STATE OF MICHIGAN

COURT OF APPEALS

FRANCES DANGER,

Plaintiff-Appellant/Cross-Appellee,

v

JAMES A. MENTER and ROXANNA MENTER,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
August 22, 2013

No. 310888
Van Buren Circuit Court
LC No. 10-600505-CE

Before: BORRELLO, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals, and defendants cross-appeal, from a judgment of the circuit court entered in favor of defendants following a bench trial. We affirm.

Plaintiff owns 24-½ acres of property located at 38442 36-½ Street in Waverly Township. Defendants own the adjacent parcel located at 36772 39th Avenue. Plaintiff's property sits at a higher elevation than defendants' property, allowing water to drain naturally across defendants' property into lakes Simmons and Wilcox.

Sometime after 2005, defendants built a berm on their property that served as a roadway for all-terrain vehicles to pass over water draining from plaintiff's property. Defendants also installed a drainage tube that ran through the berm to allow water to continue draining from plaintiff's property. In late 2007, plaintiff's property flooded. The water level rose higher in 2008 and higher again in 2009, resulting in a stagnant pond of water reaching within 12-20 feet of plaintiff's home.

Plaintiff subsequently filed her complaint claiming that defendants' berm and tube (1) backed up water onto plaintiff's property, causing it to flood; (2) prevented plaintiff from possessing the wooded portion of her property; and (3) destroyed the value of her trees. Plaintiff's complaint sought an order to compel defendants to abate the nuisance and trespass and remove the obstruction.

In its opinion entered following a bench trial, the trial court focused entirely on the issue of causation and found that plaintiff failed to provide any proof of causation. Further, the trial court found that the standard for a frivolous lawsuit had not been met because plaintiff sincerely believed that defendants caused the flooding on her property. Accordingly, the trial court

entered a judgment of no cause for action against plaintiff and denied defendants' request for sanctions.

Plaintiff argues on appeal that the trial court erred in concluding that expert testimony was necessary to establish a prima facie case of inundation of a dominant estate by a servient estate. Plaintiff further argues that we should take judicial notice that water runs downhill and that, because the flooding occurred after defendants installed the berm, there can be no other explanation for the flooding and expert testimony is unnecessary to show that the berm was the cause of the flooding. While we agree that water flows downhill, we disagree that it was unnecessary to present expert testimony to establish the cause of the flooding.

Defendants, on the other hand, maintain that multiple factors could have caused plaintiff's water problem, including: (1) the saturation rate of the soil type; (2) the ponding length of that soil type; (3) the subsidence level of that soil type, which contributes to water ponding on the soil; (4) the quantity and timing of rainfall and snow melt events; (5) groundwater fluctuations; and (6) changes in the watershed that supplies runoff water to the wetland. Defendants further maintain that an expert witness was the only way that plaintiff could have eliminated these other factors with any amount of certainty to prove causation based on her theory that it was the tube and berm that caused the flooding.

"Following a bench trial, this Court reviews the trial court's conclusions of law de novo, and its findings of fact for clear error." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195; 761 NW2d 293 (2008), citing *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A finding is clearly erroneous where this Court is left with a "definite and firm conviction that a mistake has been made." *Mettler Walloon*, 281 Mich App at 195, citing *American Federation of State, Co & Muni Employees v Bank One*, 267 Mich App 281, 283; 705 NW2d 355 (2005).

In determining causation, we find instructive the following language from the Michigan Supreme Court:

> [A] plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." A valid theory of causation, therefore, must be based on facts in evidence. And while "'[t]he evidence need not negate all other possible causes,'" this Court has consistently required that the evidence "'exclude other reasonable hypotheses with a fair amount of certainty.'" [*Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004), citations omitted.]

So while plaintiff was not required to invalidate every other potential theory of causation, plaintiff was required to set forth sufficient facts in evidence to prove her theory of causation.

It is possible that when defendants installed the berm and tube on their property that they changed the natural drainage of plaintiff's land. But plaintiff did not present any evidence to

show (1) when the obstruction was installed, (2) that defendants' berm and tube could have caused plaintiff's water problem, and (3) potential causes of prior water problems to rule them out as causes of the current water problem. Plaintiff's "after which therefore because of which" theory, as indicated by the trial court, did not prove causation.

In sum, it cannot be said that the trial court's judgment of no cause for action leaves this Court with a definite and firm conviction that a mistake was made. At best, plaintiff presents a plausible explanation that defendants may be responsible for the injury. But we cannot say that the trial court's findings were clearly erroneous.

Turning to the cross-appeal, defendants argue that the trial court erred in denying their request for sanctions. Defendants argue that plaintiff did not conduct a reasonable investigation to determine causation before filing her claim and, therefore, plaintiff was unable to form a reasonable basis for her belief that defendants caused her water problems, thus making the claim frivolous. We disagree. To determine whether plaintiff had a reasonable basis for her belief, "it is necessary to evaluate the claims or defenses at issue at the time they were made." *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002).

At the time plaintiff's claim was made, plaintiff likely believed that defendants' installation of the tube and berm caused her property to flood. After waiting to see if the water would naturally subside, plaintiff called the Drain Commissioner, the Township Supervisor, the Trustee, the Road Commissioner, and the DNR. No one could tell plaintiff why her property was flooded or do anything to fix the problem. In addition, plaintiff's son discovered that defendants installed a drainage tube and berm where plaintiff's property would otherwise naturally drain without interruption. Mr. Danger testified that the land on defendants' side of the tube was dry, while plaintiff's property was so flooded that he had to wear knee-high boots just to access it.

In making their argument that plaintiff failed to show that she could have reasonably believed defendants caused her water problem, defendants rely heavily on the absence of an expert witness. But the test for a frivolous lawsuit is not whether an expert witness testified, but whether plaintiff had a reasonable basis to believe that her claim was true when she filed it. Further, plaintiff's "inability to prove [her] case by a preponderance of evidence at trial does not merit a finding that [her] claim was frivolous." *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). Such a determination "depends on the particular facts and circumstances of the claim involved." *In re Costs & Attorney Fees*, 250 Mich App at 95.

We are not persuaded that the trial court erred in concluding that the claim was not frivolous and, therefore, in denying defendants' request for sanctions.

Affirmed. No costs, neither party having prevailed in full.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto