

STATE OF MICHIGAN
COURT OF APPEALS

MONA LIVINGSTON, Trustee of the MONA
LIVINGSTON TRUST,

UNPUBLISHED
January 13, 2009

Plaintiff-Appellee,

v

No. 285833
Oceana Circuit Court
LC No. 02-003390-CH

NORMAN MILLER,

Defendant-Appellant.

Before: Zahra, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court’s order finding defendant’s motions under MCR 2.612 and MCR 2.119 frivolous pursuant to MCL 600.2591(3)(a)(iii) and awarding attorney fees and court costs to plaintiff. We affirm. This case has been decided without oral argument in accordance with MCR 7.214(E).

In November 2002, plaintiff filed a complaint alleging that defendant had constructed a detached garage on an easement benefiting plaintiff’s property. The trial court entered a consent judgment on October 6, 2003, terminating plaintiff’s easement to the extent that the garage encroached it, granting plaintiff a construction easement on defendant’s property, and awarding plaintiff damages and attorney fees. On June 28, 2004, the trial court entered an order specifying the construction easement’s scope: “Plaintiff’s [sic] are granted a 20-foot wide, private, exclusive easement for ingress and egress to be used only by big trucks (larger than a standard one-half ton pickup truck) and only for (a) delivery of construction materials and (b) delivery and picking up of construction equipment. . . .” The trial court subsequently reopened the matter only for the purpose of determining the location of the construction easement.

On February 15, 2007, defendant, representing himself, filed a motion for relief from judgment under various provisions of MCR 2.612, as well as a motion to enforce under MCR 2.119. In those motions, defendant alleged that a proposed road across the construction easement would result in trespass on his property, and that the damages award unjustly enriched plaintiff because it exceeded plaintiff’s actual costs to obtain a new permanent easement and construct a new driveway. Defendant also alleged that plaintiff misstated and misrepresented both the scope of the construction easement and the amount of damages, and claimed that any proposed road across the construction easement would violate the sand dune management and protection act, MCL 324.35301 *et seq.*, by damaging dunes located on plaintiff’s and defendant’s

respective parcels. In his motion under MCR 2.119, defendant also argued that the language of the construction easement was ambiguous, and that it was not meant to create a road or other passageway but, instead, it was only intended to allow materials and vehicles to be hoisted over defendant's property.

Following a bench trial, the trial court dismissed defendant's motions. Plaintiff moved for fees and costs pursuant to MCL 600.2591. The trial court subsequently found that defendant's motions were frivolous and awarded those fees and costs to plaintiff. Defendant challenges that award on appeal.

We review a trial court's finding that an action was frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A finding is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake was made. *Id.* at 661-662.

A party presenting a frivolous claim is subject to costs under MCR 2.625(A)(2). MCR 2.114(F); *Attorney Gen v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). MCR 2.625(A)(2) provides that costs are awarded as provided by MCL 600.2591. On motion of any party, MCL 600.2591(1) requires a nonprevailing party that raised a frivolous claim or defense in a civil case to pay costs and fees to the prevailing party. Under MCL 600.2591(3)(a), a claim or defense is frivolous when at least one of the following conditions is met:

- (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the underlying facts were true.
- (iii) The party's position was devoid of arguable legal merit.

The determination whether a claim or defense was frivolous depends upon the particular facts and circumstances of each case at the time the claim was asserted. *Robert A Hansen Family Trust v FGH Industries, LLC*, 279 Mich App 468, 486; ___ NW2d ___ (2008).

The trial court did not clearly err when it found that defendant's contentions of mistake, fraud, and misrepresentation under MCR 2.612(C)(1)(a), (b), and (c) were frivolous. MCR 2.612(C)(2) requires that these motions be filed within one year after the judgment, order, or proceeding was entered or taken. Defendant filed his motion long after that time limit passed. Additionally, defendant failed to show that he had any reasonable basis to believe that any mistake occurred or that plaintiff had committed fraud or made a misrepresentation. The testimony of defendant's lawyer indicated that defendant was accurately informed of the scope of the construction easement, and defendant did not establish that there were any communications between him and plaintiff (or plaintiff's counsel) regarding the construction easement and through which plaintiff could have defrauded or otherwise misled defendant.

The trial court also did not clearly err when it found that defendant's equitable claims under MCR 2.612(C)(1)(e) and (f) lacked merit. Defendant's unjust enrichment claim could not have succeeded because the consent judgment neither limited the damages award to plaintiff's

actual costs nor placed conditions on how plaintiff might spend that award. Additionally, defendant's argument that he intended to agree to such limitations and that, consequently, these limitations should apply to the awards lacks legal merit because a party's subjective views of the settlement do not control the terms of the agreement placed on the record. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).

Defendant additionally failed to show that any other legally cognizable inequity existed at the time he filed his motions. Defendant's allegation that no necessity existed to justify the construction easement lacks arguable legal merit because the construction easement was not created by necessity, but rather for a specific use. Defendant also did not invoke any legal doctrine or other support for his additional equitable contentions, which amount to no more than mere protestations concerning the normal collateral consequences of having an easement created on one's property and which may, under certain circumstances, lead to a decrease in land value or some compromise of his quiet enjoyment of the burdened property.

In addition, defendant groundlessly invoked the sand dune management and protection act, MCL 324.35301 *et seq.*, of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.* Plaintiff had not taken action to obtain a variance under MCL 324.35316 to construct a road across the construction easement, and even if she had taken a course of action that implicated the act, it is doubtful that defendant could have established his standing to challenge her in court under its provisions.

Next, the trial court did not clearly err when it found that defendant's MCR 2.119 motion was frivolous. Defendant's contention that the construction easement is ambiguous, yet was intended only to allow construction equipment and material to be hoisted over defendant's property line, lacks arguable legal merit.

"Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). "[C]onsidering extrinsic evidence in the absence of ambiguous language is 'clearly inconsistent with the well-established principles of legal interpretation . . . and is thus incorrect.'" *Blackhawk Development Corp v Village of Dexter*, 473 Mich 33, 49; 700 NW2d 364 (2005), quoting *Little, supra* at 700 n 2.

We can only conclude that the construction easement reflects the intention that construction equipment and materials may be hoisted over defendant's property line by considering defendant's testimony, which constitutes extrinsic evidence. But defendant failed to show ambiguity, so consideration of his extrinsic testimony is therefore inappropriate. Specifically, the phrase "ingress and egress to be used only by big trucks" does not create an ambiguity. Because trucks customarily get from place to place by driving, the lack of any language limiting how trucks may traverse the easement indicates that driving on the easement was envisioned and permitted.

Finally, defendant contends that the trial court was required to determine the frivolousness of his motions upon their filing, and that the court erred by waiting until the end of trial to make such a determination. "The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted." *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). We disagree. Defendant misconstrues the

applicable rule. As set forth in *Hansen Family Trust, supra* at 486, the rule is that a court determining the frivolousness of a party's claims must do so on the basis of the circumstances as they existed when the party brought those claims. *Hansen Family Trust* does not stand for the proposition that the trial court must determine whether a party's claims are frivolous at the moment they are first presented.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood