STATE OF MICHIGAN

COURT OF APPEALS

CHARLES TOUSSAINT,

Plaintiff-Appellee,

v

CITY OF STERLING HEIGHTS, and DANIEL KOT, d/b/a QUALITY TREE SERVICE,

Defendants-Appellants.

UNPUBLISHED
May 18, 2004

No. 244086
Macomb Circuit Court
LC No. 1998-003436-CH

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

This matter reaches us by order of our Supreme Court for consideration as on leave granted. Defendants City of Sterling Heights and Daniel Kot, d/b/a Quality Tree Service, appeal the circuit court order vacating its prior award of mediation sanctions to defendants as the prevailing parties in plaintiff Charles Toussaint's inverse condemnation and trespass action. We reverse and remand for further proceedings.

This case arose when defendants entered plaintiff's property to cut down a maple tree, which defendant Sterling Heights claimed was diseased and dangerous. A mediation panel evaluated plaintiff's action at $2,000, which plaintiff rejected and defendants accepted. The case went to trial and a jury found no cause of action. The trial court entered an order of judgment permitting defendants to bring a motion for attorney fees; although the court rule, MCR 2.403(O)(8), provides a twenty-eight day period to file a motion for costs, the trial court's order stated that defendants could bring a motion "so long as the motion is filed within 21 days after the judgment was entered." The order was drafted by defendants.

Defendants' motion for mediation sanctions was heard on October 23, 2000, and the trial court granted defendants an award of $30,533.96. Plaintiff later challenged defendants' motion, which was filed on October 11, 2000, as untimely. Defendants' motion was filed within 21 days of September 21, 2000, the date the judgment was logged into the docket, but more than 21 days after September 18, 2000, the date on the order itself.

On reconsideration, the trial court agreed with plaintiff, concluded that it lacked jurisdiction to grant defendants sanctions, and vacated its previous order. According to the trial court's opinion, the order of judgment was "signed" on September 18, 2000, but "not logged into the computerized docket until September 21, 2000." The trial court did not address its discretion

to extend the time period for defendants' motion under MCR 2.108(E), in the event the motion was late because of "excusable neglect." In addition, defendants submitted an affidavit that the order was dated September 18, but was not signed until September 20, and not docketed until September 21. The trial court did not address, and plaintiff does not contest, the accuracy of the affidavit.

On appeal, this Court entered an order on December 19, 2001, vacating the trial court's order and remanding for further proceedings. This Court denied plaintiff's subsequent motion for reconsideration. Plaintiff filed an application for leave and, on September 30, 2002, our Supreme Court vacated this Court's order and remanded for our consideration as on leave granted.

The trial court's decision whether to award sanctions is reviewed de novo, as is the court's interpretation of a court rule. *Brown v Gainey Transportation*, 256 Mich App 380, 383; 663 NW2d 519 (2003). The date an order is signed is the date of entry. *Moriarity v Shields*, ___ Mich App ___; ___ NW2d ___ (2004); MCR 2.602(A)(2).

Defendants argue on appeal that, under the court rule, MCR 2.403(O)(8), they were entitled to bring a motion for costs within twenty-eight days after entry of the judgment in this case. Plaintiffs respond that defendants waived the twenty-eight day period when they drafted the order in this case that expressly limited the time to twenty-one days.

We note that the trial court made its ruling on the unexplained assumption that the order in this case was signed and entered on September 18, 2000. However, defendants averred in an affidavit that the September 18, 2000, date on the trial court's order was a clerical error that did not accurately reflect the date the order was signed. Plaintiff does not dispute this claim and the trial court did not address it. Because it is not necessary to resolution of this case, we need not address the parties' argument regarding whether a trial court may reduce the time for filing a motion under MCR 2.403(O)(8). Instead, we remand to permit the court to determine whether, in fact, as the uncontroverted evidence suggests, the order contained a clerical error as to the date of signing. Clerical mistakes may be corrected at any time. MCR 2.612.

If, on remand, the court finds that there was a clerical error in the date of signing, it shall correct the error and consider the other issues raised in plaintiff's motion objecting to the October 23, 2000, sanction award.

Alternatively, if the court finds that the order was, in fact, signed on September 18, it shall determine whether or not to exercise its discretion to extend the time period because of "excusable neglect" caused by the uncertainty regarding the date in this case. MCR 2.108(E). If, in that event, the court chooses to extend the time for defendants' motion, it shall also resolve plaintiff's remaining challenges to the October 23, 2000, award of sanctions.

Finally, if the court finds that the order was signed on September 18, and, in the exercise of its discretion, chooses not to extend the time, it may dismiss defendants' motion on the basis that defendants are bound by the language they drafted. A party may not contribute to an alleged

error by plan or negligence and then argue error on appeal. *Munson Med v Auto Club*, 218 Mich App 375, 388; 554 NW2d 49 (1996).

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot