STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM TUCKER and MARGARET TUCKER,

Plaintiffs-Appellants,

v

FRENCHTOWN CHARTER TOWNSHIP,

Defendant-Appellee,

v

ZOLTON BAN and ESTHER BAN,

Defendants.

UNPUBLISHED
May 14, 1996

No. 177514
LC No. 93-1176

Before: Taylor, P.J. and Fitzgerald and P.D. Houk*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition of their complaint against defendant township pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief may be granted). Plaintiffs also challenge the court's subsequent denial of their motion to file an amended complaint and an order granting sanctions to defendant township. We affirm in part and reverse in part.

Zolton and Esther Ban constructed a modular home on property next to plaintiffs. The plaintiffs filed a lawsuit against the Bans and Frenchtown Charter Township, alleging that the placement of the Bans' home violated the township's zoning ordinance and contributed to excessive water runoff from the Bans' property onto plaintiffs' property. Plaintiffs' sole count against the township was entitled

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

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"enforcement of ordinance and nuisance" and alleged that the township "should be required to enforce its ordinance."

The trial court granted summary disposition of plaintiffs' claim against the township pursuant to MCR 2.116 (C)(8) on the basis of *Randall v Delta Twp*, 121 Mich App 26; 328 NW2d 562 (1980) (enforcement of an ordinance is discretionary such that a plaintiff may not compel enforcement). We review this ruling de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). Plaintiffs argue that *Randall* is distinguishable. We disagree. The trial court correctly held that plaintiffs had failed to state a claim upon which relief could be granted where they sought to make the township enforce a zoning ordinance. *Randall, supra; Scheurman v Dep't of Transportation*, 434 Mich 619, 635; 456 NW2d 66 (1990).

The trial court subsequently denied, on the basis of futility, plaintiffs' motion to file an amended complaint alleging the township was liable for a trespass nuisance. We review this ruling for an abuse of discretion. *Noyd v Claxton*, 186 Mich App 333, 340; 463 NW2d 268 (1990). Plaintiffs claim the court should have allowed them to allege that the township's actions caused a trespass nuisance. We find no abuse of discretion. The proposed amendment would have been futile as the alleged nuisance (excessive water runoff) was not set in motion by the township and the Bans' property was not controlled by the township. *Continental Paper & Supply Co v City of Detroit*, __ Mich __ (Docket No. 100464, issued 4/4/96). Plaintiffs' reliance upon *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), is misplaced. In *Hadfield*, the plaintiffs' crops had been damaged because of overflow drains that were placed in the ground by the drain commissioner. *Continental, supra* slip op at 7, n 11. The alleged trespass of water in the case at bar was attributable to the Bans and not the township.

The trial court also entered an order awarding defendant sanctions of $6,151.30 against plaintiffs pursuant to MCR 2.114(E). We review such an award for clear error. *Contel Systems v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). We first note that the township moved for summary disposition pursuant to MCR 2.116(C) (8) and (10). Although the court granted the motion pursuant to subrule (C)(8), it specifically stated in its opinion that if the (C)(8) motion had been unsuccessful it would "not be inclined to grant a" (C)(10) motion. We also note that defendants did not file the motion requesting sanctions until plaintiffs filed their motion seeking to file an amended complaint. We further note that plaintiffs relied upon and cited to the trial court a recent court ruling arising out of the same circuit involving a different township that supported their position. While this ruling was subsequently reversed by this Court, we cannot conclude that plaintiffs' position was not warranted by existing law at the time it was filed or at least a good-faith argument for the extension, modification, or reversal of existing law. MCR 2.114 (D)(2). We therefore find that the court clearly erred in awarding sanctions against plaintiffs.

Affirmed in part and reversed in part.

/s/ Clifford W. Taylor
/s/ E. Thomas Fitzgerald
/s/ Peter D. Houk