STATE OF MICHIGAN

COURT OF APPEALS

VANCE L. KINCAID II,

Plaintiff/Counter-Defendant-Appellant,

v

CHARTER TOWNSHIP OF MERIDIAN,

Defendant/Counter-Plaintiff-Appellee,

and

INGHAM COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
February 10, 2009

No. 283331
Ingham Circuit Court
LC No. 07-000441-CC

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

In this real property dispute, plaintiff Vance L. Kincaid II appeals as of right the trial court's orders granting summary disposition in favor of defendants Charter Township of Meridian and Ingham County Road Commission under MCR 2.116(C)(10). The trial court dismissed Kincaid's claims against the Township and Commission with prejudice and found that the claims were frivolous. For that reason, the trial court ordered Kincaid to pay $9044.57 to the Township and $9387 to the Commission as sanctions. The trial court also granted judgment in favor of the Township on its claim to a prescriptive easement over the sidewalk at issue and in favor of the Commission on its claim to title over the roadway at issue. On appeal, we must determine whether the trial court erred when it dismissed Kincaid's claims, granted judgment in favor of the Township and Commission on their respective claims, and ordered Kincaid to pay sanctions for filing a frivolous suit. Because we conclude that there were no errors warranting relief, we affirm.

I. Basic Facts and Procedural History

A. Background to the Dispute

In 1988, Kincaid purchased a home that sits to the east of a public road called Nakoma Drive. Although Nakoma Drive generally proceeds north and south, the road curves westward as it proceeds north near Kincaid's home. As a result, the southern end of Kincaid's property is significantly narrower than the northern end. There is also a sidewalk adjacent to Nakoma Drive on the same side of the road as Kincaid's home. This sidewalk generally matches the curve of Nakoma Drive. Both Nakoma Drive and the sidewalk were apparently first constructed in the 1920s.

When Kincaid first purchased his home, he ordered a mortgage survey. Jeffrey Autenrieth performed the survey. At his deposition, Autenrieth testified that, during the 1988 survey, he was able to find some of the monuments that marked the corners of Kincaid's property. However, he was unable to find the monuments that marked the curve for Kincaid's western boundary. He stated that he told Kincaid that the markers were likely under the sidewalk. Autenrieth testified that Kincaid did not seem concerned about the missing monuments at that time. Kincaid continued to utilize the services of Autenrieth's firm over a number of years for several projects.

In 2002, the Township and Commission gave notice of a planned reconstruction of Nakoma Drive and a portion of the adjacent sidewalk in front of Kincaid's home. The reconstruction was to be funded in part by a special assessment against the owners of property along the road. Kincaid negotiated with the Commission over the amount of the special assessment and asked the Commission to replace the entire sidewalk rather than just portions. Eventually, the Commission agreed to pay for a portion of the reconstruction costs and agreed to replace the entire sidewalk.

The reconstruction began in September 2003. At that time, Kincaid asked Autenrieth to return and see if he could find the monuments that Autenrieth had speculated might be under the sidewalk. Autenrieth testified that, after the construction crews removed a section of the sidewalk, he tried to locate the monument, but still could not find it. Autenrieth stated that his new measurements indicated that the monument was likely under the bend in Nakoma Drive. Thus, it appeared that Nakoma Drive and the adjacent sidewalk significantly encroached on Kincaid's property at the point where the road and sidewalk curved to the west and north.

After the reconstruction of Nakoma Drive and the sidewalk, Kincaid protested the special assessment and the valuation of his property, eventually appealing to the tax tribunal. An administrative law judge (ALJ) held a hearing on the appeal in October 2005 and issued a proposed opinion and judgment in November 2005. In his opinion, the ALJ noted that Kincaid's objections were premised on the assertion that the Township's sidewalk encroached on his land. The ALJ noted that Kincaid supported his claim with a survey, but that the Township presented evidence and testimony that the sidewalk was in the same place that it had been for over 30 years. Based on this evidence, the ALJ concluded that Kincaid had not established an encroachment by a preponderance of the evidence and stated that "[e]ven if that had been shown by the evidence, there is an appropriate venue for that dispute." The ALJ explained that such a dispute was for a court of general jurisdiction, not the tax tribunal. Because it concluded that

Kincaid had not established grounds for relief, the ALJ recommended denial of the requested relief and affirming the special assessment.

B. Procedural History

In April 2007, Kincaid sued the Township and Commission. In his complaint, Kincaid alleged that, prior to the 2003 reconstruction project, Nakoma Drive and the adjacent sidewalk followed the boundary of his property. He further alleged that, after the reconstruction project, the road and sidewalk encroached the western portion of his property. For this reason, Kincaid claimed that he was entitled to compensation for the land taken. Kincaid submitted a survey prepared by Autenrieth with his complaint. The survey indicated that a portion of Nakoma Drive and the adjacent sidewalk were on Kincaid's land.

In their responses, both the Township and Commission denied that they had to pay compensation for taking Kincaid's land. Both defendants alleged that the 2003 reconstruction project placed the road and sidewalk in the exact same locations that they occupied prior to the reconstruction. The Township also counterclaimed that, to the extent that the sidewalk had encroached on Kincaid's land prior to 2003, it had acquired a prescriptive easement for it. Likewise, the Commission counterclaimed that, even if Nakoma Drive encroached on Kincaid's land, it had acquired an easement over that portion under the highway-by-user statute. See MCL 221.20.

During discovery, the Township and Commission deposed Kincaid and his surveyor, Autenrieth. At his deposition, Kincaid testified that he did not rely on personal observations to support his claim that Nakoma Drive and the sidewalk are not in the same place that they occupied before the reconstruction project. Instead, Kincaid repeatedly asserted that he relied only on surveys. He noted that the 1988 mortgage survey showed that the road and sidewalk were not on his property. Kincaid also claimed that someone from the engineering company told him that the new work did not match the location of the old work. Kincaid admitted that he was not a surveyor and confessed that he had to defer to Autenrieth on the proper interpretation of the surveys.

At his deposition, Autenrieth testified that his firm had done several surveys for Kincaid, which included a mortgage survey in 1988. Autenrieth explained that the 1988 survey was based on information taken from the original plat, which was known for being difficult to verify. He indicated that, while working on the 1988 survey, he was unable to find the monuments that should have marked the western boundary of Kincaid's property at the curve in the road. He stated that, based on his calculations at that time, he thought that the monument was under the sidewalk and mentioned it to Kincaid. For this reason, he concluded that the 1988 survey was inaccurate to the extent that it showed that the road and sidewalk were not already on Kincaid's property.

Autenrieth further testified that in 2003 Kincaid hired his firm to check for the missing monuments during the reconstruction of the road and sidewalk. He indicated that he could not find the monuments and, based on new measurements, concluded that it was likely under the roadway. Indeed, he indicated that the monuments had been out in the road "[p]robably since they built the road[.]" Autenrieth further confirmed that he verified the position of the old sidewalk before it was completely torn out and then checked the position of the new sidewalk.

He also indicated that the curb of the road appeared to be in the same location and denied ever having expressed an opinion that the road or sidewalk positions had changed. He also repeatedly testified that it was his belief that the road and sidewalk were in the same place after the 2003 reconstruction project that they occupied before the project.

In December 2007, both the Township and Commission moved for summary disposition under MCR 2.116(C)(10). Both argued that the evidence indisputably supported the conclusion that the location of Nakoma Drive and the sidewalk did not change after the 2003 reconstruction. Thus, Kincaid's claim that the Township and Commission took his land when it reconstructed Nakoma Drive was without any support. Both also argued that, to the extent that the road and sidewalk encroached on Kincaid's property prior to 2003, the evidence established that they had done so since at least 1988. For these reasons, the Township argued that it had obtained a prescriptive easement over Kincaid's land for the sidewalk and the Commission argued that any portion of Nakoma Drive that encroached Kincaid's land had been impliedly dedicated to the public under MCL 221.20. Finally, both asked for an award of legal fees and costs on the ground that Kincaid filed his claim without taking the minimum steps necessary to determine its validity.

In response to these motions, Kincaid asserted that there was evidence that warranted a trial. In support of this contention he merely cited—without summarizing or analyzing—the survey attached to his complaint, some e-mail correspondences, his deposition testimony, and Autenrieth's deposition testimony.

In January 2008, the trial court held a hearing on the motions. After hearing arguments, the trial court stated that all the evidence indicated that, during the 2003 reconstruction, Nakoma Drive and the adjacent sidewalk were constructed in the same location that they had always occupied. The trial court also indicated that, to the extent that there was an encroachment prior to 2003, this same undisputed evidence established that the Township had acquired a prescriptive easement for the sidewalk and that the Commission had established an implied dedication of the land for the road under the highway-by-user statute. See MCL 221.20. The court also found that, given that Kincaid's own expert clearly and repeatedly stated that the position of the road and sidewalk did not change during the 2003 reconstruction, Kincaid did not have a reasonable basis for the claim made in his complaint. For that reason, it concluded that both the Township and Commission were entitled to recover their legal fees and costs.

On January 10, 2008, the trial court entered an order in which it dismissed Kincaid's claim against the Commission, granted the Commission title to the road adjacent to Kincaid's home, and ordered Kincaid to pay $9387 to the Commission for attorney fees and costs. On January 24, 2008, the trial court entered an order in which it dismissed Kincaid's claim against the Township, granted the Township a prescriptive easement for the sidewalk, and ordered Kincaid to pay $9044.57 to the Township for attorney fees and costs.

Kincaid now appeals as of right.

II. The Property Claims

A. Standard of Review

This Court reviews de novo whether a trial court properly granted summary disposition. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 153; 721 NW2d 233 (2006).

B. Analysis

On appeal, Kincaid argues that the trial court erred when it dismissed his claim against the Township and Commission under MCR 2.116(C)(10). In support of this contention, Kincaid merely asserts that there is "competent, admissible evidence to warrant a trial," and cites the same exhibits and testimony that he cited before the trial court. Kincaid does not summarize the cited materials, fails to explain how they demonstrate the existence of an issue of fact, and proffers no analysis of the applicable law. In addition, with the exception of a single sentence asserting that there was "no improperly created servitude to constitute a prescriptive easement," Kincaid failed to address the trial court's decision to grant the Township's and Commission's motions on their counterclaims. As our Supreme Court has explained: "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Because Kincaid failed to adequately brief this issue, he has abandoned it on appeal. See *Hamade*, 271 Mich App at 173.

Nevertheless, even if we were to conclude that Kincaid had not abandoned this claim of error on appeal, it is without merit. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). And, once a party has brought a properly supported motion for summary disposition, the non-moving party has the burden of demonstrating that there is a factual question that must be resolved by a fact-finder. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing a genuine issue of material fact exists." *Id.*

In this case, the Township and Commission moved for summary disposition on the ground that the undisputed evidence demonstrated that during the 2003 reconstruction, the construction crews replaced Nakoma Drive and the adjacent sidewalk in the exact same location that they occupied before the reconstruction. Thus, even if Nakoma Drive and the sidewalk encroached on Kincaid's land, they had done so since at least 1988 and probably since their original construction in the 1920s. Finally, both the Township and Commission presented evidence that the public's use of the road and sidewalk during that time met the elements of their respective claims for a prescriptive easement and implied dedication under the highway-by-user statute. Because the Township and Commission properly supported their motions, as the nonmoving party, Kincaid had the burden of demonstrating the existence of a factual dispute. *Id.* Kincaid did not meet this burden.

In response to the motions, Kincaid noted that the survey attached to his complaint shows an encroachment. However, the primary issue—as framed in Kincaid's complaint—is not whether there is currently an encroachment, but rather whether the encroachment occurred after the 2003 reconstruction of the road and sidewalk.[1] However, the cited survey does not on its face establish when the purported encroachment occurred; and Kincaid did not proffer any testimony that interprets the cited survey—or any survey—in such a way as to establish that the encroachment occurred during the 2003 reconstruction. See *Hamade*, 271 Mich App at 158. Kincaid's citations to his and Autenrieth's depositions do not establish that the encroachment occurred after the 2003 reconstruction. In fact, Autenrieth's testimony clearly established the opposite: that the road and sidewalk were reconstructed in the same place they occupied before 2003 and that they had likely encroached Kincaid's property since the 1920s. Further, Kincaid himself testified that he was not qualified to interpret the surveys, and Autenrieth, who was Kincaid's expert, testified that the surveys do not indicate that the road and sidewalk changed locations after the 2003 reconstruction. Indeed, Autenrieth testified that the survey he made in 1988, which was the only survey that ostensibly supported Kincaid's position,[2] was inaccurate to the extent that it showed that Nakoma Drive and the sidewalk were not on Kincaid's land. Finally, Kincaid did not highlight any testimony or present any evidence that established a question of fact on the elements of highway-by-user or prescriptive easement other than the timing of the purported encroachment. Because Kincaid failed to demonstrate a question of fact on any material issue, the trial court properly granted summary disposition in favor of the Township and Commission on Kincaid's claims and properly granted judgment in favor of the Township and Commission on their counterclaims. MCR 2.116(C)(10).

III. Sanctions

A. Standard of Review

This Court reviews a trial court's determination that a suit was frivolous for clear error. *BJ's & Sons Constr v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005). However, this Court reviews the amount of sanctions for an abuse of discretion. *Id.* at 410.

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[1] If there were an encroachment and that encroachment occurred before 2003, Kincaid would clearly have no claim against the Township and Commission because there is no evidence that any change in the road and sidewalk occurred between 1988 and 2003. Generally, the owner of land must bring an action to recover possession of lands within 15 years. See MCL 600.5801(4). After the passage of fifteen years, title vests in the party claiming adverse possession. *Gorte v Dept of Trans*, 202 Mich App 161, 168; 507 NW2d 797 (1993). Hence, assuming a start date in 1988, Kincaid would have had to have brought his claim against the Township by 2003. Likewise, Nakoma Drive became a public highway after the passage of the relevant ten-year period under the required conditions. See MCL 221.20. Consequently, Kincaid would have had to have brought an action to rebut the implied dedication under MCL 221.20 by 1998. See *Kentwood v Sommerdyke Estate*, 458 Mich 642, 654-655; 581 NW2d 670 (1998).

[2] We note that, although the 1988 survey was mentioned in deposition testimony, it was not actually submitted to the trial court in any of the pleadings related to the motions for summary disposition.

B. Analysis

Kincaid next argues that the trial court clearly erred when it found that his suit against the Township and Commission was frivolous and sanctioned him.[3] When an attorney or party signs a complaint, that signature constitutes certification by the signer that:

> (1) he or she has read the document;
>
> (2) 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; and
>
> (3) 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. [MCR 2.114(D).]

If a party signs a pleading in violation of MCR 2.114, the trial court, "shall impose upon the person who signed it . . . an appropriate sanction." MCR 2.114(D). The sanction may include "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." *Id.* Likewise, under MCL 600.2591(1), a court "shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action" if the court finds that the civil action was frivolous. An action is frivolous if the party initiating the suit "had no reasonable basis to believe that the facts underlying that party's legal position were in fact true." MCL 600.2591(3)(a)(ii).

In the present case, both the Township and Commission asked the trial court to order Kincaid to pay their attorney fees and legal costs as a sanction for filing a frivolous lawsuit. At the hearing on the motion for summary disposition, the trial court found that sanctions were warranted because "there is no reasonable basis for the bringing of the action." The trial court explained that Kincaid "acknowledged in his deposition that he didn't know" whether the Commission had done "anything wrong," and that Kincaid's "own expert not only testified very clearly that the road and sidewalk were in the same position that they were [in] prior to 2003, but, also, when given [Kincaid's] claims . . ., indicated that he could not and would not support those claims." For this reason, the trial court found that Kincaid's claims were "devoid of arguable legal merit" and had no "basis for being brought." Based on this finding, the trial court ordered Kincaid to pay the Township's and Commission's attorney fees and legal costs as a sanction under MCR 2.114.

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[3] Although the order applicable to the Commission does not specify the basis for the award of sanctions, it is clear from the record that the trial court sanctioned Kincaid for filing a frivolous suit. Further, the order applicable to the Township specifically cites MCR 2.114.

On this record, we cannot conclude that the trial court's finding was clearly erroneous. In his complaint, Kincaid asserted that the sole basis for his claim was that the Township and Commission caused Nakoma Drive and the adjacent sidewalk to be replaced in 2003 in such a way that they now encroached on his property. And, at his deposition, Kincaid readily admitted that he sued on the basis of an alleged statement by Autenrieth that the road and sidewalk were not in the same location after the 2003 reconstruction and on Autenrieth's survey. But Autenrieth testified at his deposition that he never stated that the road and sidewalk were in a different location after the 2003 reconstruction. Indeed, he repeatedly testified that the road and sidewalk were in the same location that they occupied before the 2003 reconstruction and specifically stated he could not support the relevant allegations in Kincaid's complaint. As a signor of the complaint, Kincaid had a duty to make a reasonable inquiry into the validity of the factual claims underlying his suit. See MCR 2.114(D)(2); *Lloyd v Avadenka*, 158 Mich App 623, 631; 405 NW2d 141 (1987). Consequently, given his reliance on Autenrieth, Kincaid had an obligation to consult with Autenrieth and ensure that Autenrieth's surveys and statements actually supported the allegations in his complaint. Hence, at a minimum, Kincaid proceeded to sue the Township and Commission without first taking reasonable steps to ensure the validity of his factual claims.

In addition, there was evidence that could support an inference that Kincaid knew that his complaint contained false allegations. In paragraph eight of his complaint, Kincaid alleged that the road and sidewalk followed the boundary of his property prior to the 2003 reconstruction. He also alleged that it was only after the 2003 construction that the road and sidewalk encroached on his property. But Autenrieth testified that in 1988 he told Kincaid that there were missing monuments and that they were likely under the sidewalk. Autenrieth opined that Kincaid had to have known then that the sidewalk encroached his property. Autenrieth also testified that Kincaid asked him to return in 2003 to see if he could find the missing monuments under the sidewalk. Autenrieth stated that when he returned he could not find the monuments and told Kincaid that the new measurements indicated that the monuments were likely under the Nakoma Drive. Autenrieth even testified that Kincaid appeared concerned about the degree to which the road and sidewalk encroached his property. Hence, there is evidence to support the conclusion that Kincaid knew that the road and sidewalk encroached on his property before the 2003 reconstruction. Consequently, the trial court did not clearly err in finding that Kincaid's suit was frivolous.

Kincaid also argues that the trial court erred in assessing sanctions without requiring the attorneys for the Township and Commission to submit proper documentation or holding a hearing. However, Kincaid did not object to the accuracy of the sanctions before the trial court and did not request a hearing. In a civil case, this Court need not address claims that were not properly preserved by objection before the trial court. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). And, on this record, we decline to exercise our discretion to review this issue. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

IV. Appellate Sanctions

Finally, the Township asks this Court to sanction Kincaid for filing a frivolous appeal. Although we agree that Kincaid's appeal was without merit, in the interests of finality, we decline to exercise our discretion to levy sanctions. MCR 7.216.

Affirmed. As prevailing parties, the Township and Commission may tax costs under MCR 7.219.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly