STATE OF MICHIGAN

COURT OF APPEALS

LIEGHIO TRAVELERS, LIMITED,

Plaintiff/Counterdefendant-Appellant,

v

VILLAGE OF MACKINAW CITY,

Defendant-Appellee,

and

DONALD SCHAPPACHER,

Defendant/Counterplaintiff-Appellee,

and

ALBERTA SCHAPPACHER,

Defendant.

UNPUBLISHED
May 23, 2000

No. 209845
Cheboygan Circuit Court
LC No. 95-005403 CZ

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of judgment dismissing its cause of action and awarding defendants costs and attorney fees. We affirm in part and reverse in part.

I

In 1987, Alfonso and Anna Lieghio filed in the Cheboygan Circuit Court an action challenging the Village of Mackinaw City's conveyance of a strip of land to the Schappachers. The Lieghios alleged that in conveying the property the Village "failed, neglected, and refused to comply with the

statutory requirements of the sale of land dedicated to a public use," and violated the Open Meetings Act (OMA), MCL 15.261 *et seq*.; MSA 4.1800(11) *et seq*. The strip of land was located between a lot owned by the Schappachers, to the north, and a lot owned by the Lieghios, to the south. The Lieghios and the Schappachers both operated lodging establishments on their properties.

The trial court entered a judgment for the defendants, and the Lieghios appealed to this Court, which noted the following relevant facts:

> On September 17, 1955, Lorena M. Hartley entered into a land contract agreement selling property to Eugene and Gertrude Garbinski. On March 12, 1956, Hartley executed an indenture deed granting defendant village a permanent easement and right-of-way over a strip of that property for the purpose of building a street. On March 23, 1956, the Garbinskis paid off the land contract and received a warranty deed from Hartley subject to the easement created in favor of defendant village.
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> On September 5, 1957, defendant village adopted a resolution to vacate the easement, now designated as an alley and walk running between Shore Drive and Highway U.S. 23, because its uneven width made it unusable as a public way. The street was to be relocated to the north over a thirty-foot strip which, the resolution stated, Hartley and the Garbinskis had agreed to convey to defendant village. On September 6, 1957, the Garbinskis executed a quit claim deed conveying their interest in the thirty-foot strip of land to defendant village. On October 3, 1957, defendant village council heard objections to vacation of the easement-alley/walkway and unanimously voted again to adopt the September 5 resolution.
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> In 1964, plaintiffs purchased the Travelers Motel from the Garbinskis. It was located on property adjacent to the thirty-foot strip. Between the lot on which the motel was located and the thirty-foot strip, plaintiffs also owned an empty lot on which they planned to expand their motel business. Because this lot was very narrow, plaintiffs attempted several times without success to purchase the strip from defendant village.
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> Donald and Alberta Schappacher owned the property on the other side of the strip. Over the years, plaintiffs and the Schappachers mowed the grass on the strip between their properties. Defendant village also mowed and maintained the strip several times a year. Furthermore, defendant village installed a storm sewer and sanitary waste sewer under the strip. In 1986, plaintiffs received a letter from defendant village stating its intent to maintain this land in the future and telling plaintiffs to remove their garbage cans and to cease mowing the property.
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> On July 14, 1986, defendant village conveyed the strip to the Schappachers, subject to a restriction that it be used only as a parking lot. In return, the Schappachers paid defendant village $9,000. When they learned of the sale, plaintiffs objected on the grounds that defendant village did not have the legal authority to sell this land. On

> January 12, 1987, the Schappachers executed a quit claim deed conveying the property back to defendant village. In the meantime, defendant village council held several closed meetings at which the subject of finding a legal way to sell this land to the Schappachers was discussed. On January 15, 1987, the council passed an ordinance which authorized the private sale of public land. Additionally, the council adopted a resolution that changed the use which could be made of the strip. On May 19, 1987, defendant village reconveyed the strip to the Schappachers. [*Lieghio v Village of Mackinaw City*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 1988 (Docket No. 102389), slip op at 1-3.]

This Court concluded that the disputed property, a "30 foot strip of land, approximately 209 feet in length," had not been dedicated to public use, either pursuant to statute or common law, and that the Village therefore owned the property in fee simple when it conveyed the property to the Schappachers. *Id*. at 3-5, 7. With respect to the Lieghio's OMA claim, this Court found a technical violation, but concluded that the rights of the public had not been impaired. *Id* at 6-7.

In 1990, the Village presented to the Schappachers[1] another deed "to correct a scrivener's error in the legal description of the quit claim deed dated May 19th, 1987." This deed included the remaining portion of the thirty foot-wide strip of property located between the Lieghio and Schappacher properties, thus granting the Schappachers the entirety of the approximately thirty-foot wide strip that extended between Shore Drive and U.S. Highway 23. In May 1995, plaintiff Lieghio-Travelers Limited Partnership filed the instant suit, again alleging (1) that the Village "neglected and refused to comply with the statutory requirements for the sale of land dedicated to a public use," (2) that the Village violated the OMA, and further claiming (3) that the Village lacked authority to convey the additional property, a parcel of which plaintiff asserted it owned. Donald Schappacher filed a countercomplaint requesting that the trial court quiet title to the disputed property in him. After a two-day bench trial, the trial court dismissed plaintiff's claims, and awarded defendants costs and attorney fees.

II

Plaintiff first contends that the trial court erred in concluding that the doctrine of res judicata barred its attempt to relitigate title issues concerning the disputed property. According to plaintiff, res judicata does not apply because the present case rests on different facts than the cause of action brought by Alfonso and Anna Marie Lieghio in 1987; specifically that (1) different parcels of land and different ownership of the parcels were involved in each case, and (2) the Village's 1987 and 1990 deeds conveying the disputed property were executed and delivered under different circumstances three years apart.

At trial, the parties referred to the thirty-foot wide strip as consisting of three separate parcels (A, B and C). Parcel A represented the approximately 30 foot by 209 foot length of land that the Village described in its 1987 deed to the Schappachers. Immediately west of parcel A resided parcel C, an approximately 30 foot by 70 foot parcel. While Donald Schappacher asserted that he received ownership of parcel C from the Village, plaintiff claimed that it owned parcel C pursuant to a 1995 deed from the prior record title holder, Eugene Garbinski. Parcel B, the remaining, approximately 30 foot by

38 foot portion of the strip, was located immediately west of parcel C. The parties agreed that the 1957 deed the Village received from the Garbinskis described both parcels A and B.

Res judicata operates where earlier and subsequent actions involve the same parties or their privies, the matters of dispute could or should have been resolved in the earlier adjudication, and a final decision was rendered on the merits in the earlier controversy. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994); *Harvey v Harvey*, 237 Mich App 432, 437; 603 NW2d 302 (1999). The determination whether res judicata will bar a subsequent suit is a question of law that we review de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

The trial court found that the doctrine of res judicata operates to preclude plaintiff's instant claims involving title to parcels A, B and C. The 1987 action brought by the Lieghios was decided on the merits, and the judgment of the trial court was a final decision. Therefore, the critical issues are whether both actions involved the same parties or their privies, and whether the instant matter *was or could have* been resolved in the 1987 action.

A

The same party element of res judicata requires that the parties were previously adversarial. *York v Wayne Co Sheriff*, 157 Mich App 417, 426; 403 NW2d 152 (1987). The parties to the second action need be only substantially identical to the parties in the first action, in that the rule applies to both parties and their privies. *In re Humphrey Estate*, 141 Mich App 412, 434; 367 NW2d 873 (1985). A privy is a person so identified in interest with another that he or she represents the same legal right, and includes one who, after rendition of a judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties. *Wildfong v Fireman's Fund Ins Co*, 181 Mich App 110, 115; 448 NW2d 722 (1989); *Viele v DCMA*, 167 Mich App 571, 580; 423 NW2d 270, modified on other grounds 431 Mich 898; 432 NW2d 171 (1988).

From the lower court record, it is unclear whether the plaintiffs in the 1987 action, Alfonso and Anna Lieghio, were at that time partners in the instant plaintiff, Lieghio Travelers, Ltd. Even assuming that Alfonso and Anna Lieghio were not partners in the instant plaintiff, however, Lieghio Travelers at least qualifies as a privy to the 1987 plaintiffs. Lieghio Travelers is one of many partnerships formed by the Lieghio family, which, even assuming it had no ownership interest in the property immediately south of the disputed strip in 1987, apparently acquired through Alfonso and Anna Lieghio an interest in this property that was affected by the judgment rendered in the 1987 action.

B

The instant parties do not dispute that Donald Schappacher owns parcel A pursuant to the prior decisions of the trial court and this Court. Any dispute between the instant parties regarding title to parcel A clearly is barred by the doctrine of res judicata. The parties also agree that the Village in 1987 owned in fee parcel B pursuant to the 1957 deed it received from the Garbinskis, but the parties dispute ownership of parcel C. We find that any claim regarding title to or the sale of parcels B and C *should*

have been resolved in the 1987 action, and *could have* been litigated had plaintiff exercised reasonable diligence. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 396; 573 NW2d 336 (1997).

After presiding over the two-day bench trial, the trial court issued a written opinion containing several findings and conclusions, including the following:

> The first deed issued by the City, by intent, conveyed the entire parcel. Therefore, any issue as to title in the first lawsuit (See 53rd Circuit Court Case #87-528 AW; Plaintiff's Exhibit #20 and #21) could and should have been raised in that case. Therefore, all title issues are foreclosed by res judicata and may not be re-litigated in this case.

Necessarily implicit within this pronouncement is the court's rejection of plaintiff's contention that it had obtained legal title to parcel C; for the Village to have been able to convey parcel C in 1987, it must have owned parcel C.

We note that both the trial court's findings that the Village owned parcel C and that it intended to convey parcel C within its 1987 deed to the Schappachers were supported by evidence presented during the bench trial. Two title experts opined that prior to 1987 the Village owned parcels A, B and C, and that therefore the Schappachers now owned the entire strip of land running between Shore Drive and U.S. 23. While no recorded conveyance presented at trial established the State's or Village's ownership of parcel C, it was not contested at trial that until some point toward the end of the 1920's, parcel C represented a portion of State Trunkline 10. One expert opined that the State had owned Trunkline 10 and abandoned to the Village the local portions of this trunkline. By a 1957 resolution, the Village vacated parcel C's status as a public right of way, giving the Village fee ownership of parcel C. The other title expert testified that while he was uncertain how parcel C had become a part of State Trunkline 10, because the Village had obtained parcels A and B from the Garbinskis in 1957 and subsequently passed the resolution vacating parcel C as a public right of way, as the adjoining property owner the Village obtained fee title to parcel C. Although plaintiff alleged that it owned parcel C pursuant to the 1995 deed from Garbinski, this expert characterized plaintiff's deed as a "wild deed" outside the chain of title. Regarding the trial court's finding that the Village intended to convey to the Schappachers in 1987 parcels A, B and C, uncontradicted testimony by four current and former village officials established that they believed and intended that the Village's 1987 deed to the Schappachers would convey the entirety of the thirty-foot wide strip running between plaintiff's and the Schappachers' properties. In light of this evidence, we are not left with a definite and firm conviction that the trial court erred in concluding that in 1987 the Village owned parcel C and intended to convey parcels A, B and C to the Schappachers. MCR 2.613(C); *Walters v Snyder*, ___ Mich App ___; ___ NW2d ___ (Docket No. 215536, issued 1/14/2000), slip op at 2 (This Court reviews findings of fact by a trial court sitting without a jury under the clearly erroneous standard. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.).

In light of the facts that in 1987 the Village owned parcels A, B and C and intended at that time to convey the entire strip of land running between Shore Drive and U.S. 23 to the Schappachers, res judicata precludes plaintiff's instant, second litigation concerning a portion of the disputed strip. Plaintiff, through its privies, had the opportunity during the first lawsuit to litigate issues concerning ownership of the disputed strip of land, and with reasonable diligence could and should have at that time presented any arguments or claims it wished to make. *Harvey*, *supra*; *Limbach*, *supra*. The disputed strip comprised of parcels A, B and C was a thin strip of land separating the properties of plaintiff to the south and the Schappachers to the north, and has been described as simply as an alley running between the two properties. Parcel A comprised over one half of this strip of land, and in 1987 was owned by the Village by virtue of a 1957 deed from the Garbinskis. This same deed also undisputedly conveyed to the Village title to parcel B. This information was available to plaintiff's privies in 1987. Given the size, shape, location, and value to plaintiff and the Schappachers of the entire strip of property, plaintiff, through the exercise of reasonable diligence, *could have* determined that it was the intention of the Village to convey parcels A, B *and* C to the Schappachers in 1987, and *could have* litigated any claims with respect to the entire piece of property at that time.[2] *Limbach*, *supra*.

Plaintiff maintains that res judicata should not apply because its privies in no way could have discerned in 1987 that the Village and the Schappachers contemplated a conveyance of the entire disputed strip, and because its 1995 deed from Garbinski represents a new development not considered in the prior action. Even if we accepted plaintiff's position that the trial court improperly applied res judicata, however, we would find that the trial court nonetheless reached the correct result. As we have already discussed, the trial court found that the Village owned the entire disputed strip, and that it intended in 1987 to convey the entire strip to the Schappachers. These findings, which we have determined were not clearly erroneous in light of the evidence presented at the bench trial, resolve the title issue asserted within plaintiff's complaint. Therefore, we would affirm the trial court's judgment despite an assumption that the trial court incorrectly relied on res judicata. *Dehart v Joe Lunghammer Chevrolet, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 207542, issued 12/21/99), slip op at 2 (We will not reverse when the trial court has reached the right result even if for the wrong reason.).

III

Plaintiff also argues that the Village improperly executed its 1990 deed to the Schappachers because it failed to enact prior to the conveyance an ordinance authorizing the transfer of parcels B and C. MCL 67.4; MSA 5.1288 requires that a municipality adopt an ordinance authorizing a private sale of municipally owned land. In 1987, the Village adopted an ordinance authorizing the sale of property described as parcel A. The record demonstrates that at the time the Village enacted the previous ordinance and conveyed the 1987 deed to the Schappachers, it intended to also convey parcels B and C. Thus, the Village found it necessary to subsequently issue a corrected deed, which action plaintiff concedes was proper. In 1997, the Village enacted an ordinance that similarly corrected the description of the property conveyed to the Schappachers. Because the 1987 ordinance was intended to apply to the entire strip eventually conveyed by the Village's 1990 deed, we can ascertain no harm arising from the Village's allegedly tardy and untimely 1997 ministerial correction of the 1987 ordinance's property description. No indication exists that the Village has attempted to engage in

"secret government by fiat"[3] where the Village had previously adopted the ordinance authorizing the sale of described land consisting of greater than half the disputed strip, or that the Village sought to avoid the statutory requirement that it enact an ordinance authorizing the private sale of municipal property. Moreover, plaintiff provides no authority supporting its suggestion that the Village was prohibited from adopting a subsequent ordinance to correct inadvertent errors or omissions in a previously adopted ordinance permitting the sale of real property. Under these circumstances, we decline to further address this issue. *Samonek v Norvell Twp*, 208 Mich App 80, 86; 527 NW2d 24 (1994) ("It is well settled that this Court will not search for authority to support a party's position.").

IV

Plaintiff further avers that the Village's decision to execute and deliver the 1990 deed was not made at a meeting open to the public, in violation of the OMA, MCL 15.261 *et seq*.; MSA 4.1800(11) *et seq*., and therefore invalid. Subsection 3(2) of the OMA demands that "[a]ll decisions of a public body shall be made at a meeting open to the public." MCL 15.263(2); MSA 4.1800(13). There is no dispute that the Village represents a public body and that it made a decision to execute and deliver the 1990 deed to the Schappachers conveying parcels B and C, MCL 15.262(a), (d); MSA 4.1800(12)(a), (d). The Village further admits that it conducted no meeting for this purpose. Because the Village had intended the 1987 deed to convey parcels A, B and C, the trial court found that the OMA did not require the Village to conduct a meeting merely to correct the error in the 1987 deed by issuing the 1990 deed.

Even accepting plaintiff's position that the OMA did demand that the Village hold a public meeting merely to ministerially correct the 1987 deed's erroneous property description to conform with the intended conveyance, we find that any violation of the OMA by the Village is harmless. A court in its discretion may invalidate a municipality's decision when the municipality failed to enact the decision at a public meeting "and the court finds that the noncompliance or failure has impaired the rights of the public under this act." MCL 15.270(2); MSA 4.1800(20)(2); *In re Jude*, 228 Mich App 667, 672; 578 NW2d 704 (1998). Here, plaintiff offers no specific examples of how the Village's actions with respect to the 1990 deed resulted in any harm to the public. See *In re Jude*, *supra* ("A mere recital that the rights of the public were impaired is insufficient to support a request for invalidation."); *Cape v Howell Bd of Ed*, 145 Mich App 459, 467; 378 NW2d 506 (1985) ("Mere recital of the language of § 10(2) of the act is insufficient where there are no factual allegations to support the conclusion."). To the contrary, the Village's issuance of the corrected 1990 deed apparently inured to the public's benefit. In affirming the trial court with respect to the 1987 action, this Court found that the Village's success in obtaining grant money for a needed sewer project was tied to the sale of the strip of property to the Schappachers. *Lieghio*, *supra* at 6-7. The instant record provides further evidence that the entire disputed strip of property represented little or no value to anyone other than plaintiff and the Schappachers, and that the sale of the entire disputed strip was essential to the Village's acquisition of grant money for the needed Village sewer project.

Therefore, even assuming that the Village's execution and delivery of the 1990 deed violated the OMA, we cannot conclude that the trial court abused its discretion in refusing to invalidate the execution and delivery. *In re Jude*, *supra*.

IV

Lastly, plaintiff claims that the trial court erred in sua sponte awarding defendants their attorney fees when the court failed to make a finding that plaintiff's cause of action was frivolous. In the judgment of dismissal, the trial court found that "Plaintiff's First Amended Complaint having lacked merit, and otherwise being sanctionable pursuant to MCR 2.114, 2.625 and MCLA 600.2591," the Village and the Schappachers were entitled to costs and attorney fees.

MCR 2.114(F) provides for sanctions pursuant to MCR 2.625(A)(2) in the event a party pleads a frivolous claim. MCR 2.625(A)(2) authorizes the trial court, on the motion of a party, to find that an action was frivolous and to award costs as provided by MCL 600.2591; MSA 27A.2591. This statute, in turn, permits the trial court to find, on the motion of a party,[4] that a civil action was frivolous, and allows in the event such a finding is made for the award of costs, including attorney fees. MCL 600.2591(1), (2); MSA 27A.2591(1), (2). A trial court's finding that a claim was frivolous will not be reversed unless it is clearly erroneous. *Meagher v Wayne State Univ*, 222 Mich App 700, 727; 565 NW2d 401 (1997).

In this case, the trial court failed to explain the basis of its apparent determination that plaintiff's cause of action was meritless and otherwise sanctionable. The circumstances existing at the time a case is commenced are of critical importance in determining whether a lawsuit has a basis in fact or law. *Meagher*, *supra*. The ultimate outcome of the case does not necessarily determine the issue of frivolousness. *Louya v William Beaumont Hosp*, 190 Mich App 151, 164; 475 NW2d 434 (1991). Courts should not construe MCL 600.2591; MSA 27A.2591 in a manner that has a chilling effect on advocacy or prevents the filing of all but the most clear cut cases. Nor should the statute be construed in a manner that penalizes a party whose claim initially appears viable but later becomes unpersuasive. *Id*. at 163.

Our review of the instant record leaves us with the definite and firm conviction that the trial court erred in finding that plaintiff's action qualified as frivolous as defined by MCL 600.2591(3); MSA 27A.2591(3). *Walters*, *supra*; *Meagher*, *supra*. Prior to trial, the Village moved for summary disposition on the basis that plaintiff's cause of action was barred by the doctrines of res judicata and collateral estoppel. At the hearing on the Village's motion, the trial court specifically noted, "I can see merit on both sides of the issue." The trial court ultimately denied the Village's motion, opining that res judicata did not apply to preclude plaintiff's instant action because this case appeared to involve different property than the 1987 case. Thus, the trial court must have found as late as the Village's motion for summary disposition that the circumstances surrounding plaintiff's cause of action presented a factually and legally viable claim. *Meagher*, *supra*. Given that the court initially denied the Village's motion for summary disposition, yet subsequently found that plaintiff's cause of action was frivolous, we find that the trial court's grant of attorney fees to defendants improperly penalized plaintiff, whose cause of action initially appeared viable but later became unpersuasive.[5] *Louya*, *supra*. Because the court erred in finding that plaintiff's action was frivolous on the basis that it lacked merit, and absent any other basis for awarding attorney fees pursuant to MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591; MSA 27A.2591,[6] we conclude that the court improperly awarded defendants attorney fees under these provisions.

We therefore affirm the judgment of the trial court with the exception of that portion of the judgment awarding defendants attorney fees pursuant to MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591; MSA 27A.2591, which portion we reverse. We remand to the trial court for its calculation of an appropriate award of costs to defendants.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

[1] Named defendant Alberta Schappacher passed away prior to the instant trial.

[2] Plaintiff suggests that the application of res judicata was inappropriate when the trial court rejected res judicata as a basis for granting the Village's pretrial motion for summary disposition. After viewing the testimony and evidence presented at the bench trial, however, the trial court reconsidered its position. Plaintiff cites no authority for the proposition that the court was precluded from revisiting a previously decided issue after having reviewed new evidence.

[3] Plaintiff quotes in its brief on appeal from this Court's observation in *Parr v Lansing City Clerk*, 9 Mich App 719, 723; 158 NW2d 35 (1968), that "[t]he technical passage requirements of ordinances are mainly intended to avoid situations of secret government by fiat."

[4] While plaintiff suggests that no party moved for a finding that plaintiff's action qualified as frivolous, the Village and the Schappachers both requested attorney fees, citing MCL 600.2591; MSA 27A.2591, which defines a "frivolous" action.

[5] While the Village argues that MCR 2.114(E) permits the award of reasonable attorney fees by the trial court on its own initiative if it is determined that a party or his attorney has signed a document in violation of the court rule, nothing in the record suggests that the trial court awarded costs and attorney fees on this basis.

[6] The statutory definition of frivolity, besides encompassing meritless claims, contemplates claims filed in bad faith.

> "Frivolous" means . . .
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe the facts underlying that party's legal position were in fact true. [MCL 600.2591(3)(a); MSA 27A.2591(3)(a).]

To the extent that the Village suggests in its brief on appeal that "[t]his litigation was brought for a wholly improper purpose," and that plaintiff did not truly believe that the Village did not have title to the disputed property, we do not so find on the basis of the instant record.