

STATE OF MICHIGAN
COURT OF APPEALS

OSPREY SA LTD,

Plaintiff/Counter-Defendant-
Appellee,

and

MICHAEL J. BIBER,

Plaintiff/Counter-Defendant/Third
Party Plaintiff-Appellee/Cross-
Appellant

v

WEBBER INVESTMENT COMPANY, LLC, and
WEBBER DEVELOPMENT COMPANY, LLC,

Defendant/Counter-Plaintiffs/Third
Party Plaintiffs-Appellants/Cross-
Appellees,

and

WAYNE W. WEBBER,

Defendant/Third Party Plaintiff-
Appellant/Cross-Appellees,

and

LYON PROPERTIES ASSOCIATES, LLC,

Third Party Defendant,

and

BIBER, O'TOOLE, FOWLER, AND
CLARKSON, PLLC, and SARAH CLARKSON,

UNPUBLISHED
December 10, 2015

No. 324001
Livingston Circuit Court
LC No. 10-025438-CZ

Third Party Defendants-Appellees.

Before: MURRAY, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Wayne Webber (“Wayne”), Webber Development Company, LLC, and Webber Investment, Company, LLC,¹ appeal as of right an order dismissing their claims. At issue in the Webber Parties’ appeal are (1) an order granting summary disposition to Michael Biber and Osprey SA Ltd (“Osprey SA”), (2) an order granting summary disposition to Biber and Biber, O’Toole, Fowler, and Clarkson, PLLC (“BOFC”), and (3) an order granting summary disposition to Sarah Clarkson. Biber also cross-appeals the order of dismissal. We affirm.

I. FACTS

This appeal arises out of a business dispute between the members of Osprey East, LLC, (“Osprey East”), a Michigan limited liability company that is in the business of owning, developing, managing, and leasing commercial real estate. The members of Osprey East are Osprey SA, a limited partnership in which Biber holds a financial interest, and the Webber Entities. Osprey SA owns a 50% interest in Osprey East while Webber Development Company, LLC, owns a 38.61% interest and Webber Investment Company, LLC, owns an 11.39% interest.

Wayne is the founder of the Webber Entities. In 1975, Wayne met Biber when Biber was an attorney at the law firm that is now BOFC. At that time, Wayne retained Biber to provide various legal services.

In 2002, Biber and Wayne began discussing a potential real estate business involving Osprey SA and the Webber Entities. During discussions revolving around the business opportunity, Wayne told Biber that he was only interested in a short-term investment; one that would last no longer than three to five years. Biber assured Wayne that the business would be short term (within three to five years) and that an exit strategy would be put in place for the Webber Entities.

Once the discussions about the business became more specific, Biber advised Wayne that George Christopoulos, an attorney at a different law firm, should represent Wayne in the negotiations and formation of the business. Despite Biber’s recommendation, Wayne decided that he would have David Stone, an attorney at BOFC, represent him.

¹ Wayne, Webber Development Company, LLC, and Webber Investment, Company, LLC, are collectively referred to as “The Webber Parties.” Webber Development Company, LLC and Webber Investment, Company, LLC, are collectively referred to as “The Webber Entities.”

On July 15, 2003, Stone prepared a “waiver of conflict and consent to representation letter.” The letter indicated that David Stone would be representing the Webber Entities and Biber would be representing Osprey SA with regard to the proposed organization and funding of Osprey East. In addition to the letter, Stone discussed the risks and advantages of BOFC representing all the parties involved in the transaction and advised Wayne to seek independent counsel prior to waiving the conflict of interest. After discussing the conflict of interest, Wayne signed the letter, waiving any conflict of interest.

After months of negotiations, the parties executed the Osprey East operating agreement on September 1, 2003. The operating agreement gave the Webber Entities and Osprey SA the right to “put” their interest in Osprey East to the other members in the event they wanted to sell their membership interests. The “put” provision required the nonputting members of Osprey East to purchase the exercising member’s interests at a preferential rate, and in the event that the other members did not purchase the exercising member’s interests within 180 days, Osprey East would be liquidated. Wayne understood that the put provision allowed the Webber Entities to exit Osprey East at any time. In addition, the operating agreement provided that Biber was responsible for the day-to-day operations and decisions of Osprey East.

After the formation of Osprey East, it began to acquire real estate. Each time a new property was acquired, a new LLC would be created, and the newly created LLC would hold title to the newly acquired property. Sarah Clarkson, an attorney at BOFC, was responsible for drafting the operating agreements for the subsequent LLCs.

In late 2007, Wayne told Biber that “it was the perfect time to sell” and that he “wanted out” of Osprey East. Biber subsequently reminded Wayne that the put provision was available for Wayne to exercise if he wished to sell his interest in Osprey East. Despite the reminder, Wayne took no action.

In April 2009, the Webber Entities learned that Biber and Osprey SA were allegedly “diverting large amounts of money to themselves” and to other entities. Further, the Webber Entities learned that Biber, as the day-to-day manager of Osprey East, engaged in unauthorized intercompany loans, improperly allocated overhead expenses, and engaged in business transactions involving conflicts of interest in violation of the operating agreement. After learning of Biber’s actions, Wayne requested the financial records of Osprey East.

Instead of sending the financial records, Osprey SA exercised its right to put its membership interest on June 1, 2010, requiring the Webber Entities to either purchase Osprey SA’s membership interests in Osprey East, or agree to the liquidation of Osprey East. Three days later, the Webber Entities attempted to exercise the put provision.

II. PROCEDURAL HISTORY

After the Webber Entities attempted to exercise their right to put their interest in Osprey East, Biber and Osprey SA filed a complaint against the Webber Parties seeking declaratory relief regarding Biber and Osprey SA’s conduct. Specifically, the complaint sought a declaration that (1) Osprey SA properly exercised the put provision, (2) the management fees incurred were proper, (3) Biber’s overhead allocations and expense reimbursements with respect to Osprey

East were proper, (4) Osprey SA's intercompany loans were proper, (5) Osprey East's payments to Osprey companies and other companies were proper, (6) Biber acted properly and exercised his business judgment in running the operations of Osprey East.

The Webber Parties countered by filing a first amended counterclaim and third party complaint against Biber, Osprey SA, Clarkson, and BOFC. In their nine-count complaint, only two counts are relevant to this appeal; Count 3, which alleged fraud against Biber, and Count 5, which alleged legal malpractice against Biber, Clarkson, and BOFC. As to the legal malpractice claims, the Webber Parties alleged that Biber, Clarkson, and BOFC breached the standard of care by (1) "intentionally meld[ing] their role as legal advisor[s] . . . with their role as business advisor," (2) failing to disclose to Wayne the conflict of interest that arose out of representing the Webber Entities and Osprey SA, (3) failing to disclose to Wayne the conflict of interest that arose out of representing the Webber Entities and Osprey East, (4) and engaging in various business related acts "through Osprey East."

Biber then filed a first amended counterclaim against Wayne alleging breach of contract, quantum meruit, and unjust enrichment in connection to unpaid legal fees Wayne owed Biber.

Osprey SA and Biber subsequently moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), on the Webber Parties' fraud claim. Osprey and Biber asserted that summary disposition was appropriate because (1) the Webber Parties' fraud claim was barred by the six year statute of limitations, (2) the Webber Parties failed to plead fraud with the required particularity, (3) any alleged false statements made before the execution of the operating agreement were barred by the merger clause in the operating agreement, and (4) Biber did not make a false representation as Webber was provided an exit strategy, the put provision in the operating agreement.

In opposition to the motion, the Webber Parties argued that they created a genuine issue of material fact with regard to their fraud claim. Specifically, the Webber Parties claimed that there was evidence of six fraudulent representations ranging from 2003-2010. The Webber Parties also contended that their claim was not barred as (1) the statute of limitations did not bar any of the misrepresentations that occurred after September 30, 2006, and (2) the statute of limitations was tolled by equitable estoppel, the continuing wrongs doctrine, or fraudulent concealment.

After listening to the parties' arguments and taking the motion under advisement, the trial court subsequently entered a written opinion and order granting summary disposition to Biber and Osprey SA. The trial court ruled summary disposition was proper pursuant to MCR 2.116(C)(7) because the Webber Parties' fraud claim was barred by the six year statute of limitations set forth in MCL 600.5813 and that the statute of limitations was not tolled by equitable estoppel, the continuing wrongs doctrine, or fraudulent concealment. The trial court also granted summary disposition pursuant to MCR 2.116(C)(8) as the Webber Parties (1) failed to comply with the notice pleading requirements, (2) failed to state a claim of fraud because the circumstances of the alleged fraud were not plead with particularity, and (3) failed to state a claim of fraud because fraud cannot be based on a promise of future conduct. Lastly, the trial court determined that no genuine issue of material fact existed regarding whether Biber

committed fraud because the operating agreement contained a merger clause, which precluded any evidence of misrepresentations prior to executing the Osprey East operating agreement.

Clarkson also moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Clarkson first argued that any violation of the Michigan Rules of Professional Conduct as the basis for relief for the Webber Parties' legal malpractice claim is not sufficient to give rise to an independent cause of action in tort. Clarkson contended that the Webber Parties cannot establish that they sustained actual damages that were proximately caused by Clarkson's alleged negligence. Clarkson also maintained that she was not negligent for failing to disclose the conflict to Wayne as all conflicts were expressly disclosed to and waived by Wayne.

The Webber Parties, in opposition to Clarkson's motion, argued for the first time in their responsive brief that Clarkson was negligent by (1) failing to include "put" language in the subsequent LLC operating agreements, (2) failing to recognize, disclose, or act appropriately "in the face of glaring conflicts of interest," and (3) knowingly complying with Biber's actions despite the fact that he was acting illegally and in violation of his professional obligations.

After listening to arguments, the trial court stated that the Webber Parties "have not carried their burden as to" the fourth element of a legal malpractice case, which requires a plaintiff to prove the fact and extent of the injury alleged. The trial court subsequently entered an order granting summary disposition to Clarkson.

After Clarkson moved for summary disposition on the legal malpractice claim, Biber and BOFC filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) with regard to the Webber Parties' legal malpractice claim. Biber and BOFC argued that the conflict of interest claims should be dismissed because Wayne waived any and all conflicts of interest. Additionally, Biber and BOFC contended that Webber did not state a claim for legal malpractice because the conduct described in the complaint did not occur during the legal representation of the Webber Parties. Lastly, Biber and BOFC contended that the Webber Parties cannot demonstrate that they suffered damages as a proximate result of Biber's legal malpractice.

In the Webber Parties' brief in opposition, the Webber Parties again raised several theories of negligence for the first time. Specifically, the Webber Parties contended that Biber was negligent for (1) failing to include "put" language in the subsequently created LLC operating agreements, (2) reviewing Wayne's estate plan, (3) disclosing confidential information in March 2002, and (4) impermissibly engaging in a business transaction with a client that was nonconsentable pursuant to the Michigan Rules of Professional Conduct.

After listening to arguments, the trial court agreed with Biber and BOFC and granted them summary disposition on the Webber Parties' legal malpractice claim. Specifically, the trial court granted summary disposition pursuant to MCR 2.116(C)(8) for the allegations contained in paragraph 104(d)-(h) of the Webber Parties' complaint because those claims arose out of Biber's capacity as the day-to-day manager of the business instead of the law firm's legal representation of the Webber Parties. The trial court also granted summary disposition because the Webber Parties failed to plead a count of legal malpractice, as they merely provided a conclusory paragraph with regard to causation that failed to provide factual allegations on how damages were caused. The trial court also granted summary disposition pursuant to MCR 2.116(C)(10)

because the Webber Parties failed to create a genuine issue of material fact regarding causation. Lastly, the trial court stated, “to the extent that the Webber [Parties] have attempted to plead new claims in . . . their responsive brief, I don[’]t see that these - - those claims were pled before and they[’]re barred pursuant to MCR 2.116(C)(8) and MCR 2.11[1](B)(1). As to do otherwise would be completely prejudicial at this late stage. Specifically claims regarding . . . the failure to include put language in the subsequent agreement - - operating agreements are therefore barred.”

After all of the allegations in the Webber Parties’ first amended counterclaim were resolved, Osprey SA and the Webber Parties filed a joint motion under MCR 2.504(A)(2) to dismiss Biber’s complaint for declaratory relief. Osprey SA, a plaintiff to the complaint for declaratory relief, requested voluntary dismissal of the complaint, while the Webber Parties requested dismissal because Biber did not have standing to bring the declaratory action.

Biber responded by arguing that he was a plaintiff to the declaratory relief action and did not consent to the dismissal of the complaint. He further argued that he had standing to bring the action because an actual controversy existed. Additionally, Biber contended that the Osprey SA and Webber Parties’ motion was brought under the incorrect court rule because the motion was a dispositive motion and thus needed to be brought pursuant to MCR 2.116.

At the motion hearing, the trial court agreed with Osprey SA and the Webber Parties that Biber did not have standing to bring the declaratory relief and dismissed the complaint for declaratory relief. The trial court was also informed that a settlement agreement among some of the parties required a final order with regard to the Webber Parties’ first amended countercomplaint. In order to create a final order, the trial court severed Biber’s unrelated claim for unpaid “success fees” and created a new circuit case number for those claims. Because Biber’s claims were severed and the declaratory action was dismissed, the trial court subsequently entered a final order of dismissal on September 19, 2014. This appeal then ensued.

III. APPELLATE JURISDICTION

We reject Biber, BOFC, and Clarkson’s initial contention that this Court lacks jurisdiction over the trial court’s September 19, 2014 order of dismissal. This Court has jurisdiction of an appeal of right if the order appealed from is a final order. MCR 7.203. MCR 7.202(6)(a)(i) defines a final judgment or order as “the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties.” Here, the September 19, 2014 order is a final order as all of the claims were disposed of prior to entry of the order. All of the Webber Parties’ claims in their first amended countercomplaint were disposed of either by settlement or summary disposition. Moreover, the trial court severed Biber’s three claims relating to the unpaid attorney fees and assigned those claims a new circuit court case number. Lastly, the trial court dismissed Biber’s complaint requesting declaratory relief. As a result, there were no more claims that could have been adjudicated in this case. Thus, the September 19, 2014 order of dismissal is a final order.

Biber and BOFC particularly argue that the trial court impermissibly manipulated appellate jurisdiction when it severed Biber’s claims to create a final order. MCR 2.505(B) allows a circuit court to sever a party’s claims to avoid prejudice or for convenience, expedition, or economy. See also *LeGendre v Monroe County*, 234 Mich App 708, 719; 600 NW2d 78

(1999). By severing Biber’s unrelated claims for unpaid attorneys from the instant case, the trial court was able to enter a final order, which in turn allowed Biber’s unrelated claims to proceed to trial as scheduled, while providing the Webber Parties an opportunity to appeal the trial court’s summary disposition rulings. Although the trial court severed Biber’s claims to create a final order, it did so for the convenience, expedition, and economy of the parties and the trial court was therefore permitted to sever Biber’s claims pursuant to MCR 2.505(B). It cannot be said that the trial court “impermissibly” acted when it had the authority to sever Biber’s claims pursuant to the court rule. We have jurisdiction to address the arguments set forth in this appeal.

IV. WEBBER PARTIES’ APPEAL

A. FRAUD

The Webber Parties argue that the trial court erred when it granted summary disposition to Biber and Osprey SA on the Webber Parties’ fraud claim. We hold that the trial court properly granted summary disposition to Biber and Osprey SA with regard to the Webber Parties’ fraud allegation because (1) the fraud claim was not pleaded with the required particularity, (2) the fraud claim is barred by the statute of limitations and (3) there is no genuine issue of material fact regarding whether Biber committed fraud. We will address each of these grounds for summary disposition in turn.

1. PLEAD WITH PARTICULARITY

STANDARD OF REVIEW

This Court reviews a grant of summary disposition de novo. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). Summary disposition was granted to Biber and Osprey SA on the basis that the Webber Parties failed to state a claim upon which relief can be granted, pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) “tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted.” *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). All well-pleaded allegations are accepted as true and are construed in the light most favorable to the nonmoving party. *Id.* A motion under this subrule is properly granted if no factual development could possibly justify recovery. *Id.*

ANALYSIS

“Michigan is a notice-pleading state.” *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011). A complaint must include: “A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.” MCR 2.111(B)(1); See also *Dalley v Dykema Gossett*, 287 Mich App 296, 305; 788 NW2d 679 (2010) (“The primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.” [Alteration omitted.]). However, the Webber Parties’ claim is based on alleged fraudulent activity, which requires a heightened pleading standard. *Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014). Specifically, MCR 2.112(B)(1) provides: “In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated

with particularity.” To comply with MCR 2.112(B)(1), each element of the tort must be particularly addressed, and general allegations or mere speculation are insufficient to properly plead a claim for fraud. See *Cooper v Auto Club Ins Ass’n*, 481 Mich 399, 414; 751 NW2d 443 (2008) and *LaMothe v Auto Club Ins Ass’n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). To properly plead a fraud claim, the plaintiff must allege that:

(1) the defendant made a representation that was material, (2) the representation was false, (3) the defendant knew the representation was false, or the defendant’s representation was made recklessly without any knowledge of the potential truth, (4) the defendant made the representation with the intention that the plaintiff would act on it, (5) the plaintiff actually acted in reliance, and (6) the plaintiff suffered an injury as a result. [*Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 230; 859 NW2d 723 (2014).]

The gravamen of the Webber Parties’ arguments on appeal is that certain numbered paragraphs in their countercomplaint encompass four different material false representations made by Biber to Wayne that occurred from 2003 to 2010. The four contended misrepresentations are that Biber told Wayne that: (1) Biber will create an exit plan from Osprey East for Wayne within three to five years after its creation,² (2) Biber will charge Osprey East only the agreed upon 3.5% management fee,³ (3) Biber will not make any changes to the Osprey East fee structure without first discussing the matter with Wayne,⁴ and (4) intercompany loans are standard in the industry and Wayne was not disadvantaged by the intercompany loans.⁵

The Webber Parties’ countercomplaint provides:

38. Prior to entering into the Agreement, Biber repeatedly stated to Mr. Webber that his investment in Osprey East would, in fact, be short term and promised that within three to five years, an exit strategy would be put in place for the Webber Entities, either dissolving or purchasing from them, their Membership interest in Osprey East.

39. Biber used these representations and promises to induce the Webber Entities to agree to form Osprey East and to provide capital in the form of both money and real estate.

40. Biber’s representations and promises were false, lacked substantial basis and were made for the purpose of inducing the Webber Entities into entering into Osprey East.

² This misrepresentation is purportedly contained in paragraphs 38, 40, 50, 52, 53-54 and 76-83.

³ This misrepresentation is purportedly contained in paragraphs 50, 52, 57, 59-61, 73b, and 76.

⁴ This misrepresentation is purportedly contained in paragraphs 50, 52, 57, 59-61, 73a, 73b, and 76.

⁵ This misrepresentation is purportedly contained in paragraphs 50, 52, 57, 59-71, 73a, and 76.

* * *

50. Based upon the recommendations of the Defendant Attorneys and their position of highest trust and confidence, from 2003 through March 2010, the Webber Plaintiffs invested in various real estate projects, made numerous capital investments and improvements to real estate in which they invested, entered in numerous loan transactions regarding the real estate in which they invested, retained and hired property managers and leasing agents, and in short spent millions of dollars based upon the advice, counsel and recommendation of their long-time attorneys.

* * *

52. Based on Biber's recommendations and his position of highest trust and confidence, from 2003 to 2008, the Webber Entities, through Osprey East, invested in various real estate projects.

53. In 2008, five years after the initial investment in Osprey East, the Webber Entities, through Wayne Webber, requested that an exit strategy be put in place for the Webber Entities, either dissolving or purchasing from them, their Membership interest in Osprey East, as Biber had represented.

54. Despite his previous representations, Biber refused to provide to the Webber Entities, the exit strategy he had promised as an inducement to get them to enter into the Osprey East investment.

* * *

76. The Webber Entities reallege and incorporate herein the allegations in paragraphs 1-75, above.

77. Defendant Osprey SA entered into the Osprey East Operating Agreement with the Webber Entities on or about September 1, 2003.

78. The Agreement sets forth the terms pursuant to which the limited liability company would conduct business and operations.

79. In an effort [to] induce the Webber Entities to enter into the Agreement, Biber and Osprey SA represented to the Webber Entities that [Osprey] East would be a short-term entity, and would exist for a period of no longer than five years.

80. That representation was material in that in its absence, the Webber Entities would not have entered into the Agreement with SA.

81. At the time Biber and Osprey SA made the aforementioned representations, they knew that they were false and that they had no present intention of honoring them at that time or in the future.

82. The aforementioned representations were made with the specific intent to induce the Webber Entities to rely upon them in agreeing to enter into the Agreement.

83. As a direct and proximate cause of Biber and Osprey SA's misrepresentations, the Webber Entities have been damaged in an amount in [sic] to be determined at trial, but in excess of \$25,000.

Despite the Webber Parties' contention, misrepresentations 2, 3, and 4, are not contained in the Webber Parties' countercomplaint. The complaint contains no language to put Biber on notice of fraudulent misrepresentations 2, 3, and 4, which the Webber Parties seek to address on appeal. Rather, the complaint only addresses alleged fraudulent misrepresentations that were made to induce Wayne into executing the Osprey East operating agreement. No specific fraudulent representations are identified in the complaint that occurred after the execution of the Osprey East operating agreement. As such, the Webber Parties' contended misrepresentations 2, 3, and 4, do not comply with MCR 2.111(B)(1), and were properly dismissed for failure to state a claim.

With regard to the fraudulent misrepresentations that are contained in the pleadings, which are (1) that the business venture would last only three to five years and (2) that an exit strategy would be put in place for Wayne to exit Osprey East within three to five years, Biber argues that these identified alleged misrepresentations cannot constitute fraud as these statements are based on a promise of future conduct. See *State Bank of Standish v Curry*, 190 Mich App 616, 623; 476 NW2d 635 (1991), aff'd in part and rev'd in part by 442 Mich 76 (1993). However, a panel of this Court has explained:

Generally, a claim of fraud cannot be based on a promise of future conduct. An exception to this rule exists, however, if a promise is made in bad faith without the intention to perform it. Evidence of fraudulent intent, to come within the exception, must relate to conduct of the actor at the very time of making the representations, or almost immediately thereafter. Plaintiffs, therefore, must demonstrate that at the time defendants made promises to them, defendants did not intend to fulfill the promises. [*Derderian v Genesys Health Care Systems*, 263 Mich App 364, 378-379; 689 NW2d 145 (2004) (citations, quotation marks, and alterations omitted).]

Additionally, fraud may be based upon a promise of future conduct where a relation of trust and confidence exists between the parties. *Rutan v Straehly*, 289 Mich 341, 348-349; 286 NW 639 (1939).

As indicated in the complaint, the Webber Parties sufficiently pleaded that Biber and Osprey SA had no present intention of honoring the promise to Wayne and that a relationship of trust and confidence existed between the parties. Nonetheless, the Webber Parties' countercomplaint is deficient as the Webber Parties' countercomplaint failed to particularly state when these identified material representations took place, thus failing to fully plead with particularity the circumstances of the alleged fraud. MCR 2.112(B)(1); See also *Chesbrough, MD v VPA, PC*, 655 F3d 461, 467 (CA 6, 2011) (interpreting Federal Rule of Civil Procedure

(9)(b), the federal corollary to MCR 2.112(B)(1), and stating that a plaintiff must allege the time and place of the alleged misrepresentation to sufficiently plead fraud). Because general allegations of fraud are insufficient and the circumstances of fraud must be plead with particularity, the trial court properly granted summary disposition in favor of Biber and Osprey SA.⁶

2. STATUTE OF LIMITATIONS

STANDARD OF REVIEW

The trial court also granted summary disposition on the basis that the Webber Parties' fraud claim was barred by the applicable statute of limitations. The trial court granted summary disposition pursuant to MCR 2.116(C)(7). Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations. *Kincaid*, 300 Mich App at 522. If there is no material factual dispute, a court may determine that a claim is barred under the applicable statute of limitations. *Id.* at 523.

ANALYSIS

The statute of limitations for fraud claims is six years. MCL 600.5813; *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 6; 555 NW2d 496 (1996). A fraud claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827; *Boyle v General Motors Corp*, 468 Mich 226, 231; 661 NW2d 557 (2003). "The wrong is done when the plaintiff is harmed, rather than when the defendant acted." *Id.* at n 5. A plaintiff is harmed when he did not receive what he expected to receive as a result of the fraud. *Mayhall v AH Pond Co*, 129 Mich App 178, 183; 341 NW2d 268 (1983).

As indicated previously, the misrepresentations contained in the countercomplaint revolve around inducing the Webber Parties to enter into the Osprey East operating agreement. Thus, the Webber Parties did not allegedly receive what they expected to receive (an exit strategy and a short term entity) the day the Osprey East operating agreement was executed, September 1, 2003. Therefore, because the fraud claim is only based upon statements made *prior to the execution of the operating agreement*, the Webber Parties were required to file their claim by September 1, 2009. The Webber Parties' fraud claim was not filed until September 30, 2010, more than six years after the claim began to accrue, making their fraud claim untimely. The undisputed facts establish that the Webber Parties' fraud claim was barred by the applicable statute of limitations.

3. FACTUAL SUFFICIENCY OF COMPLAINT

⁶ Although our resolution of this issue on this basis makes addressing the other grounds for summary disposition unnecessary, we do so anyway for the sake of completeness.

STANDARD OF REVIEW

The Webber Parties also argue that the trial court erred when it granted Biber and Osprey SA's motion for summary disposition pursuant to MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

ANALYSIS

Here, there is no genuine issue of material fact regarding whether Biber committed fraud. In *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 502-503; 579 NW2d 411 (1998), this Court addressed the effect of fraud allegations with respect to a contract that contained a merger clause and held that a contract with a merger clause nullifies all antecedent claims of fraud. Specifically, collateral agreements that were used to induce a party to enter into a contract are nullified by a merger clause because "parol evidence regarding false representations in a collateral agreement that induced the plaintiff to enter into the contract would vary the terms of the contract." *Id.* at 502. The *UAW* Court further explained that when a merger clause is used, "parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause." *Id.* Stated differently, "when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself." *Id.* at 503.

Here, the Osprey East operating agreement contained a merger clause that specified the operating agreement supersedes all other agreements, either oral or written. Because the operating agreement contained a merger clause and the Webber Parties failed to demonstrate or allege that the fraud related to the merger clause itself, the antecedent instances of fraud used to induce the Webber Parties to enter into the operating agreement are nullified. *Id.* at 502. Accordingly, no genuine issue of material fact existed regarding whether Biber committed fraud.

The Webber Parties argue that the merger clause does not bar subsequent misrepresentations after the execution of the contract. However, as noted earlier, the Webber Parties failed to plead any specific instances of fraud that occurred after the execution of the operating agreement. Because summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, *Joseph*, 491 Mich at 206, no genuine issue of material fact exists regarding whether Biber committed fraud.

4. RIGHT TO AMEND COMPLAINT

The Webber Parties assert that the trial court abused its discretion in denying their request for leave to amend their complaint. The grant or denial of leave to amend is within the trial

court's discretion. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000). "An abuse of discretion occurs when the decision is outside the range of principled outcomes." *Hardrick v Auto Clubs Ins Ass'n*, 294 Mich App 651, 659-660; 819 NW2d 28 (2011).

A party may amend a pleading by leave of the court and "leave shall be freely given when justice so requires." MCR 2.118(2).

A motion to amend ordinarily should be granted in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment. If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision. [*Cole*, 241 Mich App at 9-10 (citations omitted).]

A trial court's failure to state on the record its decision to deny leave to amend is error requiring reversal unless such amendment would be futile. *PT Today, Inc v Comm'er of Office of Financial and Ins. Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

A proposed second amended countercomplaint was attached to the Webber Parties' motion for reconsideration of Biber and Osprey SA's motion for summary disposition, and requested leave to amend their complaint. The next day, the trial court simply entered an order denying the Webber Parties' motion for reconsideration for "failure to demonstrate palpable error by which the court and the parties have been misled." The order does not discuss the Webber Parties' request to amend their complaint or provide a reason for denying such request. Therefore, reversal is required unless the amendment would be futile. *PT Today, Inc*, 270 Mich App at 143. However, given that the Webber Parties merely assert the allegations in the proposed amended complaint are pleaded with the required specificity and fail to provide any analysis regarding the sufficiency of their proposed seconded amended complaint, the Webber Parties have abandoned this issue for failing to provide a factual basis for their claim, and for merely asserting a position and leaving it up to this Court to rationalize the basis for their position. *McIntosh v McIntosh*, 282 Mich App 471, 484-485; 768 NW2d 325 (2009) and *Wysocki v Felt*, 248 Mich App 346, 360; 639 NW2d 572 (2001).

B. LEGAL MALPRACTICE AGAINST BIBER AND BOFC

The Webber Parties' next contention is that the trial court erred when it granted summary disposition in favor of Biber and BOFC because the Webber Parties created a genuine issue of material fact regarding whether Biber was negligent for failing to include "put" language in the subsequent LLC operating agreements. The Webber Parties' argument fails to recognize that the trial court dismissed this theory of negligence pursuant to MCR 2.116(C)(8), as this theory of negligence was first raised in their responsive brief and was not previously pleaded in their countercomplaint, in violation of MCR 2.111(B)(1). Because the trial court specified that it

granted summary disposition under MCR 2.116(C)(8), we will review the trial court's decision pursuant to that subrule.

“The elements of legal malpractice are: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury, and (4) the fact and extent of the injury alleged.” *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004).

In the first amended countercomplaint, the Webber Parties alleged:

104. The Defendant Attorneys, in disregard of their duties and obligations to the Webber Plaintiffs, and in direct contravention of the standard of care, were negligent and committed malpractice as follows:

a. Defendant Attorneys intentionally melded their role as legal advisor to the Webber Plaintiffs and used this mixture of roles to take advantage of the Webber Plaintiffs;

b. Defendant Attorneys failed to disclose to Mr. Webber the conflict between their simultaneous representation of the Webber Plaintiffs and Osprey SA (without obtaining a conflict waiver for such representations) when the interests of the Webber Plaintiffs and Osprey SA we[re] actually or apparently divergent;

c. Defendant Attorneys failed to disclose to Mr. Webber the conflict between their simultaneous representation of the Webber Plaintiffs and Osprey East (without obtaining a conflict waiver for such representations) when the interests of the Webber Plaintiffs and Osprey SA we[re] actually or apparently divergent;

d. Defendant Attorneys, through Osprey East, engaged in improper intercompany loans;

e. Defendant Attorneys, though Osprey East, applied improper overhead allocations on Osprey East;

f. Defendant Attorneys, through Osprey East[,] used Osprey East funds for their own purposes;

g. Defendant Attorneys, through Osprey East[,] engag[ed] in business transaction with actual or apparent conflicts of interest; and

h. Defendant Attorneys, through Osprey East, usurped Osprey East business.

* * *

107. As a direct, natural, proximate, and foreseeable consequence of the foregoing, the Webber Plaintiffs have suffered damages in excess of \$25,000, which they are entitled to recover, including, but not limited to compensatory damages, consequential damages, exemplary damages, interest, costs and attorney fees.

As indicated, the countercomplaint does not contain any allegation that Biber was negligent for failing to include “put” language in the subsequent LLC operating agreements. In fact, the countercomplaint is devoid of any reference to subsequently created LLCs or the language contained in those operating agreements. Thus, the Webber Parties failed to reasonably inform Biber and BOFC of the nature of the claims against which they were required to defend, in violation of MCR 2.111(B)(1). For this reason, summary disposition was appropriate on this theory of negligence.

With regard to the Webber Parties’ allegations of negligence that are actually contained in the countercomplaint, the trial court properly dismissed those for failure to state a claim upon which relief can be granted. Specifically, the allegations set forth in paragraphs 104(d)-(h) do not arise out of the legal representation of the Webber Parties. The language “through Osprey East” indicates that these allegations arise out of Biber’s day-to-day duties as manager of Osprey East rather than as Biber’s role as an attorney for the Webber Parties. Thus, those allegations against Biber do not arise out of the legal representation of the Webber Parties and the trial court properly granted summary disposition to Biber and BOFC with regard to paragraphs 104(d)-(h).

Furthermore, as the trial court properly concluded, the Webber Parties’ conclusory allegations in paragraph 107 are insufficient to state the causation element of a legal malpractice claim. *Kloian v Schwartz*, 272 Mich App 232, 234; 725 NW2d 671 (2006), is instructive. In that case, the plaintiff alleged that the defendant attorneys committed legal malpractice. More specifically, the plaintiff alleged that “Plaintiff Kloian has been damaged directly and proximately in his peace of mind, property, standing in the community and standing in the Courts . . .” *Id.* at 241. This Court held that the plaintiff’s “conclusory paragraph, unsupported by factual allegations, [was] insufficient to satisfy the proximate-cause or injury elements of a legal malpractice action.” *Id.* The Court stated that “[a] mere statement of a pleader’s conclusions, unsupported by allegations of fact, will not suffice to state a cause of action.” *Id.* The Court further explained that the “plaintiff failed to include factual allegations regarding how the specific instances of alleged malpractice caused the alleged injuries.” *Id.*

Similar to *Kloian*, the Webber Parties’ allegation in paragraph 107 fails to include any factual allegation regarding how the specific instances of alleged malpractice caused the alleged injuries. The Webber Parties have merely included a conclusory sentence, unsupported by

factual allegations, which is insufficient to state a claim for legal malpractice. *Id.* Accordingly, summary disposition was appropriate.⁷

C. LEGAL MALPRACTICE AGAINST CLARKSON

Lastly, the Webber Parties contend that the trial court erred when it granted summary disposition to Clarkson on the legal malpractice claim. Clarkson moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), but because the court specified that it granted summary disposition pursuant to MCR 2.116(C)(10), we will review the court's decision pursuant to that subrule.

The Webber Parties' theories of negligence *on appeal* are that Clarkson was negligent for (1) failing to act appropriately in the face of conflicts of interest, (2) failing to place "put" language in the newly created LLC operating agreements, and (3) knowingly complying with Biber's actions despite the fact that he was acting illegally and in violation of his professional obligations. First, summary disposition was appropriate as the Webber Parties did not properly plead these theories of negligence in their countercomplaint. The countercomplaint makes no mention of these theories of negligence nor provides a factual basis for which these theories could be supported. Simply put, the Webber Parties failed to comply with the notice pleading requirements with regard to these theories of negligence. See MCR 2.111(B)(1); *Dailey*, 287 Mich App at 305.

Nonetheless, even assuming these theories of negligence were properly pleaded, the Webber Parties failed to carry their burden of creating a genuine issue of material fact regarding Clarkson's legal malpractice. Specifically, no genuine issue of fact exists regarding the fact and extent of the injuries the Webber Parties suffered. First, the Webber Parties contend that a report authored by their expert witness, Kenneth Mogill, is sufficient to establish a genuine issue of material fact regarding the fact and extent of the injuries suffered. Upon close examination of the Mogill report, it does not contain any evidence of the fact and extent of the injury caused by Clarkson, as it merely provides Mogill's opinions regarding whether Clarkson breached various rules of the Michigan Rules of Professional Conduct. The Mogill report merely states the opinion that Clarkson violated MRPC 1.1 and 1.3 for "compromising" Wayne's interests and that she violated MRPC 1.7 for favoring another client's interests over Wayne's. Although the Mogill report provides opinions regarding whether various Michigan Rules of Professional Conduct were breached, it does not specifically identify the fact and the extent of the injuries suffered by the Webber Parties.

In an attempt to create a genuine issue of material fact on appeal, the Webber Parties rely on the Webber Parties Answers to Interrogatory Responses, which states that an expert will testify that the Webber Parties suffered damages of approximately \$42.2 million due to the decline in the value of assets owned by Osprey East from June 30, 2007 to 2012, as a result of

⁷ Summary disposition pursuant to MCR 2.116(C)(10) was also appropriate with regard to the allegations that Biber was negligent for failing to disclose the conflicts of interest to Wayne. It is undisputed that Wayne signed a conflict of interest waiver.

Clarkson's malpractice. Though this evidence identifies the fact and extent of the alleged injuries, this evidence was not presented to the trial court when it rendered its decision on the motion for summary disposition. Our review is limited to the evidence that was properly presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). At the time the motion was decided, a genuine issue of fact did not exist regarding the fact and extent of the injuries caused by Clarkson's alleged malpractice and summary disposition was thus appropriate.

III. BIBER'S APPEAL

On cross appeal, Biber contends that the trial court abused its discretion when it dismissed his complaint seeking a declaratory judgment. We review a trial court's decision to decline to declare the rights of the parties for an abuse of discretion. *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 NW2d 743 (1993).

A litigant has standing to seek a declaratory judgment when the litigant meets the requirements of MCR 2.605. *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). MCR 2.605(A)(1) provides: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interest party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." "An actual controversy will be found to exist only where a declaratory judgment is necessary to guide a litigant's future conduct in order to preserve the litigant's legal rights." *Flanders Industries, Inc, v State of Mich*, 203 Mich App 15, 20; 512 NW2d 328 (1993); See also *PT Today, Inc*, 270 Mich App at 140-141. "If no actual controversy exists, the circuit court lacks subject-matter jurisdiction to enter a declaratory judgment." *Genesis Ctr, PLC v Comm'r of Fin & Ins Servs*, 246 Mich App 531, 544; 633 NW2d 834 (2001).

Here, no "actual controversy" existed between Biber and the Webber Parties as Biber does not require a declaration to guide his future conduct. The resolution of Biber's declaratory judgment claims regarding the propriety of his actions as day-to-day manager of Osprey East would not have provided guidance to his future conduct of the management of Osprey East since he had subsequently been removed from his position as the day-to-day manager. Simply stated, because Biber was no longer the day-to-day manager of Osprey East, Biber had no legal rights to preserve as such, and his future conduct did not require the trial court's guidance. *Flanders Industries, Inc*, 203 Mich App at 20. Therefore, the trial court did not abuse its discretion in declining to declare the rights of the parties as Biber did not have standing under MCR 2.605.

Biber also contends that the trial court did not offer an explanation or basis for its dismissal of Biber's complaint, and to the extent that it did, the trial court dismissed the complaint for an improper reason, to facilitate a settlement among other parties. Biber's arguments are refuted by the record. Before ruling on the issue, the trial court recognized that it was dealing with "interesting arguments about . . . standing," and then stated that it was dismissing Biber's complaint for declaratory relief as a result of Osprey SA and the Webber Parties' arguments regarding whether an actual controversy existed. It is apparent from the record that the trial court based its decision on the fact that an actual controversy did not exist.

Lastly, Biber argues that Osprey SA and the Webber Parties' motion to dismiss should have been brought pursuant to MCR 2.116, instead of MCR 2.504. To the extent the Osprey SA and the Webber Parties' motion should have been brought under MCR 2.116, this is a procedural defect that is subject to a harmless error analysis. See *In re Utrera*, 281 Mich App 1, 14; 761 NW2d 253 (2008); *Detroit v Volunteers of America*, 169 Mich App 465, 472-473; 426 NW2d 743 (1988); *Gilbert v Grant Trunk Western RR*, 95 Mich App 308, 315; 290 NW2d 426 (1980). MCR 2.613(A) provides the following with regard to harmless errors: "[A]n error or defect . . . in anything done or omitted by the court or by the parties . . . is not ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." We conclude there was no surprise or prejudice to Biber solely because the motion was mislabeled or was not brought pursuant to the correct court rule. Biber clearly had notice of the basis for the motion and that the relief sought was dismissal of Biber's complaint as demonstrated by the fact that Biber filed a written response to the arguments set forth in the motion. Therefore, we conclude that allowing the trial court's order to stand is not inconsistent with substantial justice.

Affirmed. Osprey SA, BOFC, and Clarkson may tax costs on appeal, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray

/s/ Patrick M. Meter

/s/ Michael J. Riordan