

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN WILKINSON,

Plaintiff-Appellee,

UNPUBLISHED
November 15, 2002

v

JAMES MERRILL and LINDA MERRILL,

Defendants-Appellants.

No. 235603
Oakland Circuit Court
LC No. 00-023518-NO

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendants appeal as of right from a circuit court judgment which included attorney fees awarded under MCL 600.2591. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff claimed damages for injuries sustained when he was bitten by defendants' dog. Defendants claimed that plaintiff had provoked the dog, but presented no evidence to support it and the court directed a verdict as to liability. Plaintiff later sought sanctions, claiming that defendants' defense was frivolous. The trial court agreed and granted the motion.

The prevailing party in an action is entitled to costs. MCR 2.625(A)(1). 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. MCR 2.625(A)(2). That statute provides that if the court finds a civil action or a defense to a civil action to be frivolous, it shall award the prevailing party the costs and fees incurred in the action, including all reasonable costs actually incurred by the prevailing party and costs allowed by law or court rule, including court costs and reasonable attorney fees. MCL 600.2591(1), (2). A defense is frivolous if (1) the defendant's primary purpose in asserting the defense was to harass, embarrass or injure the plaintiff, (2) the defendant had no reasonable basis to believe that the facts underlying his legal position were in fact true, or (3) the defendant's legal position was devoid of arguable legal merit. MCL 600.2591(3)(a). Whether a defense is frivolous is to be determined in light of the facts and circumstances existing at the time it was raised. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002).

Once the court finds that an action or defense was frivolous, the imposition of sanctions is mandatory. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996). The trial court's finding that an action or defense was frivolous is reviewed for clear error, but

the amount of sanctions awarded is reviewed for an abuse of discretion. *In re Attorney Fees & Costs*, 233 Mich App 694, 701, 704; 593 NW2d 589 (1999).

Defendants first contend that they had a reasonable basis for asserting the defense of provocation because their neighbor testified at her deposition that plaintiff provoked the dog. Although defendants raised this argument in their response to plaintiff's initial motion, they never argued it to the trial court, which never addressed it. Instead, when they argued against the motion on rehearing, they opposed it on the alternate ground that they had never asserted the defense of provocation because provocation did not constitute an affirmative defense. Because the trial court never addressed defendants' initial argument that they had a reasonable basis for raising the defense of provocation, it has not been preserved for appeal. *Sallee v Auto Club Ins Ass'n*, 190 Mich App 305, 308; 475 NW2d 828 (1991).

In addition, defendants did not present the neighbor's deposition transcript to the trial court in connection with the motion and because it is not part of the lower court record, it cannot be considered on appeal. MCR 7.210(A)(1); *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 579-580; 609 NW2d 593 (2000), *aff'd sub nom Byrne v Michigan*, 463 Mich 652 (2001); *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 12 (1994). Therefore, defendants have not shown that the trial court clearly erred in awarding sanctions under § 2591.

Defendants also dispute the amount of the fees awarded. Although defendants disputed plaintiff's right to sanctions under the statute, they never contested the amount or reasonableness of the fees requested. Therefore, the issue has not been preserved for appeal. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000).

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter