STATE OF MICHIGAN

COURT OF APPEALS

MARGARET GLIDDEN,

Plaintiff-Appellant,

v

THOMPSON AND HAWLEY FUNERAL HOME,

Defendant/Cross-Defendant-Appellee,

and

BETZLER FUNERAL HOME, a/k/a BETZLER AND THOMPSON FUNERAL HOME,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
July 20, 2006

No. 259887, 261002
Van Buren Circuit Court
LC No. 03-051732-CZ

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

PER CURIAM.

In Docket No. 259887, plaintiff Margaret Glidden appeals as of right the trial court's order granting summary disposition in favor of defendants Thompson and Hawley Funeral Home and Betzler Funeral Home under MCR 2.116(C)(10). In Docket No. 261002, plaintiff also appeals as of right the judgment awarding attorney fees and costs in favor of defendants pursuant to MCR 2.405. We affirm.

Plaintiff first contends that the trial court erred in granting summary disposition in favor of Thompson and Hawley Funeral Home (Thompson and Hawley) because she presented sufficient evidence to establish a genuine issue of material fact regarding whether it failed to transport her son's body to the funeral home within a reasonable time. We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10), considering the pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 41-42; 672 NW2d 884 (2003). Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations in pleadings but must set forth specific facts showing that a genuine issue of material fact exists. *Koenig v City of South Haven*, 460 Mich 667, 674-675; 597 NW2d 99 (1999). Summary disposition is proper on

a breach of contract claim where there is no issue of material fact regarding a breach of duty through the failure to exercise ordinary care in performing under the contract. See, e.g., *Joyce v Rubin*, 249 Mich App 231, 246; 642 NW2d 360 (2002).

"[A]ccompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and . . . a negligent performance constitutes a tort as well as a breach of contract." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465; 683 NW2d 587 (2004), quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). Plaintiff contends that defendants breached a contract to perform funeral services by failing to transport her son's body from the hospital to the funeral home within a reasonable time. Plaintiff's son was involved in an automobile accident on December 27, 1997. He was pronounced dead at 7:30 P.M. on December 28, 1997. At 11:08 P.M., a hospital employee called Thompson and Hawley to inform them that plaintiff's son had passed away and that plaintiff wanted them to arrange the funeral services. Thompson and Hawley did not pick up plaintiff's son's body from the hospital until 12:18 P.M. the next day, after receiving a second telephone call from the hospital.

Plaintiff signed a written contract at the funeral home on December 29, 1997. The contract did not specify the time for performance. "When no time for performance is specified in the contract, a 'reasonable time' is implied." *Smith v Michigan Basic Prop Ins Ass'n*, 441 Mich 181, 191 n 15; 490 NW2d 864 (1992) (citation omitted). "The general rule is that time is not to be regarded as of the essence of a contract unless made so by express provision of the parties or by the nature of the contract itself or by circumstances under which it was executed." *MacRitchie v Plumb*, 70 Mich App 242, 246; 245 NW2d 582 (1976).

We agree with plaintiff that time was of the essence in performing the contract for funeral services because, between the time of death and the embalming procedure, the plaintiff's son's body would naturally continue to deteriorate. See *Kelly-Nevils v Detroit Receiving Hosp*, 207 Mich App 410, 419; 526 NW2d 15 (1994) (stating that time is of the essence in securing donated organs at the time of the donor's death). However, plaintiff failed to present evidence that Thompson and Hawley agreed to transport the body to the funeral home before December 29, 1997, or, that Thompson negligently failed to do so. Frank Thompson, the licensed mortician who answered the first telephone call from the hospital, testified that, although he considered the telephone call to be a request to pick up the body, he did not consider the telephone call to be a request to pick up the body "right away." During the telephone call, he told the hospital employee to notify him after she confirmed that an autopsy was not going to be performed on the body. Thus, Thompson and Hawley did not pick up the body from the hospital in response to the first call because they were awaiting a second call, which they received on December 29, 1997. Furthermore, Jeffery Jamieson, the funeral director at Thompson and Hawley, testified that it was not unusual for the funeral home to receive a "courtesy call" from a hospital, notifying them that a person had died, before receiving an official request to transport the body from the hospital. He also testified that it was not unusual to wait 15 hours between the time of death and the embalming process. Plaintiff offered no testimony to contradict the assertions of Thompson or Jamieson. Thus, she failed to establish a genuine issue of material fact regarding whether the delay was unreasonable and, therefore, whether the delay constituted a breach of contract. The trial court did not err in granting summary disposition in favor of defendants. *Joyce*, *supra* at 246.

Moreover, defendants were entitled to summary disposition because, as determined by the trial court, plaintiff failed to prove that her damages were the proximate result of the alleged delay in transporting and embalming her son's body. "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Plaintiff asserted that the delay in picking up the body caused the embalming procedure to be unsuccessful. As a result, her son's body was "grotesque," and she was unable to have an open casket funeral. However, plaintiff failed to present sufficient evidence to establish that the alleged delay proximately caused her son's body to be "grotesque," necessitating a closed casket.

Unlike a medical malpractice claim, in which expert testimony is required to establish the applicable standard of care, *Locke v Pachtman*, 446 Mich 216, 223-224; 521 NW2d 786 (1994), expert testimony is not required to establish the applicable standard of care in a breach of contract case. Nor is expert testimony required, as a matter of law, to establish whether defendants' actions, or inaction, were the proximate cause of plaintiff's damages. "Any witness is qualified to testify as to his or her physical observations and opinions formed as a result of them." *Lamson v Martin (After Remand)*, 216 Mich App 452, 459; 549 NW2d 878 (1996). However, plaintiff's lay opinion testimony that the delay in picking up her son's body from the hospital caused tissue gas to be present in his body, and caused his appearance to become distorted, was not sufficient to support that the funeral home's delay was the proximate cause of her damages. As noted by the trial court, expert testimony on this issue relating to tissue gasses and their cause and effect was necessary to assist in an understanding of the issue and a determination of proximate cause, MRE 702. No expert testimony was provided. Moreover, lay witness testimony in the form of an opinion is only permitted where it is rationally based on the witness' perception and is helpful to a clear understanding of the witness' testimony or the determination of a fact at issue. MRE 701. Plaintiff's testimony was not based on her perception and was not helpful to a clear understanding of her testimony or the determination of a fact in issue. Her opinion was also not reliable. She did not know where, or from whom, she learned the information regarding tissue gasses that formed the basis for her opinion. Moreover, her opinion that the delay, alone, caused the condition of her son's body was not one that could be made by people in general. Such an opinion is dependent on scientific, technical, or specialized knowledge. Cf. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454-456; 540 NW2d 696 (1995); *Co-Jo, Inc v Strand*, 226 Mich App 108, 116-117; 572 NW2d 251 (1997), superceded on other grounds by MCR 7.208(I).

Furthermore, although Thompson testified that the effectiveness of the embalming procedure may be affected by the amount of time between the time of death and the beginning of the embalming procedure, his testimony was general in nature and did not address the facts of this particular case. Thompson recited several factors that affect the deterioration of a deceased person's body. And, from his testimony, it is unclear which factors contributed or may have contributed to the deterioration of plaintiff's son's body. Therefore, Thompson's testimony was not sufficient to establish that plaintiff's alleged damages were the proximate result of the delay by the funeral home. Plaintiff's claim was based on mere speculation. "'The law is well settled that a case should not be submitted to the jury where a verdict must rest upon a conjecture or guess.'" *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998), quoting *Scott v Boyne City, G & A R Co*, 169 Mich 265, 272; 135

NW 110 (1912). The trial court, therefore, did not err in granting summary disposition in favor of defendants.

Additionally, because we conclude that defendants were entitled to summary disposition, the issues of whether plaintiff could recover damages for mental distress and recover economic damages are moot. See *City of Romulus v MI Dep't of Environmental Quality*, 260 Mich App 54, 66 n 10; 678 NW2d 444 (2003). We therefore decline to address those issues. And, in light of our decision, we find it unnecessary to address defendants' alternative grounds for affirmance of the trial court's grant of summary disposition.

Plaintiff next contends on appeal that the trial court erred in granting summary disposition in favor of defendant Betzler Funeral Home because, when Betzler purchased Thompson and Hawley's assets in June 1999, Betzler became liable, as a successor corporation, for Thompson and Hawley's liabilities. We disagree.

A determination regarding whether a corporation is liable under the doctrine of successor liability is reviewed de novo on appeal. *Craig v Oakwood Hosp,* 471 Mich 67, 77; 684 NW2d 296 (2004). "[A] corporation that merely purchases the assets of another corporation is not generally responsible for the liabilities of the selling corporation." *Jeffrey v Rapid American Corp,* 448 Mich 178, 189; 529 NW2d 644 (1995). Thus, when a successor corporation purchases the predecessor corporation's assets for cash,

> the successor corporation assumes its predecessor's liabilities *only* "(1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking; or where the transfer was without consideration and the creditors of the transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation." [*Craig, supra* at 96-97, quoting *Foster v Cone-Blanchard Machine Co,* 460 Mich 696, 702; 597 NW2d 506 (1999) (emphasis in original, footnotes omitted).]

Plaintiff cannot establish her claim that Betzler is liable as a successor corporation. First, she has not alleged that the sale of Thompson and Hawley's assets was fraudulent, that some of the elements of good faith were lacking, that the transfer was without consideration and the creditors of Thompson and Hawley were not provided for, or that Betzler was a mere continuation of Thompson and Hawley. Second, although plaintiff did allege that the sale of assets amounted to a consolidation or a merger, she failed to provide any supporting argument or evidence demonstrating that the sale amounted to a consolidation or merger. A party may not state a position on appeal and leave it to this Court to search for authority to support that position. *Badiee v Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005). Third, nothing in the record supports that Betzler expressly or impliedly assumed Thompson and Hawley's liabilities. Rather, the agreement of sale explicitly stated that the sale of assets *excluded* Thompson and Hawley's liabilities. Under the circumstances, we hold that Betzler neither expressly nor impliedly assumed Thompson and Hawley's liabilities. Therefore, Betzler is not liable as a successor corporation. See *Zantel Marketing Agency v Whitesell Corp,* 265 Mich App 559, 570; 696 NW2d 735 (2005). Cf. *Jeffrey, supra* at 182-183; *Haworth, Inc v Wickes Mfg Co,* 210 Mich App 222, 225; 532 NW2d 903 (1995). Finally, we reject plaintiff's

argument that, because Thompson worked for Betzler after the sale of assets, Thompson's knowledge of plaintiff's claim was imputed to Betzler. Cf. *Stevens v McLouth Steel Products Corp,* 433 Mich 365, 377-379; 446 NW2d 95 (1989). The trial court did not err in granting summary disposition in favor of Betzler.

Finally, plaintiff contends on appeal that the trial court erred in awarding defendants costs and attorney fees under MCR 2.405. We disagree. We review a trial court's decision to award sanctions under MCR 2.405 for an abuse of discretion. *J C Bldg Corp II v Parkhurst Homes, Inc,* 217 Mich App 421, 426; 552 NW2d 466 (1996), citing *Cole v Eckstein,* 202 Mich App 111, 117; 507 NW2d 792 (1993). An abuse of discretion occurs when the trial court's decision is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999) (citations omitted).

"The purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation." *Knue v Smith,* 269 Mich App 217, 220; 711 NW2d 84 (2005) (citations and internal quotation marks omitted). MCR 2.405(D) provides that, if an offer of judgment is rejected, costs are payable as follows:

> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.

"Actual costs" means "the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6). Under MCR 2.405(D)(3), the court may, "in the interest of justice," refuse to award attorney fees. However, "[t]he grant of attorney fees under MCR 2.405 should be the rule rather than the exception." *Knue, supra* at 222, quoting *Miller v Meijer, Inc,* 219 Mich App 476, 480; 556 NW2d 890 (1996). "The circumstances justifying refusal must be unusual." *Id.,* citing *Luidens v 63rd Dist Court,* 219 Mich App 24, 35; 555 NW2d 709 (1996).

The "interest of justice" exception might apply in a case involving a legal issue of first impression or a case involving an issue of public interest. *Luidens, supra* at 35. For example, the "interest of justice" exception applies "where the law is unsettled and substantial damages are at issue." *Id.* at 36, quoting *Nostrant v Chez Ami, Inc,* 207 Mich App 334, 343; 525 NW2d 470 (1994). Further, the "interest of justice" exception "appears to be directed at remedying the possibility that parties might make offers of judgment for gamesmanship purposes, rather than as a sincere effort at negotiation." *Knue, supra* at 223, quoting *Luidens, supra* at 35. An offer of judgment is made for gamesmanship purposes when the offer is de minimus and was made in the hope of tacking attorney fees to costs if successful at trial. See *Luidens, supra* at 35; see also *Stitt v Holland abundant Life Fellowship (On Remand),* 243 Mich App 461, 474; 624 NW2d 427 (2000).

Plaintiff's case does not present the "unusual circumstances" that justify denial of attorney fees under MCR 2.405. This case does not involve a legal issue of first impression or an issue of public interest. Moreover, the governing contract law is not unsettled and there are no substantial damages at issue. Further, the defendants' offer of judgment, for $1,000 was not de

minimus in light of the contract price of $6,600. And, nothing in the record indicates that defendants made the offer of judgment in the hope of tacking attorney fees to costs if they were successful at trial. Rather, the offer reflects a sincere effort at negotiation, and the "interest of justice" exception does not apply. The trial court did not abuse its discretion in awarding costs and attorney fees in favor of defendants under MCR 2.405.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray