STATE OF MICHIGAN

COURT OF APPEALS

SEAN JORDAN, Plaintiff-Appellant,	UNPUBLISHED March 25, 2014
v	No. 309428 Wayne Circuit Court
NATIONAL CITY BANK and PNC BANK, Defendants-Appellees.	LC No. 10-006749-NO

MARK CLARK, Plaintiff-Appellant,	
v	No. 309438 Wayne Circuit Court
NATIONAL CITY BANK and PNC BANK, Defendants-Appellees.	LC No. 10-006750-NO

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 309428, plaintiff Sean Jordan ("Jordan") appeals by right the circuit court's orders granting summary disposition in favor of defendant National City Bank and its corporate successor defendant PNC Bank (collectively "the Bank") in Wayne Circuit Court Case No. 10-006749-NO. In Docket No. 309438, plaintiff Mark Clark ("Clark") appeals by right the circuit court's orders granting summary disposition in favor of the Bank in Wayne Circuit Court Case No. 10-006750-NO. We affirm in both cases.[1]

[1] The two matters have been consolidated for appeal. *Jordan v National City Bank*, unpublished order of the Court of Appeals, entered July 25, 2012 (Docket Nos. 309428; 309438).

I. BASIC FACTS AND PROCEDURAL HISTORY

Clark and Jordan, both African-Americans with knowledge of investment and banking, were hired to work as vice presidents in the Bank's Private Client Group and to recruit high-net-worth investors such as current and former professional athletes. It was the Bank's intent that each of these high-net-worth investors would open a line of credit, to be secured by his or her deposits with the Bank. The investors would then borrow against these lines of credit and invest in certain real estate ventures recommended by the Bank. During 2004 and 2005, Clark and Jordan successfully recruited several investors, including Charles Batch ("Batch"), Lomas Brown ("Brown"), and Dolores Brown ("Dolores"), all of whom placed substantial assets on deposit with the Bank and opened lines of credit as plaintiffs recommended. Plaintiffs allege that the Bank "pressured" them to continuously loan money to these investors, apply for increases in the investors' lines of credit, and facilitate real estate deals.

As the real estate market began to decline, certain investments began to fail. Some of the investors, including Batch, contacted the Bank and questioned why their investments were not performing as promised by plaintiffs. Batch and others also requested that the Bank return their money. The Bank initially denied any knowledge of the real estate investments. After further investigation, however, the Bank informed the investors that Clark, Jordan, and other unspecified vice presidents had made unauthorized investments using their money and had wrongfully accessed funds from their lines of credit.

Carol Crain ("Crain"), an assistant vice president in the Bank's Investigative Services Group, interviewed both plaintiffs and gathered information concerning their activities. Crain ultimately concluded that Clark and Jordan had conducted unapproved investment transactions with funds belonging to several of the investors.[2] In January 2006, the Bank terminated Clark and Jordan. Plaintiffs allege that the Bank did not give them any written explanation concerning its decision to terminate them. Plaintiffs' former supervisor, Al Kantra ("Kantra"), thereafter contacted the affected investors and informed them that plaintiffs had been terminated for improperly investing their money. For example, Kantra informed Batch that plaintiffs had invested his money in certain real estate ventures without the Bank's knowledge or approval, and outside the Bank's normal investment procedures.

A. THE BATCH LITIGATION

Batch sued the Bank, Clark, Jordan, and various other defendants for securities fraud, fraudulent misrepresentation, breach of fiduciary duty, breach of contract, negligence, and unjust enrichment in the Wayne Circuit Court on May 4, 2006 (hereinafter the "Batch litigation" or "Batch matter"). Batch alleged that, in the fall of 2004, Clark and Jordan had strongly recommended that he invest in two Detroit-area real estate ventures; he ultimately agreed to invest significant sums of money in both ventures. According to Batch, plaintiffs represented that his initial investments would be fully repaid after one year and that he would begin to realize

[2] Plaintiffs maintain that Crain "presumed [they were] guilty of wrongdoing before gathering all the facts" and that her investigation was, at least in part, racially motivated.

considerable returns within two years. Batch then invested additional sums in the two ventures, which he borrowed against his line of credit with plaintiffs' assistance.

After more than a year, Batch contacted plaintiffs and asked when his initial investment of principal would be repaid. Following several evasive responses and repeated telephone conversations in late 2005, Clark and Jordan eventually told Batch that they did not know when he would receive his money. Apparently frustrated, Batch called the developers of one of the real estate ventures. Batch was informed that his "deal with the Bank did not conform to the terms which [Clark and Jordan] had represented."

In January 2006, Batch and his accountant spoke with Clark, Jordan, Kantra, and another Bank officer named Bill Goodhue ("Goodhue"). Clark, Jordan, Kantra, and Goodhue all professed ignorance of Batch's real estate investments. Indeed, according to Batch, "Mr. Goodhue stated that the Bank did not do these types of investments." Sometime later, Kantra notified Batch that Clark and Jordan had been terminated and were under investigation for wrongfully investing his money.

On October 27, 2007, Batch sought a default judgment against Clark and Jordan, citing their failure to provide discovery and failure to defend. Batch also moved for summary disposition with respect to his claims against the Bank. On November 2, 2007, the circuit court entered a default judgment against Clark and Jordan. The Bank ultimately settled with Batch. As part of the settlement, Batch assigned his default judgment against Clark and Jordan to the Bank.

B. THE BROWN LITIGATION

Brown sued the Bank, Clark, and Jordan for conversion, securities fraud, breach of fiduciary duty, negligence, and civil conspiracy in the Wayne Circuit Court on September 13, 2007 (hereinafter the "Brown litigation" or "Brown matter"). Brown alleged that Clark and Jordan had convinced him to place approximately $930,000 on deposit with the Bank and to open a line of credit to be secured by these assets. Throughout 2005, Jordan recommended certain investments, including a real estate project that was being developed by another former professional athlete named Herman Moore ("Moore"). However, Brown alleged that he did not accept Jordan's recommendations and did not authorize Jordan or anyone else to invest his money in Moore's project.

When Brown attempted to borrow $40,000 in March 2006, he was informed that he had only $30,000 remaining on his line of credit at the Bank. Confused, Brown inquired as to what had happened. He was informed that "a large sum of money" had been transferred from his line of credit to an account at the Bank belonging to Moore. Brown called Jordan to ask about this transfer. Jordan initially told Brown that he did not know about the transfer and would investigate. According to Brown, Jordan subsequently told him that Clark had taken the money to enter into an unauthorized real estate deal.

Brown contacted the Bank and met with Kantra and another individual. Kantra told Brown that he did not know about the transfer of money to Moore's account and that he would investigate. The Bank later confirmed that the money had been transferred into Moore's

account; however, the Bank maintained that it did not know how the transfer had occurred. Brown later learned that Jordan and Clark had been fired for suspected financial improprieties.

On March 2, 2008, Brown settled with the Bank for $227,000. In exchange, Brown assigned his claims against Jordan and Clark to the Bank. Then, on April 30, 2008, the Bank filed a cross-complaint against plaintiffs, alleging that Jordan and Clark had wrongfully drawn funds from Brown's line of credit and transferred those funds to Moore without authorization. The Bank later sought a default judgment against Jordan and Clark, apparently with respect to its own cross-claims as well as Brown's original claims. Defaults were entered against both plaintiffs but the matter of a default judgment was reserved.

Clark was eventually dismissed from the Brown litigation. However, the Bank proceeded with the claims and cross-claims against Jordan. On April 19, 2010, the circuit court entered a default judgment against Jordan.

C. THE DOLORES LITIGATION

Dolores, the ex-wife of Brown, sued the Bank, Clark, and Jordan for conversion, securities fraud, breach of fiduciary duty, negligence, and civil conspiracy in the Wayne Circuit Court on November 16, 2007 (hereinafter the "Dolores litigation" or "Dolores matter"). Dolores alleged that Clark and Jordan had recruited her as an investor, had convinced her to place substantial assets on deposit with the Bank, and had persuaded her to open a $500,000 line of credit.

According to Dolores, Clark recommended that she invest in a housing venture consisting of two rental properties in Detroit. Dolores alleged that Clark told her that she would recoup her initial investment after one year and would then begin to realize guaranteed annual returns of 20 percent. Clark allegedly informed Dolores that the venture would generate monthly rents of $3,700, which would be sent to a P.O. Box held by the Bank and then deposited into her account beginning in November 2005. Dolores agreed to invest in the venture and authorized the necessary draws against her line of credit.

When Dolores began receiving significantly less than $3,700 a month, she called Clark to inquire what had happened. Clark allegedly told Dolores that the Bank was "having problems with the P.O. Box" and that he would take care of the problem. In January 2006, Clark called Dolores and informed her that "he was leaving [the Bank] as a full time employee, but would still be conducting business for [her]." Dolores became concerned when she did not receive any rental payments the following month. She again called Clark, who informed her that he would "take care of it." Then, a short time later, Clark called Dolores and told her that he was "evicting the tenants and was going to renovate [one of the rental properties]." After numerous other delays, Dolores called back and asked Clark to liquidate her investment. But Clark told Dolores that he could not liquidate her investment at that time.

Clark eventually suggested that, if Dolores would agree to wait until market conditions improved, he would arrange for her to receive "profit payments" of $2,000 a month. Clark assured Dolores that these $2,000 monthly payments "would not offset or otherwise reduce the [guaranteed return] of 20% that was accumulating on her total investment each year." Dolores

reluctantly agreed and received payments of $2,000 for a few months. But then the payments stopped entirely. Dolores called Clark and demanded that he send her all documents pertaining to her investments. Instead, Clark suggested that he would simply convey the two rental properties to Dolores by way of quit-claim deeds. Dolores later discovered that the two rental properties were worthless.

The Bank ultimately settled with Dolores for $200,000. In exchange, Dolores assigned her claims against Clark and Jordan to the Bank. As in the Brown litigation, the Bank filed a cross-complaint against plaintiffs, alleging that Jordan and Clark had been engaged in unauthorized investment activities using Dolores's money. The Bank sought the entry of defaults against Clark and Jordan in May 2009; defaults were entered against both plaintiffs shortly thereafter. After retaining new counsel, plaintiffs requested that the circuit court set aside the defaults and that the Bank dismiss the claims and cross-claims against them. However, it appears that the Dolores litigation remains pending and that the circuit court has refused to set aside the defaults.

D. PLAINTIFFS' PRESENT LAWSUITS

On June 14, 2010, Jordan commenced Wayne Circuit Court Case No. 10-006749-NO by filing his complaint against the Bank. That same day, Clark commenced Wayne Circuit Court Case No. 10-006750-NO by filing his complaint against the Bank. By this time, both Clark and Jordan were represented by the same counsel. Plaintiffs' complaints, which are essentially identical, set forth the following claims: concert of action (count I), civil conspiracy (count II), defamation (count III), intentional infliction of emotional distress (count IV), malicious prosecution (count V), abuse of process (count VI), fraudulent misrepresentation (count VII), exemplary damages (count VIII), violation of the Bullard-Plawecki Employee Right to Know Act (count IX), tortious interference with business expectancies (count X), declaratory judgment (count XI), promissory estoppel (counts XII & XIII), breach of contract (count XIV), and wrongful discharge (count XV). Both actions were assigned to Wayne Circuit Judge Kathleen Macdonald.[3]

On December 7, 2010, plaintiffs moved to disqualify Judge Macdonald on the basis of certain remarks that the Bank's attorney had made at hearing on July 8, 2010, in the Brown litigation. At that hearing, the Bank's attorney remarked that he and Moore's lawyer had "met with the judge in chambers [and] told her about the settlement [with Moore]."[4] The Bank's attorney then remarked, "I can tell you it has been reported to me that Judge Macdonald was not too happy with the conduct of Mr. Clark and Mr. Jordan." Plaintiffs argued that these comments by the Bank's attorney proved that there had been an ex parte communication and that Judge

[3] Clark's lawsuit was originally assigned to Wayne Circuit Judge Michael Sapala, but the circuit court entered an order shortly thereafter reassigning the case to Judge Macdonald.

[4] It appears that Moore was added as a defendant in the Brown matter sometime during the pendency of the litigation.

Macdonald was biased against them. Plaintiffs asserted that Judge Macdonald should recuse herself to prevent the appearance of impropriety.

On December 10, 2010, plaintiffs moved for summary disposition with respect to count IX of their complaint, which pertained to the Bank's alleged violation of the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*. Plaintiffs argued that when they attempted to review their personnel files before the commencement of their lawsuits, they discovered that the Bank had withheld certain relevant documents.

Following a hearing on January 21, 2011, Judge Macdonald entered an order denying plaintiffs' motion to disqualify her and referring the matter to the chief judge in accordance with MCR 2.003. On February 4, 2011, Wayne Circuit Chief Judge Virgil Smith conducted a de novo hearing on plaintiffs' request to disqualify Judge Macdonald. See MCR 2.003(D)(3)(a)(*i*). Chief Judge Smith denied plaintiffs' request to disqualify the judge.

At a hearing on March 9, 2011, Visiting Wayne Circuit Judge Brian Levy, acting in the absence of Judge Macdonald, ruled that the Bank had not violated the Bullard-Plawecki Employee Right to Know Act. The court entered orders denying plaintiffs' request for summary disposition with respect to the Bullard-Plawecki claims and granting summary disposition in favor of the Bank with respect to these claims pursuant to MCR 2.116(I)(2).

In separate motions filed on September 26, 2011, the Bank sought summary disposition with respect to plaintiffs' defamation, breach-of-contract, declaratory-judgment, and wrongful-discharge claims. Plaintiffs filed a motion requesting that the circuit court reconsider its earlier decision and reinstate their Bullard-Plawecki claims. At oral argument on October 28, 2011, plaintiffs' counsel stated that Clark and Jordan had decided to withdraw their wrongful-discharge claims and that a stipulated order would be prepared in this regard. Counsel also stated that Clark would withdraw his defamation claim but that Jordan would not. After hearing the arguments of counsel, the circuit court ruled that Jordan's defamation claim was time-barred. Plaintiffs' counsel then conceded that his clients' declaratory-judgment claims were legally untenable because there was no support for plaintiffs' assertion that the Bank was obligated to indemnify them or provide them with a bond under Michigan's Banking Code of 1999. The attorneys agreed to dismiss plaintiffs' declaratory-judgments claims.

With respect to plaintiffs' breach-of-contract claims, the Bank admitted that it had a policy of insurance with Advent Guaranty Corporation. However, the Bank's attorney pointed out that the policy had a $10 million deductible and did not cover losses of the type caused by Clark and Jordan. The Bank's attorney also explained that the insurance policy did not require the Bank to defend its own employees. He argued that, under the circumstances, there was no question that plaintiffs were not intended third-party beneficiaries of the insurance contract.

The circuit court entered orders dismissing plaintiffs' wrongful-discharge claims and Clark's defamation claim by stipulation of the parties. The court thereafter entered separate orders granting summary disposition in favor of the Bank with respect to plaintiffs' declaratory-judgment and breach-of-contract claims. The court also entered an order granting summary disposition in favor of the Bank with respect to Jordan's defamation claim. The court denied plaintiffs' request to reinstate the Bullard-Plawecki claims.

On December 22, 2011, the Bank moved for summary disposition with respect to plaintiffs' claims of fraudulent misrepresentation and exemplary damages, as well as plaintiffs' claims of promissory-estoppel in count XIII. The Bank argued that it had never promised or fraudulently represented to plaintiffs that it would defend and indemnify them in the Batch, Brown, or Dolores litigation. The Bank also argued that it had never promised or fraudulently represented to plaintiffs that it would dispense with the enforcement of its default judgments. That same day, the Bank moved for summary disposition with respect to plaintiffs' claims of malicious prosecution and abuse of process.

On January 13, 2012, plaintiffs filed a motion requesting that the circuit court set aside the defaults and default judgment that had been entered against them in the Batch litigation. The Bank responded on February 6, 2012, arguing that plaintiffs had already moved to set aside the defaults and default judgment in the Batch matter and that this request had already been denied.

On January 24, 2012, plaintiffs filed a second motion seeking to disqualify Judge Macdonald on the basis of a comment she had made on the record in the Brown litigation almost three years earlier. Specifically, plaintiffs pointed to a motion hearing on March 13, 2009, during which Judge Macdonald responded to a question from counsel by stating that plaintiffs had "cheated" former professional athletes. Judge Macdonald ultimately denied plaintiffs' second motion to disqualify her, explaining that "[t]he remark I made was not a remark of fact; it was just a response. The motion is denied."

Following a hearing on February 23, 2012, the circuit court noted that it would grant the Bank's motions for summary disposition with regard to plaintiffs' claims of fraudulent misrepresentation, exemplary damages, promissory estoppel, abuse of process, and malicious prosecution. The court determined that it was beyond factual dispute that the Bank had not made any actionable promises or fraudulent representations to plaintiffs. Regarding plaintiffs' abuse-of-process claims, the court remarked that even if the Bank had an ulterior motive for serving certain disputed writs of garnishment on plaintiffs' counsel, this was "certainly not an irregular act in the use of process." Lastly, with respect to plaintiffs' claims of malicious prosecution, the court concluded that the malicious-prosecution statute[5] did not apply, that there was no evidence of common-law malicious prosecution by the Bank in the Batch matter, and that plaintiffs had failed to establish the elements of common-law malicious prosecution arising from the Bank's prosecution of the Brown and Dolores matters. Lastly, the court explained that it would deny plaintiffs' motion to set aside the defaults and default judgment in the Batch matter.[6]

On February 27, 2012, the Bank moved for summary disposition with respect to plaintiffs' remaining claims. At a hearing on March 13, 2012, plaintiffs' attorney explained that

[5] MCL 600.2907.

[6] The circuit court observed that it had been five years since the defaults were entered in the Batch matter and four years since the default judgment was entered in that case. The court noted that plaintiffs had already unsuccessfully moved to set aside the defaults and default judgment in the Batch matter.

his clients had agreed to voluntarily dismiss these remaining claims with prejudice.[7] Plaintiffs' attorney clarified that because plaintiffs' primary claims had already been dismissed, his clients "will not oppose [the Bank's] motion." But the Bank's attorney believed that the circuit court should place at least some reasoning on the record to support the dismissal of these remaining claims. Accordingly, the circuit court noted that it would dismiss plaintiffs' claims of tortious interference and intentional infliction of emotional distress because they were time-barred. The court went on to remark that there was no evidentiary support for plaintiffs' remaining claims of promissory-estoppel, concert of action, and civil conspiracy.

On March 13, 2012, the circuit court entered orders granting summary disposition in favor of the Bank with respect to these remaining claims. The court also entered an order denying plaintiffs' motion to set aside the defaults and default judgment in the Batch matter. Each plaintiff filed a separate claim of appeal in this Court on March 29, 2012.

II. STANDARDS OF REVIEW

When considering a motion to disqualify a judge, we review for an abuse of discretion the circuit court's findings of fact and review de novo the court's application of the relevant law to the facts. *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012); *Olson v Olson*, 256 Mich App 619, 637-638; 671 NW2d 64 (2003). The circuit court abuses its discretion when it makes a decision that falls outside the range of reasonable and principled outcomes. *Mitchell*, 296 Mich App at 523.

We review de novo the circuit court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is proper under MCR 2.116(C)(10) when the admissible documentary evidence shows that there is no genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). Summary disposition is proper under MCR 2.116(C)(8) when the nonmoving party has failed to state a claim on which relief can be granted and no factual development could justify recovery. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

III. JUDICIAL DISQUALIFICATION

Plaintiffs first argue that the circuit court erred by denying their motions to disqualify Judge Macdonald, which were based on the judge's alleged bias and a purported appearance of impropriety. We disagree.

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[7] It appears that the Bank initially refused this offer, believing that the proposed order of dismissal prepared by plaintiffs' counsel was incorrect. This proposed order apparently stated that the remaining claims were being dismissed on summary disposition. Instead, the Bank's attorney believed that the proposed order should state that the remaining claims were being dismissed by stipulation.

Plaintiffs first moved to disqualify Judge Macdonald on the basis of certain comments made by the Bank's attorney during a hearing on July 8, 2010, in the Brown litigation. At that hearing, the Bank's attorney remarked that he and Moore's lawyer had "met with [Judge Macdonald] in chambers [and] told her about the settlement [with Moore]." The Bank's attorney then remarked, "I can tell you it has been reported to me that Judge Macdonald was not too happy with the conduct of Mr. Clark and Mr. Jordan." According to plaintiffs, these remarks proved that the Bank's attorney had an ex parte communication with Judge Macdonald and that the judge was personally biased against them. At the very least, plaintiffs argue, these remarks established an appearance of impropriety requiring the judge to recuse herself.

"Due process requires that an unbiased and impartial decision-maker hear and decide a case." *Mitchell*, 296 Mich App at 523. "A trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption." *Id*.

Disqualification of a judge is warranted when, among other things, the judge is actually biased or prejudiced for or against a party, MCR 2.003(C)(1)(a), there is a reasonable perception that the judge has "a serious risk of actual bias," MCR 2.003(C)(1)(b)(*i*), or there is a reasonable perception that the judge has failed to adhere to the "appearance of impropriety" standard of the Michigan Code of Judicial Conduct, MCR 2.003(C)(1)(b)(*ii*). Ex parte communications may give rise to an appearance of impropriety requiring judicial disqualification. See Michigan Code of Judicial Conduct, Canon 3(A)(4); see also *In re JK*, 468 Mich 202, 222; 661 NW2d 216 (2003) (statement by WEAVER, J.).

As a preliminary matter, we note that the remarks of the Bank's attorney on July 8, 2010, did not prove the existence of an improper ex parte communication. The Bank's attorney clearly stated that he and Moore's attorney had met with Judge Macdonald in chambers to advise her of the proposed settlement with Moore.[8] Further, counsel made clear that a court reporter was present at the time of the discussion, which was "put . . . on the record." Not all ex parte communications are improper. See Michigan Code of Judicial Conduct, Canon 3(A)(4); see also *People v Waterstone*, 296 Mich App 121, 158; 818 NW2d 432 (2012) (TALBOT, J., concurring in part and dissenting in part). A judge may allow an ex parte communication concerning scheduling or administrative matters, such as proposed settlements, so long as no party gains a tactical advantage as a result of the communication and the judge promptly notifies all parties of the communication. Michigan Code of Judicial Conduct, Canon 3(A)(4)(a). Any proposed settlement with Moore in the Brown litigation would not have directly affected plaintiffs. Thus, plaintiffs have failed to establish that the communication with Judge Macdonald concerning the proposed settlement with Moore was improper.

Nor have plaintiffs established that Judge Macdonald was actually, or reasonably likely to be, biased or prejudiced against them. Plaintiffs' first motion to disqualify Judge Macdonald was based on the hearsay comments of the Bank's attorney—*not* the remarks of Judge Macdonald herself. Indeed, Judge Macdonald specifically stated that she could not recall having

[8] As noted earlier, it appears that Moore was subsequently added as a defendant in the Brown litigation after Brown's initial complaint had been filed.

made any comments about her feelings toward Clark and Jordan; she also confirmed that she was not personally biased against them. Even if Judge Macdonald did actually state that she was "not too happy with the conduct of Mr. Clark and Mr. Jordan," it is well settled that a "judge's remarks . . . which are critical of or hostile to counsel, the parties, or their cases, ordinarily do not establish disqualifying bias." *In re MKK*, 286 Mich App 546, 567; 781 NW2d 132 (2009). Plaintiffs have not carried their burden of proving that Judge Macdonald was biased or prejudiced against them. *Mitchell*, 296 Mich App at 523.[9] It appears more likely that plaintiffs were simply dissatisfied with certain rulings by Judge Macdonald. But "[d]isqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous." *In re MKK*, 286 Mich App at 566. We conclude that Judge Macdonald properly denied plaintiffs' first request to disqualify her.[10]

On January 24, 2012, plaintiffs again moved to disqualify Judge Macdonald, this time on the basis of a different comment she had made in the Brown litigation. In response to a question by counsel at a motion hearing on March 13, 2009, Judge Macdonald had stated on the record that plaintiffs "cheated" former professional athletes.

Judge Macdonald denied this second motion for disqualification, explaining that "the remark I made was not a remark of fact; it was just a response." Unlike plaintiffs' earlier request for disqualification, this second motion was untimely under the court rules. MCR 2.003(D)(1)(a); see also MCR 2.003(D)(1)(d); *Band v Livonia Associates*, 176 Mich App 95, 118; 439 NW2d 285 (1989). Moreover, Judge Macdonald's isolated comment, made in response to counsel's question, did not create an appearance of impropriety or "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg v Rochester Elks*, 228 Mich App 20, 39-40; 577 NW2d 163 (1998); see also *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1998). We find no error in Judge Macdonald's denial of plaintiffs' second motion for disqualification.

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[9] Judge Macdonald also ruled that plaintiffs' first motion to disqualify her was untimely. "[A]ll motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification." MCR 2.003(D)(1)(a). "[U]ntimeliness is a factor in deciding whether the motion should be granted." MCR 2.003(D)(1)(d); see also *Band v Livonia Associates*, 176 Mich App 95, 118; 439 NW2d 285 (1989). It is true that plaintiffs' first request to disqualify Judge Macdonald was based on the comments of the Bank's attorney on July 8, 2010. However, plaintiffs' counsel represented that he did not know of these comments until early December 2010, when he finally received the transcript of the July 8, 2010, hearing. If this is true, plaintiffs' request, filed on December 7, 2010, was not untimely. See MCR 2.003(D)(1)(a).

[10] Wayne Circuit Chief Judge Virgil Smith subsequently conducted a de novo hearing regarding plaintiffs' first motion to disqualify Judge Macdonald. See MCR 2.003(D)(3)(a)(*i*). At the end of the hearing, Chief Judge Smith denied the request, ruling that plaintiffs had failed to show any bias or appearance of impropriety on the part of Judge Macdonald. We cannot conclude that Chief Judge Smith abused his discretion in making these findings. See *Mitchell*, 296 Mich App at 523.

IV. BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT

Plaintiffs next argue that the circuit court erred by granting summary disposition in favor of the Bank with respect to count IX of their complaints, which alleged a violation of the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*. Plaintiffs also argue that the circuit erred by denying their subsequent motion to reinstate their Bullard-Plawecki claims. We disagree.

Each plaintiff requested a copy of his personnel file from the Bank prior to the commencement of the present lawsuits. However, according to plaintiffs, the Bank provided an "incomplete" file which "did not contain any information relating to compensation or disciplinary action[s]." Plaintiffs claim that they sent two additional letters, but that the Bank still failed to produce the allegedly missing documents. The essence of plaintiffs' argument is that their personnel files *must have* contained other, unspecified documentation concerning the Bank's investigation into their conduct that was never disclosed to them.

In response to plaintiffs' Bullard-Plawecki claims, the Bank submitted Crain's affidavit, dated January 16, 2011, in which Crain averred that she had "[r]ecently . . . ordered from PNC Bank's Human Resources Department in Pittsburgh, Pennsylvania, employment records for Mark Clark and Sean Jordan." Crain went on to aver:

> I compared the contents of those files to the documents that I understand were produced to the lawyers for Mark Clark and Sean Jordan. I have concluded that each of the documents previously produced to the lawyer for Mark Clark and Sean Jordan were contained within the files provided to me from PNC's HR Department.

Crain explained that she had generated certain other files in the course of her investigation into Clark and Jordan. But she averred that the "files from these investigations have been maintained by me, separate and apart from other employment records of Mark Clark and Sean Jordan."

Plaintiffs' attorney argued before the circuit court that the personnel files produced by the Bank did not contain any letters of reprimand, notices of termination, documents pertaining to additional compensation, or documents concerning the Bank's internal investigation of Clark and Jordan. He suggested that although such information was not contained in the files, it "should have been" included therein. In response, the Bank's attorney argued that plaintiffs had not sufficiently "describe[d] the personnel record[s]" that they were seeking as required by MCL 423.503. Plaintiffs insisted that they had requested their "complete files," and that this request should have been understood to include any letters of reprimand, notices of termination, and records concerning the Bank's internal investigation. The Bank admitted that the investigative files generated by Crain were not included in the personnel files given to plaintiffs. But the Bank maintained that these investigative files, which were maintained separately and apart from plaintiffs' personnel records, were "specifically exempt from being produced" under MCL 423.501(2)(c)(*v*) and MCL 423.509(1).

The circuit court ruled that the records of Crain's internal investigation were exempt from disclosure under MCL 423.501(2)(c)(*v*) and MCL 423.509(1), and noted that plaintiffs had not

particularly identified the other materials that they claimed should have been contained in the personnel files.

Crain was subsequently deposed on September 12, 2011. Among other things, she testified that all documents she generated in the course of her internal investigation of Clark and Jordan had been maintained separately from plaintiffs' personnel files. Crain testified that she is not responsible for compiling or maintaining personnel files for the Bank; that is the responsibility of the Human Resources Department. Crain confirmed that she had merely requested Clark's and Jordan's personnel files from the Human Resources Department. The Human Resources Department never "told [her] one way or another" if any information or documents had been withheld from the files that were transmitted to her. Specifically, Crain explained:

> When I request a file, it comes to me with what's in there. I mean, I don't know what's maintained in those files that are sent to me, I don't know what's pulled out.

After Crain was deposed, plaintiffs filed a motion requesting that the circuit court reconsider its earlier decision and reinstate their Bullard-Plawecki claims. This motion was denied.

The circuit court did not err by granting summary disposition in favor of the Bank with respect to plaintiffs' Bullard-Plawecki claims or by denying plaintiffs' subsequent motion to reinstate their Bullard-Plawecki claims. As a precondition of disclosure, an employee must make a "written request which describes the personnel record" that he or she seeks to review. MCL 423.503. Under MCL 423.509, "the employer may keep a separate file of information relating to the investigation" of an employee for suspected criminal activity. A "personnel record" does not include "[i]nformation that is kept separately from other records and that relates to an investigation by the employer pursuant to [MCL 423.509]." MCL 423.501(2)(c)(*v*). Accordingly, any separate records maintained by Crain concerning her internal investigation of Clark and Jordan were properly withheld from the personnel files that were produced. MCL 423.509(1).

Plaintiffs argue that there must have been other documents contained within their personnel files, such as letters of reprimand, notices of termination, and documents pertaining to additional compensation. But plaintiffs offer nothing more than surmise and conjecture to support their assertion that the files contained such additional, undisclosed documents. Plaintiffs also argue that the circuit court erred by relying on Crain's affidavit because Crain's subsequent deposition testimony contradicted her previous sworn statement. But contrary to plaintiffs' argument, Crain's deposition testimony did not contradict her earlier affidavit. It is true that Crain testified at her deposition that she did not know exactly which types of documents and information the Human Resources Department would have included in Clark's and Jordan's personnel files. However, Crain had never claimed to possess such knowledge in her affidavit. Indeed, Crain had merely averred that she compared the documents transmitted to her by the Human Resources Department with those that were provided to plaintiffs and that "[t]hese documents constitute all of the employment records produced by PNC Bank's Human Resources Department *in response to my request for all documents*." (Emphasis added). In other words, Crain averred only that each document contained in the personnel files transmitted to her was

also provided to plaintiffs.[11] She never claimed to know whether any documents had been removed from the personnel files before the files were transmitted to her; nor did she claim to know whether any documents were kept in any other location by the Human Resources Department. We perceive no error in the circuit court's dismissal of plaintiffs' Bullard-Plawecki claims.

V. DECLARATORY JUDGMENT AND BREACH OF CONTRACT

Plaintiffs next argue that the circuit court erred by granting summary disposition in favor of the Bank with respect to their declaratory-judgment and breach-of-contract claims. We disagree.

In count XI of their complaints, plaintiffs requested a declaratory judgment concerning the Bank's duty to defend and indemnify them in the underlying matters. Plaintiffs argued that they were entitled to statutory indemnification under the provisions of Michigan's Banking Code of 1999, MCL 487.11101 *et seq.* In count XIV of their complaints, plaintiffs alleged that the Bank had an insurance contract with Advent Guaranty Corporation as required by MCL 487.13903(1),[12] and that they were third-party beneficiaries of this contract. Plaintiffs argued that, as third-party beneficiaries, they were entitled to stand in the Bank's shoes and make a claim on the contract to reimburse the Bank for any losses it had incurred as a result of their alleged misconduct.

We note that plaintiffs' counsel conceded at a hearing on October 28, 2011, that the declaratory-judgment claims were untenable because there was no legal support for plaintiffs' assertion that the Bank was statutorily obligated to indemnify them. The attorneys agreed to the entry of an order dismissing plaintiffs' declaratory-judgments claims. At any rate, it is undisputed that the Bank is a national association organized under federal law, and not a state-chartered bank. Accordingly, the bonding and indemnification provisions of Michigan's Banking Code of 1999 do not apply to it. See MCL 487.11202(g). Nor were plaintiffs intended third-party beneficiaries of the Bank's insurance contract. The contract was exclusively between the Bank and Advent Guaranty Corporation. Plaintiffs, as former officers of the Bank, were only incidental beneficiaries without a right to sue for benefits. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 429; 670 NW2d 651 (2003).

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[11] Crain averred that the only exceptions were (1) a signed authorization to obtain Clark's consumer report from 2004, (2) a signed questionnaire from 2004 concerning Clark's business dealings with National City Bank, (3) signed questionnaires from 2003 and 2004 concerning Jordan's business dealings with National City Bank, and (4) an affirmative action survey.

[12] Section 3903(1) of Michigan's Banking Code of 1999, MCL 487.13903(1), provides: "The board of directors shall require every employee involved in the handling of money, accounts, or securities of the bank to be bonded by a surety company authorized to do business in this state in an amount determined by the board. The bank shall pay for any surety bonds required of its employees."

Moreover, "even an intended third-party beneficiary is only entitled to what the contract provides." *Blackwell v Citizens Ins Co of America*, 457 Mich 662, 668 n 4; 579 NW2d 889 (1998). There is no question that the contract between the Bank and Advent Guaranty Corporation had a deductible of $10 million per occurrence and did not cover losses of the type allegedly caused by Clark and Jordan. In addition, the contract did not require the Bank to defend its current and former officers or employees. Furthermore, it is beyond dispute that the aggregate amount at issue in the Batch, Brown, and Dolores litigation was far less than $10 million. Thus, even if plaintiffs had been intended third-party beneficiaries of the contract, Advent Guaranty Corporation would not have been responsible for paying benefits and the Bank would have been required to cover its own losses. In other words, even if plaintiffs were entitled to stand in the Bank's shoes, Advent Guaranty Corporation could not be liable to indemnify plaintiffs or the Bank for the losses incurred in this case. We conclude that the circuit court properly dismissed with prejudice plaintiffs' declaratory-judgment and breach-of-contract claims in counts XI and XIV.

VI. MALICIOUS PROSECUTION AND ABUSE OF PROCESS

Next, plaintiffs contend that the circuit court erred by granting summary disposition in favor of the Bank with respect to their malicious-prosecution and abuse-of-process claims. Again, we disagree.

The circuit court correctly ruled that the malicious-prosecution statute, MCL 600.2907, did not apply. As our Supreme Court explained in *Camaj v SS Kresge Co*, 426 Mich 281, 290; 393 NW2d 875 (1986), MCL 600.2907 "is intended only to reach those actions in which a party brings suit against a person who had instituted proceedings . . . in the name of another, without the named person's consent, or where there is no such person known." It is true that the Bank took by assignment the default judgment in the Batch matter, as well as the claims of Brown and Dolores, and then proceeded to pursue the judgment and claims against plaintiffs. But this belies plaintiffs' claim that MCL 600.2907 applies. Indeed, because Batch, Brown, and Dolores freely assigned the default judgment and claims to the Bank, it cannot be said that the Bank prosecuted these claims "in the name of another, *without the named person's consent, or where there is no such person known*." *Camaj*, 426 Mich at 290 (emphasis added). The circuit court correctly determined that MCL 600.2907 was inapplicable.

In addition, the circuit court properly ruled that it was beyond factual dispute that the Bank had not committed the tort of common-law malicious prosecution. As our Supreme Court explained in *Friedman v Dozorc*, 412 Mich 1, 48; 312 NW2d 585 (1981), the tort of common-law malicious prosecution consists of the following elements when arising from the prosecution of an underlying civil proceeding:

> Apart from special injury, elements of a tort action for malicious prosecution of civil proceedings are (1) prior proceedings terminated in favor of the present plaintiff, (2) absence of probable cause for those proceedings, and (3) "malice," more informatively described . . . as "a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based." [Citation omitted.]

A party must have been ultimately successful in defending the underlying civil litigation in order to prevail on a subsequent claim of malicious prosecution. *Id*. at 34, 48. As the circuit court correctly observed, it was beyond factual dispute that the Batch, Brown, and Dolores matters had not terminated in favor of plaintiffs. Moreover, it was beyond factual dispute that the Bank had probable cause to file its cross-claims against plaintiffs in the Brown and Dolores matters. After all, these cross-claims were based on the Bank's own internal investigation and resulting reasonable belief that plaintiffs had been engaged in unauthorized investment activities.

Alternatively, it would have been appropriate for the circuit court to dismiss plaintiffs' malicious-prosecution claims pursuant to MCR 2.116(C)(8) because plaintiffs failed to plead and identify any special injury resulting from the underlying civil litigation.[13] *Friedman*, 412 Mich at 32. In Michigan, a plaintiff fails to state a legally cognizable claim of common-law malicious prosecution unless he pleads and identifies a special injury. *Id*. The circuit court properly dismissed plaintiffs' malicious-prosecution claims.

Nor did the circuit court err by dismissing plaintiffs' abuse-of-process claims. "To recover upon 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 which is improper in the regular prosecution of the proceeding." *Id.* at 30; see also *Davis v Sequin*, 22 Mich App 44, 45; 176 NW2d 707 (1970). Plaintiffs claimed that the Bank committed the tort of abuse of process by serving writs of garnishment on their attorneys. In granting summary disposition for the Bank with regard to these claims, the circuit court ruled that even if the Bank had an ulterior motive for serving the writs of garnishment, this was "certainly not an irregular act in the use of process."

The Bank had already obtained a judgment against plaintiffs. "Garnishment after judgment is a legitimate and frequently used procedure to satisfy a claim evidenced by a judgment . . . and the same can be said for a writ of execution on assets of the debtor." *Id*. "[A] regular use of process with bad intention is not a malicious abuse of that process. The manner of use of the process, not the intention, is what is evaluated." *Pilette Industries, Inc v Alexander*, 17 Mich App 226, 228; 169 NW2d 149 (1969). If a party "believes that the garnishee defendant is indebted to the principal defendant, he may initiate . . . a garnishment to protect his interest[.]" *Id*. "The fact that it is later shown by disclosure of the garnishee that no debts are due, or that the theory of law advanced by the [garnishor] bore no legal fruits, does not then automatically subject [the garnishor] to an action for abuse of process . . . ." *Id.*

Irrespective of the Bank's purpose or intention in serving the writs of garnishment, plaintiffs failed to plead and establish any irregularity in the Bank's use of process. *Friedman*,

[13] A "special injury" is an arrest, seizure of property, or other direct injury to one's person or property. *Friedman*, 412 Mich at 34, 40-42; *Young v Motor City Apartments*, 133 Mich App 671, 676; 350 NW2d 790 (1984). Mere damage to one's fame or reputation does not constitute a special injury for purposes of common-law malicious prosecution. *Id*. at 678; see also *Barnard v Hartman*, 130 Mich App 692, 694; 344 NW2d 53 (1983). Similarly, "[i]nterference with one's usual business and trade, including the loss of goodwill, profits, business opportunities and the loss of reputation" does not constitute a special injury. *Young*, 133 Mich App at 676.

412 Mich at 31; see also *McKay Machine Co v Bosway Tube & Steel Corp*, 24 Mich App 276, 278; 180 NW2d 96 (1970); *Pilette Industries*, 17 Mich App at 228. Summary disposition was properly granted in favor of the Bank and plaintiffs' abuse-of-process claims were properly dismissed with prejudice. *Friedman*, 412 Mich at 31.

VII. FRAUD, PROMISSORY ESTOPPEL, AND EXEMPLARY DAMAGES

We also conclude that the circuit court properly granted summary disposition in favor of the Bank with respect to plaintiffs' claims of fraudulent misrepresentation, promissory estoppel (count XIII), and exemplary damages.[14]

As this Court explained in *Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008), the tort of fraudulent misrepresentation, also known as common-law fraud, consists of the following elements:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury.

See also *Lawrence M Clarke, Inc v Richco Construction, Inc*, 489 Mich 265, 284; 803 NW2d 151 (2011). "Fraud will not be presumed but must be proven by clear, satisfactory and convincing evidence." *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). To be actionable in fraud, the alleged misrepresentation must generally relate to past or present facts. *Lawrence M Clarke*, 489 Mich at 284.

This Court set forth the elements of promissory estoppel in *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999):

> (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided.

[14] In count VIII of their complaints, plaintiffs claimed that they were entitled to exemplary damages because of the malicious and outrageous nature of the Bank's fraudulent misrepresentations. In Michigan, exemplary damages are only recoverable when the defendant's conduct is "malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff's rights." *Veselenak v Smith*, 414 Mich 567, 574-575; 327 NW2d 261 (1982). "When compensatory damages can make the injured party whole, this Court has denied exemplary damages." *Hayes-Albion v Kuberski*, 421 Mich 170, 187; 364 NW2d 609 (1984). We conclude that the circuit court properly dismissed plaintiffs' claims for exemplary damages.

"The doctrine of promissory estoppel is cautiously applied." *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993).

We first note that allegations of fraud must be "stated with particularity." MCR 2.112(B)(1); see also *Lawrence M Clarke*, 489 Mich at 284. Plaintiffs failed to identify any particular false representations of past or present fact in their fraud claims. Plaintiffs alleged that they met with agents of the Bank in 2009, who "intentionally made false representations of material fact . . . regarding plaintiff[s'] defense against the accusations . . . by [their] former clients and the cross-claims against [them] by the Bank." Plaintiffs further alleged that the Bank induced them to "rely on the representations and not properly defend [themselves] against claims by [their] former clients and the cross-claims by the Bank." Thus, while the pleadings *generally* alleged that the Bank made false statements in 2009, the complaints did not identify any *particular* representations by the Bank. Nor did the complaints identify the substance of these alleged false statements or the person who allegedly made these representations. General allegations of fraud are insufficient to state a claim. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). Plaintiffs' claims of fraudulent misrepresentation were insufficient to justify relief as a matter of law. See MCR 2.116(C)(8); see also *LaMothe*, 214 Mich App at 586.

In contrast, plaintiffs' promissory-estoppel claims in count XIII were not subject to dismissal under MCR 2.116(C)(8). Plaintiffs generally alleged that the Bank had promised (1) to defend them in the underlying matters and (2) not to enforce its default judgments against them arising from the underlying matters. These allegations were minimally sufficient to state a claim of promissory estoppel. Cf. *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 361; 466 NW2d 404 (1991).

Despite alleging these promises in their complaints, however, plaintiffs failed to come forward with admissible documentary evidence to prove that any such promises were actually made. Once the Bank had moved for summary disposition of plaintiffs' promissory-estoppel claims in count XIII pursuant to MCR 2.116(C)(10), the burden shifted to plaintiffs to come forward with admissible documentary evidence showing the existence of a genuine issue of material fact for trial. MCR 2.116(G)(4); *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). We conclude that plaintiffs failed to meet this burden.

Jordan was deposed on May 25, 2011, at which time the following exchange took place with counsel:

> *Q.* [N]obody at the [B]ank told you they were going to represent you in [the Batch] case, did they?
>
> *A.* I don't remember them saying one way or another; I just know that we asked.
>
> *Q.* You asked but didn't get an affirmative response ever?
>
> *A.* Correct.
>
> *Q.* So you went out and hired your own lawyer?

A. Right.

Q. That's why I presume you went out and hired [John Dingle, Jr.[15]], correct?

A. Correct.

Q. Did you ever ask the [B]ank to defend you in the Lomas and Dolores Brown [litigation]?

* * *

A. Well, . . . we weren't getting any help from the [B]ank and it seemed like with their . . . knowledge of the actual facts of what happened and the fact that the [B]ank shouldn't have given these people the money, . . . and we were still on the hook, we figured that we needed to protect ourselves.

Q. Because the [B]ank wasn't hiring somebody to defend you?

A. Correct.

Q. You know that the [B]ank sued you and Mark [Clark] in connection with the Lomas and Dolores [Brown] cases, right?

A. Right.

Q. And I presume that furthered your impression that the [B]ank wasn't seeking to protect you and Mark [Clark] in connection with those cases, right?

A. Correct.

When Jordan's deposition continued on June 20, 2011, the following exchange took place with the Bank's attorney:

Q. [Y]ou mentioned earlier that you had . . . a feeling or thought that the [B]ank would defend you in connection with the Batch case prior to your termination from the [B]ank. Where did that feeling or thought come from?

* * *

[15] John Dingle, Jr., was plaintiffs' former attorney. Dingle's license to practice law was suspended for 180 days, effective January 11, 2007. Dingle's license to practice law was subsequently revoked, effective May 31, 2007. Dingle is not currently licensed to practice law in Michigan.

A. I just thought that, because I knew that I didn't do anything wrong, so I just figured that they would defend [us].

Q. So you just assumed that basically?

A. It was a thought, like I mentioned before, it was a thought.

Q. And nobody told you that that was going to be the case, right?

A. No, I don't think so.

Q. No, they didn't?

A. I don't think so.

Q. Not that you can recall at least?

A. Correct.

* * *

Q. Nobody from the [B]ank ever told you that the [B]ank was going to defend you in the Lomas Brown case, correct?

A. Correct.

* * *

Q. I never told you that the [B]ank was going to defend you in the Dolores Brown case, true?

A. True.

Q. Nobody from Clark Hill ever told you that the Bank was going to defend you in the Dolores Brown case, true or false?

A. True.

Q. Nobody from the [B]ank ever told you that the Bank was going to defend you in the Dolores Brown case, true or false?

A. True.

Jordan confirmed that there were no "writings or documents stating that the [B]ank was going to defend [him]" in the Batch, Brown, or Dolores matter.

With respect to Bank's enforcement of the default judgments, Jordan testified that the Bank had not made any specific statements other than the allegations in its cross-complaints, which Jordan believed to be false. Jordan confirmed that it was merely his belief that, after

learning that Batch's and Brown's original claims were untrue, the Bank would not enforce the default judgments against him.

At his deposition of July 26, 2011, Clark testified that he had never specifically asked the Bank to defend or indemnify him in the Batch, Brown, or Dolores litigation. Clark explained that his former attorney, Dingle, had suggested that the Bank would defend and indemnify him in the Batch matter. However, Clark testified that he believed Dingle had lied to him and Jordan concerning this issue. Clark explained that, sometime earlier, he had received a telephone call from Batch's attorney, who asked him to cooperate with Batch in his lawsuit against the Bank. Clark refused and "just hung up" on Batch's attorney. Later, Batch's attorney apparently called Clark back and informed him that Dingle had been disbarred.

Clark testified that, by the spring of 2007, he was "[a]bsolutely" aware that the Bank was not going to defend him in the Batch litigation. But even with this knowledge, and the knowledge that Dingle had been disbarred, Clark never hired a new lawyer to defend him in the Batch litigation. Clark confirmed that he knew the Batch matter was being litigated, but never went to any hearings, filed any papers, responded to any discovery, or otherwise defended himself in the case. Clark stated that he "was in a state of denial." But he did not believe that he bore any responsibility for the fact that he was defaulted. Clark testified that the Bank should have defended him "[f]or whatever reason."

Clark later hired a new attorney after the Brown and Dolores lawsuits were filed. Clark maintained that the Bank had represented "that if [he] cooperated in . . . the lawsuits regarding the Browns, [he] would be treated fairly or would get some benefit from it." Clark could not recall when the Bank had made these representations. Nonetheless, Clark testified that a representative of the Bank had stated at some point "that Lomas and Dolores [Brown] are lying, and that[it is] basically going to be over anyway, something like that, you'll be out of [the lawsuits]."

Clark confirmed that the Bank's attorneys never specifically promised to abandon the Bank's default judgment against him in the Batch matter; nor did the Bank's attorneys ever specifically promise to dismiss the claims and cross-claims against him in the Brown and Dolores matters. Clark agreed that it was "just [a] general, vague statement, let's just get through the deposition, Lomas and Dolores [Brown] are lying, so you don't have anything to worry about in th[ose] lawsuit[s]." Clark never received any promises or representations to this effect in writing. But Clark continued to insist that the Bank's attorneys had insinuated that he and Jordan should "just cooperate, we'll get through this deposition, and once proven untrue, the allegations made by Dolores and Lomas [Brown] will go away." Again, however, Clark could not recall when this had happened. Clark insisted that the Bank had acted maliciously by continuing to pursue the claims and cross-claims against him and Jordan even after settling with Brown and Dolores.

"To support a claim of estoppel, a promise must be definite and clear." *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995). A plaintiff's subjective belief or expectation that a defendant will take action or refrain from taking action is insufficient to support a claim of promissory estoppel. *Id.*; see also *First Security Sav Bank v Aitken*, 226 Mich App 291, 316 n 12; 573 NW2d 307 (1997), overruled on other grounds by *Smith v Globe Life Ins*

Co, 460 Mich 446 (1999). Both Clark and Jordan subjectively believed that the Bank would defend them in the underlying matters and that the Bank would refrain from enforcing its default judgments. But neither plaintiff identified any "definite and clear" promise by the Bank in this regard. See *Schmidt*, 208 Mich App at 379. Indeed, Jordan testified that it was "a thought" and that he "just figured that [the Bank] would defend" him. Similarly, although Clark believed that the Bank should have defended him "[f]or whatever reason," it is clear that this expectation was based on insinuations rather than definite promises or representations. And neither Clark nor Jordan identified any definite promise by the Bank to refrain from enforcing the default judgments. Even viewing the documentary evidence in a light most favorable to plaintiffs, no reasonable person could have concluded that the Bank made a "definite and clear" promise to defend plaintiffs in the underlying litigation or to refrain from enforcing the default judgments against them. See *id*.; see also *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (noting that "[a] genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ"). The circuit court properly granted summary disposition in favor of the Bank with respect to plaintiffs' promissory-estoppel claims in count XIII. See MCR 2.116(C)(10).

VIII. WRONGFUL DISCHARGE

Plaintiffs argue that the circuit court improperly granted summary disposition in favor of the Bank with respect to their wrongful-discharge claims. Specifically, plaintiffs argue that the Bank had verbally promised to terminate them only for good cause, that these verbal promises created an implied "for cause" employment contract, and that the court therefore erred by dismissing the wrongful-discharge claims. Plaintiffs also argue that they were somehow "stymied" in the pursuit of their wrongful-discharge claims because "the trial judge refused all reasonable discovery."

Plaintiffs waived appellate review of their arguments in this regard by stipulating to the dismissal of their wrongful-discharge claims in the circuit court. See *Young v Morrall*, 359 Mich 180, 187; 101 NW2d 358 (1960); see also *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001); see also *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). Having stipulated to the dismissal with prejudice of their wrongful-discharge claims, plaintiffs cannot now seek relief on the ground that the circuit court should not have accepted their stipulations.

IX. REMAINING CLAIMS

On March 13, 2012, plaintiffs' counsel consented on the record to the dismissal with prejudice of plaintiffs' remaining claims of concert of action, civil conspiracy, intentional infliction of emotional distress, and tortious interference with business expectancies. Counsel also consented to the dismissal of plaintiffs' remaining claims of promissory estoppel in count XII. Error requiring reversal must be that of the trial court, not error to which the aggrieved party has contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964). "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper [in the circuit court] since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d

705 (1989). Because plaintiffs' counsel affirmatively agreed to the entry of an order granting summary disposition for the Bank with respect to these remaining claims, plaintiffs cannot now argue on appeal that the circuit court erred by dismissing the claims with prejudice.[16]

X. CONCLUSION

For the foregoing reasons, the circuit court properly dismissed with prejudice all claims brought against the Bank. In light of our conclusions, we need not address the remaining arguments raised by plaintiffs on appeal.

Affirmed. Defendants National City Bank and PNC Bank, having prevailed on appeal, may tax their costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro

[16] Plaintiffs do not specifically challenge the circuit court's dismissal of their defamation claims. Unlike Clark, who stipulated to the dismissal of his defamation claim, Jordan did not. Nonetheless, the circuit court properly ruled that Jordan's defamation claim was time-barred. The period of limitations for defamation actions is one year, MCL 600.5805(9), and "[a] defamation claim accrues when 'the wrong upon which the claim is based was done regardless of the time when damage results.'" *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005), quoting MCL 600.5827. It was beyond factual dispute that the Bank's allegedly defamatory statements occurred more than one year before the filing of Jordan's complaint on June 14, 2010. Thus, the circuit court correctly concluded that Jordan's defamation claim was barred by MCL 600.5805(9). *Mitan*, 474 Mich at 24.