STATE OF MICHIGAN

COURT OF APPEALS

EVERGREEN HOME HEALTH CARE, LLC and EVERGREEN PERSONAL SERVICES, LLC, Plaintiffs-Appellants-Cross-Appellees,	UNPUBLISHED October 20, 2009
v	No. 286893 Wayne Circuit Court
DANIELLE WILSON and SARA ELLENA, Defendants-Appellees-Cross-Appellants,	LC No. 06-624423-CZ
and AARON GOLDFEIN, M.D., ROBERT MCPHERSON, CRYSTAL HOME HEALTH CARE, INC, and TRI-CITY MEDICAL CENTERS, P.C., Defendants.	

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiffs Evergreen[1] appeal as of right from the trial court's order closing the case and awarding defendants sanctions. Defendants Wilson and Ellena[2] cross-appeal, contesting the reduced amount they were awarded. We affirm the trial court's determination that the suit was

[1] Although they are separate entities, the same facts apply to both plaintiffs. Thus, for ease of reference we will refer to both plaintiffs collectively as "Evergreen."

[2] Goldfein and Evergreen reached a settlement agreement. McPherson, Crystal, and Tri-City were dismissed by stipulation. Because these defendants are not part of this appeal, "defendants" refers only to Wilson and Ellena.

frivolous, and remand for a reasoned determination of the amount of attorney fees awarded. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The only issues presented here are whether the trial court erred in awarding sanctions and whether it erred in reducing the amount of attorney fees awarded. The facts underlying the original lawsuit concern plaintiffs' treatment of patients in its care. Evergreen provides home health care services and is set up in several apartment buildings in the state. Wilson is a registered nurse and Ellena is a nurse's aid. Evergreen employed both Wilson and Ellena in 2005. Defendants allegedly became unhappy with the treatment Evergreen was giving patients. Wilson quit and Evergreen terminated Ellena's employment allegedly because there was not enough work for Ellena. Evergreen sued, making numerous allegations against defendants. Count I alleged that defendants breached a noncompete covenant in their contracts by going to work for Crystal Home Health Care; Count II alleged Crystal intentionally interfered with Evergreen's contractual relationships; Count III alleged defamation resulting from defendants' statements to patients and patients' family members that Evergreen was "killing patients," illegally administering prescription drugs, and providing substandard care; Court IV alleged that defendants intentionally interfered with Evergreen's contracts by giving Crystal the names and addresses of Evergreen's patients; and Count V alleged civil conspiracy among all defendants.

Defendants made an offer of settlement of $500 each, which Evergreen rejected. The case went to mediation, and the panel unanimously awarded $100 to Evergreen for each of the two defendants. Defendants accepted. Evergreen rejected the award.

Defendants characterized this as a "spite" suit, filed in retaliation for defendants' involvement in Evergreen being reported to the Attorney General. According to them, Evergreen was involved in administering prescription medication to a patient ("Patient X" in the record), despite the fact that the treating physician, Dr. Goldfein, would not prescribe it because it was contraindicated for that patient. Patients and their families got upset as word spread, and over a dozen patients left Evergreen for Crystal. Evergreen, in contrast, asserted that defendants had been reprimanded for attendance and other employment matters. Evergreen complained that it was defendants who were acting out of vengeance by spreading lies about Evergreen and luring patients away.

In deciding defendants' motion for summary disposition, the trial court first observed that Evergreen never produced the noncompete agreement Wilson had allegedly signed. Regarding Ellena's agreement not to compete, the trial court found the provision unreasonable because employers do not need that kind of protection when the employee has no special skill or knowledge. The court found no "significant, material statements that amount to defamation," and no "significant, material evidence" supporting either the tortious interference claim or the civil conspiracy claim. The trial court therefore granted defendants' motion for summary disposition.

Defendants then brought a motion for costs and fees based on Evergreen's rejection of mediation and on MCL 600.2591 and MCR 2.625(A). Defense counsel requested $27,000 in fees at a rate of $200 per hour, and $1,755 in costs. Counsel noted that defendants had actually paid over $17,000 to date. Evergreen argued that the suit was not frivolous because the suit had valid factual grounds, and that this was no different from any other suit where the other party

was successful. Evergreen also argued that the court should not decide the amount of fees without holding an evidentiary hearing because the billing appeared excessive as far as number of items.

The trial court stated that it initially felt the case was frivolous, and when the case evaluation award of $100 came in, that reinforced the court's conclusion. But in awarding sanctions, the court stated:

> I'm really not going to give [defense counsel] what he's asked for. I probably should, I probably should. But I'm going to reduce the amount requested, and I'm actually tempted to reduce it down to what he's indicated his clients actually paid, but I think I'm gonna reduce it down to $15,000. I'm going to make it 75 [sic, $7,500] per client.

The court then said that if it held a hearing, as Evergreen asked, the amount would be increased. It would not hold a hearing, "because I think the amount that I've decided on more than encompasses, even if I cut his hourly rate down a lot more." Yet, the court also said, given defense counsel's thirty-two years of practice, he should probably get more than $200 per hour. The court also awarded the full amount of costs, $1,755, for a total of $16,755. In its written order, the court identified MCR 2.625(A)(1), MCL 600.2591, and MCR 2.114 as grounds for awarding sanctions.

We review a trial court's decision to grant or deny attorney fees for abuse of discretion. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). The trial court has not abused its discretion if the outcome of its decision is within the range of principled outcomes. *Id*. A factual finding that the suit is frivolous is reviewed for clear error. *Id*.; *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

MCR 2.625(A)(1) allows the court to award costs to the prevailing party unless otherwise prohibited by statute or court rule. MCR 2.625(A)(2) provides that, "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action 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.
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> (2) The amount of costs and fees awarded under this section 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.
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> (3) As used in this section:
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> (a) "Frivolous" means that at least 1 of the following conditions is met:

(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 that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

(b) "Prevailing party" means a party who wins on the entire record.

MCR 2.114 provides in relevant part:
(D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a 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.

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which 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. The court may not assess punitive damages.

(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

The trial court did not abuse its discretion in awarding costs and fees under any of the cited provisions. The court did not identify which of the grounds it found under MCL 600.2591, but there is factual support for either (3)(a)(i) or (3)(a)(ii). Defendants argued frequently in the trial court that Evergreen's purpose was to harass and embarrass them, and to cause them great personal expense trying to defend themselves. Even if it is true that patients left Evergreen, no admissible evidence indicates their reasons or shows that they went to Crystal. The content of the alleged defamatory statements is left purely to speculation. Given the absence of insurance coverage in this case, it is difficult to see what financial gain Evergreen hoped to achieve from suing a nurse and a nurse's aid. It seems much more likely that the aim was defendants' financial ruin.

The absence of factual support for Evergreen's allegations also supports the conclusion that the suit was frivolous. A suit for defamation must allege:

> 1) a false and defamatory statement concerning the plaintiff, 2) an unprivileged communication to a third party, 3) fault amounting to at least negligence on the part of the publisher, and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. [*Rouch v Evening News*, 440 Mich 238, 251; 487 NW2d 205 (1992).]

Claims for defamation must be pleaded with specificity. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 52; 495 NW2d 391 (1992). A plaintiff must allege and identify specifically which statements he considers to be materially false. *Id*. at 52-53. Evergreen's complaint does identify specific statements, alleging defendants told Evergreen's patients and others that Evergreen was "killing patients"; that Evergreen illegally administered prescription drugs; and that Evergreen provided substandard health care services. However, Dr. Goldfein made the alleged statement about killing patients, and Evergreen provides no evidence that defendants made any unprivileged, false statements to anyone else. It is not enough that a plaintiff alleges all the necessary elements. The complaint must be "well grounded in fact" and filed only after "reasonable inquiry." MCR 2.114(D)(2).

In short, no factual support exists for Evergreen's tort claims. The only evidentiary support is in the form of affidavits and statements made in depositions. While these documents are admissible, the statements relied on ultimately turn out to be hearsay, unsupported opinion, or do not actually say what Evergreen claims they say. The trial court was in the best position to ascertain attitudes and the purpose for inflammatory rhetoric and actions. Thus, we conclude that the trial court did not clearly err in finding Evergreen's tort suit frivolous.

As for the breach of contract claims, the trial court also did not err in finding this claim groundless. A noncompete clause in an employment contract must be reasonable "as to its duration, geographical area, and the type of employment or line of business." MCL 445.774a(1). "To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited." *Id*. "To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill." *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006).

Whether the trial court erred in deciding the clause was unreasonable is not at issue here. Rather, the question is whether the court erred in concluding that Evergreen's suit was frivolous, given that the clause was unreasonable. Certainly, the court did not clearly err in finding Evergreen's breach claim against Wilson to be frivolous because Evergreen could not even prove such an agreement ever existed. Ellena signed a noncompete agreement, but the court found the entire agreement unreasonable because it could not serve the purpose of protecting the employer that such agreements are intended to do. We cannot say that the trial court abused its discretion in finding Evergreen's decision to enforce the agreement, coupled with the other claims brought in its suit, was frivolous and intended to harass and financially damage these defendants.

We next address defendants' cross-appeal regarding the trial court's reduction in the amount of the award sought.[3] Defense counsel submitted an accounting of his fees that totaled around $25,000.[4] The trial court indicated that an hourly rate of $200 was reasonable for an attorney of counsel's experience. Yet, despite stating it "probably should" award what was requested and without indicating that any of the items billed were excessive or unnecessary, the court reduced the fee award to $15,000, providing no reason other than he thought it "more than encompasses." The exact meaning of this is unclear and, without more, seems arbitrary, especially because the court indicated to Evergreen's counsel that if the court held an evidentiary hearing on the issue, the award would likely be even higher. Although the two court rules cited by the trial court as grounds for sanctions are permissive, MCL 600.2591, also cited as grounds, mandates the court to award all reasonable fees:

> (2) The amount of costs and fees awarded under this section *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. [Emphasis added.]

In light of this, we are unable to determine whether the trial court abused its discretion in reducing the amount.

We affirm the judgment of the trial court regarding its finding that the suit was frivolous, and remand for a reasoned determination of the amount of attorney fees awarded. We do not retain jurisdiction. Costs to defendants.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio

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[3] Evergreen does not appeal the amount awarded, nor has it responded to defendants' cross-appeal brief. Thus, the only challenge to the amount that is before this Court is whether the trial court should have awarded more than it did.

[4] Defendants sought $27,067.16 in total costs and fees, $1,755 of this was costs.