

STATE OF MICHIGAN
COURT OF APPEALS

JOHN BARBER,

UNPUBLISHED

Plaintiff-Appellant,

and

DENNIS BARBER, d/b/a BARBER FARMS, and
HAROLD BARBER,

Plaintiffs,

v

No. 179974

Huron Circuit Court
LC No. 93-8404-NM

WILLIAM J. DRILLOCK and LAW OFFICES OF
WILLIAM J. DRILLOCK,

Defendants-Appellees.

Before: Reilly, P.J., and White and P.D. Schaefer,* JJ.

WHITE, J. (concurring in part, dissenting in part)

While I conclude that the better course would have been to grant the motion to amend and address the merits of the fraud claim through a ruling on a motion for summary disposition, if brought by defendants after amendment, I conclude that based on the posture of the case and the failure of plaintiff to present the trial court with support for his fraud claim, the court's grant of the motion, apparently based on its conclusion that amendment would be futile, should not be reversed.

I respectfully dissent, however, from the majority's conclusion that defendants were entitled to sanctions and attorney fees under MCR 2.114(E). I would remand on this issue.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff's complaint in the underlying suit alleged:

12. That Plaintiffs . . . expanded from four to five milkers in 1983 **and to six milkers in 1984**; that DeLaval through its agents and employees represented that said system was designed in 1981 to operate with three milkers on each side for a total of six milkers using a two-inch stainless steel milkline.”

* * *

15. That after the expansion to six milkers in **1984**, Plaintiffs John Barber and Dennis Barber experienced minor problems with their herd, but had no reason to believe that the milking system was not properly designed and installed; that in the spring of 1986, Plaintiffs . . . began experiencing high somatic cell counts and severe mastitis problems in their dairy herd.” [Emphasis added.]

Plaintiff's response to defendant's motion for summary disposition in the instant case stated: “In 1981 the brothers added new stalls and expanded the milking system and **again expanded the system in 1984.**” Emphasis added. One of the plaintiffs¹ testified at deposition that paragraph twelve of the underlying complaint, quoted above, was factually correct.

Thus, I conclude that plaintiff should not have been sanctioned for pleading in the instant case that defendant was consulted “within four years from the date of the last installation,” unless it is determined that there is no factual basis for the allegation that the system was expanded in 1984. It appears that the circuit court's finding that the allegation (paragraph six) “is clearly an untrue statement. . . . The plaintiffs entered the office of the defendant five and a half years after the last installation, everyone agrees with that . . . even the plaintiff can't--isn't asserting otherwise,” was based on the belief that the last installation was 1981. The basis for this conclusion is unclear.

I would remand with instructions to address the question whether there was a reasonable basis to assert that there was an additional installation in 1984. If the court concludes that there was, the sanctions should be vacated; if the court concludes that there was no basis for the allegation that there was an additional installation in 1984, the sanctions should not be vacated.

/s/ Helene N. White

¹ Exhibit six of defendant's motion for summary disposition contains excerpts of the deposition testimony of either Dennis or John Barber. Defendant's brief refers to exhibits six and seven jointly, as the depositions of Dennis and John Barber.