STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM F. BURGER, Plaintiff-Appellant,	UNPUBLISHED January 14, 2014
v	Nos. 307312; 308764 Wayne Circuit Court
FORD MOTOR COMPANY and GEORGE WEBER, Defendants-Appellees.	LC No. 10-006396-CZ

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

In Docket No. 307312, plaintiff, William Burger, appeals as of right from the trial court's order granting summary disposition in favor of defendants, Ford Motor Company (Ford Motor) and George Weber, and thereby dismissing plaintiff's claims for negligence and tortious interference with an at-will employment contract, advantageous business relationship, or expectancy of continued employment. In Docket No. 308764, plaintiff appeals as of right from the trial court's postjudgment orders requiring plaintiff to pay Ford Motor $36,391.74 as plaintiff's share of certain discovery expenses and awarding Ford Motor case-evaluation sanctions of $67,040.70. We affirm in Docket No. 307312, but we affirm in part and reverse in part in Docket No. 308764 and remand for further proceedings regarding case-evaluation sanctions.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff formerly served as president and chief executive officer (CEO) of Ford Component Sales, L.L.C. (FCS), a wholly owned subsidiary of Ford Motor. On May 21, 2009, FCS's board of directors unanimously approved a resolution to terminate plaintiff's employment. The four FCS board members, including Weber, were each employees of Ford Motor. Before voting to terminate plaintiff's employment, the FCS board members heard findings and a recommendation made by Jodi Davis, a personnel relations representative employed by Ford Motor, regarding her investigation of complaints received by Ford Motor about plaintiff's conduct. After terminating plaintiff's employment, the FCS board appointed Weber as interim president and CEO of FCS. Although Weber was tasked with conducting a search to fill the position on a permanent basis, he eventually assumed the permanent position.

In June 2010, plaintiff filed this action against Ford Motor and Weber, alleging in count I a claim for tortious interference with his at-will employment contract with FCS, his advantageous business relationship, or his expectancy of continued employment with FCS. Plaintiff alleged that defendants wrongfully induced and caused FCS's board of directors to terminate his employment. In count II, plaintiff sought to hold Ford Motor vicariously liable for Davis's alleged negligent investigation of the complaints against him.

During the course of discovery, the trial court ordered the parties on June 13, 2011, to equally share expenses related to Ford Motor's production of electronically stored emails referring to plaintiff, which plaintiff had requested in discovery. The trial court later granted summary disposition to both defendants under MCR 2.116(C)(10), following which it entered an order on November 8, 2011, dismissing plaintiff's complaint in its entirety. Ford Motor then moved the trial court for contempt sanctions for plaintiff's failure to comply with the trial court's order of June 13, 2011. Ford Motor also moved for case-evaluation sanctions against plaintiff. In February 2012, the trial court denied Ford Motor's motion for sanctions predicated on plaintiff's failure to comply with the June 13, 2011 order, but established the amount of plaintiff's responsibility for his share of the discovery expenses at $36,391.74, payable to Ford Motor within 30 days. The trial court also granted Ford Motor's motion for case-evaluation sanctions and awarded sanctions in the amount of $ $67,040.70.

II. DOCKET NO. 307312

A. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred by dismissing his claims against both defendants pursuant to MCR 2.116(C)(10). We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 489; 835 NW2d 363 (2013). A motion under MCR 2.116(C)(10) tests the factual support for a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Grange Ins Co of Mich*, 494 Mich at 489-490. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

We begin by addressing plaintiff's claim for tortious interference with a contract, business relationship, or business expectancy, which plaintiff brought against both defendants. In *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005), this Court explained:

> In Michigan, tortious interference with a contract or contractual relations is a cause of action distinct from tortious interference with a business relationship

> or expectancy. *Badiee v Brighton Area Schools*, 265 Mich App 343, 365-367; 695 NW2d 521 (2005); *Feaheny v Caldwell*, 175 Mich App 291, 301-303; 437 NW2d 358 (1989)[1]; M Civ JI 125.01 and 126.01. The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. *Badiee, supra* at 366-367; *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996); *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989); see also M Civ JI 125.01 (adding the necessary damage element to the cause of action). The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. *Badiee*, *supra* at 365-366; *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003); *Feaheny, supra* at 301; see also M Civ JI 126.01.

Although it is unclear from the trial court's summary-disposition ruling how it applied these principles to plaintiff's tortious-interference theories against each defendant, we conclude on de novo review that summary disposition was properly granted to each defendant.

We agree with plaintiff's argument that tortious interference with an at-will employment contract is actionable. *Feaheny*, 175 Mich App at 304. But in order to prevail, a plaintiff must establish that the defendant unjustifiably initiated a breach of the plaintiff's contract with another. *Knight Enterprises, Inc v RPF Oil Co*, 299 Mich App 275, 280-281; 829 NW2d 345 (2013); *Health Call of Detroit*, 268 Mich App at 90. Because plaintiff did not allege, let alone present evidence, that FCS breached the at-will employment contract, we conclude that the standards for evaluating a claim for tortious interference with a business relationship or a business expectancy provide the sole framework for analyzing plaintiff's tort claims against defendants, notwithstanding that the claim is based on the existence of an enforceable contract between FCS and plaintiff.

With regard to plaintiff's tortious-interference claim against Weber, we find merit to plaintiff's argument that a corporate agent or employee acting for strictly personal reasons may be held liable for tortiously interfering with another's advantageous employment relationship with the corporation. Liability in this circumstance arises from the fact that a corporate agent or employee acting for strictly personal reasons stands as a third party to the employment relationship. *Feaheny*, 175 Mich App at 305. Nonetheless, although it may be reasonable to infer from Weber's deposition testimony and other evidence that Weber was aware that he could be appointed to serve as plaintiff's replacement on an interim and possibly permanent basis, and that this would affect his compensation in some manner, we find no support for plaintiff's claim

[1] The Court in *Health Call of Detroit* overruled *Feaheny* in part on other grounds.

that Weber had a personal motive to find a means to help other Ford Motor employees avoid possible salary reductions based on their in-grade protection status. Mere conjecture and speculation do not establish a genuine issue of material fact. *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001).

In any event, as with the three other FCS board members, the evidence indicates that Weber's vote to terminate plaintiff's employment was initiated only by Davis's presentation of the results of her investigation. Regardless of whether there may have been deficiencies in Davis's investigation, we reject plaintiff's argument that the evidence established a genuine issue of material fact with regard to whether Weber stood as a third party to plaintiff's employment relationship with FCS when he voted to terminate plaintiff's employment. Even if we were to assume that plaintiff could establish that Weber stood as a third party to plaintiff's employment relationship, an essential element of a claim for tortious interference with a business relationship is that the intentional interference induced or caused a breach or termination of the relationship. *Health Care of Detroit*, 268 Mich App at 90. Plaintiff failed to establish that Weber's vote was necessary for the FCS board to terminate plaintiff's employment, and he failed to present any competent evidence that Weber influenced other board members in their votes. Accordingly, plaintiff failed to establish a genuine issue of material fact with respect to the inducement or causation requirement. Therefore, we affirm the trial court's dismissal of the claim for tortious interference against Weber.

Turning to plaintiff's tortious interference claim against Ford Motor, we reject plaintiff's argument that Davis's deposition testimony regarding her understanding that FCS functioned as a "third party" between Ford Motor and customers was sufficient to establish a genuine issue of material fact with respect to whether Ford Motor stood as third party to plaintiff's employment relationship with FCS. Aside from the fact that Davis's deposition testimony did not address Ford Motor's control over FCS, the general rule is that a person's opinions do not establish disputed facts. *SSC Assoc LP v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

Plaintiff also gives undue weight to his theory that Ford Motor should be held vicariously liable for any alleged tortious interference by Davis in his employment relationship with FCS, inasmuch as a corporation can only act through its employees and agents. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 213-214; 476 NW2d 392 (1991); *Mossman v Millenbach Motor Sales*, 284 Mich 562, 568; 280 NW 50 (1938). In addition, under the doctrine of respondeat superior, an employer is generally liable only for torts committed by its employees that are within the scope of the employer's business:

> The doctrine of respondeat superior is well established in this state: An employer is generally liable for the torts its employees commit within the scope of their employment. It follows that "an employer is not liable for the torts . . . committed by an employee when those torts are beyond the scope of the employer's business." This Court has defined "within the scope of employment" to mean "'engaged in the service of his master, or while about his master's business.'" Independent action, intended solely to further the employee's individual interests, cannot be fairly characterized as falling within the scope of employment. Although an act may be contrary to an employer's instructions,

> liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer's business. [*Hamed v Wayne Co*, 490 Mich 1, 10-11; 803 NW2d 237 (2011) (footnotes with citations omitted).]

If, as plaintiff proposes, Davis stood as a third party to his employment relationship with FCS, Ford Motor would not be liable for Davis's alleged tortious interference because Davis would not be furthering Ford Motor's business or interests. Accordingly, we reject plaintiff's argument that Davis's alleged third-party status provides the proper framework for determining whether Ford Motor could be held liable for tortiously interfering with his employment relationship with FCS. The proper focus is on the relationship between Ford Motor and FCS and, in particular, the effect of Ford Motor's sole ownership of FCS on the tortious interference claim.

As noted in *Feaheny*, 175 Mich App at 305 n 2, this Court applied a rationale akin to the "piercing the corporate veil" doctrine[2] in *Dzierwa v Mich Oil Co*, 152 Mich App 281; 393 NW2d 610 (1986), in concluding that the corporation in that case was so closely identified with the individual defendant that he could not be treated as a third party to the plaintiff's employment relationship with the corporation for purposes of a claim for tortious interference with a contract. The individual defendant in *Dzierwa* was a controlling shareholder, director, and officer of the corporation, who also had responsibilities with respect to the plaintiff's employment. *Dzierwa*, 152 Mich App at 287-288. Although this case involves a tortious interference claim against the corporation, and not an individual, as the court recognized in *Servo Kenetics, Inc v Tokyo Precision Instruments Co*, 475 F3d 783, 801-802 (CA 6, 2007), a corporate defendant's status as a controlling shareholder may also provide a sufficient unity of interest with the controlled corporation to preclude treatment of the corporate defendant as a third party capable of "interfering" with the controlled corporation.

The evidence in this case shows that Ford Motor is the sole member of FCS and controls its board of directors. Therefore, the trial court reached the right result by granting Ford Motor's motion for summary disposition with respect to the tortious-interference claim. In short, we find no factual support for plaintiff's claim that Ford Motor stood as a third party to his employment relationship with FCS when investigating complaints against him or recommending to the FCS board that his employment be terminated. Therefore, it is unnecessary to address plaintiff's arguments regarding other elements of the tortious-interference claim.

[2] Piercing the corporate veil is an equitable remedy that allows courts to disregard the corporate form to serve the ends of justice. *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996).

Plaintiff also argues that the trial court erred by dismissing his negligence claim against Ford Motor under MCR 2.116(C)(10) for failure to establish the duty element of a negligence claim or, more specifically, for failure to establish that Ford Motor, acting through Davis, had a duty to investigate the complaints against plaintiff with reasonable care. We disagree.

Whether a defendant owes a particular plaintiff a duty is a question of law that we review de novo. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). Although the determination whether a defendant has a common-law duty to act for the benefit of a plaintiff encompasses several factors, the most important factors are the relationship of the parties and the foreseeability of harm. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 661; 822 NW2d 190 (2012). A contract may furnish the state of things that furnishes the occasion for a tort. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 165; 809 NW2d 553 (2011). But whether a defendant owes a particular plaintiff a duty is generally determined without regard to obligations in a contract. *Id.* at 171.

As plaintiff observes, every person engaged in the performance of an undertaking generally has an obligation to use due care to not unreasonably endanger the person or property of another. See *id.* at 165; *Hill*, 492 Mich at 660. Nonetheless, Ford Motor's investigation of plaintiff does not create a risk of physical harm to plaintiff's person or property. Further, as plaintiff concedes, Ford Motor is not his employer. We do not agree with plaintiff's argument that the mere fact that Ford Motor has policies and procedures to make objective investigations of complaints that it receives from FCS employees is sufficient to impose a legal duty on the part of Ford Motor to act for his benefit.

The only arguable basis for plaintiff to establish a relationship giving rise to a legal duty on the part of Ford Motor to act for his benefit arises from the undisputed fact that Ford Motor, as the sole owner of FCS, exercised its right to involve itself in FCS's relationship with its employees by investigating complaints and making recommendations to FCS's board of directors. More specifically, considering the unity of interests between FCS and Ford Motor and that the harm suffered by plaintiff was the termination of his employment with FCS, we conclude that the existence of a legal duty depends on whether FCS had a legal duty to conduct a proper investigation before terminating plaintiff's at-will employment through the action of its board. Under *Ferrett v Gen Motors Corp*, 438 Mich 235, 245; 475 NW2d 243 (1991), no such duty existed because an employer has no common-law duty to evaluate or correctly evaluate an at-will employee before terminating that employee's employment. It follows that Ford Motor also had no legal duty do so. Thus, we affirm the trial court's dismissal of plaintiff's negligence claim against Ford Motor.[3]

B. AMENDMENT OF THE COMPLAINT

Plaintiff argues that he should have been allowed to amend his complaint to allege a claim for breach of contract against Ford Motor if Ford Motor is not treated as a third party to his

[3] In light of our decision, it is unnecessary to address Ford Motor's alternative argument that the investigation was conducted with reasonable care.

at-will employment contract with FCS. Although the trial court did not rule on this issue, because plaintiff raised this issue in opposition to Ford Motor's motion for summary disposition, we shall address it. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994) (stating that a party should not be punished for a trial court's failure to rule on an issue that is properly raised).

MCR 2.116(I)(5) provides that a trial court shall give the plaintiff an opportunity to amend the complaint under MCR 2.118 where summary disposition is granted in favor of the defendant under MCR 2.116(C)(10), unless the evidence shows that amendment would not be justified. An amendment is not justified if it is futile. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

Plaintiff correctly observes that an action based on an at-will employment contract is possible. Indeed, "[s]ome contractual rights will vest as the employee performs under the contract and becomes entitled to compensation for his or her services." *Feaheny*, 175 Mich App at 304. Nonetheless, plaintiff's action in this case involves the termination of his employment with FCS. Assuming for purposes of review that Ford Motor would be a proper party to sue for wrongful discharge, plaintiff's proposed breach-of-contract claim against Ford Motor would be futile.

There are two theories of enforceability that may support an employee's claim of wrongful discharge. *Rood v Gen Dynamics Corp*, 444 Mich 107, 118; 507 NW2d 591 (1993). One theory is based on consensual contract principles. *Id.* But an employment contract is presumptively terminable at will by either party "for any reason or for no reason at all" unless there is a contract provision for a definite term or a provision forbidding discharge except for just cause. *Id.* at 116-117.

The other theory of enforceability that may support an employee's claim of wrongful discharge is grounded on public-policy considerations. *Id.* at 118. Some forms of wrongful discharge may be so contrary to public policy that they may be actionable, notwithstanding the existence of an at-will employment relationship. *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982). Most often, the public-policy exception is based on explicit legislative statements prohibiting the adverse treatment of an employee who acts in accordance with a statutory right or duty. *Id.*

But public-policy considerations also permit an employee to pursue a breach-of-contract claim under the "legitimate expectations" approach to employment relationships in *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579; 292 NW2d 880 (1980). See *Rood*, 444 Mich at 117-118. Under this approach, employer policies and procedures may become an enforceable part of an employment relationship if they instill legitimate expectations of job security. *Id.* The first step in analyzing a "legitimate expectations" claim is to determine what, if anything, was promised by the employer. *Id.* at 138. If a promise was made, the second step is to determine if the promise was reasonably capable of instilling a legitimate expectation of just-cause employment in the employee. *Id.* at 139.

Here, the gravamen of plaintiff's proposed breach-of-contract action against Ford Motor is that he was not dealt with in good faith. "However, this Court has refused to recognize a cause

of action for breach of an implied covenant of good faith and fair dealing in the employment context." *Barber v SMH (US), Inc*, 202 Mich App 366, 372; 509 NW2d 791 (1993), citing *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152; 483 NW2d 652 (1992). Under the "legitimate expectation" theory for a wrongful-discharge claim, plaintiff's proposed amendment would be futile because he does not dispute that he was an at-will employee. It follows that plaintiff had no legitimate expectation of job security, notwithstanding Ford Motor's policies and practices for investigating complaints and making recommendations to FCS's board of directors. Therefore, even assuming that Ford Motor would be a proper party for a wrongful-discharge claim, remand to allow plaintiff to amend his complaint is not warranted. Plaintiff's proposed amendment is futile.

C. SUBSTITUTE SERVICE

Plaintiff also challenges the trial court's denial of his motion for substitute service of a subpoena seeking to take the deposition of an FCS employee who made a complaint that led to Ford Motor's investigation of plaintiff. In light of our decision to affirm the trial court's grant of summary disposition to defendants, this issue is moot and need not be addressed.[4] See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) (explaining that this Court does not address moot issues).

D. ELECTRONIC-DISCOVERY COSTS

Plaintiff also challenges the trial court's order of June 13, 2011, requiring the parties to "equally split" the final cost of providing electronic information required to be produced under the court's order of April 1, 2011, "for work performed by Ford IT and its outside vendor Xerox Litigation Services." Plaintiff argues that the April order was too broad and that the trial court lacked the authority to impose a cost condition on the production of the electronic information produced by Ford Motor before the June order was entered. We disagree with both arguments.

We review a trial court's ruling on a discovery motion for an abuse of discretion. *Truel v City of Dearborn*, 291 Mich App 125, 131; 804 NW2d 744 (2010). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). We review de novo issues of law involving the construction and application of the court rules. *Truel*, 291 Mich App at 131.

Initially, plaintiff challenges the scope of the electronic discovery ordered by the trial court on April 1, 2011. After reviewing the record, we reject plaintiff's argument that the trial court ordered discovery that he did not request. The April order required Ford Motor to produce all emails from FCS employees that referenced plaintiff during the period of May 21, 2007, to May 21, 2009. It also required Ford Motor to produce all emails referencing plaintiff from the

[4] We nevertheless note that were we to address this issue, we would conclude that plaintiff's argument lacks merit where plaintiff moved the court for substitute service on July 22, 2011, after the discovery-cutoff date of July 18, 2011, set by order of the court on May 13, 2011.

date of plaintiff's discharge going back five years for FCS board members who served during the five-year period before plaintiff's discharge. Although we agree that the scope of the electronic discovery ordered on April 1, 2011, was broader than what was requested in plaintiff's written motion to compel, MCR 2.119(A)(1) also permits a motion to be made at a hearing. The record discloses that plaintiff's counsel broadened the scope of plaintiff's requested discovery at hearings on February 4 and March 4, 2011. The trial court's April order is consistent with the requested discovery at those hearings, which plaintiff's counsel maintained was necessary to both determine what other employees may have said about plaintiff's termination or management style and rebut Ford Motor's position that plaintiff treated FCS employees inappropriately. A party may not request a certain action on the part of the trial court and then argue on appeal that the action was error. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001). Plaintiff has not established that the trial court's discovery order of April 1, 2011, exceeded the scope of discovery that he requested.

Plaintiff next challenges the trial court's authority to require the parties to share the costs of producing the requested electronic discovery. MCR 2.302(B)(6), as amended effective January 1, 2009, provides:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for the discovery. [MCR 2.302(B)(6).]

A court construes a court rule using the same principles that govern the interpretation of statutes. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). Where the text is unambiguous, a court applies the language as written. *Id.* A provision is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *East Lansing v Thompson*, 291 Mich App 34, 37; 804 NW2d 567 (2010).

The trial court considered Ford Motor's renewed motion to require plaintiff to pay the costs of electronic discovery after it had already entered the April 1, 2011 order compelling the discovery, commenting that it was at fault for not addressing Ford Motor's prior request for costs. The court expounded on this position when it later denied plaintiff's motion for reconsideration of the June 13, 2011 order, by specifying that Ford Motor had objected to the motion to compel discovery because of the burden and expense of the discovery.

We find merit to plaintiff's argument that the procedure in MCR 2.302(B)(6) should have been triggered by his written motion to compel discovery. As indicated previously, however, it was not necessary that the entire scope of the motion be set forth in writing. MCR 2.119(A)(1). We further note that plaintiff's own initial written motion was procedurally deficient because it treated the requested emails similar to other documents that he was seeking to inspect under MCR 2.310, rather than as electronic information subject to the procedure in MCR 2.302(B)(6). MCR 2.310 contains its own cost provision, which provides that "[u]nless otherwise ordered by

the court for good cause, the party producing items for inspection shall bear the cost of assembling them and the party requesting the items shall bear any copying costs." MCR 2.310(C)(6). Notwithstanding this deficiency in plaintiff's written motion, it is clear from the record that Ford Motor consistently opposed the electronic discovery on the ground that it was overly burdensome and that it sought costs in connection with electronic discovery ordered by the trial court on February 7, 2011, and as later clarified and modified in its order of April 1, 2011. Considering that both parties were aware that discovery costs were in dispute, any error arising from the parties' initial reliance on MCR 2.310, rather than MCR 2.302(B)(6), was harmless. See MCR 2.613(A) (an error or defect in anything done or omitted by the court or parties is not grounds for relief unless the failure to take the action appears inconsistent with substantial justice.); see also *Heugel v Heugel*, 237 Mich App 471, 483; 603 NW2d 121 (1999).

The more significant issue raised by plaintiff is whether the trial court could impose a cost condition on discovery that commenced pursuant to the April 1, 2011 order but had not yet been concluded. Although plaintiff correctly points out that the limitations for protective orders specified in MCR 2.302(C) could not be implemented for past discovery, this case does not involve a protective order but, rather, the trial court's authority under MCR 2.302(B)(6) to "specify conditions for the discovery."

In construing a court rule, a court may consult a dictionary to determine the plain meaning of a word in the rule. *Wardell v Hincka*, 297 Mich App 127, 132; 822 NW2d 278 (2012). The word "condition" is defined, in relevant part, as "a restricting, limiting, or modifying circumstance" and "a circumstance indispensible to some result; prerequisite." *Random House Webster's College Dictionary* (1997). However, we must also consider the context in which a word is used in the court rule and the placement of the court rule within the structure of the Michigan Court Rules. *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005); *Wardell*, 297 Mich App at 132. The use of the word "may" in MCR 2.302(B)(6) indicates that the court's decision to impose conditions is discretionary or permissive. See *Haring Twp v City of Cadillac*, 290 Mich App 728, 749; 811 NW2d 74 (2010). Further, as Ford Motor observes, MCR 2.302(B)(6) does not specify that a court may only impose conditions at the commencement of discovery. As a matter of statutory construction, "[a] court may not engraft on a statutory provision a term that the Legislature might have added to a statute but did not." *People v Kern*, 288 Mich App 513, 522; 794 NW2d 362 (2010). Applying this principle here, MCR 2.302(B)(6) is reasonably construed as granting the trial court authority to order conditions where electronic discovery sought by one party imposes an undue burden or cost on the other party. Because the very nature of costs is that they can be evaluated and allocated between parties after the commencement of discovery, it would be unreasonable to construe MCR 2.302(B)(6) as precluding a trial court from imposing a cost condition after electronic discovery commences. Therefore, we reject plaintiff's argument that the trial court lacked the authority to order him to pay costs after the April 1, 2011 order was entered.

Plaintiff's newly raised argument that Ford Motor's renewed motion for costs was time-barred under MCR 2.119(F)(1) is unavailing because Ford Motor did not move for rehearing or reconsideration under that court rule. In addition, plaintiff has not established that Ford Motor was required to move for rehearing or reconsideration under MCR 2.119(F)(1) in order to seek a ruling regarding its request for a cost condition under MCR 2.302(B)(6). MCR 2.119(F)(1) provides that "[u]nless another rule provides a different procedure for reconsideration of a

decision (see, e.g., MCR 2.604[A], 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion." Under MCR 2.604(A), a court may revise a previous order to reflect a more correct adjudication of the parties' rights or liabilities before entry of a final judgment. *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997); see also *Hill v City of Warren*, 276 Mich App 299, 306-307; 740 NW2d 706 (2007) (relying on MCR 2.604(A), this Court rejected a defendant's claim that the trial court could not consider a plaintiff's renewed motion for class certification on the ground that it was really an untimely motion for reconsideration).

Considering the circumstances of this case, the trial court had the authority to consider Ford Motor's renewed motion for costs after entry of the April 1, 2011 order, as well as the authority under MCR 2.302(B)(6) and MCR 2.604(A) to specify conditions for the discovery required to be produced under the court's April 1, 2011 order. Accordingly, we affirm the order of June 13, 2011, requiring plaintiff and Ford Motor to equally share the discovery costs associated with the production of the electronic information.

III. DOCKET NO. 308764

A. CASE-EVALUATION SANCTIONS

Plaintiff argues that the trial court lacked jurisdiction to consider Ford Motor's motion for case-evaluation sanctions because the November 8, 2011 order dismissing the case on summary disposition did not reserve any issue concerning case-evaluation sanctions and specified that "it resolves the last pending claim and closes the case." Plaintiff argues that the trial court's decision to allow Ford Motor to move for case-evaluation sanctions constituted an improper amendment of the November 8, 2011 dismissal order from which he had filed a claim of appeal in Docket No. 307312. We disagree.

The proper interpretation of a court order involves questions of law that we review de novo. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). We also review de novo issues involving a court's subject-matter jurisdiction. *Usitalo v Landon*, 299 Mich App 222, 228; 829 NW2d 359 (2012). Subject-matter jurisdiction involves a court's power to act and authority to hear and decide a case, not a mistake by the court in the exercise of its jurisdiction. *Id.* at 228-229.

Plaintiff's argument gives undue weight to the trial court's insertion in the November 8, 2011 order of language that the order "resolves the last pending claim and closes the case." It is clear from the record that the trial court did not intend for the order to apply to postjudgment matters. A de novo consideration of the meaning of the order also supports this conclusion. See, generally, *Silberstein*, 278 Mich App at 460.

Although MCR 2.602(A)(3), as amended effective December 1, 1998, requires that each judgment contain a statement indicating whether it resolves the last pending claim and closes the case, as noted in the staff comment to the 1998 amendment, the goal of the amendment is to facilitate docket management. As indicated in *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 61; 807 NW2d 354 (2011), such language is not dispositive

of whether the judgment is, in fact, a final judgment or order appealable by right to this Court. Rather, this Court has jurisdiction as of right from a final judgment or final order as defined in MCR 7.202(6). See MCR 7.203(A)(1). In a civil case, a "final order" or "final judgment" includes "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order." MCR 7.202(6)(a)(i). It also includes postjudgment orders awarding attorney fees and costs, as defined in MCR 7.202(6)(a)(iv). Consistent therewith, MCR 7.208(I), which became effective February 1, 2000, provides a trial court with authority to "rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless the Court of Appeals orders otherwise" after a claim of appeal is filed or leave to appeal is granted in this Court.

Plaintiff's reliance on cases addressing a trial court's jurisdiction to act while an appeal is pending before MCR 7.208(I) was adopted is misplaced. As explained in *Wilson v Gen Motors Corp*, 183 Mich App 21, 41; 454 NW2d 405 (1990), an order awarding attorney fees was previously considered an amendment of the trial court's order granting judgment, unless the judgment provided that the trial court intended to award attorney fees. Because MCR 7.208(A) divested the trial court of jurisdiction to amend "final orders" after the filing of the appeal, the trial court was considered to have been without jurisdiction to award attorney fees in the absence of the provision for attorney fees. *Id.* As explained in *Lincoln v Gupta*, 142 Mich App 615, 630-631; 370 NW2d 312 (1985), where the judgment contained the requisite provision for the fees, the trial court was permitted to determine the amount because that involved a ministerial task and the judgment was enforceable during the pendency of an appeal, absent a stay of enforcement.

Under the current structure of the court rules, the rationale in *Wilson* and *Lincoln* no longer applies. Indeed, MCR 2.403(O)(8) expressly permits a party to request case-evaluation sanctions after entry of a judgment. In addition, MCR 7.202(6)(a)(iv) provides that a postjudgment order awarding case-evaluation sanctions under MCR 2.403 is itself a final order appealable as of right.

The intent of a court rule is determined by examining the court rule and its placement within the structure of the Michigan Court Rules as a whole. *Haliw*, 471 Mich at 706. Because there is nothing in MCR 2.602(A)(3) to indicate that it was intended to preclude postjudgment actions where a judgment states that "it resolves the last pending claim and closes the case," and there is no jurisdictional impediment to the trial court considering a postjudgment motion for case-evaluation sanctions, we reject plaintiff's claim that the trial court lacked the authority to consider Ford Motor's motion for case-evaluation sanctions.

Plaintiff also argues that the trial court erred by failing to rule on its request to invoke the interest-of-justice provision in MCR 2.403(O)(11) to preclude an award of case-evaluations sanctions in favor of Ford Motor. We disagree. The trial court is only required to articulate the basis of its discretionary decision when it invokes the interest-of-justice provision to deny sanctions. *Haliw v Sterling Hts (On Remand)*, 266 Mich App 444, 447-449, 702 NW2d 637 (2005). Here, the trial court did not refuse to award case-evaluation sanctions. Thus, we need only determine whether the refusal to invoke this provision was an abuse of discretion. *Id.*

The interest-of-justice provision should only be invoked in usual circumstances, such as whether there is a legal issue of first impression, unsettled law in a case where substantial damages are at issue, there is an indigent party in a case that merits a decision by a trier of fact, or the effects on third parties may be significant. *Id.* at 448. The common theme underlying these examples is that a public interest is served by having an issue judicially decided. *Id.* at 449.

We disagree with plaintiff's argument that this case involved a legal issue of first impression. The viability of plaintiff's causes of action depended on the particular facts of the case. The underlying legal concepts were well settled. And while plaintiff opposed Ford Motor's request for case-evaluation sanctions in the trial court on the ground that there was significant financial disparity between the parties, plaintiff did not argue that he was indigent or offer evidence to establish his financial status, other than to allege that he was unemployed. Further, the record indicates that the trial court considered plaintiff's concerns regarding the circumstances surrounding discovery in determining the amount of case-evaluation sanctions to award. Considering the grounds advanced by plaintiff for invoking the interest-of-justice provision in MCR 2.403(O)(11), the trial court's failure to invoke MCR 2.403(O)(11) to deny case-evaluation sanctions was not an abuse of discretion.

Plaintiff also challenges the amount of attorney fees awarded by the trial court. We review a trial court's award of attorney fees and costs under MCR 2.403(O) for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

Attorney fees may only be awarded as case-evaluation sanctions under MCR 2.403(O) if there is causal nexus between the services performed by the attorney and a particular party's rejection of the case evaluation. *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 214; 823 NW2d 843 (2012). Only a "reasonable attorney fee based on a reasonable hourly or daily rate" may be awarded as a case-evaluation sanction. MCR 2.403(O)(6)(b). The burden of establishing that attorney fees are reasonable rests with the party requesting the attorney fees. *Van Elslander*, 297 Mich App at 228; *Smith*, 481 Mich at 528-529. The trial court must consider the totality of the special circumstances applicable to the case at hand. *Smith*, 481 Mich at 529; *Van Elslander*, 297 Mich App at 228. "If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Smith*, 481 Mich at 532.

In determining whether attorney fees are reasonable, our Supreme Court in *Smith* adopted an approach that begins by first determining the fee customarily charged in the locality for similar legal services. *Id.* at 530-531. That number is to be multiplied by the reasonable number of hours expended in the case. *Id.* at 531. Using this calculation as a starting point, a court should then consider the factors in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), and Michigan Rule of Professional Conduct (MRPC) 1.5(a) to make

appropriate upward and downward adjustments. *Id.* at 529-531.[5] The Court cautioned that excessive, redundant, or otherwise unnecessary hours should be excluded, regardless of the skill, reputation, or experience of an attorney. *Id.* at 532 n 17; see also *Van Elslander*, 297 Mich App at 231. The Court stated that a trial court should briefly discuss its view of the various factors in *Wood* and the MRPC when making adjustments to aid appellate review. *Smith*, 481 Mich at 531.

In this case, the trial court did not follow the methodology in *Smith* or rule on specific objections raised in plaintiff's written response to Ford Motor's motion for case-evaluation sanctions. The court only addressed plaintiff's overall objection to attorney fees associated with discovery after his rejection of the case evaluation. The trial court indicated that it had an opportunity to review in detail the "motions" regarding case-evaluation sanctions, confirmed with plaintiff's counsel that he was not challenging the hourly rates for the attorneys, and, after determining that Ford Motor could recover attorney fees for time related to discovery and reducing the hourly rate for paralegal services, determined that the "numbers are good," with the exception of time spent to recover costs.

We disagree with plaintiff's argument that the time claimed by one of Ford Motor's three attorneys was patently unreasonable. But plaintiff made a sufficient showing of a genuine factual dispute regarding the reasonableness of the hours billed, and whether they were redundant or otherwise unnecessary, to warrant an evidentiary hearing. Because the trial court did not follow the methodology in *Smith*, and the lack of factual development in the record precludes us from determining the reasonableness of the time claimed by Ford Motor's multiple attorneys from the face of the detailed invoices, we remand for a redetermination of case-evaluation sanctions in accordance with *Smith*. The trial court should conduct an evidentiary hearing regarding any factual disputes raised by plaintiff, consistent with *Smith*, 481 Mich at 530-532.

The record is also insufficient to consider plaintiff's claim that the trial court awarded attorney fees to Ford Motor for services provided to nonparties. But contrary to Ford Motor's argument on appeal, its close relationship with FCS is insufficient to warrant case-evaluation sanctions for attorney fees incurred to represent FCS for purposes of responding to various discovery requests. The relevant inquiry under MCR 2.403(O) is not the relationship between FCS and Ford Motor but, rather, whether the attorney fees were incurred by Ford Motor as a consequence of defending against plaintiff's theories of liability and damages. See, generally, *Van Elslander*, 297 Mich App at 214. Because the trial court failed to rule on this specific challenge to the attorney fees raised by plaintiff, and the record lacks sufficient factual development to determine whether particular hours in the detailed invoice of attorney fees include the requisite defensive status to be recoverable under MCR 2.403(O), we remand for further proceedings regarding this issue.

[5] Chief Justice Taylor, joined by Justice Young, determined in the lead opinion that neither the amount in question, the results achieved, nor the fixed or contingent nature of the attorney fee are relevant factors. *Smith*, 481 Mich at 534-535. Justice Corrigan, joined by Justice Markman, disagreed with this aspect of the lead opinion. *Id.* at 538.

The record is also insufficient to review plaintiff's claim that Ford Motor was seeking attorney fees for communicating with a nonparty's attorney for a matter unrelated to this case. Accordingly, the trial court shall also address that issue on remand. But we disagree with plaintiff that Ford Motor is unable to recover attorney fees for time spent preparing for and attending a deposition of a former FCS employee taken by plaintiff's counsel for purposes of this case. Although Ford Motor concedes that its counsel provided assistance to the former FCS employee, such dual representation establishes, at most, a factual issue with respect to the reasonableness of the attorney fees that the trial court should address on remand.

Lastly, we reject plaintiff's argument that the trial court erred by allowing attorney fees for time spent by Ford Motor's counsel on discovery matters after his rejection of the case evaluation. The underlying purpose of case-evaluation sanctions is to shift the burden of litigation costs to the party insisting on a trial by rejecting a case-evaluation award. *Id.* at 212-213. The risk of sanctions encourages parties to seriously consider the case evaluation. *Smith*, 481 Mich at 527. Although a causal nexus between the attorney services performed and a particular party's rejection of the case evaluation must still be established, *Van Elslander*, 297 Mich App at 214, the record in this case indicates that plaintiff's counsel filed his second motion to extend the discovery cutoff date shortly before the date scheduled for case evaluation in April 2011, without seeking to have the case evaluation rescheduled. Had plaintiff been concerned that discovery was incomplete at the time of the case evaluation, he could have moved to reschedule the case evaluation to September 2011 in accordance with the same track of the scheduling order on which he relied to seek an extension of the discovery cutoff date.

In any event, considering that the discovery conducted after the case evaluation is causally related to plaintiff's rejection of the case evaluation, the trial court did not abuse its discretion when it determined that Ford Motor could recover attorney fees related to discovery. Whether a particular item of attorney fees involving discovery was unreasonable or should have been disallowed because it was based on Ford Motor providing untimely discovery presents a distinct question, which was not decided by the trial court and has been inadequately addressed by plaintiff. Therefore, we limit the scope of appellate relief to reversing the amount of attorney fees determined by the trial court pursuant to its February 15, 2012 order and remanding to the trial court to redetermine an appropriate award of attorney fees consistent with *Smith*.

B. DISCOVERY COSTS

Plaintiff also challenges the trial court's order of February 2, 2012, requiring that he pay $36,391.74 to Ford Motor within 30 days for his share of the costs of the electronic discovery. We have already rejected plaintiff's argument that the trial court's inclusion of a phrase indicating that the November 8, 2011 order "resolves the last pending claim and closes the case" precluded the trial court from taking any postjudgment action in this case. The February 2, 2012 order was, in substance, merely an order effectuating the trial court's prior June 13, 2011 order that the parties' equally share discovery costs. A trial court has inherent authority to enforce its own directives. *Walworth v Wimmer*, 200 Mich App 562, 564-565; 504 NW2d 708 (1993); see also MCL 600.611 ("Circuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit court's jurisdiction and judgments"). Absent a stay, a party must comply with a trial court's order while an appeal from that order is pending. *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003); see also MCR 7.209(A)(1). Contrary

to plaintiff's argument on appeal, the trial court did not assess any sanctions under MCR 2.313. Indeed, the trial court's February 2, 2012 order expressly provides "no sanctions." Thus, plaintiff's argument predicated on MCR 2.313 is misplaced. Accordingly, we reject plaintiff's challenges to the trial court's February 2, 2011 order.

In Docket No. 307312, we affirm the dismissal of plaintiff's claims. In Docket No. 308764, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Jane M. Beckering