STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN TALLEY,

Plaintiff/Counterdefendant-Appellant,

v

PAMELA HERZOG,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee,

and

JAMES D. LESLIE,

Third-Party Defendant.

UNPUBLISHED
April 16, 2019

No. 342813
Washtenaw Circuit Court
LC No. 16-000071-CH

Before: SWARTZLE, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

Plaintiff, Kathleen Talley, appeals an order dismissing her adverse possession claim against defendant Pamela Herzog. Following bench trial, the trial court granted a directed verdict in favor of Herzog, concluding that Talley had no cause of action for adverse possession. However, the trial court concluded that Talley was entitled to a "reasonable prescriptive easement," and it ordered each party to submit an easement proposal. The trial court chose Herzog's proposal, and the parties entered into a "Neighbor Access Agreement." Herzog then filed a motion for attorney fees and costs, and the trial court granted Herzog's request, concluding that she was the prevailing party and Talley's claim was frivolous. On appeal, Talley challenges the trial court's award of attorney fees and costs, and she argues that the parties are bound by an earlier settlement agreement. We affirm in part and reverse in part.

I. BACKGROUND

This case involves an eight-foot-wide strip of Herzog's property that is immediately adjacent to the southern line of Talley's property. Talley purchased her property in 1998, and she used the strip of land at issue to grow plants, access planter boxes that she built on the land, and to access the basement entrance to her home. In 2015, Herzog purchased the neighboring property, which included the land at issue, and a year later, Talley filed her complaint alleging adverse possession. Talley argued that she had been in possession of the property for more than 15 years and that her possession was actual, open, hostile, continuous, exclusive, and uninterrupted since her purchase of the property. Herzog, however, argued that Talley was friendly with the previous owner, who gave her permission to use the property. Therefore, Talley could not prove the element of hostility.

Eventually, the parties filed cross-motions for summary disposition, and the trial court held a hearing. However, the trial court did not decide the motions because the parties were close to reaching a settlement. The parties thereafter reached a tentative settlement agreement, but Herzog never signed the agreement. Talley soon moved to amend her complaint, claiming Herzog breached the tentative agreement by erecting a fence. Talley filed a motion to compel settlement, and Herzog opposed the motion, claiming the settlement was not enforceable because it was not signed by the parties. The trial court held a hearing on the motion to compel settlement, but instead of deciding the motion, it deferred the issue for trial scheduled the following day. On October 6, 2017, the trial court held a bench trial. At the close of Talley's proofs, Herzog moved for a directed verdict. Herzog argued that Talley had failed to establish hostility because the testimony showed that she used the strip of land at issue with the prior owner's permission. Talley responded that Herzog had mischaracterized the meaning of "hostility" under Michigan law, claiming that she had acted without permission asked or given, and therefore, the use was hostile. Talley requested fee title to the land in question, or alternatively, a prescriptive easement. The trial court concluded that the evidence presented had failed to establish hostility.

The trial court found that, at best, the former owner was "a decent human being who got along with his other neighbors" and that he "acquiesced in permission . . . as any good neighbor probably would" to Talley's use of the land. The trial court granted Herzog's motion for a directed verdict, but it also concluded that it would grant Talley a "reasonable prescriptive easement" for use of the property. According to the trial court, it was going to use the "old principle of baseball arbitration." Instead of the trial court deciding the terms of the easement, each party would provide a proposal, and the court would pick which proposal was most like the easement that the court had in mind. On October 17, 2017, the trial court found that Herzog's proposal was more reasonable than Talley's and instructed Talley to enter into Herzog's "Neighbor Access Agreement" within 30 days. According to the agreement, Talley had to provide notice to Herzog whenever she utilized the back part of Herzog's property to move large items, such as kayaks and ladders, from Talley's basement. Additionally, Talley's rights under the agreement would cease once she no longer lived at her residence.

Thereafter, Herzog filed a motion for entry of judgment and attorney fees, arguing Talley's adverse possession claim was frivolous. In response, Talley sought costs as a prevailing party because she had received an easement through the litigation. The trial court found that

when the parties submitted their easement proposals, Herzog had compromised but Talley had not. The trial court told Herzog's counsel that "your[proposal] clearly showed some measure of compromise and some measure of giving up your hard legal position." Turning to Talley's counsel, the trial court said: "Yours did not. You just stuck like a tank going that direction." Therefore, the trial court concluded that Herzog had prevailed and was entitled to attorney fees and costs. Talley's counsel then asked the trial court what exactly was the basis for the attorney fees, and the trial court explained, "I think the position that you took with all that guidance at the end was frivolous." After Herzog submitted a verified bill of costs, the trial court awarded her $26,941.68. Talley does not appeal the merits of her adverse possession claim. Instead, she appeals only the award of fees and costs to Herzog and argues that the tentative settlement agreement between the parties was binding and should have been enforced.

II. STANDARD OF REVIEW

We review a trial court's finding that an action is frivolous for clear error. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35; 666 NW2d 310 (2003). This Court reviews a trial court's decision to award fees and costs for an abuse of discretion. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 642; 607 NW2d 100 (1999).

We review de novo the existence and interpretation of a settlement agreement because such agreements are "governed by the legal principles applicable to the construction and interpretation of contracts." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Additionally, we review de novo the construction and application of court rules and whether MCR 2.507 bars enforcement of a settlement agreement. *Id*. at 456.

III. ANALYSIS

A. ATTORNEY FEES AND COSTS

Talley first argues that the trial court erred when it found that her claim was frivolous and that Herzog was entitled to attorney fees and costs. We agree.

Pursuant to MCR 2.625(A)(2) and MCL 600.2591, if a trial court finds that a civil action or defense to a civil action is frivolous, the trial court may award costs and fees to the prevailing party. MCL 600.2591(3)(a) and (b); *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 245; 635 NW2d 379 (2001). Thus, a trial court must find that the action was frivolous and that the opposing party prevailed. "[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 to believe the underlying facts were true; or (3) the party's position was devoid of arguable legal merit." *Jerico*, 257 Mich App at 35-36. And "[i]n order to be considered the prevailing party, [a party is] required to show at the very least that its position was improved by the litigation." *Citizens Ins*, 247 Mich App at 245. When a claim is not asserted in a party's pleadings but is tried by express or implied consent of the parties, that claim may be treated as though it was raised by the pleadings. MCR 2.118(C)(1).

The trial court did not conclude that Talley's claim was meant to harass, embarrass, or injure Herzog, and there is no dispute that Talley had a reasonable factual basis for her claim. MCL 600.2591(3)(a)(i) and (ii). Instead, the question turns on whether Talley's claim was

devoid of arguable legal merit. MCL 600.2591(3)(a)(iii). Importantly, "[t]he determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted[,]" and "[t]hat the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry." *Jerico*, 257 Mich App at 36. In this case, the trial court granted a directed verdict based on the element of hostility, concluding that the prior owner gave Talley implied permission to use the property. The parties argued extensively on the definition of "hostility" and whether the facts at issue constituted hostile use of the property. This in no way shows a claim devoid of legal merit, and the trial court clearly erred when it concluded that the adverse possession claim was frivolous. Therefore, the trial court abused its discretion to the extent that it granted attorney fees and costs on this claim.

With that said, it appears the trial court also awarded costs and fees based on its conclusion that Talley's easement proposal was frivolous. We have long held that "it is necessary to evaluate the claims or defenses at issue at the time they were made." *In re Costs and Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). The trial court stated at the hearing that Talley's proposal failed to show "a measure of compromise" and she "stuck like a tank." When Talley's counsel asked the trial court to clarify the basis for its awarding attorney fees, the court indicated it was because Talley's position at the end was frivolous. Even if Talley's proposed relief was unrealistic, this does not change the fact that the request for an easement at trial—well before the apparently frivolous easement proposal was presented to the trial court—was far from frivolous. In fact, the trial court concluded that Talley was entitled to relief. Thus, the claim for an easement was not frivolous at the time it was made. *Id*. Moreover, this Court is left to speculate as to the contents of Talley's easement proposal because only Herzog's Neighbor Access Agreement is in the record.[1] Regardless, the content of the proposal has no bearing on the merit of the easement claim itself. And even if somehow the trial court had the authority to grant fees and costs for the entire litigation based solely on Talley's frivolous request for a certain type of relief—despite its conclusion that she was entitled to *some* relief—Herzog was not entitled to fees as the "prevailing party."

Herzog was not a "prevailing party" because she did not improve her position by way of the litigation. When the litigation commenced, Herzog owned the property without any encumbrances, and following bench trial, the trial court granted Talley an easement so that she could access her basement. As Talley argues in her brief on appeal, "[t]he simple truth is that when the suit began, [Talley] had no legal right to anything." When the litigation concluded, Talley had obtained an easement to use the land in question for limited purposes. Because

[1] At the conclusion of the bench trial, the trial court informed the parties that their proposals would be submitted under seal and that they did not have to show the other side. Herzog attached the Neighbor Access Agreement to her motion for entry of judgment, but Talley's proposal was never made available in the record.

Herzog's property was then encumbered, she cannot be the prevailing party, and the trial court abused its discretion when it awarded her costs and attorney fees.[2]

B. SETTLEMENT AGREEMENT

Finally, Talley argues that the trial court erred when it did not enforce the tentative settlement agreement that the parties reached. We disagree.

MCR 2.507(G) states that "[a]n agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." Further, an agreement to settle must comply with MCR 2.507(G) to be enforceable. *Mich Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 483; 637 NW2d 232 (2001). "[T]his Court will not enforce a settlement agreement that fulfills the requirements of contract principles if that agreement does not also satisfy the requirements of the court rule." *Mich Mut Ins*, 247 Mich App at 484-485. When a plaintiff seeks to enforce a settlement agreement that was not made in open court, "to be enforceable, there must be a writing subscribed to by defendant or its attorney." *Id*. at 486; see also *Kloian*, 273 Mich App at 456.

The settlement agreement was never placed on the record. Therefore, to be enforceable, the agreement must have been reduced to writing and signed by Herzog or her counsel. See *Kloian*, 273 Mich App at 456; *Mich Mut Ins*, 247 Mich App at 486. The settlement agreement was reduced to writing, but the parties agree that it was never signed by Herzog or counsel for either party. Therefore, the settlement agreement is not binding or enforceable against Herzog. See MCR 2.507(G); *Kloian*, 273 Mich App at 456; *Mich Mut Ins*, 247 Mich App at 486.

Affirmed in part and reversed in part.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron

[2] In her appellate brief, Talley asserts, in a single sentence, that she should then be entitled to costs as the prevailing party. This issue is not properly raised in the statement of the questions presented, *City of Fraser v Almeda Univ*, 314 Mich App 79, 99 n 4; 886 NW2d 730 (2016), and the merits of the claim is not properly briefed, *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Therefore, we decline to address the issue.