

STATE OF MICHIGAN
COURT OF APPEALS

LARY R. BERKOWER and LYNDON FORD,

Plaintiffs-Appellants/Cross-
Appellees,

v

EUGENE APPLEBAUM, MARKUS M. ERNST,
GILBERT C. GERHARD, SPENCER M.
PARTRICH, LAURIE M. SHAHON, and
SAMUEL VALENTI, III,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED

April 17, 2003

No. 232207

Oakland Circuit Court

LC No. 98-004107-CZ

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants cross-appeal from the trial court's order denying their motion for mediation sanctions pursuant to MCR 2.403(O).¹ We affirm the trial court's order granting summary disposition in favor of defendants and remand for further proceedings on the issue of mediation sanctions.

Defendant Eugene Applebaum opened a chain of drugstores known as Arbor Drugs. The remaining defendants were officers or directors of the corporation. In the 1990s, Arbor Drugs issued stock options as compensation for its corporate executives. The stock option plan was accelerated if a change in control of the drug store chain occurred. The stock option plan was allegedly designed to aid in long-term growth, and stock options were a common mechanism utilized to reward executive performance. When shareholders were notified of the stock option plans, there was no indication that the drug store chain would be sold. In 1997, defendant Applebaum retained Goldman Sachs to explore the possibility of a merger with another drug retail chain. In December 1997, the chief executive officer of CVS contacted defendant

¹ MCR 2.403 was amended, effective August 1, 2000, to change the term "mediation" to "case evaluation." *Marketos v American Employers Ins Co*, 465 Mich 407, 411 n 6; 633 NW2d 371 (2001). We will refer to the procedure as mediation, the term used at the time relevant to this case.

Applebaum to discuss the possibility of a merger. Ultimately, a merger agreement was signed on February 9, 1998. Plaintiffs, shareholders of Arbor stock, filed this litigation, alleging that the issuance of stock options was designed to benefit the officers and directors of the corporation, who acted with knowledge of the planned sale. Following oral argument, the trial court granted defendants' motion for summary disposition and denied defendants' motion for mediation sanctions.

Plaintiffs allege that summary disposition was improper because there were questions of fact regarding the motivation for issuance of stock options in light of the acts taken in furtherance of a sale of the Arbor drug store chain. We disagree. Our review of summary disposition is de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id.* To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id.* Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden, supra*. Mere conclusory allegations that are devoid of detail are insufficient to demonstrate that there is a genuine issue of material fact for trial. See *Quinto, supra* at 371-372. Additionally, a party opposing a motion for summary disposition must present more than conjecture and speculation to meet the evidentiary burden. See *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001). An explanation consistent with known facts that does not arise as a reasonable inference from the facts is conjecture. *Id.* If multiple plausible explanations for an event exist without a logical sequence, the evidentiary burden is not satisfied. *Id.*

In *Bershad v Curtiss-Wright Corp*, 535 A2d 840, 841-843 (Del. 1987), the plaintiff, a minority shareholder of Dorr-Oliver, challenged the cash out merger of the company by its parent company Curtiss-Wright. The plaintiff alleged that the merger did not have a proper business purpose and the shareholder approval of the merger was invalid because the proxy statement did not advise minority shareholders of Curtiss-Wright's policy against the sale of its 65% holdings in Dorr-Oliver. The plaintiff alleged that breach of fiduciary duty was established by the omission from proxy statements that two other companies had made casual inquiries to acquire Dorr-Oliver. The Court rejected the allegations of breach of duty to disclose, holding that information regarding efforts to arrange mergers is immaterial, as a matter of law, until the firms have agreed to a price and structure of the transaction. *Id.* at 847. Indeed, the completion of the merger as well as price and structure may be compromised by premature disclosure of merger discussions. *Id.* No breach of fiduciary duty occurs, despite a motivation for personal profit, provided that there is no violation of the duty owed to other shareholders. *Id.* at 845.

We find persuasive the reasoning of *Bershad* which, like the present case, is based on common law fiduciary duty principles. Applying the principles of *Bershad* to the case at bar, the trial court properly granted defendants' motion for summary disposition. Irrespective of the analysis by Goldman Sachs of the transition of retail drug store chains due to acquisitions, there was no evidence that substantive negotiations occurred with any entity until the December 1997 negotiations with CVS. Furthermore, the purchase price and possibility of a sale may have been compromised if the negotiation with CVS was divulged prior to an agreement to substantive

terms. *Bershad, supra*. Accordingly, the trial court properly granted defendants' motion for summary disposition.²

On cross-appeal, defendants allege that the trial court erred in concluding that the provisions of MCR 2.403(O) governing mediation sanctions was inapplicable to class actions. We agree. Issues involving interpretation of a court rule present a question of law that we review de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001). The trial court's decision to grant mediation sanctions is also reviewed de novo because it involves a question of law, not a discretionary matter. *Great Lakes Gas Transmission Ltd Part v Markel*, 226 Mich App 127, 129; 572 NW2d 61 (1997).

In *Great Lakes, supra* at 130, this Court stated:

MCR 2.403 identifies three narrow circumstances under which the court is not required to grant sanctions. . . . First, in cases involving equitable relief, the court may decline to award costs if, considering both the equitable and monetary relief, the verdict is more favorable to the rejecting party than the mediation evaluation. MCR 2.403(O)(5). Second, the court may not award costs against a plaintiff in a dramshop action who rejects an award against the minor or alleged intoxicated person unless the court finds that the plaintiff was not motivated by the need to comply with the name and retain provision of the dramshop act. MCR 2.403(O)(9). Third, the court may, in the interest of justice, refuse to award costs in cases where the "verdict" is a judgment entered as a result of a ruling on a motion after the party rejected the mediation evaluation. MCR 2.403(O)(11).

In connection with the case law regarding MCR 2.403(O)(11), it is clear that there are only three exceptions under which the trial court is not required to grant sanctions, none of which specifically deal with class action cases. Accordingly, the trial court erroneously determined that MCR 2.403(O) does not apply to class action cases.

The trial court also declined to grant mediation sanctions based on public policy by stating, "requiring a class representative to pay these fees would defeat the purpose of the class action rule, which is to more economically adjudicate large numbers of small claims based on the same facts." MCR 2.403(O)(11) provides an exception to the general rules of MCR 2.403: "If the "verdict" is the result of a motion as provided by the subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." In *Luidens v 63rd District Court*, 219 Mich

² Plaintiffs rely on *Basic Inc v Levinson*, 485 US 224, 235; 108 S Ct 978; 99 L Ed 2d 194 (1988), a case alleging violations of §10b of the Securities and Exchange Act, 15 USC 78A *et seq.*, for the proposition that materiality of any merger discussion presents a question for the trier of fact. However, the United States Supreme Court concluded that the determination of materiality was evaluated on a case by case basis by examining board resolutions, instructions to financial advisors, and negotiations between principals to reflect "indicia of interest." *Basic Inc* at 239. When opposing a motion for summary disposition, a plaintiff must present admissible documentary evidence with a plausible inference that arises from the facts. *Maiden, supra*; *Karbel, supra*. A market analysis of the changes in the retail drug store industry and calendar entries evidencing trips to New York are mere conjecture and does not create an issue of material fact regarding any potential negotiation or sale. *Karbel, supra*. This evidence was also insufficient to create a factual issue regarding indicia of interest.

App 24, 31-32; 555 NW2d 709 (1996), this Court addressed the “interest of justice” exception in the context of MCR 2.405. The *Luidens* Court stated:

With respect to a decision not to award attorney fees under MCR 2.405, the *Hamilton* Court held at 597 that “the trial court must articulate why the ‘interest of justice’ will be served in light of the role that MCR 2.405 was designed to serve in the administration of our judicial process under the Michigan Court Rules.” [*Luidens, supra* at 32, quoting *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 597; 543 NW2d 60 (1995).]

The *Luidens* Court determined that the interest of justice exception is not established, thus warranting a reduction in mediation sanctions, if a party reasonably rejects a mediation offer, the parties occupied disparate economic positions, or a party’s claim was not frivolous. *Id.* at 33. However, the interest of justice exception may be satisfied if the case presents a legal issue of first impression or the case involves an issue of public interest that should be litigated. *Id.* at 35. Accordingly, we remand this case for clarification of the trial court’s conclusion with respect to defendants’ motion for reimbursement of costs and the trial court’s findings on remand should comport with the requirements of MCR 2.403(O).

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood