STATE OF MICHIGAN

COURT OF APPEALS

U-HAUL INTERNATIONAL,

Plaintiff-Appellant,

v

J&T TOWING,

Defendant-Appellee.

UNPUBLISHED
August 16, 1996

No. 179051
LC No. 94-416540-PD

Before: White, P.J., and Smolenski and R.R. Lamb,* JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing this claim and delivery case and imposing sanctions pursuant to defendant's motion for summary disposition. We affirm.

Plaintiff first argues that the trial court failed to recognize that a genuine issue of material fact existed concerning plaintiff's theory of conversion. We disagree. It is well established that when considering a motion for summary disposition pursuant to MCR 2.116(C)(10) the existence of a disputed fact must be established by admissible evidence, not inadmissible hearsay. *Amorello v Monsanto Corp*, 186 Mich App 324, 329; 463 NW2d 487 (1990); *Pauley v Hall*, 124 Mich App 255, 262; 335 NW2d 197 (1983). In this case, even assuming that the supplemental police report itself could be authenticated as a business record, the statement[1] relied on by plaintiff in this report to support its contention that an issue of material fact existed is hearsay within hearsay and, as such, is inadmissible where no foundation has been established to bring each independent hearsay statement within an exception to the general rule prohibiting the admission of hearsay evidence. See 805; *Solomon v Shuell*, 435 Mich 104, 129; 457 NW2d 669 (1990). We conclude that the trial court did not err in failing to find the existence of an issue of material fact. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993). Accordingly, the trial court did not err in granting summary disposition of plaintiff's suit for claim and delivery. No evidence was presented that defendant had unlawfully taken or unlawfully detained plaintiff's truck. See MCR 3.105(A). And, as indicated previously, no admissible evidence was presented to create a question of fact concerning whether

* Circuit judge, sitting on the Court of Appeals by assignment.

defendant intended to convert the truck to its own use by initiating a sale of the truck without the authorization of the Sumpter Township Police Department.

Next, plaintiff argues that if the trial court's grant of summary disposition in favor of defendant was error, then the trial court's award of sanctions in the amount of $2500 in favor of defendant was error. We disagree. As indicated previously, the trial court did not err in granting summary disposition in favor of defendant. Moreover, even when the issue of sanctions is considered on its own merits, the trial court's award of same in favor of defendant did not constitute error.

As explained in *LaRose Market, Inc v Slyvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995):

> A trial court's finding that a claim is frivolous will not be reversed on appeal unless clearly erroneous. *Attorney General ex rel Director of Dep't of Natural Resources v Acme Disposal Co*, 189 Mich App 722, 728; 473 NW2d 824 (1991). . . .
>
> An attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. MCR 2.114(D); *Davids v Davis*, 179 Mich App 72, 89; 445 NW2d 460 (1989). The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case. *Id*. In addition, MCR 2.625(A)(2) mandates that a court tax costs incurred during the course of frivolous litigation. *Davids, supra; Wells v Dep't of Corrections*, 447 Mich 415, 419; 523 NW2d 217 (1994). A claim is frivolous when (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe that the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a).

In awarding sanctions in favor of defendant in this case, the trial court stated as follows:

> But a claim and delivery against [defendant] only, I don't see where you had any basis for it.

We agree. Plaintiff's inquiry into the factual viability of its claim for claim and delivery does not appear to have been objectively reasonable under the facts and circumstances of this case where, as indicated previously, no evidence was presented that defendant had unlawfully taken or unlawfully detained plaintiff's truck, and plaintiff's only basis for asserting that defendant intended to convert the truck to its own use by initiating a sale of the truck without the authorization of the Sumpter Township Police Department was premised on layers of inadmissible hearsay, including an anonymous phone call. Further, defendant asserted that plaintiff's attorney was informed

before suit was commenced that the vehicle had not been listed for sale. We conclude that the trial court's finding that plaintiff's claim was frivolous was not clearly erroneous.

Affirmed.

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Richard R. Lamb

[1] "On or about May 12, 1994 I received a call from Carol Doney (U-Haul) 800-562-3766 inquiring about the truck, she stated a female called her and informed her that the vehicle was going to be sold at auction (I knew nothing about the sale of this truck.)."