STATE OF MICHIGAN

COURT OF APPEALS

L. TODD REED, DEBORAH V. REED, and the L. TODD REED LIVING TRUST/DEBOARAH V. REED LIVING TRUST,

Plaintiffs-Appellees,

v

WILLIAM SHURLOW, SHURLOW CUSTOM HOMES, INC., and SHURLOW DEVELOPMENT CORP. INC.,

Defendants-Appellants,

and

LINCOLN WOOD PRODUCTS, INC., and ARTEC BUILDING PRODUCTS,

Defendants.

UNPUBLISHED
December 15, 2009

No. 288201
Mason Circuit Court
LC No. 07-000470-CK

DAVID A SEAMAN, and SHERI A. SEAMAN,

Plaintiffs-Appellees,

v

WILLIAM SHURLOW, SHURLOW CUSTOM HOMES, INC., and SHURLOW DEVELOPMENT CORP. INC.,

Defendants-Appellants,

and

LINCOLN WOOD PRODUCTS, INC., and ARTEC BUILDING PRODUCTS,

Defendants.

No. 288202
Mason Circuit Court
LC No. 07-000477-CK

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendants William Shurlow and Shurlow Development Corporation, Inc. appeal as of right the trial court order denying their motion for sanctions pursuant to MCR 2.114(F) and MCR 2.625, on the basis that the complaints filed by the plaintiffs in this consolidated appeal were frivolous. We affirm.

The underlying action arises from a dispute over liability for damages resulting from defective windows in condominiums built by defendants and now owned by plaintiffs. Plaintiffs Todd and Deborah Reed purchased their condominium on August 4, 2000, from the original owners, who themselves who took occupancy of the unit no later than 1994. Plaintiffs David and Sheri Seaman purchased their condominium on August 22, 2001, also from the original owners, who had also taken occupancy of the unit no later than 1994. Defendant Shurlow Development Company, formerly known as Shurlow Homes, of which defendant William Shurlow was the president (collectively referred to hereafter as "the Shurlow defendants"),[1] constructed the condominiums in 1993 and 1994, using windows manufactured by defendant Lincoln Wood Products, Inc. and supplied by defendant Artec Building Products.[2]

After discovering extensive water damage and mold in the walls of their condominiums while replacing the defective windows in 2006, plaintiffs filed suit asserting claims sounding in breach of contract, breach of implied warranty of merchantability, negligence, and violation of the Michigan Consumer Protection Act (MCPA). They also asserted a claim against William Shurlow individually for a violation of a builder's licensing statute. Plaintiffs premised their complaints on their belief that the Shurlow defendants were involved in efforts, by Artec and Lincoln, to correct defects in the windows in 1999 and 2003. Ultimately, however, plaintiffs were unable to offer evidence to substantiate this belief, and the trial court granted the Shurlow defendants' motion for summary disposition, concluding that MCL 600.5839(1), barred plaintiffs' claims. The trial court denied the Shurlow defendants' motion for sanctions, however, concluding that plaintiffs' claims, although ultimately lacking in merit, were not frivolous at the time they were filed. It is this decision from which the Shurlow defendants now appeal.

This Court reviews a trial court's decision whether an action is frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654; 661 NW2d 245 (2002). "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." *Id.* at 661-662. Generally, "[a] claim is frivolous when (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the

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[1] Defendant Shurlow Custom Homes, Inc. was voluntarily dismissed in the trial court because it performed no work of any kind relating to plaintiffs' condominiums.

[2] Defendants Lincoln Wood Products, Inc. and Artec Building Products are not parties to this appeal.

party's position was devoid of arguable legal merit." *Jericho Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35-36; 666 NW2d 310 (2003), citing *Kitchen, supra*. As this Court explained in *Attorney Gen v Harkins*, 257 Mich App 564, 575-576; 669 NW2d 296 (2003):

> Every document of a party represented by an attorney must be signed by at least one attorney of record, which constitutes a certification that: (1) the signor has read the document; (2) to the best of the signor's knowledge, information and belief 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. MCR 2.114(D). If a pleading is signed in violation of MCR 2.114(D), the party or attorney, or both, must be sanctioned. MCR 2.114(E). In addition, a party pleading a frivolous claim is subject to costs under MCR 2.625(A)(2). MCR 2.114(F). The frivolous claims provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). The reasonableness of the inquiry is determined by an objective standard. *Id.* The focus is on the efforts taken to investigate a claim before filing suit, and a determination of reasonable inquiry depends on the facts and circumstances of the case. *Id.*

The determination whether a claim is frivolous must be based on the circumstances at the time the claim was asserted. *Jericho Constr*, *supra* at 36; *In re Costs and Attorney Fees*, 250 Mich App 89, 64; 645 NW2d 697 (2002); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996). That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry. *Jericho Constr*, *supra* at 36. And, "'[n]ot every error in legal analysis constitutes a frivolous position.'" *Id.*, quoting *Kitchen*, *supra* at 663; *Robert A Hansen Family Trust v FGH Industries, LLC*, 279 Mich App 468, 486; 760 NW2d 526 (2008). Thus, stated simply, a claim premised on a reasonable belief that there is an arguable case is not frivolous. *Id.*

The Shurlow defendants first argue that plaintiffs' complaints were frivolous in their entirety, without regard to the specific claims alleged, because they were filed beyond the expiration of the applicable limitations period and are barred by the applicable statute of repose set forth in MCL 600.5839(1). The trial court effectively concluded that, at the time they filed their complaints, plaintiffs had a reasonable belief that the Shurlow defendants were involved in the efforts to remediate the defects in the windows in 1999 and 2003, which, if true, would have rendered the claims, at least arguably, timely filed. On the record before us, we cannot conclude that the trial court clearly erred in making such a finding.

MCL 600.5839(1) provides:

> No person may maintain *any action* to recover damages *for any injury to property*, real or personal, or for bodily injury or wrongful death, *arising out of the defective and unsafe condition of an improvement to real property, nor any action for* contribution or *indemnity for damages sustained as a result of such*

> *injury*, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or *against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement*, use or acceptance of the improvement, *or 1 year after the defect is discovered or should have been discovered*, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. *However, no such action shall be maintained more than ten years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.* [Emphasis added.]

There is no dispute that the condominium units were constructed and occupied no later than 1994. Thus, in the absence of later work on the windows by the Shurlow defendants, plainly, plaintiffs could not file any action against them arising out of the defective windows after 2004. *Id.* The instant action was filed in 2007. However, plaintiffs asserted below that they reasonably believed that the Shurlow defendants were involved in the efforts to remediate the defective condition of the windows in 1999 and 2003. And, plaintiffs' counsel provided the trial court with the basis for this belief, which included the manner in which plaintiffs' windows were replaced, that windows were replaced in a number of other condominiums constructed by the Shurlow defendants in this development, and plaintiffs' knowledge of other legal action against the Shurlow defendants on the same grounds as asserted here. We find nothing in the record to indicate that plaintiffs' belief that the Shurlow defendants may have been involved in the remediation efforts was unreasonable at the time their complaints were filed. That William Shurlow subsequently averred, after the actions were filed, that he was not involved and that plaintiff could not ultimately establish otherwise, does not invalidate plaintiffs' reasonable belief at the time the action was filed. *Jericho Constr, supra* at 36. Had the Shurlow defendants been involved in the subsequent efforts to correct the defective condition of plaintiffs' windows, plaintiffs' claims were, at least arguably, timely filed under MCL 600.5839(1). Therefore, on this record, plaintiffs' assertion that MCL 600.5839(1) did not bar their claims cannot be said to be "devoid of arguable legal merit."[3] *Kitchen, supra* at 663; *Jericho Constr, supra* at 36. And, there is nothing in the record to indicate that the actions were filed to merely harass, embarrass or injure the Shurlow defendants. The trial court did not clearly err in concluding that the complaints were not frivolous merely because they were not timely filed.

The Shurlow defendants next assert that, even if timely filed, each and every claim asserted against them was so devoid of legal merit so as to be frivolous, warranting sanctions. We disagree. Considering each of plaintiffs' claims in turn, we are not "left with a definite and firm conviction that a mistake has been made" by the trial court in denying the motion for sanctions. *Kitchen, supra* at 661-662.

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[3] We note that this Court has held that an error regarding application of the statute of limitations does not necessitate a finding that an action is frivolous. See, *Siecinski v First State Bank of E Detroit*, 209 Mich App 459, 465-466; 531 NW2d 768 (1995).

Merely because a claim advanced by a litigant is rejected by a trial court, or by this Court, does not establish that the claim was so lacking in legal merit as to support a conclusion that it was frivolous. *Attorney Gen, supra* at 577. Certainly, there is nothing inherently suspect in the filing of a complaint by a homeowner against the builder of the home seeking to recover for damages resulting from the use of defective materials or from defective workmanship in the construction of the home, even where the homeowner is a successor in interest to the original purchaser. And, while certain of plaintiffs' alleged causes of action might be said to have relied on novel application of legal principles, considering plaintiffs' reasonable belief that the Shurlow defendants were involved in attempts to remedy the defective condition of the windows as recently as 2003, we do not find that the claims asserted were frivolous.

More specifically, while plaintiffs were not party to the original contracts for the construction and purchase of their condominiums, they did own the condominiums in 2003, when Artec and Lincoln again attempted to remedy the defective condition of the windows. Even assuming that the 2003 attempt to remediate the defect was gratuitous, and was not undertaken out of any legal duty to plaintiffs, it was required to be undertaken "carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task." *Sponkowski v Ingham Co Road Comm*, 152 Mich App 123, 127; 393 NW2d 579 (1986). Thus, courts have imposed a duty where a defendant voluntarily assumed a function that it was under no legal obligation to assume. *Baker v Arbor Drugs*, 215 Mich App 198, 205; 544 NW2d 727 (1996); *Sponkowski v Ingham Co Rd Comm*, 152 Mich App 123, 127; 393 NW2d 579 (1986); *Rhodes v United Jewish Charities of Detroit*, 184 Mich App 740, 743; 459 NW2d 44 (1990); *Terrell v LBJ Electronics*, 188 Mich App 717, 720; 470 NW2d 98 (1991); *Holland v Liedel*, 197 Mich App 60, 64-65; 494 NW2d 772 (1992). Considering that plaintiffs reasonably believed that the Shurlow defendants were involved in the 2003 attempt to correct the defective condition of the windows at the time they filed their complaints, we cannot conclude that plaintiffs' claims that the Shurlow defendants had a duty to properly remedy the defect was completely devoid of arguable legal merit, so as to be frivolous.

Moreover, on the facts presented here, we find that the efforts by Artec, Lincoln, and – plaintiffs reasonably believed – the Shurlow defendants to remedy the defective condition of the windows in 2003, after plaintiffs purchased their respective condominiums from the original owners, effectively extended the benefits of the contractual obligation of those parties to the original owners to provide windows free from defect. Further, plaintiffs appear to assert, in deposition testimony, that they are, or are akin to, the assignees of the original purchasers' contracts with the Shurlow defendants and, as such, stand in the place of those original purchasers, possessing the same rights and claims, and being subjected to the same defenses. See, *Burkhardt v Bailey*, 260 Mich App 636; 680 NW2d 453 (2004). On the record before us, we do not conclude that plaintiffs' assertions in this regard were so completely devoid of arguable legal merit as to be frivolous.

Further, plaintiffs argue that the Shurlow defendants are liable in negligence because, by providing defective windows or window installation, they created new hazards – mold and water damage – that they had a duty to prevent. In support of this assertion, plaintiffs cite *Fultz v Union-Commerce Assoc*, 470 Mich 460, 464; 683 NW2d 587 (2004), and *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 707-710; 552 NW2d 186 (1995), overruled in part on

other grounds, *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), in which Courts have held that a party can be liable, to third parties, for negligent performance of a contractual obligation, including where the performance results in the creation of a "new hazard." Because the law does provide, in certain circumstances, for third party liability arising from negligent performance of contractual duties, we do not find plaintiffs' negligence claim to be so devoid of arguable legal merit as to warrant the imposition of sanctions. See, *Lakeside Oakland Development, LC v H & J Beef Company*, 249 Mich App 517, 532; 644 NW2d 765 (2002).

Similarly, plaintiffs assert that their claims under the Michigan Uniform Commercial Code, and its implied warranty of merchantability, were not frivolous, because windows are "goods" within the meaning of the statute, in that they are moveable at the time of identification to a contract for sale under MCL 440.2103(1)(k). While the Shurlow defendants advance legal authority suggesting that plaintiffs likely would not have been successful in advancing this assertion, we conclude that plaintiffs' assertion had arguable legal merit, and thus, this claim was not frivolous.

Finally, while there is no authority providing for a private claim against William Shurlow for an alleged violation of the occupational code, plaintiffs' attempt to fashion a cause of action on this basis was firmly rooted in our Supreme Court's pronouncement, in *Lash v Traverse City*, 479 Mich 180, 192-193; 735 NW2d 628 (2007), that a court may infer a private cause of action from a statute if it determines that such an action will further the purpose of the legislation and is needed to assure the effectiveness of the statute. Thus, plaintiffs' attempt to assert a private cause of action against Shurlow under the statute was, at least arguably, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Therefore, it was not frivolous.[4]

As previously noted, merely because a claim is ultimately rejected on factual or legal grounds, does not establish that the claim was frivolous, requiring that sanctions be imposed. *Attorney Gen*, *supra* at 577. We recognize that, absent the statute of limitations issue, plaintiffs faced a number of obstacles to successful assertion of their claims against the Shurlow defendants. However, we find no basis for concluding that plaintiffs' complaints were not premised on a reasonable belief that there was an arguable case against the Shurlow defendants. *Hansen Family Trust*, *supra*, at 486. Therefore, the trial court did not clearly err in concluding that the claims were not frivolous. *Kitchen*, *supra* at 661-662; *Jericho Constr*, *supra* at 35-36.

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[4] We agree with the Shurlow defendants that plaintiffs' claims under the MCPA lacked merit. Our Supreme Court has specifically held that licensed homebuilders are exempt from the MCPA, when such exemption is pled as an affirmative defense. *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 206, 208; 732 NW2d 514 (2007); MCL 445.904. However, even were we to conclude that this particular claim was frivolous, the Shurlow defendants have not established that any additional defense costs were incurred based on this claim alone, and there is no basis in the record to infer that any costs incurred were solely attributable to the presence of this claim. Therefore, considering that each of the other claims asserted were not frivolous, the trial court did not err in denying the motion for sanctions in its entirety.

We affirm.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray