

STATE OF MICHIGAN
COURT OF APPEALS

BURDA BROTHERS, INC., EFIM BURDA and
ELISSA BURDA, on behalf of themselves and
their then minor children, DOUGLAS BURDA,
MICHAEL BURDA, and JOSHUA BURDA, and
OLEG BURDA, ELLEN BURDA, and PARTY
MAX, INC.,

UNPUBLISHED
January 25, 2005

Plaintiffs-Appellants-Cross-
Appellees,

v

No. 250487
Wayne Circuit Court
LC No. 98-829170-CZ

WAYNE COUNTY PROSECUTOR,

Defendant-Appellee-Cross-
Appellant,

and

WAYNE COUNTY SHERIFF and WAYNE
COUNTY SHERIFF DEPARTMENT,

Intervening Defendants-Appellees-
Cross-Appellants.

Before: Schuette, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Plaintiffs, Burda Brothers, Inc., Efim Burda and Elissa Burda, on behalf of themselves and their then minor children, Douglas Burda, Michael Burda, and Joshua Burda, and Oleg Burda, Ellen Burda, and Party Max, Inc., appeal as of right an order denying their motion for attorney fees. Defendant, Wayne County Prosecutor, and intervening defendants, Wayne County Sheriff, Robert Ficano, and the Wayne County Sheriff Department (collectively “defendants”), filed cross appeals from the same order which also dismissed their motions for sanctions. We affirm.

The parties to this suit have a lengthy, contentious, and litigious past. Several criminal and civil proceedings have been initiated between the parties beginning in the mid-1990’s

regarding plaintiffs' business practice and sale of fireworks. This appeal stems, in part, from claims that arose in a separate criminal action, Wayne County Circuit Court case no. 98-9233, commenced against plaintiffs. In case no. 98-9233, defendant charged two plaintiffs with counterfeiting, MCL 750.248, and racketeering, MCL 750.159i. The prosecution alleged a criminal enterprise that involved fireworks. Defendant, in conjunction with intervening defendants, executed on search warrants at plaintiffs' homes and businesses, seizing property, records, and bank accounts. This seizure gave rise to the current civil action, case no. 98-829170-CZ, a civil action initiated by plaintiffs seeking, in part, the return of their property. Defendant filed a civil in rem forfeiture action, which was assigned case no. 98-890221-CF. Defendant's forfeiture action and plaintiffs' civil action were thereafter combined and heard by Wayne County Circuit Judge Michael Sapala, under case no. 98-829170-CZ.

Plaintiffs argue on appeal that the trial court erred and abused its discretion when it refused jurisdiction to enter an order enforcing its previous ruling awarding attorney fees for defense of the criminal proceeding. We disagree. A trial court's decision on a motion for reconsideration is reviewed for abuse of discretion. *Herald Co v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003). The decision whether to award costs and attorney fees is within the trial court's discretion and will be reviewed for abuse of discretion. *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003).

First, we conclude that the trial court did not refuse to exercise jurisdiction over plaintiffs' claims. In July 2000, plaintiffs motioned the court to grant it attorney fees that they had incurred in the criminal and civil proceedings. In September 2000, the court found "(1) that the predicate racketeering charges were dismissed by defendant prosecutor, (2) for purposes of the applicable statute, there was in effect an in rem civil forfeiture proceeding against plaintiffs wherein the property was sought, and (3) there was in effect a failure to meet the burden of proof as mandated by statute." Consequently, it concluded that defendant was liable for payment of attorney fees "as requested." Because plaintiffs' motion included attorney fees covering both the criminal and civil proceedings, the court's order appears to grant them fees for both proceedings. In September and November 2000, however, the court allowed defendant time to dispute its ruling and the reasonableness of plaintiffs' claimed attorney fees. The court never approved the amount of plaintiffs' fees.

Shortly thereafter, in February 2001, plaintiffs and defendant reached a settlement agreement and caused the court to enter a stipulated order, which required defendant to pay plaintiff \$54,103 in fees, resolved all disputed issues, and dismissed the case. Nineteen months later, in September 2002, plaintiffs filed their second motion for attorney fees in this action, case no. 98-829107-CZ, seeking attorney fees for defense of the criminal matter only, which had been case no. 98-9233. A hearing was held and, after review of the pleadings and the February 2, 2001, stipulated order, the trial court agreed with defendants' interpretation of the stipulated order and concluded that plaintiffs had settled their claims to attorney fees for both the civil and criminal matter in the stipulated order. The trial court stated that plaintiffs may address the criminal attorney fee issue somewhere else, but not in these proceedings. This disposition indicates that the trial court denied plaintiffs' second motion for attorney fees on the merits by interpreting the language of the stipulated order. It found that the matter regarding the amount of fees in this case, which included civil and criminal fees, had been settled. Then, in June 2003, over seven months after the entry of the order denying plaintiffs' second motion for attorney

fees, plaintiffs filed their third motion for attorney fees, again seeking recovery for fees incurred in the criminal proceeding only. At a hearing, the court indicated that plaintiffs' motion amounted to a motion for reconsideration of its previous ruling. The court declined to grant oral argument, pursuant to court rule, and denied plaintiffs' motion.

We cannot agree with plaintiffs that the trial court refused to exercise jurisdiction over their claims. The record supports defendants' position that the court decided the issue on the merits in November 2002, and, in July 2003, it declined to revisit its previous disposition. Plaintiffs' argument in this regard, therefore, has no merit.

Second, we conclude that the trial court properly treated plaintiffs' third motion for attorney fees as a motion for reconsideration and did not abuse its discretion by denying the motion. Plaintiffs' second motion for attorney fees sought fees for their defense of the underlying criminal prosecution. Plaintiffs previously attempted to get relief from Wayne County Circuit Judge John Murphy, in case no. 01-122185, but then returned to Judge Sapala in this action indicating that Judge Murphy had entered an order referring the matter back to Judge Sapala. Plaintiffs argued that the court should have enforced its prior order and awarded the criminal fees. The trial court denied plaintiffs' second motion based on its interpretation of the settlement agreement and concluded that plaintiffs had settled their claim for civil and criminal fees in this proceeding. In their third motion for attorney fees, plaintiffs requested fees for their defense of the underlying criminal prosecution. Plaintiffs indicated that Judge Murphy, in case no. 01-122185, had recently declined jurisdiction to hear this claim. Although plaintiffs recognized that the court had previously ruled against it on the issue of criminal fees, plaintiffs argued that the court should enforce its prior order and award the criminal fees.

Like a party's choice of label for an action, the court is not bound by a party's choice of label for a motion because this would exalt form over substance. See *Burkhardt v Bailey*, 260 Mich App 636, 645; 680 NW2d 453 (2004); *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Plaintiffs' third motion for attorney fees pleaded virtually identical facts and requested the same substantive relief as plaintiffs' second motion for attorney fees, when the court ruled against them. We, therefore, agree with the trial court's treatment of plaintiffs' third motion for attorney fees as a motion for reconsideration of the court's decision on their second motion for attorney fees.

A party moving for reconsideration must show that the court made a palpable error by which the court and parties have been misled and that a different disposition would result from correction of the error. MCR 2.119(F)(3); *Herald Co, supra*, p 82. A motion for reconsideration which merely presents the same issues already ruled on by the court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3); *Herald Co, supra*, pp 82-83 (finding that no abuse of discretion occurred in denying the defendants' motion for reconsideration where the defendants only questioned the court's prior reasoning and prior decisions of law and did not raise any error that had been misleading). An abuse of discretion exists if an unprejudiced person, considering the facts upon which the trial court acted, would say there is no justification or excuse for the ruling or the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Herald Co, supra*, p 92. A motion for reconsideration must be filed no later than fourteen days after entry of an order disposing of the motion. MCR 2.119(F)(1).

Plaintiffs' motion was not timely filed pursuant to MCR 2.119(F)(1). As indicated above, plaintiffs cannot circumvent the court rules by mislabeling their motion. This Court will not allow form to prevail over substance. See *Burkhardt, supra*, p 645. The court denied plaintiffs' second motion for attorney fees on December 6, 2002, and plaintiffs filed the motion at issue on June 5, 2003, well past the fourteen-day period. For this reason, no error occurred and the trial court did not abuse its discretion when it denied plaintiffs' motion.

On cross appeal, defendants argue that plaintiffs' third motion for attorney fees was frivolous and subject to sanctions. We disagree.¹ A trial court's finding that a claim or defense was or was not frivolous will not be reversed on appeal unless clearly erroneous. *Attorney General v Harkins*, 257 Mich App 564, 575; 669 NW2d 296 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

Upon motion of a party, if the court finds that an action of a party was frivolous, the court shall impose costs and attorney fees as sanctions against the non-prevailing party and their attorney. MCL 600.2591; MCR 2.625; *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 531-532; 644 NW2d 765 (2002). A claim or defense 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 that the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3)(a); *Kitchen, supra*, p 662. The determination whether a claim or defense was frivolous must be based upon the circumstances at the time they were asserted. *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

In addition, sanctions may also be imposed pursuant to MCR 2.114(E) for violation of MCR 2.114(C). Every document of a party represented by an attorney must be signed by at least one attorney of record. MCR 2.114(C), *Attorney General, supra*, p 575. The signature constitutes a certification that: (1) the signor has read the document; (2) to the best of the signor's knowledge, information and belief after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. MCR 2.114(D), *Attorney General, supra*, p 576. If a motion is signed in violation of MCR 2.114, the party or attorney or both must be sanctioned. MCR 2.113(A); MCR 2.114(A), (E); *Attorney General, supra*, p 576.

Defendants argue that plaintiffs' motion was frivolous because it was devoid of legal merit. After denying their second motion for attorney fees in November 2002, the trial court stated that plaintiffs are "certainly entitled to address the issue of attorney fees in the criminal case, but not in these proceedings, only in the 1983 action. I'll sign an order to that effect." In

¹ Judge O'Connell would grant the motion for sanctions, concluding that the present appeal is frivolous. He would remand the case to the trial court for imposition of costs and attorney fees.

January 2003, plaintiffs sought recovery for their criminal attorney fees in case no. 01-122185, the § 1983 action pending before Judge Murphy. In May 2003, Judge Murphy denied plaintiffs' motion based on lack of jurisdiction. Although offering no opinion on the validity, content, or intent of the stipulated order, Judge Murphy indicated that the February 2, 2001, stipulated order entered by Judge Sapala, to which intervening defendants were not a party, "cannot confer jurisdiction on this Court to decide the motion for attorney's fees incurred in defense of the criminal case over the objection of counsel for [d]efendants herein." Less than one month later, plaintiffs returned to Judge Sapala and filed the motion at issue.

Plaintiffs were trying to find a forum for their claim to criminal attorney fees. Arguably, their claim to these fees was settled in the February 2, 2001, stipulated order and settlement agreement. However, the paragraph which states that "this disposition of fees does not affect any attorneys' fees award which [p]laintiffs' herein may be entitled in *People v Burda Brothers*, [case no.] 98-009233 in any appropriate civil proceeding," created ambiguity regarding the parties' intent for disposition of the claim to criminal attorney fees. In November 2002, plaintiffs had a civil proceeding pending before Judge Murphy, and Judge Sapala suggested that this may be an appropriate forum for their claims. Plaintiffs followed his suggestion, which was also arguably in line with the parties' settlement agreement. Once denied a forum in front of Judge Murphy, plaintiffs returned to Judge Sapala with basically the same claims that they brought before him in November 2002, except this time, they indicated to the court that jurisdiction had been denied in front of Judge Murphy.

Although the trial court provided no basis for its dismissal of defendants' sanction motions, it does not appear that plaintiffs' actions were intended to harass defendants. They filed their motions based on their legal interpretation of an ambiguous paragraph in a settlement agreement and upon the court's prior order granting them attorney fees for both the civil and criminal proceedings. The fact that the trial court ultimately found that the settlement agreement as a whole favored defendants' interpretation, that the settlement agreement included plaintiffs' claims to civil and criminal attorney fees, does not render plaintiffs' own interpretation and consequent filings devoid of any legal merit. See generally *Lakeside Oakland Dev, supra*, p 532 (holding that the party's claim was not devoid of legal merit where the facts as conveyed by the party would support their claim and the law, in certain circumstances, may provide a remedy). Additionally, defendants do not cite any authority supporting their argument that the trial court should have conducted a hearing and allowed a record to be made regarding sanctions. An appellant may not merely announce his position and leave it to the court to discern and rationalize a basis for his claims, nor may he give issues cursory treatment with little or no citation to supporting authority. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). For these reasons, we find that no clear error occurred when the trial court declined to allow argument and denied defendants' motions for sanctions.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell