

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT DEAN SCARBROUGH and
CATHERINE SCARBROUGH,

UNPUBLISHED
April 18, 2013

Plaintiffs-Appellees,

v

No. 310838
Wexford Circuit Court
LC No. 2011-023249-CH

BERTHA FAGERMAN and ANITA LOUISE
FAGERMAN,

Defendants-Appellants.

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendants appeal as of right the trial court order awarding them partial attorney fees and costs. We affirm.

I. FACTUAL BACKGROUND

Plaintiffs filed a complaint for adverse possession regarding a parcel of land between their property and defendants' property.¹ Plaintiffs claimed that beginning with their acquisition of the property, they had used the entirety of the property, "including the Disputed Parcel, and . . . actively farmed the property every year since 1994, posted 'No Trespassing' signs, informed neighbors" and others to stay off of the property, and "hunted deer and turkey out of a hunting blind located in the pine trees on the northeast side of the property." Plaintiffs concluded that they acquired ownership of the disputed parcel.

On October 19, 2011, plaintiff Robert Scarbrough was deposed and provided further details regarding his use of the disputed parcel. He admitted that he only installed "No Trespassing" signs during the first three or four years he owned the property. He also admitted that he farmed only a fraction of the disputed parcel. Defendants responded by filing a motion for summary disposition pursuant to MCR 2.116(C)(10), contending that there was no genuine

¹ The parties stipulated to adding Catherine Scarbrough after the initial filing of the complaint, and plaintiffs subsequently filed an amended complaint.

issue of material fact regarding the adverse possession claim. Plaintiffs responded in kind and on December 8, 2011, they filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and (I)(1). The trial court ultimately agreed with defendants, and granted their motion for summary disposition and dismissed the complaint.

Thereafter, defendants moved for attorney fees and costs pursuant to MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591, asserting that plaintiffs' claim was frivolous. Alternatively, they contended that sanctions were appropriate pursuant to MCR 2.118(A)(3) and MCR 2.313(C), based on the motion to add Catherine Scarbrough as a plaintiff and fees incurred due to plaintiffs' failure to admit material facts. The trial court denied defendants' motion for fees pursuant to MCR 2.118(A)(3) and MCR 2.313(C). However, the trial court granted defendants' motion, in part, based on MCR 2.625(A)(2) and MCL 600.2591, finding that plaintiff Robert Scarbrough behaved frivolously in filing his motion for summary disposition. Thus, the trial court found that Robert and his law firm were jointly and individually liable for costs and attorney fees incurred after December 6, 2011,² amounting to \$17,538.13 (fees and costs) and \$896.93 (costs taxable under MCR 2.625(A)). Defendants now appeal.

II. FEES AND COSTS

A. Standard of Review

We review a trial court's finding that an action is frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 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. We review the amount of sanctions imposed by a trial court for an abuse of discretion. *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 410; 700 NW2d 432 (2005). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). We "review de novo the interpretation of court rules and statutes." *Vyletel-Rivard v Rivard*, 286 Mich App 13, 20; 777 NW2d 722 (2009).

B. Complaint

Defendants first contend that the trial court erred in declining to award fees from the time the complaint was filed.³ "Awards of costs and attorney fees are recoverable only where

² While plaintiffs' motion for summary disposition was filed on December 8, 2011, it was dated December 6, 2011.

³ Plaintiffs filed a cross-appeal and argued that because the trial court found the complaint was not frivolous, the trial court erred in granting sanctions at all because frivolity is determined at the commencement of the action. However, this Court granted defendants' motion to dismiss the cross-appeal because the judgment had been fully and voluntarily satisfied. "The general rule states that a satisfaction of judgment is the end of proceedings and bars any further effort to alter or amend the final judgment." *Becker v Halliday*, 218 Mich App 576, 578; 554 NW2d 67 (1996); see also *Industrial Lease-Back Corp v Romulus Twp*, 23 Mich App 449, 452; 178 NW2d

specifically authorized by a statute, a court rule, or a recognized exception.” *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010) (quotation marks and citation omitted). “The purpose of imposing sanctions for asserting frivolous claims is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose.” *BJ’s & Sons Constr Co, Inc*, 266 Mich App at 405 (quotation marks and citation omitted).

In the instant case, the trial court found that fees were justified pursuant to MCR 2.625(A)(2), but only for the time period after plaintiffs filed their motion for summary disposition. MCR 2.625(A)(2) states that “if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.” MCL 600.2591, in turn, states:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) “Frivolous” means that at least 1 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 facts underlying that party’s legal position were in fact true.

