STATE OF MICHIGAN

COURT OF APPEALS

CHARLES ROOSE and PATRICIA ROOSE, Plaintiffs/Counter Defendants-Appellants,	UNPUBLISHED March 15, 2016
v	No. 324938 Livingston Circuit Court
DANNY LORIDON and KAREN LORIDON, Defendant/Cross Plaintiffs-Appellees.	LC No. 13-027706-CZ

Before: GLEICHER, P.J., and MURPHY and OWENS, JJ.

PER CURIAM.

Plaintiffs and defendants are neighbors engaged in a long-standing feud over the natural drainage of water from defendants' higher elevation property across plaintiffs' lot and flowing toward a culvert abutting the roadway. In the latest chapter of this saga, the circuit court found no cause of action in plaintiffs' suit to quiet title and granted defendants' request for an injunction. In doing so, the court ordered plaintiffs to recompense defendants for their attorney fees. As the record supports that plaintiffs' complaint was frivolous and filed for improper purposes, we affirm.

I. BACKGROUND

Understandably frustrated by water flowing from their neighbors' oversaturated lot, plaintiffs decided to take action in 2009. Instead of working with defendants to resolve the problematic drainage issue, plaintiffs moved their septic field closer to the property line and regraded the ground to a higher elevation. Although plaintiffs had a permit to move the septic field, they specifically indicated in their "soil erosion and sedimentation control permit application" that they would not bring additional "fill" dirt onto the property. In filing this application, plaintiffs acknowledged that they were "responsible for assuring positive drainage away from any structures/improvements constructed under this permit," and "that any grading will not impair existing drainage . . . to any adjacent land or water course." Plaintiffs also agreed that "[s]urface water will be handled in a manner consistent with established drainage patterns." Without permission, plaintiffs used several truckloads of dirt to erect a berm along the property line. As a result, surface water could no longer travel downhill from defendants' property across

plaintiffs' lot to the drainage culvert along the street. This caused water to pool on defendants' land.

Defendants complained to the proper authorities in Cohactah Township. The township advised plaintiffs through two separate notices that their alteration of the land violated its zoning ordinance by "interrupt[ing] a drainage way or natural watercourse." Plaintiffs ignored these notices and the township ordered them to appear and show cause for their failure to remove the berm. At the hearing, plaintiffs requested that the township clarify its definition of "drainage," and find "no drainage across [their] property line" and that "the earthen berm . . . does not block or hinder natural water runoff in its natural state." The township reviewed the evidence and determined that the topography of the area caused surface water to naturally flow from defendants' property across plaintiffs' land and that the berm blocked that surface water from flowing. Accordingly, it upheld its violation citation.

Plaintiffs subsequently filed suit against the township and challenged the constitutionality of the ordinance. The suit was resolved by a November 22, 2011 order of dismissal. The court ordered the township to "indicate in its records that Plaintiffs are not in violation" of the zoning ordinance. Plaintiffs in turn were forbidden from "tak[ing] any future action to alter the topography of their property . . . which blocks or restricts the natural flow of surface water runoff . . . ." The judgment did not, however, ratify the actions already taken.

Thereafter, plaintiffs' berm remained in place and water continued to flood defendants' property with no way to travel to the culvert. Defendants claim that they attempted to work with plaintiffs on a resolution but were rebuffed.

Despite that the berm remained in place and no water had flowed across their property since 2009, plaintiffs filed the current quiet title action against defendants in October 2013, alleging that defendants "claim to have an unrecorded easement across Plaintiffs' property for the purpose of surface water drainage from their property onto the Plaintiffs' property." Defendants denied making any such claim and accused plaintiffs of "caus[ing] intentional destruction of property by unauthorized diversion of the natural water flow in and about the parties' properties." Defendants also filed a countercomplaint for nuisance based on plaintiffs' interference with the natural flow of surface water and sought an injunction to remove the berm and prevent future harm.

At the bench trial, the parties testified about the historic course of surface water on their properties and the changes made by plaintiffs in 2009. The Livingston County Drain Commissioner testified as well regarding the slope of the topography, which naturally caused water to run from defendants' land across plaintiffs' property toward the culvert. Charles Roose tried to convince the court that he built the berm to prevent water from his new septic field flowing onto defendants' property. He also contested that all the water that flowed from defendants' land was "surface water." Water drained heavily for more than two months in the spring of 2009 despite that precipitation had not been constant, Mr. Roose asserted, suggesting additional sources for the runoff.

Ultimately, the circuit court did not accept plaintiffs' explanations, finding "the berm was built after [plaintiffs'] property ended up being flooded because there was a lot of rain," and there was "nothing to show [the court] that this is underground water." The court continued that the law requires a property owner to "accept" naturally flowing surface water from his or her neighbor's property. And the court rejected that the circuit court in plaintiffs' earlier lawsuit found their installation lawful. All the court could conclude from the earlier order was that the zoning ordinance as written was unenforceable. Accordingly, the court ruled that the berm, as well as a raised flowerbed planted in the area, had to be removed. The court additionally ordered that the County Drain Commissioner create the plan to remediate the condition at plaintiffs' expense and enjoined plaintiffs from taking further action that would block the flow of water.

Without expressly stating its reason, the court also sua sponte ordered plaintiffs to reimburse defendants' attorney fees. The language employed suggested the court found the action frivolous: "[W]hy did we get this far." After personally inspecting the property, the court articulated:

> I have no idea why this case got this far. It makes no sense. There really is no defense. . . . [The plaintiffs] probably didn't understand and appreciate the law when they, they built it. However, they have been going through litigation often since 2009 with the Township. It seems to me that they would have understood at that time they couldn't have the berm there. And when this started, they should have been told you have to accept their surface water; you can't have a berm there. . . . I believe the defense was frivolous. . . .

At a later hearing on plaintiffs' proposed judgment, the court further questioned the very nature of plaintiffs' suit, asserting, "There was nothing to quiet."

II. ANALYSIS

Plaintiffs challenge only the court's attorney-fee award. They contend that their complaint was not frivolous. Plaintiffs further contend that such sanctions were inappropriate because defendants' countercomplaint was barred by collateral estoppel and laches.

We review for an abuse of discretion a trial court's decision to award attorney fees. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). As a general rule, litigants must cover their own attorney fees, unless a statute, court rule, contract, or common-law exception specifically permits a shifting of this burden. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 388 (2013). One such exception is found in MCR 2.114, which provides, in relevant part:

> (D) The signature of an attorney or party, whether or not the part 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 a reasonable inquiry, the document is well grounded in fact and 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) 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 access punitive damages.

(F) In addition to sanctions under this rule, a party pleading frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). . . .

It appears from the record that the trial court awarded defendants attorney fees based on this rule.

Plaintiffs contend that the court improperly sua sponte awarded sanctions based on the frivolousness of the claims. MCR 2.114(E) permits a court "on its own initiative" to sanction a party for filing a complaint in violation of the court rule. MCR 2.114(F) allows sanctions "as provided in MCR 2.625(A)(2)" when a party files a frivolous claim or defense. MCR 2.625(A)(2) in turn provides for the imposition of sanctions for a frivolous claim "on motion of a party." MCL 600.2591 similarly governs the imposition of sanctions for raising frivolous claims or defenses "[u]pon motion of any party."

We review de novo questions of statutory and court rule interpretation and application. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). It is true that both MCR 2.625(A)(2) and MCL 600.2591 provide for the imposition of sanctions based on a frivolous pleading when sought by the opposing party. However, MCR 2.114(E) provides for a court to act of its own accord when a party or attorney signs a document "in violation of this rule." And MCR 2.114(D)(2) directs that an attorney or party who signs a document attests "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." In other words, the signer attests that the argument raised is not frivolous. Accordingly, plaintiffs' challenge in this regard lacks merit.

We review the trial court's underlying factual findings that plaintiffs' claims were either frivolous or filed for an improper purpose for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002); *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen*, 465 Mich at 661-662.

MCL 600.2591(3)(a) defines a "frivolous" action as falling into one of three categories:

(*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.

Plaintiffs had no ground to believe that their claims were legally supported and made no argument for a change in the law. It is a long-standing principle of property law that a landowner may not interfere with the natural flow of surface water to the detriment of his or her neighbor. The "natural flowage of water from the upper estate is a natural servitude which the owner of the lower estate must bear." *O'Connor v Hogan*, 140 Mich 613, 624; 104 NW 29 (1905). More specifically, and particularly applicable here, "adjoining owners owe mutual duties—the one to receive the natural flow, and the other not to injuriously change its conditions." *Boyd v Conklin*, 54 Mich 583, 587; 20 NW 595 (1884). "Whatever may be rights of adjoining proprietors as to the use and diversion of water, there is no right in any one, by raising artificial obstructions, to flood his neighbors' land by stopping the escape of water that cannot escape otherwise." *Id.* at 598. See also *Wiggins v City of Burton*, 291 Mich App 532, 563-564; 805 NW2d 517 (2011) (outlining historic caselaw in this regard). Nor may the owner of the higher elevation property take action to increase the quantity or velocity of water flowing onto the lower estate. *Id.* at 564.

Here, plaintiffs never alleged that defendants took any action to increase the amount of water that saturated their lot, caused the water to flow with a greater velocity, or even diverted the water to force it to flow over plaintiffs' property. Plaintiffs only generally contended that that the water was not "surface water" but never suggested another source for the water buildup on defendants' land. See *Fenmode, Inc v Aetna Cas & Surety Co*, 303 Mich 188, 192; ("[S]urface waters are commonly understood to be waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence."). Plaintiffs' counsel even admitted that neither he nor his clients secured the services of an expert to inspect the property and advise on the propriety of plaintiffs' installations.

The law creates a dominant and a servient estate for the flow of water. Accordingly, even if defendants had expressly claimed an "easement" across plaintiffs' property, they would have had every legal right to do so.[1] Plaintiffs also had no ground to rely on the resolution of their dispute with the township. The court in the earlier action did not rule that plaintiffs had a right to block the flow of water from defendants' land and actually precluded plaintiffs from taking additional exclusionary actions. Rather, the order in the previous lawsuit appears to show that the township conceded the vagueness of its ordinance, precluding its enforcement. Plaintiffs'

[1] The trial court suggested that defendants had taken no action against plaintiffs' property for which plaintiffs needed to quiet their title. This was simply incorrect. A "natural servitude" exists for the flowing of surface water. The creation of a "servitude" and an "easement" "closely correspond[]" and both impact an owner's quiet enjoyment of his or her property. See *Black's Law Dictionary* (6th ed), p 1370. The recourse to such an infringement is a quiet title action. See, e.g., *Beach v Lima Twp*, 489 Mich 99; 802 NW2d 1 (2011).

legal challenge to defendants' attempts to resolve the drainage issue were therefore completely without merit and the trial court did not err in determining that the current lawsuit against defendants was frivolous.

In addition, the record supports the court's implication that the suit was filed for improper purposes. Plaintiffs have now spent six years and likely significant sums to obstruct surface water flowing from defendants' property. Plaintiffs hauled in loads of dirt to erect the berm. Plaintiffs knew or should have known that this berm was not permitted. When they completed the application to relocate their septic field, plaintiffs denied that they would bring "fill" dirt to the site and acknowledged their duty to not interfere with the drainage of surface water. Plaintiffs specifically denied that they would take such action, while nevertheless planning to use fill dirt to create a berm. They battled in court the township's attempts to fine them for an ordinance violation. Over a two-year period, plaintiffs refused to negotiate and compromise with defendants to reach a mutually satisfactory resolution. And finally, plaintiffs filed suit in a pointless attempt to forever stop the natural flow of water contrary to more than 150 years of caselaw. These were years and funds that could have been spent on engineering a solution to allow the water to drain without interfering with plaintiffs' interests. In the end, plaintiffs will pay that cost too, by reimbursing the county drain commission for the cost of investigating and preparing a plan of action and then putting that plan into action. In the meantime, plaintiffs have forced defendants to live with pools of stagnant water on their land. As such, the court's attorney-fee order was soundly within its discretion.

Plaintiffs further contend, however, that the trial court should not have sanctioned them because defendants' countercomplaint was legally barred. Plaintiffs contend that no water had pooled on defendants' land since 2009, and their 2013 objection to plaintiffs' berm was untimely and barred by the doctrine of laches. The equitable doctrine of laches is a "tool used to provide a remedy for the inconvenience resulting from the plaintiff's delay in asserting a legal right that was practicable to assert." *Knight v Northpointe Bank*, 300 Mich App 109, 115; 832 NW2d 439 (2013). The doctrine of laches is part of the balancing of equities involved in a claim and courts only apply it when the prejudice occasioned by the delay justifies barring the claim. *Id.*

Defendants reasonably awaited the conclusion of the action between plaintiffs and the township before moving forward on their own. Between the November 2011 conclusion of the earlier lawsuit and October 2013 initiation of the current action, defendants tried to negotiate and compromise with plaintiffs outside of court. Defendants did not sit on their rights. Rather, when plaintiffs filed the current suit, they signaled the close of informal negotiations and triggered defendants to file their countercomplaint.

Plaintiffs also contend that defendants were collaterally estopped from filing their countercomplaint because of the resolution of the earlier lawsuit with the township. For collateral estoppel to apply, "the *same parties* must have had a full opportunity to litigate the issue . . . ." *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988) (emphasis added). Defendants were not a party to plaintiffs' lawsuit against the township. As defendants' legal position was supported by abundant caselaw, they had no interest in a detour dispute over

the vagueness of the zoning ordinance's language. As such, defendants had no reason to intervene. Collateral estoppel therefore does not apply.

We affirm. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ William B. Murphy
/s/ Donald S. Owens