STATE OF MICHIGAN

COURT OF APPEALS

VC, INC. d/b/a VALUE CENTER MARKET, SPTN, INC., d/b/a VALUE CENTER MARKET PLACE, and AFENDI, INC., d/b/a VALUE CENTER MARKET,

Plaintiffs-Appellants,

v

KRAFT FOODS GLOBAL, INC., a/k/a/ KRAFT FOODS, INC., KURT KELLY, DANIEL KENNEDY, JAMES LOVEALL, THOMAS MALINOVICH, and JOHN BARDSLEY,

Defendants-Appellees.

UNPUBLISHED
December 26, 2013

No. 304506
Wayne Circuit Court
LC No. 09-011669-CZ

VC, INC., d/b/a VALUE CENTER MARKET, SPTN, INC., d/b/a VALUE CENTER MARKET PLACE, and AFENDI, INC., d/b/a/ VALUE CENTER MARKET,

Plaintiffs-Appellants,

v

KRAFT FOODS GLOBAL, INC., a/k/a KRAFT FOODS, INC., KURT KELLY, DANIEL KENNEDY, JAMES LOVEALL, THOMAS MALINOVICH, and JOHN BARDSLEY,

Defendants-Appellees.

No. 309678
Wayne Circuit Court
LC No. 09-011669-CZ

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants and the trial court's order awarding defendants costs

and attorney fees pursuant to MCR 2.403 and MCR 2.625. In Docket No. 304506, we affirm. In Docket No. 309678, we reverse and remand and direct the trial court to determine which portions of defense counsel Block & Jenner's billing statements are not subject to attorney-client privilege and thus may be submitted to plaintiffs in unredacted form for their further review and potential challenges, and for further proceedings consistent with this opinion.

Plaintiffs operate grocery stores throughout Michigan and sell products from a variety of manufacturers, including defendant Kraft Foods, Inc. Plaintiffs obtain Kraft products through several sources, including wholesale distributors. In April 2008, Kraft Foods, Inc. ("Kraft") reported that two loads of Kraft products (including Nabisco goods) were stolen from a distribution facility in Georgia. In July 2008, defendants, Thomas Malinovich, a district manager for Nabisco, Kurt Kelly, a manager at Kraft Foods, and John Bardsley, Nabisco Regional Director for Michigan, visited Value Center Markets and advised that some of the products in the Value Center Markets may have been procured through a theft. Plaintiffs asserted that they told the visitors that the products had been validly purchased through a legitimate wholesale distributor with whom plaintiffs had a long-time relationship and produced the invoices for the product purchases for inspection.

Nevertheless, according to plaintiffs, Malinovich told the Michigan State Police that there were Nabisco products from the April 2008 theft at plaintiffs' Value Center Markets and, on August 8, 2008, the Michigan State Police executed search warrants on plaintiffs' Value Center Markets and raided the stores. A press release later appeared in the media detailing the raids that occurred at plaintiff stores, as well as other stores in the area, with respect to the stolen Kraft products. Plaintiffs allege that Kraft's actions were an attempt to stop plaintiffs from purchasing products from various wholesale suppliers rather than from Kraft directly. Plaintiffs thus brought an action against defendants alleging that they engaged in defamation, tortiously interfered with a contract or advantageous business relationship or expectancy, engaged in bad faith conduct, engaged in malicious prosecution, abused process, engaged in fraud and misrepresentation, violated the Michigan Anti-Trust Reform Act, interfered with prospective business advantage, and engaged in civil conspiracy.[1]

In lieu of answering plaintiffs' complaint, defendants moved for summary disposition pursuant to MCR 2.116(C)(8). After a hearing, the trial court dismissed plaintiffs' claims of bad faith conduct, malicious prosecution, abuse of process, violation of the Michigan Anti-Trust Reform Act and civil conspiracy, without prejudice. The trial court advised plaintiffs that if they developed further facts, they could file a motion to amend their pleadings, which it would consider.

After discovery closed, plaintiffs moved to reinstate two of their five previously dismissed causes of action—abuse of process and violations of the Michigan Anti-Trust Reform Act. On the same date, plaintiffs also moved for leave to amend their complaint, essentially to add details to these two claims sufficient to survive summary disposition under MCR 2.116(C)(8). The trial court denied the motion and defendants thereafter moved for summary

[1] Various other claims were dismissed by stipulation.

disposition on plaintiffs' remaining claims (defamation, tortious interference with contract or advantageous business relationship or expectancy, interference with prospective business advantage, fraud and misrepresentation) pursuant to MCR 2.116(C)(8) and (10). The trial court granted the motion, dismissing plaintiffs' case in its entirety. Plaintiffs now appeal that decision to this Court (docket 304506). The trial court also granted defendants' motion for taxable costs in the amount of $13,316.45 and, after an evidentiary hearing, attorney fees in the amount of $196,046.50. Plaintiffs also appeal that award to this Court (docket no. 309678) and the two appeals have been consolidated for resolution.

DOCKET NO. 304056

On appeal, plaintiffs first contend that the trial court erred in granting summary disposition to defendants pursuant to MCR 2.116(C)(10) with respect to plaintiffs' claims of (1) defamation and (2) fraud and misrepresentation. We disagree.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In reviewing a motion under subrule (C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551–552; 739 NW2d 313 (2007). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 552. The applicability of a privilege is a question of law this Court also reviews de novo. *Oesterle v Wallace*, 272 Mich App 260, 263; 725 NW2d 470 (2006).

The elements of a defamation claim are: "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). "A plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Thomas M. Cooley Law School v Doe 1*, 300 Mich App 245, 262; 833 NW2d 331 (2013).

Plaintiffs' claim of defamation was premised upon allegedly false statements that Kraft provided to the Michigan State Police in order to trigger the raids on plaintiffs' stores. Plaintiffs indicate that there were questions as to whether the goods in their stores were, in fact, stolen, thus precluding summary disposition in defendants' favor. However, e-mail exchanges between Kraft employees regarding products stolen in Georgia, a chain of distribution of the product, a chain of distribution of the product produced on the same date as the stolen product and sold through legitimate means, and product codes corresponding to the stolen products as well as those recovered in Michigan stores were produced to the trial court. Kraft provided documentary evidence, unrefuted by plaintiffs, that the stolen product codes matched up with those codes found on products located in plaintiffs' stores and the plaintiffs did not purchase the product on their shelves from either of the two sources shown to have purchased the product bearing the

same date code that was proven to have been purchased through legitimate, traceable means and not stolen.

Moreover, an absolutely privileged statement cannot be actionable. *Trimble v Morrish*, 152 Mich 624, 627; 116 NW 451 (1908). "An absolutely privileged communication is one for which no remedy is provided for damages in a defamation action because of the occasion on which the communication is made." *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992). "A privileged occasion is an occasion where the public good requires that a person be freed from liability for the publication of a statement that would otherwise be defamatory." *Id*. If a statement is absolutely privileged, it is not actionable even if it was false and maliciously published. *Tocco v Piersante*, 69 Mich App 616, 629; 245 NW2d 356 (1976). Statements to law enforcement in the course of an investigation are absolutely privileged and provide no basis for a defamation claim. *Shinglemeyer v Wright*, 124 Mich 230, 239; 82 NW 887 (1900); *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 619; 396 NW2d 809 (1986). Any statements made by defendants to the police in the course of their search for their stolen product and in furtherance of their police reports—even if false or misleading as alleged by plaintiffs—are absolutely privileged and cannot form the basis of a defamation claim.

Plaintiffs also claim their defamation claim survives summary disposition because defendants provided materially false information to the police *after* the raids on their stores when the police were preparing a press release that was then published in multiple media venues. According to plaintiffs, the press release contained information implying that plaintiffs were either responsible for the goods being stolen or knowingly sold stolen goods. We disagree.

As explained in *Hawkins v Mercy Health Servs, Inc*, 230 Mich App 315, 330; 583 NW2d 725 (1998), a cause of action for defamation by implication exists in Michigan, "but only if the plaintiff proves that the defamatory *implications* are materially false, and (2) that such a cause of action might succeed even without a direct showing of any actual literally false *statements*." (emphasis in original). Here, there is no indication that the police investigation was concluded when the press release was issued. In fact, the press release specifically states that the investigation was ongoing. Because information was being provided to the police in the course of an ongoing investigation, absolute privilege still applied to communications provided by defendants to the police concerning the stolen goods.

Moreover, Detective Sergeant David Robertson, the officer in charge of the investigation, testified that the Public Affairs Department of the Michigan State Police prepared the press release concerning the seizure of the stolen Kraft products. Thus, the press release was not a false or defamatory statement made or published *by defendants*, but it was a statement published by the police.

Finally, "[t]ruth is an absolute defense to a defamation claim." *Wilson v Sparrow Health Sys*, 290 Mich App 149, 155; 799 NW2d 224 (2010). However, "it is not necessary for 'defendants to prove that a publication is literally and absolutely accurate in every minute detail.'" *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5 (2001), quoting *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 258; 487 NW2d 205 (1992). Rather, a defendant need only show that the statement is substantially true. *Id.*

"Therefore, if the gist of an article or the sting of the charge is "substantially accurate," the defendant cannot be liable." *Hawkins*, 230 Mich App at 333.

The press release at issue appears factually correct. It states that the Michigan State Police executed 13 search warrants at grocery stores in Macomb, Oakland, and Wayne County as part of an investigation into stolen food products. The press release further states that two trailers containing food products were stolen in Georgia and that undercover agents purchased stolen products from 13 grocery stores in the metro Detroit area, listing the specific stores (including plaintiffs') where said products were purchased. The press release does not state or suggest that plaintiffs were *knowingly* selling a stolen product. At most, it was suggested that all 13 stores purchased the product through channels other than through those that Kraft considered "normal," which is substantially accurate. See *Hawkins*, 230 Mich App at 333. The trial court thus did not err in granting summary disposition on plaintiffs' defamation claim.

The trial court also did not err in granting summary disposition in defendants' favor on plaintiffs' claim of fraud and misrepresentation. To establish an actionable fraud claim, a plaintiff must show: "(1) [t]hat defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury." *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 283–284; 803 NW2d 151 (2011)(quotation marks and citations omitted). There are three types of fraud: fraudulent misrepresentation, innocent misrepresentation, and silent fraud. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). Silent fraud is accomplished when one has a legal or equitable duty of disclosure, yet the truth is suppressed to the detriment of another. *Id.* at 557.

First and foremost, plaintiffs contend that their fraud and misrepresentation claim was based upon statements Kraft made to plaintiffs' representatives prior to the raids that there were no concerns with respect to the stolen goods—not based upon statements made by Kraft to the police—and that the trial court "mistakenly" believed that plaintiffs' claims were based upon statements made to the police. However, plaintiffs' first amended complaint very clearly sets forth as the basis for their fraud and misrepresentation claim statements made to the Michigan State Police. For example, plaintiffs contended, "[t]he Defendants are liable for misrepresentation in connection with the information provided to the Michigan State Police for the obtaining of a Search Warrant . . . ." Because "[a]n allegation of fraud based on misrepresentations made to a third party does not constitute a valid fraud claim," *International Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App 437, 447; 543 NW2d 25 (1995), the trial court did not err in granting summary disposition in defendants' favor on this claim.

When, at oral argument, plaintiffs asserted that they also based their claim on statements made to plaintiffs, the trial court opined that the statements made to plaintiffs were not fraudulent or misrepresented. We agree. The gist of plaintiffs' argument is that rather than tell them that goods in their store were stolen and to ask for their return or to provide plaintiffs with an opportunity to give the goods back to Kraft, Kraft instead went to the police. Plaintiffs have failed to identify any legal or equitable duty on Kraft's part, however, to advise plaintiffs of their discovery or to provide plaintiffs with an opportunity to give Kraft the stolen goods. As

previously indicated, to establish silent fraud (the theory apparently promulgated by plaintiffs at this point) plaintiffs must show that Kraft had a legal or equitable duty of disclosure, yet suppressed the truth, to plaintiffs' detriment. See *Titan Ins Co*, 491 Mich at 555. Plaintiffs have not established this element and summary disposition would have been appropriate on their silent fraud claim, had they properly pled it.

Plaintiffs next contend that the trial court erred in dismissing their abuse of process claim under MCR 2.116(C)(8) and then it improperly failed to afford them the opportunity to amend their complaint to provide more detail on this claim. We disagree.

A motion under "MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under subrule (C)(8) is appropriate "if no factual development could justify the plaintiffs' claim for relief." *Id*.

"To recover pursuant to a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). "[A] plaintiff making out a claim for abuse of process must allege a use of process for a purpose outside of the intended purpose and must allege with specificity an act which itself corroborates the ulterior motive." *Young v Motor City Apartments Ltd Dividend Housing Ass'n No 1 & No 2*, 133 Mich App 671, 681; 350 NW2d 790 (1984). Importantly, a claim for abuse of process lies only for the improper *use* of a legal process, not the bare *issuance* of the process. *Spear v Pendill*, 164 Mich 620, 623; 130 NW 343 (1911); *Dalley v Dykema Gossett*, 287 Mich App 296, 322; 788 NW2d 679 (2010). And, a bad motive alone will not establish an abuse of process. *Bonner*, 194 Mich App at 472.

In their abuse of process claim, plaintiffs asserted that defendants "abused the criminal investigative process by using for its own ulterior motives or purposes to cause vexation, trouble, embarrassment, and damage to the Value Center Markets' business reputation, and damage to the Value Center Markets' community reputation with its customers, and as retaliation for Value Center Markets' purchase of Kraft food products from wholesalers which had not been approved by Kraft. Such use of the criminal investigative process was not legitimate, regular, or legal." Plaintiffs alleged as a corroborating act of defendants' improper purpose their failure to provide police with plaintiffs' invoices showing that they had purchased the stolen goods from a legitimate source. This "act" however does not demonstrate an ulterior purpose on defendants' part. Defendants' conduct in reporting the presence of stolen goods in plaintiffs' stores (as well as several others in the metro-Detroit area) was that of any victim of theft who has potentially located their stolen goods.

More importantly, as stated in *Friedman v Dozorc*, 412 Mich 1, 30 n 18; 312 NW2d 585 (1981), quoting 3 Restatement Torts, 2d, § 682, comment *a*, at 474, "[t]he gravamen of the misconduct for which liability stated in this section is imposed is not the wrongful procurement of legal process or the wrongful initiation of civil proceedings; it is the misuse of process, no matter whether properly obtained, for any purpose other than that which it was designed to accomplish." "[this] action for abuse of process lies for the improper use of process following its

issuance, not for maliciously causing it to issue." *Id*. at 31(quotation marks and citation omitted, alteration in original). Plaintiffs' complaint sets forth allegations of improper conduct concerning information provided to police in order to initiate an investigation and obtain search warrants, i.e., to cause process to issue. Plaintiffs alleged no actions on the part of defendants *after* the search warrants were issued and the stolen product seized that constituted an abuse of process. As such, the trial court properly granted summary disposition on plaintiffs' claim of abuse of process pursuant to MCR 2.116(C)(8) and amendment would have been futile. See *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998)

Plaintiffs next assert that the trial court abused its discretion in refusing to allow plaintiffs to file their second amended complaint. We disagree.

This Court reviews for an abuse of discretion a trial court's decision denying leave to amend pleadings. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

MCR 2.116(I)(5) provides that, when the court dismisses a party's claims pursuant to MCR 2.116(C)(8), (9) or (10), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.118(A)(2) states: "[A] party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." "[A]mendment is generally a matter of right, rather than grace," *Lane*, 231 Mich App at 697, and should be denied only for particularized reasons such as futility, undue delay, bad faith or dilatory motive, undue prejudice to the opposing party, or repeated failure to cure deficiencies by previous amendments. *Weymers*, 454 Mich at 658. "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). An amendment is also futile if it "adds allegations that still fail to state a claim." *Lane*, 231 Mich App at 697.

Plaintiffs moved to amend their complaint to reinstate their abuse of process and violation of the Michigan Anti-Trust Reform Act and to add two new claims: breach of contract and discrimination in violation of the Elliott-Larsen Civil Rights Act. The trial court specified two reasons for denying plaintiffs' request: because discovery had closed and the parties had already been through case evaluation (delay), and because the motion was based merely on counsel's questions asked of witnesses, and not on any answers that they had given to the questions asked of them. In making this second statement, the trial court essentially stated that there was no basis for plaintiffs' proposed amendments, i.e., that the amendments would be futile. According to plaintiffs, new discovery supported their abuse of process claim such that they should have been allowed to amend their complaint to reinstate this claim with more detail

to establish that it would not have been futile.[2] However, in their proposed amended complaint, plaintiffs' allegations concern representations that defendants made to the police in order to cause the search warrants to issue. As indicated above, a claim for abuse of process cannot be based upon the *issuance* of the process, but only for the improper *use* of such process, *Dalley*, 287 Mich App at 322, such that plaintiffs' amendment with respect to their abuse of process claim would have been futile.

Plaintiffs also assert that their discrimination claim would not have been futile. Again, an amendment is futile if it is legally insufficient on its face or if it adds allegations that merely restate those allegations already made. *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

In their proposed amended complaint, plaintiffs sought relief under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*. The purpose of the Elliott-Larsen Civil Rights Act is "to prevent discrimination against persons based on their membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Bryant v Automatic Data Processing, Inc*, 151 Mich App 424, 430; 390 NW2d 732 (1986)(quotation marks and citation omitted). The specific provision relied upon by plaintiffs provides:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status [MCL 37.2302].

To state a claim under MCL 37.2302(a), a plaintiff "must establish four elements: (1) discrimination based on a protected characteristic (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

Plaintiffs alleged in their proposed amended complaint that Terry Farida and David Najor, owners of the plaintiff Value Center Markets, were discriminated against by Kraft Foods, defendant Kelly and defendant Malinovich because they are Chaldean. National origin is one of the specifically listed protected characteristics. They thus sufficiently plead the first element of a discrimination claim. Kelly and Malinovich are "persons" as is Kraft Foods, per the definition set forth in MCL 37.2103(g).("Person" means an individual, agent, association, corporation . . . .). Plaintiffs also sufficiently plead the second element of a discrimination claim.

[2] Plaintiffs do not make a similar argument with respect to their claim sounding in the Michigan Anti-Trust Reform Act and assert no allegation of error with respect to the trial court's denial of their motion to reinstate this count.

With respect to the third element of a discrimination claim, plaintiffs alleged that Kraft Foods denied them the full and equal enjoyment of their goods and services by interfering with plaintiffs' ability to purchase Kraft products from other legitimate sources on the open market for the lowest price possible. This allegation is somewhat confusing in that it does not allege that Kraft itself, because it had a discriminatory animus against plaintiffs, refused to do business with them or interfered with plaintiffs' consumption or purchase of Kraft products from Kraft. There is no allegation that Kraft denied plaintiffs any opportunity to enjoy their goods and services due to their Chaldean heritage. Instead, it appears that plaintiffs are alleging that, because they are Chaldean, Kraft somehow acted in a discriminatory manner that prevented plaintiffs from buying Kraft products from *someone else*. That allegation is not only incomplete, as it lacks specificity in how this was accomplished on Kraft's part, it is nonsensical. It appears that plaintiffs are alleging that Kraft was so discriminatory against Chaldeans that it wanted them to deal solely with Kraft instead of a third party. To the extent that plaintiffs are claiming that Kraft interfered with their right or opportunity to obtain Kraft products from a source other than Kraft, they are stating a tortious interference claim, which was present in their first complaint. The discrimination claim would be futile, and the trial court did not abuse its discretion in denying plaintiffs' motion to amend to add this claim.

Finally, plaintiffs assert that their proposed breach of contract claim would also not have been futile. A party claiming a breach of contract must establish "(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller–Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). A valid contract requires "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Calhoun Co v Blue Cross & Blue Shield of Mich*, 297 Mich App 1, 13; 824 NW2d 202 (2012) (quotation marks and citations omitted).

In their proposed amended complaint, plaintiffs alleged that Kraft Foods and plaintiffs had an oral agreement wherein Kraft was to be honest and candid with plaintiffs and to treat them in a fair and equitable manner. Plaintiffs further alleged that there was a mutuality of the obligation to be open and honest with one another and that defendants breached the parties' contract by saying things that were not true and engaging in the conduct at issue (i.e., causing the warrants to issue and the raids to take place on plaintiff stores).

While plaintiffs alleged that a contract was entered into, they did not identify the persons whom allegedly entered into the contract on behalf of the parties. Thus, it does not appear that element (1), parties competent to contract, has been met. The same holds true for element (3), legal consideration. Our Supreme Court has defined consideration as a bargained exchange involving "a benefit on one side, or a detriment suffered, or service done on the other." *The Meyer and Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58; 698 NW2d 900 (2005), quoting *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002)(additional quotation marks and citation omitted). In the proposed amended complaint, plaintiffs stated that the consideration for the contract is the increase in the sales of Kraft products at plaintiff stores. Plaintiffs have identified no service done on their part or benefit to them as a result of the contract. They have thus identified no bargained for exchange.

As to element (4), mutuality of agreement, plaintiffs have not identified who entered into the contract, let alone that Kraft agreed to be candid and honest with plaintiff under all circumstances and at all times. They have also not identified who, on plaintiffs' part, indicated to Kraft that plaintiffs would be candid and honest with Kraft at all times or that plaintiffs actually undertook such an obligation. Having failed to identify anyone from Kraft who entered into an agreement with plaintiffs, it is difficult to ascertain how plaintiffs have established a mutual agreement between it and Kraft to enter into any type of contract. Mutuality of agreement, after all, requires an offer and acceptance. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). Plaintiffs must establish that an offer was made, by anyone at Kraft, to be honest and candid at all times (i.e. a manifestation by Kraft of a willingness to enter into such a bargain with plaintiffs, see *Id*.) and they failed to do so.

Plaintiffs having failed to sufficiently plead all of the essential elements of a breach of contract claim, the trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint to add this claim. It would have been futile as stated.

In sum, the trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint.

DOCKET NO. 309678

Plaintiffs first contend that the trial court erred by failing to deny defendants' request for attorney fees and costs in the interests of justice.

"A trial court's decision whether to grant case evaluation sanctions presents a question of law, which this Court reviews de novo." *Tevis v Amex Assurance Co*, 283 Mich App 76, 86; 770 NW2d 16 (2009). This Court reviews a trial court's award of attorney fees and costs for an abuse of discretion, which occurs when the decision falls outside the range of reasonable and principled outcomes. *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 211; 823 NW2d 843 (2012). We also review for an abuse of discretion a trial court's decision whether to award costs in the "interest of justice" pursuant to MCR 2.403(O)(11). *Campbell v Sullins*, 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003).

MCR 2.403(O)(1) states, "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." MCR 2.403(O)(1) is a mandatory rule, which requires the party rejecting a case evaluation to pay the opposing party's actual costs under certain circumstances. *Haliw v City of Sterling Hts (On Remand)*, 266 Mich App 444, 447; 702 NW2d 637 (2005). However, where the verdict is entered as a result of a ruling on a motion, MCR 2.403(O)(11) sets forth an exception to the mandatory rule set forth in MCR 2.403(O)(1). MCR 2.403(O)(11) provides, "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." Thus, despite the mandatory nature of MCR 2.403(O)(1), MCR 2.403(O)(11) confers discretion upon the trial court regarding whether to award actual costs when a judgment is entered under MCR 2.403(O)(2)(c) and the trial court determines that awarding costs would not be in the interests of justice. Id. at 447. The *Haliw* Court further explained:

> In sum, we conclude that if the trial court finds on the basis of all the facts and circumstances of a particular case and viewed in light of the purposes of MCR 2.403(O) that unusual circumstances exist, it may invoke the "interest of justice" exception found in MCR 2.403(O)(11). It follows that if the exception applies, the trial court may, in the exercise of its discretion, refuse to award any costs or attorney fees, or may award something less than "actual costs," i.e., something less than taxable costs and reasonable attorney fees. The trial court must, however, articulate the bases for its decision. [*Haliw*, 266 Mich App at 449 (citations omitted).]

Interest of justice exceptions have been found in circumstances where it is a case of first impression, a party has engaged in misconduct, or the law is unsettled and substantial damages are at issue. *Haliw*, 266 Mich App at 448-449 (quotation marks and citations omitted). In *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 466; 702 NW2d 671 (2005), this Court stated that the above factors are not exclusive and noted that "a significant financial disparity between the parties" could also be considered a sufficiently unusual circumstance so as to warrant the application of the "interest of justice" exception.

Plaintiffs argue that the interests of justice are triggered here for two reasons: defendants engaged in misconduct, and there is a substantial financial disparity between the parties. We disagree that "defendants engaged in multiple acts of deception that caused the problems which resulted in this litigation." Defendants reported finding stolen product in plaintiffs' stores to the police. Raids were then conducted in plaintiffs' (and other) stores to recapture the product. That the trial court opined its belief that Kraft could have handled the matter better does not equate with defendants having engaged in misconduct sufficient to trigger the interests of justice exception.

As to financial disparity, there is no doubt a financial disparity exists between the parties. As noted in *Luidens v 63rd Dist Court*, 219 Mich App 24, 34; 555 NW2d 709 (1996), "[t]here is almost always some degree of disparity of economic standing between the parties" and parties should not "be able to engage in litigation with governmental or larger corporate entities secure in the knowledge that they need not weigh the same considerations as parties suing entities that are less financially endowed." Thus, factors normally present in litigation, such as economic differences between parties, are not, standing alone, enough to justify the interests of justice exception. *Haliw*, 266 Mich App at 448. Given the above, the trial court did not abuse its discretion in declining to apply the "interests of justice" exception to imposing sanctions found at MCR 2.403(O)(11).

Plaintiffs next assert that the trial court erred in simply accepting the attorney rates proffered by defendants. The determination of a reasonable hourly rate for an attorney fee to include in a case evaluation sanction is within the trial court's discretion. *Zdrojewski v Murphy*, 254 Mich App 50, 73; 657 NW2d 721 (2002).

In *Wood v Detroit Automobile Inter–Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), the Michigan Supreme Court elucidated six factors to be considered in determining a reasonable attorney fee in the context of awarding case evaluation sanctions:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client [quotation marks and citation omitted].

More recently, the Supreme Court has modified these factors slightly, and has clarified:

> In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood* [supra] and MRPC 1.5(a). Michigan Rule of Professional Conduct 1.5(a) sets forth eight factors, which overlap the *Wood* factors. [*Smith v Khouri*, 481 Mich 519, 529-530; 751 NW2d 472 (2008).]

The factors set forth in MRPC 1.5(a) are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

In accordance with *Smith*, then, when determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services by using reliable surveys or other credible evidence. At the evidentiary hearing concerning reasonable attorney fees, exhibits submitted included the 2010 Economics of Law Practice and the billing rate summary report from the State Bar of Michigan, the latter of which showed the median rate charged in Wayne County to be $230 per hour.

The first of defendants' three attorneys, Philipp Harris, testified that he is counsel of record for all defendants in the case. He is employed with a law firm in Chicago and was retained by Kraft. In 2010, he charged $468 per hour for this matter and in 2011 he charged $454 per hour, due to a volume agreement with Kraft. He is a partner at Jenner & Block in the litigation department, is co-chair of the product liability practice area, and is a member of the firm management committee. Jenner & Block employs around 450 attorneys. Harris testified that he is an experienced litigator and equity partner in this large firm. He testified that his partners consider him to be at the 95th percentile in his practice. He further testified that the 95th percentile rate according to the exhibits submitted is $485 per hour, which is more than the rate he charged for his services in this matter.

The second of defendants' three attorneys, Eric Buikema, testified that he is counsel of record in this case for Kraft and the individual defendants. He has handled a number of matters for Kraft with success over the past three or four years and has had a long relationship with LaBunski and Harris. He is an equity partner at Cardelli, Lanfear and Buikema, P.C. Buikema testified that he graduated at the top of his law class and has developed a reputation in the area as a skilled attorney, particularly in the products liability arena and is an experienced litigator. Buikema testified that his rate in the present matter is $285 per hour and that is his normal rate charged.

The third attorney, Jennifer L. Dlugosz, did not testify. However, she charged $298 per hour in 2010, $319 per hour in May 2011, and $309 per hour from June 2011 to the time the trial court rendered its opinion. Both Harris and Buikema testified as to her expertise and the reasonableness of her rates. Additionally, Julie LaBunski, chief counsel for the North American food service business of Kraft Foods Global, Inc., testified that on the basis of her experience and Kraft's experience with legal services in different localities, all three attorneys' rates are consistent with, customary, and appropriate for this locality for the type of services performed.

In its findings of fact and conclusions of law, the trial court referred to the 2010 Economics of Law Report, which stated that the average hourly billing rate charged by an equity partner in 2010 was $282 and the 95th percentile for such rate was $400 per hour. According to the trial court, the report indicated that the mean hourly rate for a firm of 50 attorneys, such as Jenner & Block (where Harris is a partner) is $313 and the 95th percentile is $525. The mean hourly rate for a firm with 11-20 attorneys, such as Cardelli, Lanfear & Buikema (where Buikema is a partner) is $287 per hour, and the 95th percentile is $450. The trial court also referred to the affidavits of the three attorneys, wherein they attested to the hourly rates that they charged in this matter and swore that such were the rates they customarily charged. The trial court concluded that "[t]he fees charged for legal services by the Fee Applicants are similar to those charged in the locality and in Mr. Buikema's case even lower than in his locality." The trial court then indicated that it should multiply the rate by the reasonable number of hours charged pursuant to *Smith*.

The trial court did not clearly err in finding the rates charged by the three attorneys to be reasonable. The trial court relied upon data provided by 2010 Economics of Law Report to establish that Harris charged above the mean for a partner in law firm in the area but less than the 95th percentile. Harris provided testimony that his customary rate was nearly $250 per hour more than he actually charged in this case, and that he represented GM in certain cases locally,

charging them $475 per hour. Julie LaBunski testified that Harris's rate was customary and reasonable on the basis of her experience in the locality, as did Buikema.

As to Buikema's $285 per hour charged, it was slightly below the $287 mean rate charged for an attorney in a firm the size of his own firm. Concerning Dlugosz's rates of $298 to $319, the mean rate for a senior associate was found to be $220 per hour with the 95th percentile being $400 per hour. Dlugosz was thus generally in the 75th percentile range. Harris testified that she was responsible for the majority of the research and brief writing and both LaBunksi and Buikema testified that, on the basis of their experience, Dlugosz's rates were reasonable and customary in the area. LaBunski further offered testimony of the reputation and experience of at least Harris and Buikema. Such testimony supports the trial court's finding given that the *Smith* Court's admonition that "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Smith*, 481 Mich at 531, quoting *Blum v Stenson*, 465 US 886, 895 n 11; 104 S Ct 1541; 79 L Ed 2d 891 (1984).

The testimony and documentary evidence was sufficient to support the trial court's finding that the charged rates were reasonably hourly rates. The trial court thus did not abuse its discretion in awarding the hourly rates as charged.

Plaintiff next asserts that the trial court erred in accepting the unreasonably redacted billing invoices of defendants' counsel as evidence of the reasonableness of their attorney fee request, thereby denying plaintiffs the opportunity to effectively challenge the request in awarding defendants case evaluation sanctions. We agree.

As previously stated, MCR 2.403(O)(1) states, "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." "Actual costs" for purposes of case evaluation sanctions include those costs taxable in any civil action and a reasonable attorney fee based on a reasonable hourly rate as determined by the trial judge for services made necessary by the rejection of the case evaluation. MCR 2.403(O)(6). The party requesting attorney fees bears the burden of proving they were incurred and that they were reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005).

In support of their request for attorney fees as part of case evaluation sanctions, defendants submitted billing invoices from attorney Eric Buikema and the law firm of Block & Jenner (two attorneys from that law firm, Harris and Dlugosz, billed from that firm). Attorney Buikema's billings are not objectionable on the basis of redaction, as they contain detailed entries such as "email correspondence from Attorney R. Acho regarding availability" and "draft review, edit and supplement facilitation brief," and are not so heavily redacted that the gist of the billings cannot be ascertained and challenged.

Block & Jenner's bills, in contrast, are very heavily redacted and contain absolutely no details. The bills simply provide "Read___" and the number of hours. Or, "Draft ___", "Revise____", "Phone conference___", etc. followed by the corresponding time spent on each task. Defendants appear to base the reasoning for the redaction on attorney-client privilege,

although no direct assertion was made that all of the redacted information fell under the privilege. In any event, the trial court evidently refused to allow plaintiffs access to the unredacted billings based upon such privilege, stating at the August 10, 2011 hearing on defendants' motion for case evaluation sanctions, "I happen to believe strongly in the attorney/client privilege here."

"The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709. "The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice." *Id.* at 618–619. "Confidential client communications, along with opinions, conclusions, and recommendations based on those communications, are protected by the attorney-client privilege because they 'are at the core of what is covered by the privilege.'" *McCartney v Attorney General*, 231 Mich App 722, 735; 587 NW2d 824 (1998), quoting *Hubka v Pennfield Twp*, 197 Mich App 117, 122; 494 NW2d 800 (1992), rev'd on other grounds, 443 Mich 863 (1993). Either the attorney or the client can assert the privilege; however, only the client may waive the privilege. *Augustine v Allstate Ins Co*, 292 Mich App 408, 420; 807 NW2d 77 (2011).

In *Augustine*, 292 Mich App at 416-419, the trial court held an evidentiary hearing when the defendant challenged the attorney fees awarded to the plaintiff. Prior to the hearing, the defendant requested that its expert be given the opportunity to review the entire litigation file that the plaintiff's attorneys relied on in support of their itemization of fees in order to test the accuracy of the billings against the alleged work product. The plaintiff, however, asserted that the entire file was privileged and that without the privileged information there would be nothing left for the defendant's expert to review other than the billing summary. The trial court ruled that the defendant could not see the litigation file. On appeal to this Court, defendant argued that the trial court erred in denying its request for the plaintiff's entire litigation file. This Court found that the trial court did not directly address the issue of privilege in its ruling and that the defendant acknowledged that it was not seeking information protected by the attorney-client privilege. *Id*. at 421. This Court further found that the trial court abused its discretion in failing to provide a redacted version of the file when defendant showed a need for review of properly redacted trial-preparation materials as contemplated by MCR 2.302(B)(3)(a), and that the trial court's failure precluded defendant from making any meaningful challenge to plaintiff's fee request. *Id*. at 423. As indicated in *Augustine*, 292 Mich App at 421-422, "[a] request for discovery that constitutes an attempt to invade the attorney-client relationship or to discover the mental impressions and strategies generally employed by opposing counsel must be rejected. But the reasonableness of an attorney-fee claim cannot be assessed in a vacuum."

While *Augustine* addressed a litigation file and the present matter concerns a billing statement, the basic premise remains the same—a party challenging an attorney fee request must have a fair opportunity to be meaningfully heard on the issue. In certain circumstances, notably when billings lack specificity, no genuine inquiry can be made of the party requesting the fees and thus no meaningful challenge can be made.

We acknowledge that the bills at issue provide an American Bar Association (ABA) code next to the task to establish what type of task it is, such as L240 to correspond with a dispositive

motion, or L250 for "other written motions and submissions" and the ABA code list was provided to defendants. However, all services billed from May 26, 2011, forward (after the date summary disposition was granted in defendants' favor) bear the billing code L470 which simply stands for "enforcement." And the codes are not particularly helpful, given that the billings are otherwise so woefully inadequate that they allow plaintiffs no meaningful opportunity to challenge them. There is no reason that the billing cannot contain some information, sanitized as it were, to allow plaintiffs to determine whether the services billed were reasonable or necessary or otherwise subject to challenge.

The testimony during the evidentiary hearing concerning the billings, while limited, underscores that the inadequacy of the redacted billings. For example, plaintiffs' counsel asked attorney Harris at the hearing what the billing for December 13, 2010, attributable for 1.5 hours of Dlugosz's time concerned. The billing simply states, in redacted form, "Prepare for and attend XXXX" with an ABA code L330 next to it. That code stands for depositions. Harris testified that he cannot tell who the witness was by looking at the billing. He testified that had he brought his records he could have looked it up, but he did not bring them. Thus, the heavily redacted billing statements were also unsupported.

The party requesting attorney fees bears the burden of proving they were incurred and that they are reasonable. *Reed*, 265 Mich App at 165-166. "In considering the time and labor involved (factor 1 under MRPC 1.5 [a] and factor 2 under *Wood*) the court must determine the reasonable number of hours expended by each attorney. The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support. 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.

Plaintiff submitted untimely subpoenas for documentary evidence to support the billings, resulting in defendants' noncompliance with the subpoenas. However, due to the inadequate and limited nature of the billings, plaintiffs' ability to effectively challenge the requested attorney fees orally at the evidentiary hearing was significantly compromised. And, there has been no assertion on defendants' part that all of the redacted information contained confidential communications by the client to defense counsel made for the purpose of obtaining legal advice. *Reed Dairy Farm*, 227 Mich App at 618–619. Furthermore, where defense counsel offered to have the trial court decide, after an *in camera* review, which of the redacted portions were not privileged and then present the unprivileged material to plaintiffs, it was an abuse of discretion to fail to do so when the end result was to essentially deprive plaintiffs of any meaningful opportunity to challenge the billings. The trial court abused its discretion in refusing to determine which portions of the billing statements were privileged and then submitting only the unprivileged portions to plaintiffs. Thus, remand to the trial court for a determination of what information in the billing statements was not privileged and then for submission of the unprivileged information to plaintiffs so plaintiffs can thereafter challenge any unredacted billing submissions they feel are challengeable is necessary.

Plaintiffs next contend that the trial court erred by not addressing plaintiffs' objections that the requested fees were excessive, redundant, and otherwise unnecessary. We agree.

In their proposed findings of fact and conclusions of law, plaintiffs pointed out several discrepancies and concerns with respect to the billings submitted by defendants (specifically attorney Harris) and pointed out how the evidentiary hearing testimony did not clarify or comport with the billings. The trial court, in its Findings of Fact and Conclusions of Law With Respect to Defendants' Motion for Case Evaluation Sanctions simply stated, "The Fee Applicants billing records support the number of hours expended and contains sufficient detail." As pointed out by plaintiffs, however, and as this Court agrees, plaintiffs were unable to adequately challenge the billing statements due to lack of sufficient detail in the redacted billing statements submitted to them. And, as further pointed out by plaintiffs, they submitted specific challenges to specific hours billed. For example, plaintiffs challenged attorney Harris's billing for 8 hours for "Final preparation for and attendance XXXX" under ABA code L240 (dispositive motion) on April 29, 2011. Harris did not argue the April 29, 2011 motion and the transcript for the motion was only 30 pages long, suggesting that the hearing was not particularly lengthy. At the evidentiary hearing, Harris testified that he does not bill for travel time. Harris further testified that attorney Dlugosz performed the vast majority of research and writing on this case. Thus, it was reasonable to challenge Harris's unsupported billing of 8 hours for this dispositive motion. This charge is particularly challengeable when contrasted with attorney Buikema's charges for the same motion. Buikema, who argued the April 29, 2011 motion, billed 6.5 hours for his appearance at the oral argument, a conference with Harris, travel, review of XXXX, and e-mail correspondence for the same date of April 29, 2011. This, and other specifically pointed-out discrepancies and differences, warrant investigation and addressing by the trial court.

Smith, 481 Mich 519, tells us that once the reasonable hourly rate is determined, that number "should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee." *Id*. at 531. Factor 1 under MRPC 1.5(a) is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly" and factor 2 under *Wood* is "the skill, time and labor involved." *Wood*, 413 Mich at 588. The trial court opined, "The complexity of this case required the skill, time and labor that the Fee Applicants' expended. Due to the complexity of the case, it was reasonable that three attorneys expended the number of hours billed upon this case. Ms. Dlugosz drafted the initial draft of all pleadings, motions and briefs conducted in the initial research. Ms. Dlugosz was supervised by Mr. Harris. Mr. Buikema provided his experience regarding Michigan law and practice." It appears in reality, however, that once the trial court found the hourly rate charged to be reasonable, it simply accepted the billings and found the number of hours charged to be reasonable in general without really determining if the actual number of hours charged for the tasks challenged (as much as they could be) by plaintiffs were reasonable. No specific objection of plaintiffs was addressed by the trial court and, as repeatedly argued by plaintiffs, they were unable to determine the nature of most work performed and the number of hours spent on any specific task due to the highly redacted billing statements. The trial court erred in not addressing plaintiffs' specific concerns.

Next, plaintiffs argue that the trial court erred in ordering costs without conducting an evidentiary hearing on the reasonableness of the requested costs, including the request for expert

witness fees. "We review a trial court's ruling on a motion for costs under MCR 2.625 for an abuse of discretion." *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 367; 737 NW2d 807 (2007).

Generally, MCR 2.625(A)(1) allows a prevailing party to tax costs. "A trial court is not required to justify awarding costs to a prevailing party; rather, the court must justify the failure to award costs." *Blue Cross & Blue Shield of Mich v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997).

Plaintiffs do not suggest that defendants are not the prevailing party or that they are not entitled to costs pursuant to MCR 2.625(A)(1). They do not even suggest that expert witness fees are not recoverable as costs for the prevailing party. Rather, they suggest that an evidentiary hearing should have been held to determine the *reasonableness* of the costs charged for the expert witness fees. Plaintiffs have offered no legal argument that a hearing is required or necessary. And, the billing submitted by the expert in this case (for which the fee was sought) is detailed. The trial court indicated that it had reviewed the billing and found that the expert witness fee was actually, necessarily, and reasonably incurred in the defense of the matter. Where the parties fully briefed this issue, had the opportunity to argue it before the court, and the trial court was familiar with the circumstances of the case, it was not an abuse of discretion for the trial court to decide this issue without holding an evidentiary hearing. See *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 83; 577 NW2d 150 (1998).

In Docket No. 304506, we affirm. In Docket No. 309678, the trial court abused its discretion in accepting the heavily redacted billings of Block & Jenner in awarding reasonable attorney fees. We therefore reverse and remand for the trial court to determine which portions of defense counsel Block & Jenner's billing statements are not subject to attorney-client privilege and thus may be submitted to plaintiffs in unredacted form for their further review and potential challenges, to address plaintiff's objections raised concerning specific excessive, redundant, or unnecessary fees, and for further proceedings consistent with this opinion. We affirm in all other respects. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Donald S. Owens