(iii) The party’s legal position was devoid of arguable legal merit.

(b) “Prevailing party” means a party who wins on the entire record.

Defendants contend that fees should have been assessed starting with the filing of the complaint, and the court erred in focusing on whether plaintiffs’ attorney had investigated the claims instead of whether plaintiffs knew that the facts alleged in the original complaint, in

819 (1970) (footnotes omitted) (“[t]he generally prevailing rule that voluntary payment or performance of a judgment bars appellate challenge is well established in Michigan.”). Thus, we will not address plaintiffs’ arguments regarding whether the trial court erred in finding that this action was frivolous.

particular paragraph 10, were untruthful.⁴ Defendants have failed to establish that the facts found in paragraph 10 were untruthful.

Paragraph 10 of the original complaint reads as follows:

Since 1994, Robert has used the entirety of his property, including the Disputed Parcel, and has actively farmed the property every year since 1994, posted “No Trespassing” signs, informed neighbors and other individuals of the change in ownership and to remain off the property, and hunted deer and turkey out of a hunting blind located in the pine trees on the northeast side of his property.

The court concluded “that the farming actually covers very little of this property,” which “is something, of course, the plaintiff[s] [have] within their own knowledge.” Contrary to defendants’ assertions, plaintiffs did not allege in the complaint that the entire property was farmed or that the disputed parcel was farmed. In fact, the complaint draws a distinction between plaintiffs’ entire property known as “the property,” and the land being claimed by adverse possession, referred to as the “Disputed Parcel.” While plaintiffs alleged in the complaint that they actively farmed the property, they made no mention of how much of that farming, if any, occurred on the disputed parcel.

As for the “no trespassing” signs, the trial court noted that it became evident in the course of the litigation that the signs had only been up for three or four years. This again does not conflict with the complaint, as nothing in the complaint stated that the signs were posted for a continuous statutory period of 15 years. Further, the complaint did not specify which neighbors or how frequently they were informed about “the change in ownership and to remain off the property.” As the court observed, discovery may have “strengthen[ed]” the claim that plaintiffs “informed neighbors and excluded others.” Lastly, the complaint correctly indicated that there was a single hunting blind located in the pine trees.

Thus, defendants’ argument that plaintiffs alleged facts in the complaint that they knew to be untrue is meritless. While the trial court ultimately found this litigation was frivolous pursuant to MCR 2.625(A)(2), it did not find that plaintiffs purposely misled the court or defendants. The court did not err in finding that fees were proper beginning with the motion for summary disposition because it was clear then that the facts were insufficient to support plaintiffs’ claims, but they persisted in arguing that they were entitled to judgment. Accordingly, the trial court’s refusal to award fees from the initiation of the complaint was not in error.⁵

⁴ Defendants refer to paragraph 10 of the first complaint, which is materially the same as paragraph 12 in the amended complaint.

⁵ While defendants also contend that plaintiffs and their attorneys were liable pursuant to MCR 2.114(D)(2) for signing a document that is untrue, the actual issue presented in defendants’ brief pertains to the trial court’s finding of frivolousness. An issue is “not preserved for appeal [when] it was not set forth in [the] statement of the questions involved.” *Lansing v Hartsuff*, 213 Mich

C. Depositions

Defendants insist, however, that the trial court should have at least assessed fees beginning at the deposition stage, when it became clear that the facts did not support plaintiffs' claim. However, such an argument assumes that plaintiffs were required to prematurely halt discovery and withdraw their claim. This would afford plaintiffs no opportunity to evaluate all of the evidence produced during discovery or to evaluate the continuing merits of the claim in light of such evidence. Instead, it is when plaintiffs filed a motion for summary disposition, after having the opportunity to evaluate the evidence produced during discovery, that it became clear that they were pursuing a frivolous action. Moreover, we find that the trial court's ruling does not conflict with *BJ's & Sons Const Co, Inc*, 266 Mich App at 408, where this Court held that sanctions were appropriate from the time plaintiffs knew their claims "were frivolous and yet proceeded anyway." Here, the trial court properly found that plaintiffs knew at the summary disposition stage that their claims were frivolous and proceeded anyway, which justified sanctions.

III. CONCLUSION

Defendants have failed to establish that the trial court erred in granting sanctions starting when plaintiffs filed their motion for summary disposition. We affirm.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan

App 338, 351; 539 NW2d 781 (1995). Furthermore, for the reasons discussed *supra*, the complaint was not an untruthful document.