, and denied plaintiff's motion for leave to amend the complaint.

As a preliminary matter, we must first consider whether plaintiff's action was one simply to establish paternity, or whether he also alleged a separate claim of fraud, misrepresentation, or negligence. Plaintiff continuously asserts that his original complaint stated two distinct claims, while the trial court treated the action as solely an action to establish paternity. "A party's choice of label for a cause of action is not dispositive. We are not bound by the choice of label because to do so would exalt form over substance." *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011) (internal citation and quotation omitted). "[T]he gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim." *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006) (internal citations and quotations omitted). Where allegations of fraud "are merely incidental" to the true nature of the claim, the alleged fraud is not "determinative of the nature of the action." *Adams v Adams*, 276 Mich App 704, 710; 742 NW2d 399 (2007). Reading plaintiff's complaint as a whole, we hold that the trial court properly treated plaintiff's action as one solely to establish paternity. The fraud, misrepresentation, and negligence alleged by plaintiff was "merely incidental" to the overall claim of paternity. Indeed, in plaintiff's complaint, the relief requested is only that he be declared the parent of the child and granted custody. Therefore, the "nature of the claim" was an action for paternity, and was properly treated as such by the trial court. See *David*, 272 Mich App at 381.

On appeal, plaintiff first argues that his claim for parental rights was not barred by law and summary disposition was improper. We conclude that this issue has been waived. This Court abides by a longstanding rule that parties are not allowed to harbor an error at trial and later use it as an appellate parachute. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Further, a party proceeding *in propria persona* is held to the same standards as members of the bar. *Totman v School Dist of Royal Oak*, 135 Mich App 121, 126; 352 NW2d 364 (1984). Plaintiff explicitly agreed that his claim for paternity of the child was barred by law. He cannot now, on appeal, allege that the trial court committed error by deciding the same. See *id.*; see also *Dresselhouse*, 177 Mich App at 477. Nevertheless, this Court has considered plaintiff's argument and it is meritless. Plaintiff's claim amounted to an impermissible collateral attack on the termination proceedings, and as such was barred by law. Thus, summary disposition was proper. See *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993) (A party cannot "challenge a probate court decision years later in a collateral attack where a direct appeal was available."); see also *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000) ("This Court ordinarily affirms a trial court's decision if it reached the right result, even for the wrong reason.").

Plaintiff also argues that the trial court abused its discretion in denying his motion for leave to amend his complaint. We disagree. This Court reviews the denial of a motion for leave to amend a complaint for an abuse of discretion. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400-401; 729 NW2d 277 (2006).

MCR 2.118(A)(2) provides that “a party may amend a pleading only by leave of the court.” “Leave shall be freely granted when justice so requires.” MCR 2.118(A)(2). A motion for leave to amend should only be denied for particularized reasons, including undue delay, bad faith or dilatory motive on behalf of the movant, “repeated failure to cure deficiencies by amendments previously allowed,” undue prejudice to the opposing party, or futility of the amendment. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). “The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile.” *PT Today, Inc v Comm’r of the Office of Fin & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006). “An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction.” *Id.* (internal citations omitted).

The trial court did not abuse its discretion because plaintiff’s proposed amendment was futile. The amendment was futile because plaintiff did not have standing to bring the proposed declaratory judgment action. “[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment.” *Lansing Schools Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). MCR 2.605(A)(1), in pertinent part, states that: “In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” Considering the plain and unambiguous language of MCR 2.605(A)(1), as this Court must, *CAM Constr v Lake Edgewood Condo Ass’n*, 465 Mich 549, 554; 640 NW2d 256 (2002), to have standing there must be an “actual controversy” between the parties. “An ‘actual controversy’ under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff’s future conduct in order to preserve legal rights.” *Int’l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). An actual controversy, as described in *Int’l Union*, does not exist in this case. Plaintiff did not require a declaratory judgment to guide his future conduct “in order to preserve legal rights.” See *id.* Rather, if plaintiff is to be believed, defendant had already committed fraud and misrepresentation, plaintiff had no legal rights to preserve, and his future conduct did not require the trial court’s guidance. As such, plaintiff’s amended complaint did not fulfill the standing requirements of MCR 2.605 and *Lansing Schools Ed Ass’n*, 487 Mich at 372; thus, his amendment was “legally insufficient on its face.” *PT Today, Inc*, 270 Mich App at 142. Accordingly, the trial court did not abuse its discretion in denying plaintiff’s motion for leave to amend his complaint. See *id.*

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood