STATE OF MICHIGAN

COURT OF APPEALS

HOSPITALISTS OF NORTHWEST MICHIGAN, P.L.C., Plaintiff-Appellee, v ERNEST G. FISCHER III, M.D., Defendant-Appellant.	UNPUBLISHED October 10, 2013 No. 301962 Grand Traverse Circuit Court LC No. 2009-027718-CK
HOSPITALISTS OF NORTHWEST MICHIGAN, P.L.C., Plaintiff-Appellant/Cross-Appellee, v ERNEST G. FISCHER III, M.D., Defendant-Appellee/Cross-Appellant, and ROBERT B. BETTENDORF, Appellee.	 No. 302126 Grand Traverse Circuit Court LC No. 2009-027718-CK

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In this contract dispute, defendant Ernest G. Fischer III, M.D., appeals as of right in Docket No. 301962 from a judgment awarding plaintiff Hospitalists of Northwest Michigan, P.L.C., damages of $120,342, and prejudgment interest of $3,577.78, following a bench trial. In Docket No. 302126, plaintiff appeals as of right and defendant cross-appeals from a "final

judgment" that additionally awarded plaintiff sanctions of $70,609 against defendant. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Plaintiff is a professional corporation consisting of physicians who provide services as hospitalists for Munson Medical Center. Defendant began working for plaintiff in 2005 as a medical resident, and became a member of plaintiff in 2006. According to plaintiff's president, defendant was treated as one of plaintiff's owners, even though he had never paid the subscription fee necessary to acquire ownership shares. This arrangement ended, effective January 1, 2009, when the ownership structure of plaintiff was changed to reduce the number of physician-owners.

Defendant's compensation as a hospitalist was governed by employment agreements, the most recent of which was restated and amended effective January 1, 2009. That agreement defined the revenue available for a hospitalist's compensation, as well as expenses to be paid by or deducted from that revenue. The agreement also allowed hospitalists to receive compensation in the form of monthly draws.

Plaintiff obtained a loan from defendant to pay off his student loans during the course of his employment. Under the loan agreement, effective September 20, 2007, defendant was required to make monthly payments and a final balloon payment at the end of a five-year period. The loan agreement specified that a default in making the monthly installment payments, the performance of other obligations under the loan agreement, or the performance of obligations under the employment agreement would, at plaintiff's option, render the loan immediately due and payable.

On June 5, 2009, plaintiff provided defendant with written notice that he had breached the loan agreement and the employment agreement. Defendant was later given the option of being terminated from his employment or executing a separation agreement, effective June 30, 2009. Defendant opted to sign the separation agreement. In December 2009, plaintiff filed the instant action, seeking payment of defendant's outstanding loan balance and other amounts allegedly owed by defendant. In March 2010, defendant filed a counterclaim in which he alleged that plaintiff had breached contractual obligations by failing to pay or give him credit for all amounts due to him.

Following a bench trial, the trial court found that plaintiff was entitled to the balance due on the outstanding loan in the amount of $88,532, plus an additional $33,147 sought by plaintiff as unpaid "overhead expenses," less $4,717 in billing, legal, and accounting expenses that were disallowed by the trial court. The trial court also determined that plaintiff was entitled to sanctions against defendant for filing a frivolous counterclaim for compensation for the years 2006 through 2008, but required plaintiff to submit documentation in support of the amount of requested sanctions. After addressing motions filed by both parties with respect to its findings and defendant's objections to the amount of sanctions requested by plaintiff, the trial court entered a final judgment awarding plaintiff sanctions of $70,609.

II. DOCKET NO. 301962

Defendant challenges the trial court's judgment for plaintiff entered after the bench trial. We review a trial court's findings of fact at a bench trial for clear error and review its conclusions of law de novo. *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Id.* at 251. To the extent that our review requires interpretation of the parties' contracts, including whether contractual language is ambiguous, our review of these matters is de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010).

A. LOAN ACCELERATION

Defendant first argues that the trial court erred in its determination that plaintiff did not waive default events under the loan agreement, or waive its related right to accelerate the loan before defendant's employment ended. Defendant argues that the separation agreement unambiguously establishes a waiver of any default events and the related right to accelerate the loan. We disagree.

The separation agreement expressly refers to defendant's earlier agreements with plaintiff, which established terms for his compensation and the repayment of the loan. The separation agreement terminates defendant's employment, effective June 30, 2009, but provides that "remaining provisions of the Employment Agreement will remain in full force and effect."

Article VI, ¶ 3, of the restated and amended employment agreement, effective January 1, 2009, contains a "deferred compensation" provision, which entitled a hospitalist who terminates his employment with plaintiff "upon proper notice, for any reason whatsoever other than termination for cause (including without limitation, death, retirement or disability)" to be paid an amount "equivalent to the accounts receivable directly attributable to patient care provided by Hospitalist actually collected by HNM[1] within nine (9) months of the event of termination, less the costs spent by [plaintiff] collecting the receivables less any individual expenses." Paragraph 3 of the separation agreement similarly entitles defendant to nine months of deferred compensation, but has two conditions, one of which requires defendant's "successful completion of . . . completing the below requirements in full and to the satisfaction of HNM." The "below requirement" in ¶ 5 addresses the five-year loan made by plaintiff to defendant in 2007. It provides that defendant "is required to pay back the loan made to him by HNM pursuant to the terms of the Loan Agreement he has signed. The Loan Agreement remains in full force and effect." The loan agreement itself provides, in pertinent part:

> On the occurrence of any event of default, all or any part of the indebtedness and all or any of all other indebtedness evidenced by this Loan Agreement and obligation then owing by [defendant] to [plaintiff] shall, at the

[1] "HNM" is identified as plaintiff in the agreement.

option of [plaintiff], become immediately due and payable without notice or demand.

The loan agreement also provides:

> [Defendant] agrees that all of his accounts receivable will serve as security for his obligations under this Loan Agreement. If [defendant] defaults in any of the terms of the Loan Agreement, [plaintiff] may suspend any payments to [defendant] under his Physician Employment Agreement. [Defendant's] accounts receivable shall immediately become the sole property of [plaintiff] and may be used by [plaintiff] to satisfy all of [defendant's] obligations under this Loan Agreement, notwithstanding any provisions in the Physician Employment Agreement between [defendant] and [plaintiff] to the contrary.

"Where one writing references another instrument for additional contract terms, the two writings should be read as a whole." *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). If the reference is made for a particular purpose, it becomes part of the contract only for that purpose. *Whittlesey v Herbrand Co*, 217 Mich 625, 628; 187 NW 279 (1922). An unambiguous contract is applied according to its plain meaning. *Shay*, 487 Mich at 660. "Only when contractual language is ambiguous does its meaning become a question of fact." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 504; 741 NW2d 539 (2007). Contractual language is ambiguous if two provisions irreconcilably conflict or a term is equally susceptible to more than one meaning. *Id.* at 503. A contract is patently ambiguous if the ambiguity is apparent from the face of the document. *Shay*, 487 Mich at 667. A contract is latently ambiguous if the contractual language suggests a single meaning, but other facts create a choice between two or more possible meanings. *Id.* at 668. "To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact the evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation." *Id.* If a latent ambiguity exists, the court examines the extrinsic evidence again to determine the meaning of the contract. *Id.*

Looking to the four corners of the separation agreement and the two agreements referenced in the separation agreement, we find no ambiguity. Contrary to defendant's argument on appeal, the separation agreement cannot be reasonably construed as limiting defendant's obligation to the "terms" provision in ¶ 3 of the loan agreement that he pay the "actual principal and interest . . . as a payroll deduction (after taxes), not to exceed $2,100 per month for 60 months," plus the balloon payment at the end of 60 months. The separation agreement unambiguously affirms that the entire loan agreement remains in full force and effect. This means that plaintiff could accelerate the loan in the event of a default and properly could look to the accounts receivable for payment of the loan balance.

In addition, unlike a forfeiture, which involves the failure to timely assert a right, a "waiver requires an intentional and voluntarily relinquishment of a known right." *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 379; 666 NW2d 251 (2003). "It is well settled that a course of affirmative conduct, particularly coupled with oral or written representations, can amount to a waiver." *Id.* A waiver may also be established by an express

oral or written agreement. *Id.* at 373. But mere silence generally does not establish a waiver. *In re Receivership of 11910 South Francis Rd,* 492 Mich 208, 229 n 45; 821 NW2d 503 (2012).

We reject defendant's argument that the separation agreement must be construed as unambiguously waiving prior default events and the related right to accelerate the loan in order to give meaning to his entitlement to accounts receivable for nine months. We also reject defendant's argument that the reaffirmation of the loan agreement in the separation agreement constitutes surplusage if the loan could still be accelerated following the execution of the separation agreement.

A court should avoid an interpretation of a contract that renders any part of the contract surplusage. *Klapp,* 468 Mich at 459. But mere surplusage does not create ambiguity. *Mich Twp Participating Plan v Pavolich,* 232 Mich App 378, 388; 591 NW2d 325 (1998). In this case, the only "surplusage" created by giving full force and effect to the loan agreement through ¶¶ 3(b) and (5) of the separation agreement arises from evidence that the amount of the accelerated loan exceeded the account receivables. In any event, it is clear from the evidence at trial that defendant's obligation to repay the loan arose under an agreement separate from his employment agreement. Properly construed, the separation agreement addresses the consequences of both agreements by acknowledging defendant's entitlement to accounts receivable, while preserving plaintiff's rights under the loan agreement to apply defendant's accounts receivable to his loan obligation in the event of a default. Neither the fact of an existing default when the separation agreement was entered, nor the inadequacy of the accounts receivable to pay for the entire loan balance converts the provision entitling defendant to the accounts receivable to mere surplusage. It also fails to convert the provision giving full effect to the loan agreement to mere surplusage.

We also hold that defendant has failed to establish any extrinsic evidence that supports his proposed interpretation of the separation agreement. *Shay,* 487 Mich at 668. Defendant's own testimony regarding what he was told about the accounts receivable is not material because, even assuming that the testimony could suffice to support a latent ambiguity, the trial court did not find the testimony credible. In reviewing the trial court's findings, we give deference to the trial court's special opportunity to judge the credibility of witnesses who appeared before it. MCR 2.613(C). And considering the absence of a patent or latent ambiguity necessitating judicial construction, we find it unnecessary to address defendant's argument that the trial court should have construed the separation agreement in his favor. The rule of *contra proferentum* is only used if there is true ambiguity and the parties' intent cannot be discerned through other means, including extrinsic evidence. *Coates,* 276 Mich App at 504.

In sum, the trial court did not err in failing to find an express contract establishing the parties' mutual agreement to waive particular default events and the related loan acceleration. We must therefore consider whether the parties engaged in a course of affirmative conduct that amounts to a waiver. *Quality Prod & Concepts Co,* 469 Mich at 379. "[W]hen a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied." *Id.* at 374. Having considered the evidence of the events after plaintiff's corporate president gave defendant notice of default in a June 5, 2009, letter, we find no basis for disturbing the trial court's finding that plaintiff did not waive the default. Defendant has failed to establish a course of conduct that clearly and convincingly demonstrates

that plaintiff waived enforcement of the loan acceleration option arising from the default events. Rather, the evidence indicates that plaintiff exercised its rights by applying receipts from the accounts receivable to pay down the loan balance in August and October 2009. Neither plaintiff's delay in taking action to fully exercise its right to collect the loan balance through this lawsuit nor its decision to accept monthly loan payments made by defendant before doing so constitutes a waiver. Therefore, the trial court did not err in awarding plaintiff damages for the remaining unpaid balance of the loan.

B. OVERHEAD EXPENSES

Defendant next challenges the trial court's finding that he was liable to plaintiff for $33,147 for unpaid "overhead expenses." Defendant argues that plaintiff's formula for calculating damages actually produces an amount of $33,047, that the trial court mischaracterized the amount sought by plaintiff as "overhead expenses," and that plaintiff's calculation would have support only if he was terminated for cause and if his entitlement to nine months of accounts receivable was forfeited. We agree.

Initially, notwithstanding plaintiff's reference to "overhead expenses" of $33,147 in its written closing argument, it is clear from plaintiff's earlier supplemental trial brief, as well as plaintiff's posttrial brief filed in opposition to defendant's motion for amended findings and plaintiff's argument in this appeal, that the requested amount represented an evaluation of defendant's compensation for 2009. Plaintiff's computation began with the year-end "bank" of $2,982 in favor of defendant, which was computed by adding defendant's income from various sources for 2009 to the prior year carryover amount of $4,331 and deducting the expenses for 2009. The income includes 100 percent of receipts from defendant's accounts receivable after June 30, 2009, which were $42,150, less monthly expenses charged to the income. It also contains monthly amounts paid out to defendant before June 2009, and draws of $40,000 in August 2009 and $10,000 in October 2009 that, according to the trial testimony, were applied to defendant's outstanding loan balance.[2] Plaintiff proposed in its supplemental trial brief that the receipts from accounts receivable totaling $42,150 be deducted from the year-end "bank" on the ground that defendant was not entitled to this income because he was terminated for cause, effective June 30, 2009. With respect to expenses, plaintiff proposed that defendant receive a credit of $4,215 for the billing charge associated with these receipts for July through December 2009, and $1,906 for legal fees. The net amount claimed by defendant, after making these three adjustments to the year-end "bank," was $33,047.

We note that this same result was reached by plaintiff in computing the amount owed by defendant in its trial exhibit no. 12, although the computation was presented in a different format and contained the more precise amount of $33,046.81. Although plaintiff requested a higher amount of $33,147 and characterized this as "overhead expenses" in its written closing

[2] The actual amounts applied to the loan, as shown in plaintiff's schedule of the outstanding loan balance introduced at trial, were $26,142.22 in August 2009 and $9,855 in October 2009. Although not material to our resolution of this appeal, we note that defendant treated these amounts as "net payroll checks applied to the loan" in his written closing argument.

argument, because the higher amount is unsupported by the record, the trial court clearly erred in accepting plaintiff's proposed damages of $33,147.

More significantly, the trial court clearly erred in accepting plaintiff's proposed damages because, while labeled "overhead expenses," the proposal substantively treats defendant as an employee who was terminated for cause, effective June 30, 2009, with no entitlement to the receipts of $42,150 collected on his accounts receivable for the period from July through December 2009. Stated otherwise, the court's award allows plaintiff to recoup the receipts from accounts receivable that it previously withdrew from defendant's "bank" to apply to the outstanding loan. This result is inconsistent with the trial court's proper determination that defendant was terminated under a separation agreement that entitled him keep the accounts receivable and have them applied toward the loan. It is also inconsistent with the trial court's finding that the billing charge for the accounts receivable should be reduced by $1,686, or forty percent of $4,215, inasmuch as plaintiff had already removed the entire billing charge of $4,215 from its proposed damages based on its position that defendant was not entitled to the accounts receivable.

Considering the trial court's findings as a whole, we can only conclude that it was operating under a misunderstanding of plaintiff's requested "overhead expenses" when determining that plaintiff was entitled to $33,147, less a credit in favor of defendant for incorrect 2009 charges totaling $4,717, which included the reduction to the billing charge. Because the trial court erred in determining this aspect of damages, we vacate the award of $33,147 in favor of plaintiff for "overhead expenses" and the related credit of $4,717 for "incorrect 2009 charges," and remand for a redetermination of the damages.[3]

C. OTHER CONTRACT ISSUES

Defendant raises several other contract-related issues, the first of which is that he did not breach the separation agreement. Defendant has not established the relevance of this claim to the trial court's resolution of this case. To the extent that defendant is seeking relief based on the separation agreement provision that "[i]f any action at law or in equity is brought to enforce or interpret the provisions of this Agreement, the prevailing party shall be entitled to reasonable costs and attorney fees," we note that the trial court found that neither party was entitled to attorney fees under the separation agreement because it did not provide for "proportionate repayment." Because defendant does not challenge the trial court's determination that a party must prevail in full to be entitled to attorney fees, but instead only argues that he prevailed completely, a position that cannot succeed in light of our rejection of defendant's argument that

[3] We decline to consider defendant's argument in his reply brief that the computation of damages contains several illegitimate entries if the accounting in plaintiff's trial exhibit no. 12 is considered. That issue is not properly before us. "Reply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Props, Inc* 259 Mich App 241, 252; 673 NW2d 805 (2003); see also MCR 7.212(G).

the settlement agreement waived the prior default events and the related loan acceleration, we affirm the trial court's decision to deny attorney fees to defendant.

Defendant next argues that plaintiff breached the settlement agreement in four different ways. Defendant first argues that he should have been paid compensation of $32,053.57 in July 2009 for services through the end of his employment on June 30, 2009. Because defendant did not pursue this piecemeal claim for damages at trial, but rather sought damages that would also account for any income, expenses, and obligations owed on the loan after June 30, 2009, we consider this issue unpreserved. *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Because this claim is factually intensive and the necessary facts have not been developed, appellate review of this unpreserved claim is inappropriate. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). To the extent that defendant argues that this alleged breach would support his position that plaintiff committed the first substantial breach of the settlement agreement, we disagree. The general rule is that the party committing the first substantial breach of contract cannot maintain an action against a party for failure to perform. *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126; 156 NW2d 575 (1968). The phrase "substantial breach" rule is given close scrutiny. *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964).

> Such scrutiny discloses that the application of such a rule can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party. [*Id.* at 574 (citations omitted).]

Even assuming that some payment should have been made directly to defendant in July 2009, considering the evidence that it was applied to the loan and the evidence that supports the trial court's decision that the loan default was not waived, defendant has failed to establish that he was harmed by the alleged nonpayment in July 2009. Further, defendant has not established anything with respect to the alleged nonpayment that would render his own performance under the separation agreement ineffective or impossible. *McCarty*, 372 Mich at 574. At most, defendant has identified a factual issue that could be addressed in a proper accounting of the amount owed to him or plaintiff under the terms of the separation agreement and loan agreement.

Second, relying on testimony from one of plaintiff's owners at trial, defendant argues that plaintiff breached the separation agreement by disparaging him to an employer and that this Court should remand for a determination of damages. Because defendant did not present this unpleaded claim to the trial court, we decline to address it. *Walters*, 481 Mich at 387-388; *Fast Air, Inc*, 235 Mich App at 549.

Third, defendant argues that plaintiff breached the separation agreement and the loan agreement by applying $50,000 in "draws" to the loan. We have already upheld the trial court's determination that plaintiff was entitled to apply receipts from defendant's accounts receivable to the loan balance, because plaintiff did not waive the default. Accordingly, defendant has not established any basis for relief with respect to this claim. As with defendant's claim that plaintiff breached the settlement agreement by not paying him compensation in July 2009 for services

through the end of his employment on June 30, 2009, defendant has merely identified a matter to be addressed in a proper accounting of the amount owed to him or plaintiff under the terms of the separation agreement and loan agreement.

Fourth, defendant argues that plaintiff breached the separation agreement because the trial court found that he should not have been charged $4,717 for legal fees, accounting fees, and billing services. Our decision to vacate that portion of the judgment and remand for a redetermination of damages is dispositive of this claim.

Defendant also argues that any recovery by plaintiff based on the settlement agreement should be overturned because plaintiff committed the first substantial breach. Defendant's failure to establish a substantial breach by plaintiff precludes relief with respect to this claim. *McCarty*, 372 Mich at 574. In a related claim, defendant seeks a declaration that the release in the settlement agreement is unenforceable. Because defendant failed to seek this declaration from the trial court, and has not established that the issue is necessary for a proper resolution of this appeal, we decline to address it. *Smith,* 269 Mich App at 427.

D. RETIREMENT PLAN

Defendant seeks to strike any reference by the trial court in its orders and judgments to plaintiff's alleged overfunding of his retirement account on the ground that the court lacked jurisdiction to consider that matter. Defendant has not established any basis for this relief with respect to this argument. Substantively, defendant's argument concerns the trial court's subject-matter jurisdiction in light of the preemption of state law claims related to employee benefit plans under the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.*, and the general subject-matter jurisdiction of federal courts to decide ERISA claims. See generally *In re Lager Estate,* 286 Mich App 158, 164; 779 NW2d 310 (2009).

But courts speak through judgments and orders, and not their oral statements or written opinions. *Tiedman v Tiedman,* 400 Mich 571, 576; 255 NW2d 632 (1977). In this case, the trial court commented in its November 4, 2010, decision on evidence that the retirement account was overfunded and its determination that defendant had admitted that the retirement account was overfunded, but also ruled that the dispute regarding this matter was within the exclusive jurisdiction of the federal courts. Although the November 4, 2010, decision is also labeled an "order," the label attached to a document is not controlling because that would place form over substance. *Cheron, Inc v Don Jones, Inc,* 244 Mich App 212, 220 n 4; 625 NW2d 93 (2000). An "order" is "[a] written direction or command delivered by a court or judge." Black's Law Dictionary (7th ed). "When a court renders a judgment, it is entering an order based on previously decided issues of fact." *Anzaldua v Band,* 457 Mich 530, 536; 578 NW2d 306 (1998).

While there are portions of the trial court's November 4, 2010, decision and order that function as an order, the trial court's statements regarding the parties' dispute concerning the retirement account do not constitute an order. Further, neither the trial court's December 10, 2010, judgment nor the later judgment adding sanctions provides declaratory or other relief regarding this dispute. Because a court a court speaks through its judgments and orders, and the

challenged statements do not qualify as a direction or command, we deny defendant's request to strike the trial court's statements.

III. DOCKET NO. 302126

Both parties raise issues concerning the trial court's decision to award plaintiff sanctions based on the court's determination that defendant's counterclaim for compensation for the years 2006 through 2008 was frivolous. We review legal issues underlying the trial court's award of sanctions, including the proper interpretation and application of a statute or a court rule, de novo. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 408 n 8, 415; 700 NW2d 432 (2005). We review a trial court's finding that an action is frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). The trial court's determination regarding the reasonableness of attorney fees is reviewed for an abuse of discretion. *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002).

A. DEFENDANT'S CROSS-APPEAL

We first address defendant's challenge to the trial court's determination that he is personally responsible for paying the imposed sanctions for a frivolous counterclaim. Although the trial court did not specify the particular court rule or statute under which it awarded sanctions, it is clear that the factual basis for the award of sanctions concerned the frivolousness of defendant's counterclaim for compensation for the years 2006 through 2008, and not the person or party who signed the counterclaim or matters certified by the signature. It is apparent from the record that the trial court relied on MCL 600.2591 as the authority for its award of sanctions, as permitted by MCR 2.625(A)(2). See also MCR 2.114(F). Therefore, it is not necessary to address defendant's argument that sanctions were not appropriate under MCR 2.114(E).

With respect to MCR 2.625(A)(2) and MCL 600.2591, defendant first argues that the trial court erred in awarding sanctions without a formal motion. We find merit to defendant's argument that the court rule and statute require the party seeking sanctions to do so by motion. Pursuant to MCR 2.119(A), either a written or oral motion is permitted:

> (1) An application to the court for an order in a pending action must be by motion. Unless made during a hearing or trial, a motion must
>
> (a) be in writing,
>
> (b) state with particularity the grounds and authority on which it is based,
>
> (c) state the relief or order sought, and
>
> (d) be signed by the party or attorney as provided in MCR 2.114.

Although plaintiff did not move for sanctions during trial or at a hearing, plaintiff clearly requested sanctions pursuant to MCR 2.625 in its supplemental trial brief and written closing argument, which the trial court permitted in lieu of oral closing arguments. The latter writing

contained a specific request for sanctions on the basis that defendant's compensation claim for the period 2006 through 2008 was frivolous. Because MCR 2.625(A)(2) refers to MCL 600.2591, we reject defendant's argument that plaintiff's failure to specifically cite MCL 600.2591 in the writing violates MCR 2.119(A). Even if plaintiff's use of the supplemental trial brief and written closing argument to request sanctions can be considered procedurally deficient, absent a showing of prejudice, relief is not warranted. MCR 2.613(A); *Heugel v Heugel*, 237 Mich App 471, 483-484; 603 NW2d 121 (1999).

Because plaintiff's supplemental trial brief and written closing argument were sufficient to apprise defendant of the basis for its request of sanctions, defendant has not established any basis for relief based on the mere form of its motion. Rather, we turn to defendant's claim that he was deprived of procedural due process. We review claims of constitutional error de novo. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008). The essence of procedural due process in a civil case is fundamental fairness. *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). The basic requirements include notice of the proceeding and a meaningful opportunity to be heard. *Id.* But a mere violation of a procedural rule does not establish a due process violation. *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000). Defendant has failed to establish that he was deprived of a meaningful opportunity to be heard with respect to plaintiff's motion. At the bench trial, the trial court remarked, "If in fact, at the end of the case either of you is entitled to sanctions, we will deal with attorney fees and costs in a separate hearing." Given this remark, it was reasonable for defendant to have expected the trial court to hold some type of posttrial hearing regarding plaintiff's request for sanctions.

Although the trial court nonetheless found in its November 4, 2010, decision that defendant's counterclaim for compensation for the years 2006 through 2008 was frivolous without conducting a hearing, defendant was given an opportunity to file detailed objections to plaintiff's documentation for the amount of requested sanctions. The record indicates that defendant used this opportunity to present his position that the counterclaim was not frivolous and that he should be afforded a hearing on this issue. Defendant also had an opportunity to move for an amendment of the trial court's November 4, 2010, findings, and the trial court specifically recognized that defendant was seeking a hearing on the frivolousness issue when allowing plaintiff to file a response to this motion and for defendant to thereafter file a reply, with supporting documents, including affidavits. The trial court's November 22, 2010, order deciding the motion provided that "the Court shall review all documents submitted and either schedule or dispense with oral argument, pursuant to MCR 2.119(E)(3)."

While the trial court ultimately dispensed with oral arguments pursuant in its December 10, 2010, decision regarding posttrial motions, a party's mere inability to present oral arguments does not amount to a deprivation of due process. See *Leonardi v Sta-Rite Reinforcing, Inc*, 120 Mich App 377, 383; 327 NW2d 486 (1982). Because the record establishes that defendant was given a meaningful opportunity to be heard regarding whether the counterclaim was frivolous and an opportunity to make an offer of proof by affidavit or otherwise to show the need for an evidentiary hearing, we reject defendant's argument that he was deprived of procedural due process.

Defendant has also failed to establish any error in the trial court's determination that plaintiff was entitled to sanctions pursuant to MCL 600.2591. MCL 600.2591(1) provides for

sanctions to the prevailing party where a court finds that a civil action or defense to a civil action was frivolous. MCL 600.2591(3)(a) specifies three circumstances under which a claim may qualify as being frivolous. The trial court's decision regarding defendant's baseless counterclaim for compensation for the years 2006 through 2008, as set forth in the court's original November 4, 2010, decision and further explained in its December 10, 2010, decision with respect to posttrial motions, clearly falls under MCL 600.2591(3)(a)(ii) ("[t]he party had no reasonable basis to believe that the facts underlying the party's legal position were in fact true").

We agree with defendant that a court must determine whether "a civil action or defense" was frivolous at the time it was made. *In re Costs & Attorney Fees*, 250 Mich App at 94. But an award of sanctions does not require that the entire action or defense be frivolous. *Id.* at 102-103. In addition, "[d]ecisions involving the meaning and scope of pleadings are reviewed for an abuse of discretion." *Taxpayers of Mich Against Casinos v Mich*, 478 Mich 99, 105; 732 NW2d 487 (2007), citing *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

The particular action at issue here was set forth in a counterclaim. "A counterclaim may, but need not, diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." MCR 2.203. "A counterclaim is a counter-demand or a cause of action that exists in favor of the defendant against the plaintiff and on which the defendant might have brought a separate action and recovered judgment." 20 Am Jur 2d, Counterclaim, Recoupment, and Setoff, § 1. Stated otherwise, "[a] counterclaim does not seek to defeat the plaintiff's claim as a cause of action but is, instead, an independent affirmative claim for relief." *Id.*

In determining that sanctions were warranted in this case, the trial court only imposed sanctions on defendant for the portion of his counterclaim pertaining to compensation for the period before the restated and amended employment contract became effective on January 1, 2009. The allegations in the counterclaim support the trial court's determination that defendant was alleging financial improprieties in the calculation of compensation due to him for the years 2006 through 2008. Indeed, we note that defendant does not dispute that the counterclaim pertained to this time period, but rather asserts that he was merely seeking an accounting. We reject defendant's argument because a court is not bound by a party's choice of labels for an action. *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). The gravamen of an action is determined by examining the entire claim. *Id.*

At the time the counterclaim was filed, defendant would have known that plaintiff was claiming that defendant was entitled to a specific sum of $4,331.11 for the "2008 bank carryover credit" because that sum was included in plaintiff's proposed schedule of income, expenses, and other items that it used to arrive at the amount it claimed was owed by defendant in its original and amended complaint. Defendant's counterclaim essentially challenged the carryover credit through his allegation that plaintiff breached its obligations to pay or give credit to him for all amounts due as compensation. Although defendant also sought a "true and correct accounting" in the counterclaim, defendant did not allege that plaintiff breached an "accounting" provision of any agreement. Examined in this context, the trial court did not abuse its discretion in treating

the gravamen of plaintiff's counterclaim as a compensation claim predicated on financial improprieties that included the years 2006 through 2008.

In addition, we find no clear error in the trial court's determination that defendant's counterclaim for the period before January 1, 2009, was frivolous. As expounded by the trial court in its December 10, 2010, decision regarding posttrial motions, it is apparent that the court's concern involved the communications that defendant received from plaintiff regarding his compensation for the years 2006 through 2008, and not the factual information that defendant's counsel relied on to file the counterclaim. The trial court could reasonably conclude from the trial evidence, including the testimony of plaintiff's certified public accountant, Kate Thornhill, that there was no reasonable basis for defendant to believe that the facts underlying his position were true when the counterclaim was filed.

Contrary to defendant's argument on appeal, the trial court's finding that the counterclaim was frivolous is consistent with its denial of plaintiff's motion for summary disposition. The factual dispute identified by the trial court for purposes of denying the summary disposition motion pertained to plaintiff's ability to enforce the release. Whether defendant had a factual basis for his counterclaim was not relevant to this issue because an affirmative defense, such as a release, does not controvert the opposing party's prima facie case. MCR 2.111(F)(3); *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993).

We uphold the trial court's determination that the counterclaim for the years 2006 through 2008 was frivolous and we reject defendant's argument that plaintiff nonetheless does not satisfy the "prevailing party" requirement of MCL 600.2591(1) for sanctions. A "prevailing party" is defined in MCL 600.2591(3)(b) as "a party who wins on the entire record." It is not necessary that a party prevail in full on all disputed issues. *BJ's & Sons Constr Co, Inc*, 266 Mich App at 409. The trial court found that plaintiff was the overwhelming prevailing party. Thus, plaintiff prevailed on the entire record. Defendant has not established any error in the trial court's determination. While we have nonetheless concluded in part II(B), *supra*, that the trial court erred in its computation of plaintiff's damages, plaintiff may still be regarded as having prevailed on the entire record because plaintiff is entitled to apply the receipts from defendant's accounts receivable to, and collect the balance due on, the accelerated loan. Because the trial court reached the right result, we affirm its determination that plaintiff was entitled to sanctions. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

Lastly, defendant challenges the trial court's determination regarding the amount of sanctions. Under MCL 600.2591(2), the amount of costs and fees to be awarded "shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees." Because the statute only requires a reasonable award, we reject defendant's argument that the trial court could only award attorney fees directly related to the compensation claim for the years 2006 through 2008. *In re Costs & Attorney Fees*, 250 Mich App at 104-105. But in light of our determination that the trial court erred in computing plaintiff's damages, we conclude that the trial court was operating under a misconception of the extent to which plaintiff prevailed when deciding the reasonableness of plaintiff's requested attorney fees and costs. Because we are unable to conclude that the trial court's error was harmless, we remand for a redetermination of an appropriate award of sanctions to be imposed against defendant.

B. PLAINTIFF'S APPEAL

Plaintiff sole claim on appeal is that the trial court erred in failing to assess sanctions against defendant's attorneys. This Court previously entered a stipulated order dismissing plaintiff's claim with respect to Sondee Racine & Doren, P.L.C., and attorney Maurice Borden. *Hospitalists of Northwest Mich, PLC v Fischer*, unpublished order of the Court of Appeals, entered June 10, 2013 (Docket Nos. 301962 & 302126). Therefore, review of this issue is limited to plaintiff's claim against attorney Robert Bettendorf.

Because plaintiff does not identify any document signed by attorney Bettendorf, we reject plaintiff's argument that he should have been sanctioned under MCR 2.114(E) for signing and filing pleadings in violation of MCR 2.114(D)(2). A party may not leave it to this Court to search for factual support for a claim. *McIntosh v McIntosh*, 282 Mich App 471, 484-485; 768 NW2d 325 (2009).

We agree, however, with plaintiff's argument that sanctions should have been imposed against attorney Bettendorf under MCL 600.2591(1). A court's primary task in construing a statute is to give effect to the Legislature's intent. *Green v Ziegelman*, 282 Mich App 292, 301; 767 NW2d 660 (2009). The words contained in a statute provide the most reliable evidence of legislative intent. *Id.* If the statutory language is unambiguous, it is applied as written. *Id.* at 302.

MCL 600.2591(1) provides that upon finding that a civil action or defense was frivolous, the trial court "shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." The use of the word "shall" in MCL 600.2591(1) establishes that the Legislature intended for mandatory sanctions once the court finds that an action or defense was frivolous. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996).

In addition, while the words "and" and "or" are sometimes used inconsistently in a statute, their literal meaning should be followed unless doing so renders the sense dubious. *People v Neal*, 266 Mich App 654, 698; 702 NW2d 696 (2005); *Auto-Owners Ins Co v Budkis*, 227 Mich App 45, 50-51; 575 NW2d 79 (1997). Because a literal application of the word "and" in MCL 600.2591(1) does not render the meaning dubious, we conclude that it unambiguously requires that costs and fees be assessed against both the nonprevailing party and their attorney. Therefore, the trial court erred in determining that only defendant was liable for sanctions.

But as indicated previously, the trial court is only required to determine a reasonable award. *In re Costs & Attorney Fees*, 250 Mich App 104. The imposition of joint and several liability is permissive. See *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 172; 712 NW2d 731 (2005), citing *In re Attorney Fees & Costs*, 233 Mich App 694, 705-707; 593 NW2d 589 (1999). Therefore, while we conclude that this case should be remanded for reconsideration of an appropriate award of sanctions, which are to be imposed against defendant and attorney Bettendorf, we reject plaintiff's argument that MCL 600.2591(1) requires the trial court to order that Bettendorf be held jointly and severally liable for sanctions imposed against defendant.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly