STATE OF MICHIGAN

COURT OF APPEALS

ACE AMERICAN INSURANCE COMPANY and ALLIANZ INSURANCE COMPANY,

Plaintiffs,

v

EMMET COATING SERVICES, INC.,

Defendant/Cross-Defendant/Cross-Plaintiff/Third-Party Plaintiff-Appellee,

and

NACCO MATERIALS HANDLING GROUP, INC., a/k/a HYSTER GROUP, and AMERIGAS PROPANE, INC.,

Defendants/Cross-Defendants,

and

WORTHINGTON INDUSTRIES, INC., d/b/a WORTHINGTON CYLINDERS CORPORATION,

Defendant/Cross-Plaintiff/Cross-Defendant,

and

SELECTIVE INSURANCE COMPANY, ELLISON, NEILSON, ZEHE & ANTAS, P.C., GREAT LAKES POWER PRODUCTS, INC., CARDELLI, HEBERT, LANFEAR & BUIKEMA, MICHIGAN INDUSTRIAL FORKLIFTS, INC., and FORKLIFT TIRE OF MICHIGAN,

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UNPUBLISHED
December 28, 2006

No. 268138
Macomb Circuit Court
LC No. 2004-000651-CK

Third-Party Defendants,

and

HERNDON & ASSOCIATES,

Third-Party Defendant-Appellant.

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

In this case arising out of a factory fire, third-party defendant Herndon & Associates (defendant) appeals as of right the trial court's refusal to impose sanctions against third-party plaintiff Emmet Coating Services, Inc. (plaintiff) or its attorneys for allegedly filing a frivolous claim. We affirm.

Defendant argues that the trial court erred in refusing to impose sanctions because plaintiff's attorneys failed to conduct a reasonable inquiry into the factual and legal viability of plaintiff's claim for spoliation of evidence. We disagree.

We review a trial court's denial of sanctions based on frivolous pleadings and claims for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). Pursuant to MCL 600.2591(3), a party's claim is frivolous if "[t]he party had no reasonable basis to believe that the facts underlying his or her legal position were in fact true," or "the party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(a)(ii) and (iii). Under MCR 2.114, sanctions are mandatory if a court finds that a pleading was signed without reasonable inquiry into the factual and legal viability of the pleading, or that a frivolous claim or defense was pleaded. *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003); see also MCR 2.625(A)(2). The reasonableness of the inquiry into the factual and legal viability of a pleading is determined by an objective standard. *Harkins*, *supra*. Whether a claim or defense is frivolous depends on the facts of each case, *Kitchen*, *supra* at 662, and must be determined on the basis of the circumstances existing at the time the claim was asserted, *In re Costs and Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). Thus, a plaintiff's inability to defeat a motion for summary disposition or to prove its claims at trial does not itself merit a finding that his claims were frivolous. See *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

Defendant argues that plaintiff's attorneys failed to reasonably develop a factual basis sufficient to support that defendant at some point had possession, custody, and control over the missing evidence. However, contrary to defendant's argument, the documents compiled by plaintiff's attorneys provide a reasonable basis for plaintiff's claim. Indeed, the fire marshal's incident report indicates that physical evidence regarding the source of the fire was turned over to defendant's agent, Dan Terski, at the accident scene. In addition, the June 2003 notes of engineer Mark Brennan indicate that "[e]vidence was lost (maybe)" and that "[defendant was] looking for that evidence." Counsel for plaintiff also had in their possession written evidence

that Brennan planned to retrieve parts from Terski at defendant's place of business for inspection. Brennan's engineering firm later noted, however, that it was unable to form an opinion as to the cause of the fire because the evidence needed to do so was "gone." Plaintiff also learned from August 2003 correspondence sent by the attorneys for Ace American Insurance Company to the law firm retained by plaintiff's insurer that defendant at one time indicated that the evidence at issue—a hose—may have disintegrated while in defendant's possession.

Nothing in the documents relied on by plaintiff as support for its spoliation claim contradicts that defendant was at some time in possession of the hose. Photographs of the hose were taken at one point in time, showing that the hose did in fact exist in recognizable form after the accident. Moreover, as noted, the fire marshal's report indicates that at least some evidence from the scene was given to defendant. Although the hose in question is not specifically listed as having been given to defendant at the scene, this fact does not preclude that defendant in fact took possession of the hose.

Furthermore, while defendant denied having ever possessed the hose, plaintiff had information inconsistent with defendant's denial of possession—namely, the August 2003 letter suggesting that defendant at one time stated that the hose may have disintegrated while in its possession. The fire marshal's report indicates that defendant took possession of at least some of the physical evidence, including the ruptured propane tank and broken strap pieces from the Hyster forklift on which the fire was determined to have begun. Defendant's contact with at least some parts of the forklift and propane tank, as well as its own possible acknowledgement that the hose may have disintegrated while in its possession provided an objectively reasonable basis for plaintiff to believe that defendant possessed, but negligently lost or intentionally destroyed, the hose at issue.

Defendant argues that in order to make the reasonable inquiry required by MCR 2.114(D)(2), plaintiff's attorneys should have asked Brennan and counsel for Ace American Insurance Company why they were under the impression that defendant had the missing hose, and should also have asked the fire marshal exactly what he turned over to Terski. Asking each party to reiterate a statement they already made is unnecessary in this case. As discussed above, the documents do not contradict each other and, when taken together, reasonably lead to a conclusion that defendant may have had possession of the hose. The multitude of writings documenting the communications between parties other than plaintiff served as a sufficient basis from which plaintiff and its attorneys could draw an objective conclusion that defendant was responsible for the evidence going missing.

Defendant also argues that sanctions were appropriate because request and review of a subrogation analysis performed by the attorneys for plaintiff's insurer would have revealed plaintiff's inability to succeed on its claim under the facts of this case. Specifically, defendant argues that disclosure of the contents of the report, which indicates the belief of the attorneys for plaintiff's insurer that the insurer would not likely be able to successfully pursue a subrogation claim because the cause of the fire was unknown and because plaintiff was itself allegedly negligent, rendered plaintiff's claim frivolous. However, the report does not indicate, and defendant does not argue, that the investigation that formed the basis for the subrogation analysis was based on any analysis of the hose in question. Thus, it is unclear how review of the subrogation analysis would have informed plaintiff of the location of the hose, whether

defendant possessed it, or its materiality to the investigation of the fire. Moreover, plaintiff's insurer's attorneys' opinion that plaintiff may have been negligent is simply an opinion, not fact. A trier of fact may have concluded that plaintiff was not negligent or, at the very least, that any alleged negligence by plaintiff did not render the manufacturers of the hose and forklift free of responsibility for all potential negligence.

With or without the report, plaintiff had sufficient evidence from which to objectively believe that defendant may have intentionally or negligently destroyed evidence material to plaintiff's case. Indeed, the hose was likely material, as evidenced by the straightforward statement of counsel for Ace American Insurance Company that "the hoses from the forklift . . . are pertinent to our determination [of] a cause of the loss." The efforts made by plaintiff in reviewing the documents filed and exchanged in this case constitute a sufficient effort to investigate its claim before filing suit. The facts and circumstances of the case show a reasonable inquiry supporting that defendant may have intentionally or negligently destroyed evidence material to plaintiff's case was made. Therefore, plaintiff's third-party claim was not frivolous and the trial court did not clearly err in refusing to award defendant sanctions on that ground, or for the reason that counsel for plaintiff failed to conduct the reasonable inquiry required under MCR 2.114.[1] *Kitchen*, *supra* at 661.

Defendant also argues that to successfully pursue a spoliation claim, plaintiff was required to prove it would have prevailed in the underlying suit had the evidence not been destroyed. Thus, defendant argues, plaintiff's claim that defendant was responsible for the loss of a cause of action was without arguable legal merit because plaintiff could not prove the cause of the fire. We again disagree.

Although Michigan law recognizes a duty to preserve evidence, see *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 212; 659 NW2d 684 (2002), there is no published authority in Michigan expressly recognizing or rejecting a claim for spoliation of evidence as a valid cause of action in this state. The substantive requirements for such a claim have not, therefore, been settled or even expressly considered by any binding Michigan authority. Under such circumstances, to award defendant sanctions on the ground that the facts evinced by the record fail to meet the substantive requirements for a claim of spoliation of evidence is speculative at best. In the absence of authority expressly recognizing and delineating the requirements for successfully prosecuting a claim for spoliation of evidence, it cannot be said that plaintiff's claim was devoid of arguable legal merit at the time it filed its complaint. See, e.g., *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 275, 290; 597 NW2d 235 (1999) (declining to find the plaintiff's claim "devoid of arguable legal merit" where the viability of its claim was not settled by published authority). The trial court did not, therefore, clearly err in failing to award sanctions on that ground.

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[1] For these same reasons, we do not find that the trial court abused its discretion in failing, on reconsideration, to award costs and attorney fees incurred by defendant subsequent to disclosure of the subrogation analysis. See *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); see also MCR 2.119(F)(3).

In light of the documentation showing that defendant received custody of at least some of the materials, as well as the engineer's notes stating that crucial pieces of evidence were missing, and statements allegedly made by defendant as to its possession of the hose, plaintiff had a reasonable basis for believing defendant was responsible for its loss. Thus, the trial court did not clearly err in refusing to impose sanctions.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra