STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

CHRISTIAN INSURANCE GROUP, INC.,

Plaintiff/Counter-Defendant,

vs.

PETER CURNOW; JOHN SHUMAY; and
NINTH HOUR INSURANCE GROUP, LLC,

Defendants/Counter-Plaintiffs.
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Case No. 18-05192-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION OF DENIAL OF ATTORNEY FEES AND COSTS

Anyone who has played pick-up basketball knows it's a bad idea to let the players call their own fouls. Thus, big games must be played with neutral officials (as opposed to coaches or players) calling the fouls. The same is true of identifying sanctionable conduct in civil litigation. In the eyes of the competing attorneys, opposing counsel engages in sanctionable conduct as a matter of course. Unsurprisingly, the Court is flooded with requests for sanctions in the form of attorney fees, but the Court ought not indulge many of those requests from attorneys who are competing in the litigation. In this case, the defendants filed a rather unremarkable motion for sanctions under MCL 445.1905 and MCL 600.2591 for the plaintiff's pursuit of an unfounded trade-secret claim. The Court batted away the request in an oral ruling and a short written order on January 23, 2020. Then, to the Court's astonishment, the defendants moved for reconsideration, notwithstanding the Court's explanation from the bench that sanctions under MCL 445.1905 are purely discretionary and that sanctions under MCL 600.2591 should be imposed sparingly. In denying the motion for reconsideration, the Court shall explain in detail why this is not an appropriate case to call a foul on the plaintiff.

As a general rule, MCR 2.119(F) permits relief in the form of reconsideration only if the moving party "demonstrate[s] a palpable error by which the court and the parties have been misled and show[s] that a different disposition of the motion must result from correction of the error." See MCR 2.119(F)(3). To be sure, "courts are permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court," Hill v City of Warren, 276 Mich App 299, 307 (2007), but MCR 2.119(F)(3) suggests that relief is warranted only if the chosen outcome is so erroneous that it must be rectified. Although the Court has occasionally granted reconsideration, a motion seeking such relief must rest upon an error that is obvious.[1] The decision to deny sanctions very rarely falls into that category.

The defendants' primary argument for sanctions relies upon MCL 445.1905, which provides that "[i]f a claim of misappropriation [of a trade secret] is made in bad faith . . . the court may award reasonable attorney's fees to the prevailing party." Our Court of Appeals has explained: "The term 'may' is permissive and indicates discretionary activity[,]" so the award of attorney fees under MCL 445.1905 is necessarily a matter left to the Court's discretion. See Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc, 303 Mich App 441, 449 (2013), aff'd, 497 Mich 337 (2015). Here, because the plaintiff voluntarily abandoned its trade-secret claim in favor of claims it deemed more viable, the Court never reached the merits of the trade-secret claim. Instead, the litigation went on with other claims as the grounds for the plaintiff's effort to obtain redress. Thus, the Court chose not to impose sanctions under MCL 445.1905, and the Court reaffirms that decision now.

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[1] Despite this stringent standard, the Court must devote the better part of this week to dealing with five motions for reconsideration that were recently filed. Indeed, whenever the Court renders a ruling, the odds are good that somebody will move for reconsideration no matter how detailed the Court was in explaining its ruling. The time will surely come when the Court will begin the day with a mocha and then arrive at the courthouse to find a motion for reconsideration chastising the Court for not ordering a latte instead.

The defendants' other argument for sanctions rests upon MCL 600.2591(1), which mandates an award of costs and attorney fees "if a court finds that a civil action or defense to a civil action was frivolous[.]" The term "frivolous" means, *inter alia*, that "[t]he party's legal position was devoid of arguable legal merit." See MCL 600.2591(3)(a)(iii). Here, the plaintiff's original complaint, which was filed on June 12, 2018, accused the defendants of breaching contractual covenants, including confidentiality obligations, see Complaint, ¶¶ 30-32, but the original complaint did not mention trade secrets. Then, on June 15, 2018, the plaintiff filed an amended complaint augmenting its claims for breach of contract with a separate count alleging a violation of the Michigan Uniform Trade Secrets Act ("MUTSA"), MCL 445.1901, *et seq*. See Amended Complaint, Count II. The MUTSA claim built upon the breach-of-contract allegations concerning the handling of confidential information by the defendants. Compare Amended Complaint, ¶¶ 35-37 (breach-of-contract claim) with Amended Complaint, ¶¶ 39-46 (MUTSA claim). Under Michigan law, trade secrets under MCL 445.1902(d) constitute a subset of the proprietary and confidential information that can be protected by restrictive covenants in contracts. See Industrial Control Repair, Inc v McBroom Electric Co, Inc, No 302240, slip op at 7-8 (Mich App Oct 10, 2013) (unpublished decision). The Court has regularly dealt with cases where a breach-of-contract claim is paired with a MUTSA claim, and the Court has routinely nudged counsel to consider whether the MUTSA claim adds anything to the contractual claim for mishandling proprietary and confidential information.[2] To sanction the plaintiff for failing to fully appreciate the subtle distinction between trade secrets and proprietary and confidential information would stretch the definition of "frivolous" pleading beyond the breaking point.

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[2] The Court's approach has been informed by participation in drafting a commentary for the Sedona Conference on the identification of asserted trade secrets in misappropriation lawsuits. Even at that level of scholarship, disputes have arisen among experts in demarcating the line between trade secrets and mere proprietary and confidential information.

In sum, the Court chooses to stand by its oral ruling denying the defendants' motion seeking sanctions against the plaintiff for pleading, and ultimately abandoning, its trade-secret claim. To be sure, frivolous pleading should not be tolerated, and a defendant who must deal with such frivolous allegations may seek sanctions for the expenditure of time, money, and effort devoted to the defense against frivolous claims. See MCL 600.2591(1). But a plaintiff's decision to augment its claim for breach of a confidentiality covenant with a MUTSA claim rarely should be regarded as frivolous if the breach-of-contract claim stands on solid ground. To punish a plaintiff for failing to appreciate the line where trade secrets end and mere proprietary and confidential information begins creates an unjustifiably low bar for sanctions, especially when the plaintiff elects to fall on its sword on a claim for misappropriation of trade secrets in order to pursue the broader theory of mishandling proprietary and confidential information. Because that is precisely what happened here, the Court concludes that sanctions are inappropriate, so the Court shall deny the defendants' motion for reconsideration.

IT IS SO ORDERED.

Dated: April 1, 2020

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge