STATE OF MICHIGAN

COURT OF APPEALS

BRIAN A. STATON and ANN STATON, Plaintiffs-Appellants	UNPUBLISHED June 8, 2004
V	No. 243515 Allegan Circuit Court
BERNARD STREHLOW and BARBARA STREHLOW, Defendants-Appellees.	LC No. 00-027147-CH

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's August 8, 2002, order which, in relevant part, denied plaintiffs' motion for sanctions against defendants' counsel, and we affirm. This action began as a boundary dispute, and eventually the parties settled; as part of the settlement, the parties agreed that plaintiffs reserved the right to appeal the trial court's denial of plaintiffs' motion for sanctions against defendants' counsel.

I. INTRODUCTION

This case stems from a boundary dispute between neighbors. Plaintiffs and defendants[1] are next-door neighbors. Defendant decided to construct a fence between his property and plaintiff's to keep his four dogs from leaving his yard. Many in the neighborhood had complained about defendant's dogs getting loose, and defendant wanted to install the fence as quickly as possible to restore peace in the neighborhood. Defendant also wanted to ensure that his fence did not encroach upon plaintiff's property. Plaintiff offered to pay half the cost of the fence because he objected to the chain-link fence defendant originally wanted to install. The

[1] Ann Staton and Barbara Strehlow were named as parties due to their interests as the spouses of Brian Staton and Bernard Strehlow, respectively, in the two respective properties involved in this case. Since their involvement in this case does not, for the most part, extend beyond that, we will use the terms "plaintiff" and "defendant" to refer solely to Brian Staton and Bernard Strehlow, respectively.

parties were not able to engage the services of the local surveyor, so they met and mutually determined a course for the fence that both thought followed the actual boundary line.

Some time after the fence was built, a survey revealed that it encroached on defendant's property, and enclosed a significant triangular area of defendant's property on plaintiff's side of the fence. Plaintiff offered to buy that portion of defendant's land from defendant, but defendant did not accept the offer, and instead decided to move his fence to run along the true boundary line. Plaintiff then engaged the services of his father, who is an attorney, and filed a complaint that, in part, sought title to the disputed land under a theory of acquiescence and sought an injunction to enjoin defendant from moving the fence. Defendant unsuccessfully moved for summary disposition, and the case went to trial. The trial court issued an opinion that found in favor of defendants on all counts. Plaintiffs' counsel filed a number of objections to defendants' proposed judgments, and motions for new trial.[2] The trial court issued a series of revised opinions and judgments. However, on the key issue of the disputed piece of property, the trial court ruled in favor of defendant with respect to the disputed triangle of land, and never reversed itself on this essential point. Plaintiffs and defendants each filed motions for sanctions, which the trial court denied. Finally, plaintiffs filed another motion for new trial, and defendants, perhaps wary of expending more resources in a dispute that had no foreseeable end, agreed to a settlement. The settlement resolved all outstanding issues except that of sanctions. Plaintiffs expressly agreed not to appeal the trial court's denial of sanctions against defendants; however, the parties expressly agreed that plaintiffs reserved the right to appeal the denial of sanctions against defendants' *counsel*.

Plaintiffs now come before us and ask us to reverse the trial court's decision to deny sanctions against defendants' counsel.

II. FACTS AND PROCEDURAL HISTORY

Plaintiffs and defendants are next-door neighbors. Their property bordered upon the Kalamazoo River, above the elevation of 684.27 feet ("elevation 684.27"), United States Geological Survey (USGS). The State of Michigan owned the land along the bank of the river below that elevation. Neither party was sure where elevation 684.27 was, and both were worried that various improvements on their respective properties might encroach on state-owned land. Plaintiff and defendant therefore agreed, in March, 1998, to jointly apply to the Michigan Department of Natural Resources (DNR) to acquire any state-owned land upon which their properties might have encroached.

Defendant owned four dogs, and used an underground "electric fence" in an attempt to keep the dogs in the yard. The electric fence was not effective, and after receiving a warning from the local animal control authorities, defendant decided that he needed to put up a fence to

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[2] We would note by way of illustration the trial court's characterization of plaintiffs' counsel: "[p]laintiff's attorney is his elderly father who has difficulty with any findings of fact which do not agree with his interpretation or are detrimental to his son's position, and he has been condescending in his chastisement and attempts to educate the Court."

keep the dogs in the yard. Because defendant wanted to ensure that his fence would not encroach on plaintiffs' property, he consulted with plaintiff about his plan. The local surveyor was unavailable, and neither plaintiff nor defendant was certain where the boundary between their properties was located. The two then consulted with one another to determine a course for the fence and agreed to share the cost of the fence. Defendant contends on appeal that the fence was built along what both parties thought was the true boundary line, and that plaintiff agreed that the fence did not, in his opinion, encroach upon his property. Plaintiff, on the other hand, acknowledges on appeal that the parties originally intended to place the fence along the true boundary, and then claims that the parties agreed to treat the fence as the boundary while acknowledging that defendant claimed there was no such agreement.

After the completion of a survey required in connection with the parties' DNR application, they discovered that the fence enclosed a significant triangular area of defendants' property on plaintiffs' side of the fence – the fence was at the boundary line at the road, but at the riverbank it was approximately 31 feet over the property line on defendants' property. Defendant told plaintiff he would move the fence, and plaintiff, in June, 2000, filed the instant case.

Defendants filed a motion for summary disposition under MCR 2.116(C)(7), (C)(8), & (C)(10) and the trial court ultimately denied defendants' motion. A bench trial was held July 23 and 24, 2001, and the trial court issued an opinion on August 7, 2001, in which it found in favor of defendants on all issues. On August 15, 2001, defendants filed a proposed judgment, to which plaintiffs filed an objection on August 20, 2001. On August 29, 2001, defendants filed a motion to settle judgment together with a second proposed judgment, and also filed a motion for sanctions alleging that plaintiffs' claims were frivolous. The trial court erroneously entered the proposed judgment on August 30, 2001. A hearing on plaintiffs' objections was held, and on September 27, 2001, the trial court issued an amendment to its first opinion, in which it agreed with plaintiffs that its original opinion made no clear findings regarding the alleged DNR agreement. The trial court then found in favor of defendants regarding the DNR issue.

On October 4, 2001, plaintiffs filed a motion for sanctions. On October 29, 2001, plaintiffs filed a motion for a new trial, or, in the alternative, for an order vacating the trial court's opinions issued August 7, 2001, and September 27, 2001. On November 9, 2001, the trial court entered an order denying defendants' motion for sanctions, and on December 19, 2001, the trial court issued an opinion agreeing with plaintiffs that it made a mistake of fact concerning the DNR issue, and that an oral agreement existed. It also issued an opinion in which it denied plaintiffs' motion for sanctions. On January 10, 2002, plaintiffs filed a motion to settle judgment and tax costs, together with a proposed judgment. On January 18, 2002, defendants filed a motion for new trial and objection to plaintiffs' proposed judgment. On January 25, 2002, the trial court issued yet another amended opinion, in which it ruled that it had failed, in its previous amended opinion, to state that the statute of frauds had been satisfied with respect to the DNR issue. On April 5, 2002, the trial court entered a third final judgment, which vacated the previous two, and which both parties agree on appeal included, in part, a clause that granted defendants, in part, the relief they sought in their January 18, 2002, motion for new trial and objections. On April 26, 2002, plaintiffs filed a second motion for new trial and a second motion for sanctions based upon the same grounds raised here on appeal, and the trial court granted the motion for new trial in part, denied it in part, and denied plaintiffs' motion for sanctions.

Ultimately, plaintiffs and defendants reached a settlement disposing of the boundary dispute and DNR agreement issues, but which reserved plaintiffs' right to appeal the trial court's denial of sanctions against defendants' counsel.[3] Plaintiffs then filed the instant appeal.

III. STANDARD OF REVIEW

This Court reviews a trial court's decision whether to impose sanctions under the clearly erroneous standard. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). Under this standard, we disturb a trial court's decision "only where this Court is left with the definite and firm conviction that a mistake has been made." *City of Essexville v Carrollton Concrete Mix*, Inc, 259 Mich App 257, 265; 673 NW2d 815 (2003).

IV. ANALYSIS

Plaintiffs say that the trial court erred in refusing to impose sanctions upon defendant's counsel. MCR 2.114(D)(2) states that, by signing any document and filing it with the court, the person signing the document certifies that "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." MCR 2.114(D)(3) states that the signer certifies that "the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." If a document is signed in violation of this rule, a court is required to impose a sanction upon the person signing the document, the party that person represents, or both. MCR 2.114(E); *Schadewald*, *supra* at 41.

A. MOTION FOR SUMMARY DISPOSITION

Plaintiffs contend that defendants' counsel violated MCR 2.114 when he signed a motion for summary disposition in which, plaintiffs claim, defendants' counsel made several assertions for which there was no factual or legal basis.

1. DOCTRINE OF ACQUIESCENCE

Plaintiffs argue that defendants' counsel erroneously argued, in his brief supporting defendants' motion for summary disposition, that a bona fide dispute was an essential element to establish acquiescence and that plaintiffs failed to establish this. Plaintiffs counter that it is not, and that defendants' counsel had no basis in fact or law for making such an argument.

There are three theories under which a person can gain title to land under the doctrine of acquiescence: (1) where the parties treat a line as the boundary between their properties for the statutory period of fifteen years, (2) where, following a dispute with respect to the boundary, the parties agree to treat a given line as the boundary, or (3) where the parties intend to deed to a

[3] The agreement specifically stated that plaintiffs would not seek sanctions against defendants themselves.

marked boundary. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Since the fence was built in 1998, and this case was filed in 2000, the first theory does not apply. The third theory does not apply because there is no deed involved in the instant case. Therefore, the only possible theory under which plaintiff could prevail on acquiescence is the second one, which does make a dispute an essential element. Plaintiffs maintain that this element is not essential in acquiescence cases, and that *Walters* holds that there is not an express set of elements for acquiescence. However, plaintiffs have taken this Court's statements in *Walters* out of context. A careful reading of this Court's opinion suggests that each separate theory indeed does have an express set of elements, and the theory to be used depends on the situation. *Walters*, *supra* at 456. This Court in *Walters* stated that there were no express elements for acquiescence, and that a bona fide controversy was not a required element, but these statements were made by the panel in a case involving the first theory, which requires that the statutory period of time has elapsed. *Id.* This Court rejected the argument that that theory required a controversy in addition to the parties treating a given line as the true boundary for the statutory period. *Walters, supra* at 457-459.

In this case, however, the theory of acquiescence with which this Court dealt in *Walters* is not relevant, whereas the second theory of acquiescence is, and under that theory, a bona fide dispute is a required element of acquiescence.

Plaintiffs further state that the trial court never made a finding regarding whether defendants' counsel made a reasonable inquiry whether the facts supported his contention that there was no dispute regarding the boundary. However, plaintiffs, in their brief on appeal, concede that the parties' intention from the outset was to raise the fence along the true boundary line. Where both parties wanted to make the fence run along the true boundary line, and then defendant erected it along what both thought was the true boundary line, there is no dispute, and hence no agreement resolving a dispute, and acquiescence does not occur under the theory relevant to this case. Accordingly, we find that defendants' counsel did not lack a basis in fact or law in making this argument, and hold that the trial court's decision to deny sanctions on this basis was not clearly erroneous.

2. DOWER RIGHTS

Plaintiffs maintain that the trial court erred in denying sanctions against defendants' counsel because he had no basis in law or fact to assert in his motion that a conveyance of land by a husband is void unless his wife also agrees to convey her dower interest. Defendants cited *Dawson v Falls City Boat Club*, 125 Mich 433, 440; 83 NW 618 (1900), MCL 558.1, and Michigan Land Title Standard 4.2. In opposition, plaintiffs cited Michigan Land Title Standards 5.1 and 5.2, together with their comments, which, according to plaintiffs, state that the dower rule is defunct due to the enactment of Michigan's 1963 constitution. Plaintiffs then take defendants' counsel to task for not having done adequate research, arguing that had defendants' counsel engaged in "the slightest bit of research," he would have discovered this alleged error. Ironically, plaintiffs do not cite any case law in support of this contention. A 1995 decision of this Court, citing Michigan's Statute of Frauds, MCL 566.108, and MCL 558.1, which establishes a wife's dower right, held that an agreement to convey land in which a wife holds a dower interest is void unless the wife signs the agreement and conveys her dower interest. *Slater Mgmt Corp v Nash*, 212 Mich App 30, 31-32; 536 NW2d 843 (1995).

We find, therefore, that defendants' counsel did not lack a reasonable basis in fact or law in asserting the dower defense, and hold that the trial court did not err in denying plaintiffs' motion for sanctions on this basis.

3. STATUTE OF FRAUDS

Plaintiffs assert that defendants' counsel erred when he argued, without any reasonable basis in fact or law, that the statute of frauds barred plaintiffs from enforcing an alleged oral agreement between plaintiff and defendant to convey a portion of land south of the fence. Plaintiff testified to such an agreement during a deposition. Plaintiffs argued that defendants' counsel should be sanctioned because plaintiffs never alleged such an agreement in his pleadings. At worst, it would appear that plaintiff and defendant merely agreed that no such oral agreement was made. It is not clear to us how this is sanctionable. However, given plaintiff's testimony regarding such an oral agreement, it does not appear unreasonable for defendant to state, in a motion for summary disposition, that the agreement was void under the Statute of Frauds, and we therefore hold that the trial court did not clearly err in denying plaintiffs sanctions on this basis.

B. REBUTTAL BRIEF

Plaintiffs claim that defendants' counsel violated MCR 2.114 when he submitted a rebuttal brief in response to plaintiffs' response to defendants' motion for summary disposition. Plaintiffs' primary objection to this document is that the court rules do not specifically permit parties to file such a document. While there is indeed a lack of express approval in the court rules for such a document, the rules do not bar it, either. The trial court indicated that it routinely permitted such documents to be filed, and that defendants' counsel did not appear to file it in bad faith. Moreover, the trial court, at the suggestion of defendants' counsel, granted an adjournment to allow plaintiffs to respond to it, should they feel it necessary to do so. Furthermore, save for a passing reference to the court rules, plaintiffs cite no other authority in support of their arguments relating to this issue. A party may not leave it to this Court to search for authority in support of its position by giving "issues cursory treatment with little or no citation of supporting authority." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Accordingly, we hold that trial court's decision to deny plaintiffs' motion for sanctions was not clearly erroneous because we are not left with the firm conviction that a mistake was made. *Schadewald, supra* at 4; *City of Essexville, supra* at 265.

C. DEFENDANTS' MOTION FOR SANCTIONS

Plaintiffs argue that defendants' counsel submitted a motion for sanctions and violated MCR 2.114 because defendants had no reasonable basis in fact or law for believing that they were the prevailing parties on all issues. Immediately following the bench trial, the trial court issued an opinion holding finding in favor of defendants on all issues. Defendants submitted a proposed judgment on August 15, 2001. On August 20, 2001, plaintiffs submitted objections. Apparently, the trial court inadvertently entered defendants' proposed judgment before hearing plaintiffs' objections. Defendants also moved for sanctions, alleging that plaintiffs' claim was frivolous. A hearing on plaintiffs' objections was held, and the trial court acknowledged that it

had failed to make a required finding in its previous opinion. It issued an amended opinion on September 27, 2001, finding in favor of defendants on the DNR issue. Defendants' motion for sanctions was ultimately denied.

The trial court, denied plaintiffs' motion for sanctions on the ground that defendants' motion for sanctions violated MCR 2.114, and held that defendants reasonably believed that they were the prevailing party, and that they had a reasonable basis for asserting that plaintiffs' claim was frivolous. A claim is frivolous where a party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party, where the party had no reasonable basis to believe that the facts underlying that party's legal position were true, or where the party's legal position was devoid of arguable legal merit. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002), quoting MCL 600.2591(3)(a). A prevailing party is the party who wins "on the entire record." MCL 600.2591(3)(b). "Not every error in legal analysis constitutes a frivolous decision." *Kitchen*, *supra* at 663.

At the time defendants moved for sanctions, they could reasonably have believed they were the prevailing party, given the trial court's opinion. The record was in flux at the time, and the fact that defendants proved not to be the prevailing party, and that defendants' counsel might have been slightly erroneous in his legal analysis does not, in and of itself, make defendants' motion frivolous. Furthermore, if defendants' position was to be believed, there was no agreement concerning the fence as a boundary or to acquire land from the DNR, and defendants had a reasonable basis for arguing that plaintiffs' complaint was frivolous.

Additionally, our review of the record reveals the fact that the trial court entered several "final judgments" at various stages below. In at least two of them, defendants did appear to have a reasonable basis for believing that the case was closed and that they had prevailed on all issues. Accordingly, we hold that the trial court's decision to deny plaintiffs' motion for sanctions was not clearly erroneous.

D. MOTION FOR NEW TRIAL AND OBJECTION TO JUDGMENT

Plaintiffs state that defendants' counsel violated MCR 2.114 when he filed a motion for new trial and objection to plaintiffs' proposed judgment. On appeal, plaintiffs and defendants agree that the trial court granted, at least in part, the relief sought by defendants in their objection to plaintiffs' proposed objections. Where a motion underlying a document is granted, that motion is not frivolous, and the document would not be subject to sanctions under MCR 2.114. *Afshar v Zamarron*, 209 Mich App 86, 93; 530 NW2d 490 (1995). Accordingly, we are not left with the firm conviction that a mistake was made when the trial court denied plaintiffs' motion for sanctions on this basis. *Schadewald*, *supra* at 4; *City of Essexville*, *supra* at 265.

V. CONCLUSION

In summary, we hold that the trial court's decision to deny plaintiffs' motion for sanctions was not clearly erroneous. As such, we decline to address plaintiffs' remaining issues because they are moot.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette