STATE OF MICHIGAN

COURT OF APPEALS

GREGORY J. BOWENS, PAULA M. BRIDGES, GARY A. BROWN, ROBERT B. DUNLAP and PHILLIP A. TALBERT,

Plaintiffs-Appellants,

v

AFTERMATH ENTERTAINMENT, AMAZON.COM, INC., AOL TIME WARNER, PHILIP J. ATWELL, BARNES & NOBLE, INC., BARNES & NOBLE.COM, INC., BEST BUY CO., BLOCKBUSTER, INC., CHRONIC 2001 TOURING, INC., JOHN DOE NUMBER ONE, JOHN DOE NUMBER TWO, EAGLE ROCK ENTERTAINMENT, EAGLE VISION, INC., GERONIMO FILM PRODUCTIONS, HMV MEDIA GROUP, HONIGMAN MILLER SCHWARTZ & COHN, L.L.P., INGRAM ENTERTAINMENT HOLDINGS, INTERSCOPE RECORDS, INC., ERVIN JOHNSON, MAGIC JOHNSON PRODUCTIONS, METROPOLITAN ENTERTAINMENT, MOVIE GALLERY.COM, INC., RADIO EVENTS GROUP, INC., RED DISTRIBUTION, INC., PHIL ROBINSON, WILLIAM SILVA, TRANS WORLD ENTERTAINMENT, CORP., KIRDIS TUCKER, W H SMITH, PLC, HOUSE OF BLUES CONCERTS, BORDERS GROUP, INC., WHEREHOUSE ENTERTAINMENT, MGA, INC., MTS, INC./TOWER RECORDS, THE MUSICLAND GROUP, and ANDRE YOUNG,[1]

Defendants-Appellees,

UNPUBLISHED
April 19, 2005

No. 250984
Wayne Circuit Court
LC No. 02-233251-CZ

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[1] Defendant Andre Young will be referred to by his professional name, "Dr. Dre."

and

CDNOW, INC., CIRCUIT CITY STORES, INC., HARMONY HOUSE RECORDS & TAPES, INC., HASTINGS ENTERTAINMENT, INC., and PANAVISION, INC.,

Defendants.

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

This is an appeal from the order granting defendants' motions for summary disposition. We agree with the result and analysis in Judge Meter's opinion, except for its resolution of the eavesdropping claim against the "disclosing defendants," who are not otherwise included within the group of defendants denoted as the "aiding defendants."[2] In our view, the discovery plaintiffs claim they need on that claim is irrelevant because the disclosing defendants moved for dismissal under MCR 2.116(C)(8). Therefore, we also affirm the dismissal of the eavesdropping claim against these defendants.

A brief comment with respect to why reversal is required on the eavesdropping claim against the aiding defendants. As Judge Meter's opinion indicates, a motion for summary disposition brought under MCR 2.116(C)(10) is premature if the non-moving party shows that further discovery could lead to the disclosure of facts that are material to a substantive issue in the case. See, e.g., *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). "However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Id.* at 25.

Judge Meter correctly concludes that, based upon the footage contained within the DVD, further discovery may reveal relevant, material evidence. As the circuit court noted, the DVD footage "is crucial to this case," but from a review of the cassette submitted to the trial court, it is not at all clear that plaintiffs were aware that the meetings were being taped. Indeed, while at some points in the footage a hand-held video camera appears in a reflection from a mirror, when

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[2] The "disclosing defendants" who are not also a part of the "aiding defendants" are: Eagle Rock, Eagle Vision, Robinson, Red Distribution, AOL Time Warner, Best Buy, Honigman, Ingram, Smith, TransWorld, Wherehouse, MRS/Tower Records, Borders, Circuit City, Musicland, Barnes & Noble, Barnes & Noble.com, Movie Gallery.com, MGA, Harmony House Hastings, Amazon, CDNow, Blockbuster, and Movie Gallery. Although Honigman is also an "aiding defendant," it is a law firm, not a distributor of DVD's or cassettes. Plaintiffs have neither offered any evidence nor asserted any factual allegations that Honigman engaged in any distribution of the DVD's.

plaintiffs are shown, the footage contains characteristics that suggest that the meeting was being secretly taped. For example, at times there are no bright lights as there are when the video camera's presence is clear, and at the same time, the person being taped appears, because of the proximity and height of the recording, to be speaking to an individual who was not holding a video camera. Thus, it is quite possible that the meeting with plaintiffs was secretly taped, yet the other portions of the segment (where plaintiffs were not present) were openly videotaped. Only further discovery, and in particular, a review of any unedited versions of the recordings, will reveal the existence or non-existence of such material facts.

We will also address plaintiffs' claim that the "disclosing defendants" used or divulged information that they knew or reasonably should have known was obtained in violation of MCL 750.539c or MCL 750.539d. See *Blackburne & Brown Mortgage v Ziomek*, 264 Mich App 615, 627; 692 NW2d 388 (2004). The issue was raised by defendants below, and the issue can be addressed as a matter of law because defendants sought dismissal of this allegation under MCR 2.116(C)(8). *Id.*[3] Additionally, since the trial court did dismiss the eavesdropping claim against all defendants, we are free to affirm the trial court on the same or different grounds. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

After review of plaintiffs' complaint, it is evident that there are insufficient allegations that these defendants had the requisite knowledge that the conversations were recorded in violation of State law. Indeed, the complaint only contains conclusory assertions, with no factual recitation backing up the allegations. Nowhere in the complaint do plaintiffs provide *any* facts to support the allegation that the disclosing defendants did or should have had a reasonable belief that the video was produced without the consent of some of the participants. Although Michigan is a notice pleading state, plaintiffs still had an obligation to plead some facts showing that there was a viable claim existing at the time the lawsuit was filed. *Butler v Ramco-Gershenson*, 214 Mich App 521, 534; 542 NW2d 912 (1995) ("However, mere conclusions unsupported by allegations of fact, will not suffice to state a cause of action. . . ."), quoting *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995); *Ulrich v Fed Land Bank of St. Paul*, 192 Mich App 194, 197; 480 NW2d 910 (1991). Plaintiffs' complaint contained no such facts, and therefore, should have been dismissed pursuant to MCR 2.116(C)(8), rather than MCR 2.116(C)(10). *Id.*

In light of the foregoing, and the portions of Judge Meter's opinion with which we agree, the trial court's dismissal of all the claims is affirmed, except as to the eavesdropping claim against the aiding defendants. That claim is remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Donald S. Owens

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[3] Thus, plaintiffs' argument that defendants' motion was deficient because it did not contain admissible evidence in support of its assertions, MCR 2.116(G)(3)(b), is not applicable to this issue.

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Defendants.

Before: Murray, P.J., and Meter and Owens, JJ.

METER, J. (*concurring in part, dissenting in part)*.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition. We affirm in part and reverse and remand in part.

I. Facts

The "Up in Smoke Tour" was a national gangster rap concert tour featuring the rap musicians Dr. Dre, Snoop Dogg, Ice Cube, and Eminem. The concert performance included an eight minute video introduction to Dr. Dre and Snoop Dogg's headline performance. The tour took place in ten cities in the United States, without incident, before coming to the city of Detroit. On July 6, 2000, the tour was scheduled to perform at the Joe Louis Arena in Detroit. Just hours before the performance, plaintiff Bowens, the press secretary for Detroit Mayor Dennis Archer; plaintiff Bridges, Second Deputy Chief and key spokesperson for the Detroit Police Department; and plaintiff Brown, a commander in the Detroit Police Department, arrived at the Joe Louis Arena to discuss with concert officials the video introduction to Dr. Dre and Snoop Dogg's performance.

Bowens allegedly demanded that the video not be shown because it contained subject matter inappropriate for minors. A dispute and various discussions ensued, and the concert eventually proceeded without the video being shown. Plaintiffs allege that they believed the discussions surrounding the playing of the video were *private* discussions. However, audio and video recordings of the July 6, 2000, meeting and discussion between Detroit representatives and concert representatives were used to create two bonus tracks on the "Up in Smoke Tour" DVD. The two DVD bonus tracks, entitled "The Detroit Controversy" and "Crew,"[2] are included in the DVD's "exclusive backstage footage" section. The "Up in Smoke Tour" DVD is very popular, achieving worldwide multi-platinum status.

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[2] The "Crew" bonus track consists of interviews with concert crew members and backstage footage from various tour venues. At issue is an excerpt of a conversation between plaintiff Dunlap, a Detroit police officer, and Bob Fontenot, head of tour security, about the number and placement of security officers at the Detroit concert.

Plaintiffs objected to the use of their likenesses and allegedly private discussions on the DVD bonus tracks and therefore filed suit against defendants, alleging, inter alia, eavesdropping, invasion of privacy, and fraud. After defendants moved for summary disposition, the trial court dismissed plaintiff's lawsuit in its entirety. On appeal, plaintiffs argue that summary disposition was inappropriate because the trial court used erroneous factual findings and improper inferences to grant summary disposition, genuine issues of material fact exist, and plaintiffs were not allowed to conduct sufficient discovery.

II. Standard of Review

"We review a trial court's grant or denial of a motion for summary disposition de novo." *Collins v Detroit Free Press, Inc,* 245 Mich App 27, 31; 627 NW2d 5 (2001). Defendants moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). The trial court clearly did not rely on MCR 2.116(C)(7) to dismiss plaintiff's lawsuit. Moreover, while the court did not specify whether it was relying on MCR 2.116(C)(8) or (C)(10) in reaching its decision, it reviewed and relied on materials beyond the pleadings. Therefore, we will review the court's decision under the standards applicable to MCR 2.116(C)(10). *Collins, supra* at 31. "In reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists." *Collins, supra* at 31.

III. False-Light Invasion of Privacy

Plaintiffs argue that the trial court improperly granted summary disposition to defendants with respect to plaintiffs' false-light invasion of privacy claims. The common law right of privacy protects against four types of invasion of privacy, including "'publicity which places the plaintiff in a false light in the public eye.'" *Battaglieri v Mackinac Ctr for Public Policy,* 261 Mich App 296, 300; 680 NW2d 915 (2004), quoting *Tobin v Civil Service Comm,* 416 Mich 661, 672; 331 NW2d 184 (1982).

> "In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." [*Derderian v Genesys Health Care Sys,* 263 Mich App 364, 385; 689 NW2d 145 (2004), quoting *Duran v Detroit News,* 200 Mich App 622, 631-632; 504 NW2d 715 (1993).]

Plaintiffs argue genuine issues of material fact exist regarding whether plaintiffs were portrayed in a false light. They assert that the "Detroit Controversy" track contained several false statements. First, plaintiffs point out that, although Dr. Dre asserts on the track that plaintiffs raised concerns regarding the introductory video "on a weekend, and we couldn't go to court and fight 'em back," the events actually occurred on a Thursday.

Falsity of a statement is required to raise a viable false light claim. *Battaglieri, supra* at 303-304; *Porter v City of Royal Oak,* 214 Mich App 478, 487; 542 NW2d 905 (1995). However, because the First Amendment limitations applicable to defamation claims also apply to false-

light invasion of privacy claims, the "substantial truth" doctrine applies to false light claims. *Collins v Detroit Free Press, Inc,* 245 Mich App 27, 33-36; 627 NW2d 5 (2001). In applying the substantial truth doctrine to grant summary disposition to the defendant with respect to the plaintiff's false light claim, the *Collins* Court stated, "[t]o avoid liability, it is not necessary for 'defendants to prove that a publication is literally and absolutely accurate in every minute detail.' . . . 'the test look[s] to the sting of the article to determine its effect on the reader; if the literal truth [would have] produced the same effect, minor differences [a]re deemed immaterial.'" *Collins, supra* at 33, quoting *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 258-259; 487 NW2d 205 (1992).

Although Dr. Dre's statement that the events occurred on a weekend is literally false, plaintiffs did not demonstrate that it was "unreasonable and highly objectionable" or "placed . . . plaintiff[s] in a false position." *Derderian, supra* at 385 (internal citation and quotation omitted). Plaintiffs do not mention, and, therefore, apparently do not object to the first half of Dr. Dre's statement that they cite on appeal. Dr. Dre's full sentence was: "They waited until it was time for the doors to open, and it was on a weekend, and we couldn't go to court and fight 'em back." The "gist" or "sting" of the statement is that plaintiffs raised concerns about the video introduction at a time when defendants were unable to challenge plaintiffs in court in time for the scheduled concert. Therefore, Dr. Dre's statement was substantially true. The literal truth would have produced the same effect on the viewer.

Second, plaintiffs assert that Dr. Dre's statement that he was continuing to show the video introduction gave the false impression that the DVD introduction is the same as the video introduction to Dr. Dre and Snoop Dogg's performance that plaintiffs found objectionable. We hold that Dr. Dre's statement did not place plaintiffs in a false position or create a false impression. On the "Detroit Controversy" track, Dr. Dre explains that tour officials had a different version of the movie introduction but that plaintiffs did not express their concerns "until it was time for the doors to open," and, therefore, he could not show the alternate video. The interviewer asks Dr. Dre, "what was in that video?" and inquires whether he was "still showing that." Dr. Dre replies, "yeah, we're still showing that." The interviewer inquires, "which version," and Dr. Dre responds, "we're showing the one that we wasn't supposed to show." Taken in context, Dr. Dre merely stated that they were continuing to show the original video introduction on the tour. Plaintiffs failed to demonstrate that Dr. Dre's statement was unreasonable and highly objectionable by attributing to plaintiffs characteristics, conduct, or beliefs that were false and placed the plaintiffs in a false position.

Dr. Dre's statement did not create the false impression that the DVD introduction is the original video introduction to Dr. Dre and Snoop Dogg's performance. A plaintiff's conclusion "is refuted if only a 'strained reading' . . . would yield the offensive interpretation that a plaintiff alleges." *Battaglieri, supra* at 305, quoting *Howard v Antilla,* 294 F3d 244, 254 (CA 1, 2002). Only a strained interpretation of Dr. Dre's statement would lead the viewer to conclude that he was referring to the concert tour DVD. The natural interpretation of Dr. Dre's statement is merely that he was continuing to show the original video introduction on the concert tour.

As noted above, the first amendment limitations on defamation claims also apply to false light invasion of privacy claims. *Tomkiewicz v Detroit News, Inc,* 246 Mich App 662, 679 n 12; 635 NW2d 36 (2001). Plaintiffs are "public officials," and, therefore, are public figures for First Amendment purposes. *Id.* at 671. Public figure plaintiffs must prove actual malice by clear and

convincing evidence. *Battaglieri, supra* at 304. Actual malice is defined as knowledge that the published statement was false or reckless disregard for whether the statement was false. *Id*. The determination of whether sufficient evidence has been presented to demonstrate actual malice in a false-light claim is a question of law. *Id.* Additionally, "where the plaintiffs are claiming injury from an allegedly harmful implication . . . plaintiffs 'must show with clear and convincing evidence that the defendant[s] intended or knew of the implications that the plaintiff is attempting to draw . . . .'" *Id.* at 305, quoting *Saenz v Playboy Enterprises, Inc,* 841 F2d 1309, 1318 (CA 7, 1988). Plaintiffs presented no evidence that defendants intended or knew of the implication that plaintiffs are attempting to draw from Dr. Dre's statement – that the DVD introduction is the same as the video introduction that plaintiffs found objectionable – much less the clear and convincing evidence necessary to defeat summary disposition.

Third, plaintiffs argue that the "Detroit Controversy" track created false implications about plaintiffs through the use of "slick editing and selective footage," including that (1) the meetings were recorded with a lighted camera and a large hand-held microphone, (2) plaintiffs knew they were being recorded, (3) plaintiffs consented to be part of the DVD, (4) plaintiffs were irresponsible and willing to incite a riot, and (5) plaintiffs had no basis for alleging that the video was obscene.

Again, plaintiffs are claiming injury from allegedly harmful implications arising from the DVD, and, therefore, "'must show with clear and convincing evidence that the defendant[s] intended or knew of the implications that the plaintiff is attempting to draw . . . .'" *Battaglieri, supra* at 305, quoting *Saenz, supra* at 1318. Plaintiffs presented no such evidence, much less the clear and convincing evidence necessary to defeat summary disposition. Additionally, only a "strained" interpretation would lead the viewer to conclude that plaintiffs consented to be part of the DVD, as the bonus tracks show plaintiffs objecting to the performance.

Also, the allegedly false implication that plaintiffs were irresponsible and willing to incite a riot is not actionable. Statements must be proveable as false to be actionable. *Ireland, supra* at 616. As the trial court noted in granting summary disposition, the implication that plaintiffs were irresponsible is an expression of opinion, not susceptible to a "true or false" analysis.

Fourth, plaintiffs object to defendant Tucker's statement that, although plaintiffs originally agreed to card all concertgoers, plaintiffs later said "absolutely not." On appeal, plaintiffs and defendants agree that there was an initial agreement that all concertgoers would be carded and only those eighteen or over would be admitted. However, while Brown asserted that "concert staff subsequently withdrew their consent to this plan," Tucker asserted that *plaintiffs* withdrew their support for the plan. Thus, a genuine issue of material fact exists regarding whether Tucker's statement is false.

Despite the existence of a factual dispute regarding the falsity of Tucker's statement, we hold that summary disposition was properly granted to defendants. *Ireland, supra* at 622. As discussed above, to demonstrate a false light claim, plaintiffs must prove actual malice by clear and convincing evidence. *Battaglieri, supra* at 304. The determination whether plaintiffs presented sufficient evidence to demonstrate actual malice is a question of law. *Id.* In this case, plaintiffs have not provided any clear and convincing evidence of actual malice. See *id.* at 207 (explaining that the "clear and convincing evidence" standard involves a much heavier burden than the "preponderance of the evidence" standard used in most civil litigation).

Plaintiffs additionally argue that the trial court should not have granted summary disposition with regard to their false-light claims because discovery was incomplete and defendants had not produced the raw footage used to compile the DVD tracks in question. Generally, a grant of summary disposition under MCR 2.116(C)(10) is premature if discovery concerning a disputed issue is incomplete. *Stringwell v Ann Arbor Pub Sch Dist,* 262 Mich App 709, 714; 686 NW2d 825 (2004). However, "[i]f a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust,* 262 Mich App 485, 507; 686 NW2d 770 (2004) (internal citation and quotation omitted). Additionally, even if discovery is incomplete, "'summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position.'" *Stringwell, supra* at 714, quoting *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 25; 672 NW2d 231 (2003).

Plaintiffs assert that discovery would have shown that defendants used "slick editing" to create the false implications that (1) the meetings were recorded with a lighted camera and a large hand-held microphone, (2) plaintiffs knew they were being recorded, (3) plaintiffs consented to be part of the DVD, (4) plaintiffs were irresponsible and willing to incite a riot, and (5) plaintiffs had no basis for alleging that the movie introduction was obscene and inappropriate for children. We hold that the trial court did not prematurely grant summary disposition with regard to plaintiffs' false light claims. Indeed, as discussed above, because plaintiffs are claiming injury from the allegedly harmful implications arising from the DVD, they must show with clear and convincing evidence that defendants intended the implications that plaintiffs are attempting to draw. *Battaglieri, supra* at 305. Although further discovery could have shown that defendants edited the footage, further discovery did not stand a fair chance of uncovering the required clear and convincing evidence that defendants intended to create the allegedly false implications that plaintiffs are attempting to draw, and, therefore, the trial court did not err in granting summary disposition.

IV. Invasion of Privacy through Appropriation

Plaintiffs argue that the trial court improperly granted defendants summary disposition with respect to plaintiffs' claims of invasion of privacy through appropriation.[3]

The invasion of privacy cause of action for appropriation is "founded upon 'the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.'" *Battaglieri, supra* at 300, quoting Restatement of Torts, 2d, § 652(C), comment a. The appropriation tort protects the plaintiff's property interest in his name or likeness. *Battaglieri, supra* at 300-301.

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[3] Plaintiffs mention in a footnote that the trial court did not specifically address their unjust enrichment and restitution claims. However, the trial court found that "plaintiffs' claim for publicity misappropriation, also brought under restitution and unjust enrichment, fails." As the trial court noted, the unjust enrichment and restitution claims mirrored the appropriation claim.

Unlike the other forms of invasion of privacy, including false light, appropriation does not require falsity. *Id.* at 301. Rather, any unauthorized use of the plaintiff's name or likeness is actionable if it benefits another. *Id.* However, the First Amendment protects and privileges matters of public concern. *Id.*

> [C]ourts that have recognized the appropriation tort have also uniformly held that the First Amendment bars appropriation liability for the use of a name or likeness in a publication that concerns matters that are newsworthy or of legitimate public concern. "If a communication is about a matter of public interest and there is a real relationship between the plaintiff and the subject matter of the publications, the matter is privileged. [*Battaglieri, supra* at 301, quoting *Haskell v Stauffer Communications, Inc,* 26 Kan App 2d 541, 545; 990 P2d 162 (1999) (internal citations omitted).]

The character of the publication determines whether the public interest privilege applies. *Battaglieri, supra* at 302. "Michigan courts have . . . recognized a fundamental difference between the use of a person's identity in connection with a legitimate news item and its commercial use in an advertisement for the pecuniary gain of the user." *Nichols v Moore,* 334 F Supp 2d 944, 955 (ED Mich, 2004). The use of a person's likeness for news reporting, commentary, entertainment, and advertising incidental to such uses is generally privileged, and, therefore, does not constitute an actionable commercial use. *Ruffin-Steinback v De Passe,* 82 F Supp 2d 723, 730 (ED Mich, 2000). "A defendant can be 'liable for the tort of misappropriation of likeness only if defendant's use of plaintiff's likeness was for a predominantly commercial purpose. . . . The use must be mainly for purposes of trade, without a redeeming public interest, news, or historical value.'" *Battaglieri, supra* at 301, quoting *Tellado v Time-Life Books, Inc*, 643 F Supp 904, 909-910 (D NJ, 1986). Generally, the question whether the public interest or newsworthiness privilege applies is a question of law to be decided by the court. *Battaglieri, supra* at 302.

"A publication that has 'commercial undertones' may still be protected if it concerns a legitimate matter of public concern. 'The cases uniformly apply a newsworthiness privilege to matters . . . even though they are published to make a profit.'" *Battaglieri, supra* at 302-303, quoting *Haskell, supra* at 545 (internal citation omitted). The Sixth Circuit explained that "[t]he fact that the publisher or other user seeks or is successful in obtaining a commercial advantage from an otherwise permitted use of another's identity does not render the appropriation actionable." *Ruffin-Steinback, supra* at 730.

On appeal, plaintiffs assert that there were genuine issues of material fact regarding whether plaintiffs' likenesses were used for defendants' benefit. However, we hold that, regardless of whether plaintiffs' likenesses were used for defendants' benefit, the First Amendment bars appropriation liability because the DVD tracks in question concern matters that are newsworthy or of legitimate public concern. Both parties submitted newspaper articles regarding both the "Up in Smoke Tour" and the Detroit officials' actions. Because the subject matter in question was newsworthy and plaintiffs had a real relationship to the subject matter, their appropriation claims are barred by the First Amendment. Although the DVD was produced to make a profit, the newsworthiness privilege still applies. Indeed, defendants' use of plaintiffs' likenesses possessed redeeming public interest and news value. Even if a commercial advantage was sought or obtained, given the news commentary and entertainment value of the information,

"the fact that the publisher or other user seeks or is successful in obtaining a commercial advantage from an otherwise permitted use of another's identity does not render the appropriation actionable." *Ruffin-Steinback, supra* at 730.

Additionally, although plaintiffs argue that the trial court made erroneous factual findings and inferences – including that the commercial value of plaintiffs' likenesses was based on plaintiffs' generic identity as law-enforcement officers and that defendants were not concerned about the commercial value of plaintiffs' likenesses – such statements are not outcome-determinative. Although the trial court granted summary disposition on different grounds than those asserted here, we hold that the trial court's decision granting summary disposition must be affirmed because the right result was reached. *Pro-Staffers, Inc v Premier Mfg Support Servs,* 252 Mich App 318, 322; 651 NW2d 811 (2002).[4]

V. Fraud

Plaintiffs argue that the trial court improperly granted summary disposition to defendants with regard to plaintiffs' fraud claims.

To establish a claim of fraudulent misrepresentation, a plaintiff must show:

> "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." [*M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), modified on other grounds by *Novak v Nationwide Mut Ins Co,* 235 Mich App 675, 689-691; 599 NW2d 546 (1999).]

In addition to a situation involving false assertions, fraud may also be committed by suppression of facts and suppression of the truth. *Hord v Environmental Research Institute of Michigan,* 463 Mich 399, 412; 617 NW2d 543 (2000). With respect to silent fraud, mere nondisclosure is insufficient. *Id.* The suppression of material facts can constitute silent fraud only if the defendants are under a legal or equitable duty to make a disclosure. *Mable Cleary Trust, supra* at 500. "A legal duty to disclose commonly arises from a circumstance in which the plaintiff inquires regarding something, to which the defendant makes a false or misleading representation by replying incompletely with answers that are truthful but omit material information." *Id.*

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[4] Although plaintiffs make a general statement in their appellate brief that the trial court prematurely granted summary disposition to defendants before the completion of discovery, they do not make a specific discovery argument with regard to their claims of invasion of privacy through appropriation. Accordingly, the "premature discovery" issue as applied to these claims is waived for purposes of appeal. *Palo Grp Foster Care, Inc v Michigan Dep't of Social Services,* 228 Mich App 140, 152; 577 NW2d 200 (1998).

Plaintiffs' complaint alleged both fraudulent misrepresentation and silent fraud. Plaintiffs argued that defendants Tucker, Young, Silva, House of Blues, Johnson, Magic Johnson Productions, and Aftermath fraudulently represented to plaintiffs Bowens, Bridges, and Brown that their meeting would be private and unrecorded. Second, plaintiffs argued that the defrauding defendants had actual knowledge that the meeting was being secretly recorded but failed to disclose this fact to plaintiffs, knowing that this failure would create a false impression. On appeal, plaintiffs argue that genuine issues of material fact exist regarding whether plaintiffs relied on defendants' alleged fraudulent acts.

We hold that summary disposition was appropriate because plaintiffs did not submit sufficient documentary evidence to create a question of fact regarding whether they relied on defendants' alleged representations. Although plaintiffs' complaint asserted that "the defrauded plaintiffs relied on the representation" and "the defrauded plaintiffs relied on the false impression," plaintiffs did not submit any documentary evidence, such as affidavits or depositions, claiming reliance in response to defendants' motion for summary disposition. Given that the burden of proof would rest on plaintiffs at trial, plaintiffs cannot rely on mere allegations in the pleadings. *Shepherd Montessori Center Milan v Ann Arbor Twp,* 259 Mich App 315, 324; 675 NW2d 271 (2003). Because plaintiffs failed to produce documentary evidence on this issue, summary disposition was appropriate under MCR 2.116(C)(10).

Also, plaintiffs argue that the trial court used the erroneous factual finding that the act of videotaping was clearly visible to conclude that plaintiffs did not reasonably rely on the fraudulent acts and to grant summary disposition with respect to plaintiffs' fraud claims. Although the trial court granted summary disposition on different grounds than those set forth here, we hold that the trial court's decision granting summary disposition must be affirmed because the right result was reached. *Pro-Staffers, Inc, supra* at 322.

Plaintiffs also argue that the court granted summary disposition prematurely with respect to the fraud claims. They argue that discovery would have shown that plaintiffs were not in the room when the "clearly visible" videotaping occurred and that plaintiffs did not see the camera operator. Plaintiffs assert that "at best discovery would have conclusively proven that plaintiffs relied on the fraud. At worst, discovery would have shown that reliance is a question of fact."

We hold that summary disposition of plaintiffs' fraud claims was not prematurely granted. Indeed, even if further discovery showed that the videotaping was not clearly visible, summary disposition of plaintiffs' fraud claims would still be appropriate because plaintiffs did not submit sufficient documentary evidence to create a question of fact regarding whether they relied on defendants' alleged representations. To establish a claim of fraudulent misrepresentation, plaintiffs must show that they acted in reliance on defendants' misrepresentations. *Mable Cleary Trust, supra* at 499-500. Further discovery was not necessary for plaintiffs to discover their own reliance. Reliance was within the knowledge of plaintiffs. After being given almost a year to conduct discovery with regard to the reliance issue, plaintiffs' conclusory allegations regarding their own reliance did not raise a genuine issue of fact.

VI. Eavesdropping

Plaintiffs argue that the trial court improperly granted summary disposition to defendants with regard to the eavesdropping claims under MCL 750.539c or 750.539d. With regard to this issue, we find dispositive the fact that discovery had not been completed.

Plaintiffs argue that further discovery would have demonstrated that (1) defendants' responses to plaintiffs' requests for a private meeting were edited out, (2) only a limited number of concert staff and officials were allowed in the meeting, (3) a guard was stationed outside the meeting room door, and (4) plaintiffs were unaware that they were being videotaped. In light of the video footage available in the existing record, we agree that further discovery might serve to provide documentary evidence for plaintiffs' eavesdropping claims. *Mable Cleary Trust, supra* at 507; *Stringwell, supra* at 714. Indeed, further, unedited footage might make it apparent that plaintiffs had a reasonable expectation that their conversations would be private and that defendants perpetrated or aiding in perpetrating eavesdropping or violating various statutes relating to eavesdropping. See *People v Stone,* 463 Mich 558, 561-562; 621 NW2d 702 (2001) (discussing in general the components of eavesdropping).[5]

VII. Conspiracy and Concert of Action

Plaintiffs argue that the trial court improperly granted summary disposition to defendants with regard to the conspiracy and "concert of action" claims. Plaintiffs state that the "conspiracy and aiding and abetting claims are derivative of [the] primary claims" and that summary disposition was inappropriately granted "for the same reasons that summary disposition was inappropriately granted on [the] primary claims." Because we reject the majority of plaintiffs' primary claims, we also reject the conspiracy and concert of action claims that correspond to these primary claims. With regard to the eavesdropping claim, we conclude that further discovery might provide support for plaintiff's related claims for conspiracy and concert of action. See, generally, *Mable Cleary Trust, supra* at 507, and *Jodway v Kennametal, Inc,* 207

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[5] Defendants contend that plaintiffs failed to state a cognizable claim against the "production, distribution, and retail defendants" because (1) liability could only be found if these defendants used or divulged information when they knew or should have known that the information was obtained by eavesdropping and (2) plaintiffs set forth no specific allegations or evidence that these defendants had the requisite knowledge or constructive knowledge. The majority notes that these "disclosing defendants" raised this issue below under MCR 2.116(c)(8) and thus it can be dealt with as a matter of law. However, I note that defendants admit that "the circuit court did not reach this issue." I would direct the court to address this issue on remand. We further note that we are remanding plaintiff Dunlap's eavesdropping claim along with the eavesdropping claims of the remaining plaintiffs, even though Dunlap's claim was separate and arose out of the "Crew" DVD segment. On the issue concerning plaintiffs' reasonable expectation of a private conversation, the "Crew" DVD segment provides less evidence in favor of plaintiffs than the "Detroit Controversy" segment. Nonetheless, we conclude that further discovery has a reasonable chance of uncovering factual support for Dunlap's eavesdropping claim. *Stringwell, supra* at 714.

Mich App 622, 631; 525 NW2d 883 (1994). (discussing civil conspiracy and concert of action claims). Accordingly, we remand with respect to this issue.

/s/ Patrick M. Meter