

STATE OF MICHIGAN
COURT OF APPEALS

EARL RENNIE and BRENDA RENNIE/All
Others Similarly Situated,

UNPUBLISHED
October 16, 2007

Plaintiffs-Appellees,

and

157 CLASS MEMBERS,

Plaintiffs-Appellants,

v

MARBLEHEAD LIME, INC., a/k/a
MARBLEHEAD LIME COMPANY,

No. 269529
Wayne Circuit Court
LC No. 02-241029-NZ

Defendant-Appellee.

RUSSELL MULLINS et al.,

Plaintiffs-Appellants,

v

CARMEUSE LIME, INC., f/k/a MARBLEHEAD
LIME, INC., a/k/a MARBLEHEAD LIME
COMPANY,

No. 272637
Wayne Circuit Court
LC No. 06-607653-CE

Defendant-Appellee.

Before: Smolenski, P.J., Whitbeck, C.J., and Kelly, J.

PER CURIAM.

In Docket No. 269529, plaintiffs 157 class members (hereinafter “appellants”) appeal as of right the trial court’s revised final judgment. In Docket No. 272637, appellants appeal as of

right the trial court's order granting summary disposition in defendant's favor and awarding \$10,000 in sanctions against appellants and their attorney.

I. Background

Docket No. 269529

Plaintiffs Earl and Brenda Rennie on behalf of themselves and others similarly situated (hereinafter "plaintiffs") filed a complaint against defendant alleging that their homes and yards were invaded by "noxious odors and pollutants including particulates and air contaminants" originating from defendant's facility. Plaintiffs alleged trespass, nuisance, and negligence and sought monetary relief, an order holding that defendant's action constituted a nuisance, trespass and gross negligence, and damages for personal injuries.

The parties stipulated to entry of an order extending the time for plaintiffs to file a motion for class certification. But before the motion was filed, the parties filed a settlement agreement on May 21, 2003. In the settlement agreement, the parties "agree[d] to the certification of the Lawsuit as a class action for settlement purposes only," set forth the definition of the class and set forth notice requirements. The settlement provided for defendant to make improvements at its facility and for a cash payment of \$75,000. Also on May 21, 2003, the trial court entered an order granting preliminary approval of the parties' settlement agreement. The order also approved notice by publication and the content of the notice, which contained a definition of the class.

On June 17, 2003, plaintiffs filed a report asserting that they published notice of the prospective settlement on May 29, 2003 and June 8, 2003. They further asserted, "No persons within the Plaintiff Certified Class geographic area requested exclusion from the Certified Class by any method." On June 24, 2003, the trial court entered a final judgment approving the settlement agreement.

Shortly thereafter, appellants filed an emergency motion to set aside the settlement and judgment arguing that they had not received adequate notice of the settlement and that the class and category of claims released were "unconscionably broad and the settlement payment is grossly inadequate." The trial court ruled that the publication notice was reasonable and adequate and that the settlement was fair. The trial court entered an order denying the motion.

In the meantime, appellants filed a claim of appeal in this Court arguing that the trial court erred in allowing notice to be served on the unnamed class members exclusively through publication. This Court determined that the trial court failed to state on the record facts and legal conclusions justifying its ruling in that regard. Appellants also argued that the trial court erred in allowing Earl and Brenda Rennie to represent the class. This Court held that the record was insufficient for it to determine whether the trial court applied the proper scrutiny to whether the representatives would fairly and adequately assert and protect the interests of the class. *Rennie v Marblehead Lime, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2005 (Docket No. 249913). This Court held,

. . . we remand this case to the trial court with instructions to set aside the settlement agreement, and to decide anew whether to enter judgment on that

agreement after full factual and legal development of appellants' objections concerning both notice and the adequacy of the named plaintiffs' representation of the class. [*Id.* at slip op p 4.]

Subsequently, appellants' counsel filed an appearance on their behalf in the trial court and filed a motion to re-certify the case as a class action, prescribe notice requirements and set dates for exclusion from the class. The trial court determined that this Court had only asked it to make findings with regard to the notice and adequacy of representation. At a subsequent hearing, the trial court again addressed the extent of this Court's prior opinion stating, "So there are two issues that the Court of Appeals remanded this matter for, and that was to develop a full record regarding the Notice requirement and regarding the representation of the class." As instructed by this Court, the trial court examined the notification under MCR 3.501(C) and addressed the adequacy of the class representation on the record and determined that both were adequate.

Appellants then filed a "Motion for Review of Settlement Agreement, Re-Publication of Class Action Notice & Opportunity for 157 Class Members to Opt Out of the Class." Appellants argued that after this Court vacated the June 24, 2003, judgment, the trial court was required to re-certify the class, re-notify the class, and re-consider the settlement agreement. The trial court stated that this matter had already been addressed and entered a revised final judgment.

Docket No. 272637

Meanwhile, appellants had filed a their own claim against defendant alleging that defendant emitted air contaminants including noxious particulate matter and odors that invaded appellants' homes. Defendant filed a motion for summary disposition arguing that the claim was barred by res judicata, collateral estoppel, and release. At oral argument, the trial court noted that the appellants were the same class members who had attempted to set aside the June 24, 2003, judgment. The trial court determined that res judicata barred appellants' claims because this case involved the same parties and the same claims that were decided in the prior action. The trial court also relied on MCR 2.116(C)(6) and (C)(7). The trial court further ruled that defendant could recover its "fees and expenses" for defending this action. Defendant subsequently filed a motion for entry of order and presented a list of services performed demonstrating that they generated \$10,000 in costs and fees in defending appellants' claim. Appellants filed a response arguing that the fees were too high for a single motion and requested an evidentiary hearing. The trial court denied appellants' request for a hearing and entered an order granting defendant's motion for summary disposition and awarding sanctions in the amount of \$10,000 against appellants and their attorney.

II. Analysis

A. Docket No. 269529

1. Adequacy of Representation

Appellants first contend that the class representation was inadequate. We disagree. Under MCR 3.501(A)(1) five factors must be satisfied before class certification may be granted. Appellants' contention focuses on the requirement that "the representative parties will fairly and

adequately assert and protect the interests of the class.” To assess whether this requirement is met, we employ a two-part inquiry: “First, the court must be satisfied that the named plaintiffs’ counsel is qualified to sufficiently pursue the putative class action. Second, the members of the advanced class may not have antagonistic or conflicting interests.” *Neal v James*, 252 Mich App 12, 22; 651 NW2d 181 (2002) (citation omitted).

On remand, the trial court addressed the adequacy of class representation. First, the trial court asked plaintiffs’ attorney to describe his background and experience. He stated that he had practiced law since 1977 and, since 1990, worked in a law firm that handled over 100 class actions that were successfully brought to judgment or settlement. Based on this record, we agree with the trial court that plaintiffs’ counsel was “certainly well able to handle and represent the interest of the Class.”

With regard to Earl and Brenda Rennie, the trial court determined that they had the same interest to be protected as the other potential class members. These findings were supported by plaintiffs’ pleading and also by the questionnaire answered by the Rennies. They both stated that the pollutants affected their home and that they wanted defendant to “stop the dust.” Nothing in the record demonstrates that their interests were antagonistic to or conflicting with those of the other class members. Based on this record, the trial court’s conclusion that the Rennies had the same interest to protect was not clearly erroneous.

Appellants also assert that representation was inadequate because plaintiffs failed to file a timely motion for class certification. However, the reason such a motion was not filed is that the parties agreed to extend the time for such filing and a settlement was ultimately reached before the motion was filed. Appellants also complain that few motions were filed before the settlement agreement was reached. But this does not demonstrate that representation was inadequate. To the contrary, the fact that the parties engaged in negotiations and ultimately reached a settlement speaks to the adequacy of representation. Further, as defendant points out, appellants’ complaints on appeal focus on the inadequacy of the *settlement* rather than the representation. The trial court’s determination that the representative parties would adequately assert and protect the interests of the class was not clearly erroneous.

2. Notice by Publication

Appellants also contend that the notice to class members was insufficient. We disagree. MCR 3.501(C) outlines the procedure for notifying class members. While giving notice is mandatory, MCR 3.501(C)(1), the court has discretion regarding the manner in which notice is given, MCR 3.501(C)(4)(a). See also *Kass v HB Shaine & Co*, 71 Mich App 101, 105; 246 NW2d 396 (1976). An abuse of discretion occurs when the trial court’s decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 3.501(C)(4)(a) requires “[r]easonable notice . . . as the court directs.” MCR 3.501(C)(4)(b) states that “[t]he court may require individual written notice to all members who can be identified with reasonable effort[,]” but may also resort to “another method reasonably calculated to reach the members of the class[,]” including publication in a newspaper. Subrule (C)(4)(c)(i)-(v) directs that the court, in deciding the manner of notice, consider:

- (i) the extent and nature of the class,
- (ii) the relief requested,
- (iii) the cost of notifying the members,
- (iv) the resources of the plaintiff, and
- (v) the possible prejudice to be suffered by members of the class or by others if notice is not received.

After remand by this Court, the trial court examined the factors in MCR 3.501(C)(4)(c)(i)-(v). The trial court first identified approximately 11,000 members of the class in approximately six cities. Second, the trial court identified the type of relief as primarily “for the cessation of the operation and the emission of these pollutants,” and not monetary damages. Third, the trial court considered the cost of notification. It concluded that approximately 50 percent of the mail would probably be returned and, considering the cost of mailing, the amount to be recovered and plaintiffs’ resources, determined it would not be practical to mail notification. Finally, the trial court considered the harm of prejudice suffered by the members and concluded, “there’s very little harm if any when looking at the objective of the action, and that is to cause a cessation of the pollutants. It will help or benefit everyone in that community.” Accordingly, the trial court concluded, “the publication of the Notice was a method that was reasonably calculated to reach the members of this class, and that method was an appropriate method.”

Appellants assert that the trial court’s findings of fact were erroneous and based on plaintiffs’ misrepresentations. However, the record demonstrates, contrary to appellants’ assertion, that appellants’ addresses are in River Rouge, Ecorse, Lincoln Park, Dearborn, and Detroit. This supports the trial court’s determination that class members are from at least five cities. Further, appellants’ motion to certify the class action states that there are “about 2,777 individuals residing in 1,055 households.” Plaintiffs’ original complaint asserted that there were approximately 11,000 potential class members. Appellants never contested this estimation. Regarding the type of relief sought, the trial court stated that the relief obtained was primarily “for the cessation of the operation and the emission of these pollutants.” A review of plaintiffs’ complaint reveals that while they sought monetary damages, they also sought declaratory relief, namely that defendant’s emission of pollutants was a nuisance, trespass, and negligent. However, the settlement that was reached before this case was remanded provided:

4.1 Defendant shall implement, maintain, and/or install the processes, equipment, personal [sic] additions, and procedures set forth in its Settlement Agreement of June, 2002 with the City of River Rouge, James Brown, and Chris Bodrie in Case No. 01-73510 (United States District Court) (the “Improvement Measures”) and shall fully implement the Improvement Measures at its facility in River Rouge, Michigan, provided, however, that the Improvement Measures may be altered amended or eliminated if, in the reasonable judgment of Defendant, future regulatory changes, or changes in Defendant’s operational processes, equipment or procedures, preclude, or reduce the effectiveness of, or the need for, the Improvement Measures.

5.1 In exchange for the consideration provided herein, including the releases . . . , Defendant shall make settlement payment totaling \$75,000

Thus, the trial court correctly determined that the relief obtained was primarily for “for the cessation of the operation and the emission of these pollutants.” Further, while the trial court had no factual basis for determining that 50 percent of the mail would likely be returned, there was a factual basis for the conclusion that the cost of mailing, the amount to be recovered and plaintiffs’ resources demonstrated that it would not be practical to mail notification. The trial court was reviewing these factors in light of the settlement agreement and knew that the amount of the settlement was \$75,000 and the primary relief was defendant’s improvement of its procedures. Accordingly, the trial court also correctly assessed that because defendant agreed to improve its procedures to prevent pollution, the class members would not be prejudiced by the agreement, but rather, would benefit.

The trial court’s findings of fact were not clearly erroneous, and the decision to approve notice by publication was within the range of principled outcomes. *Maldonado, supra* at 388.

3. Sufficiency of Notice

Appellants also raise objections to the content of the notice provided in the newspapers. MCR 3.501(C)(5) provides:

The notice shall include:

- (a) a general description of the action, including the relief sought, and the names and addresses of the representative parties;
- (b) a statement of the right of a member of the class to be excluded from the action by submitted an election to be excluded, including the manner and time for exercising the election;
- (c) a description of possible financial consequences for the class;
- (d) a general description of any counterclaim or notice of intent to assert a counterclaim by or against members of the class, including the relief sought;
- (e) a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;
- (f) a statement that any member of the class may intervene in the action;
- (g) the address of counsel to whom inquiries may be directed; and
- (h) other information the court deems appropriate.

Appellants complain that the notice in two newspapers did not set forth the case name or number. They misleadingly state that the notices omit “all of page one of the approved form of notice.” But page one was the case caption. So the question is whether, without a caption, the

notice was sufficient. It was. The case number would provide little, if any, useful information to potential class members. And, while not in the form of a caption or heading, the notice stated that Earl and Brenda Rennie were representative plaintiffs and that the action concerns pollutants or particulate matter emitted “from marblehead operations in Wayne County.” The notice also provided the representatives’ address. Thus, while the notice was not quite eye-catching, the information minimally satisfied the court rule’s requirements for particularity with regard to identifying the parties. Appellants acknowledge that the third newspaper included the heading, in bold type, “RENNIE v. MARBLEHEAD LIME, INC.” But they complain that this falls short of indicating the full name of the case. Given that this notice contained a heading with the parties’ names, it also satisfied the court rule’s requirements.

Appellants also contend that the notice was insufficient because it did not “fairly and clearly describe the terms of the settlement agreement.” However, the notice provided that a hearing would be held to determine whether the settlement was fair, reasonable, and adequate. Thus, if potential class members had read the notice, they would have been informed that they could ascertain the terms of the settlement agreement at the hearing. Therefore, the notice was not deficient in this regard.

Appellants also assert that the notice failed to inform the class members that “any member may intervene in the action” as required by MCR 3.501(C)(5)(f). While not using the word “intervene,” the notice described how a class member who did not request to be excluded could intervene in the action on his own behalf. Therefore, MCR 3.501(C)(5)(f) was fulfilled.

Appellants also contend that the notices were published late. The trial court’s order approving the notice by publication indicated that the Detroit News/Free Press notice be published on May 27, 2003, and the News-Herald notice be published the “Week of May 27, 2003” “if possible.” The Detroit News/Free Press notice was published on May 29, 2003. The News-Herald notice was published June 8, 2003. The notices indicated that the hearing on the settlement agreement would take place on June 24, 2003. Thus, the Detroit News/Free Press notices provided 25 days’ notice. And the News-Herald provided 16 days’ notice. Appellants have cited no authority indicating that this time was insufficient. Under the circumstances of the case, the time was sufficient. But even if the notice period could be considered insufficient, appellants have not demonstrated that they were prejudiced. Plaintiffs’ complaint alleged that defendant was emitting pollutants into the air that drifted to their homes. Although the complaint asked for monetary damages, the settlement reached was that, in exchange for a release, defendant agreed to take measures designed to reduce or eliminate the pollutants. This relief clearly benefits all class members whether they opted out or not, and untimely notice would not have adversely affected any class member’s enjoyment of that benefit.

4. After Remand

Appellants also contend that the trial court erred in, after remand, re-entering the settlement agreement without recertifying the class, reviewing the terms of the settlement agreement and ensuring that proper notice was provided for opting out. We disagree. In *Rennie*, *supra* at slip op p 4, this Court specifically remanded for the trial court to explain its ruling on notice and representation; it held,

. . . we remand this case to the trial court with instructions to set aside the settlement agreement, and to decide anew whether to enter judgment on that agreement after full factual and legal development of appellants' objections concerning both notice and the adequacy of the named plaintiffs' representation of the class.

Accordingly, because this Court's prior opinion left the trial court's certification of the class intact, there was no need for the trial court to recertifying the class. The trial court properly followed this Court's instructions on remand.

B. Docket No. 272637

In this case, appellants contend that the trial court erred in granting defendant's motion for summary disposition and awarding sanctions against them and their attorney.

1. Summary Disposition

The trial court granted summary disposition on the basis of res judicata, MCR 2.116(C)(6), and MCR 2.116(C)(7). This Court reviews de novo on the basis of the entire record a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) to determine if the moving party is entitled to judgment as a matter of law. *Davis v City of Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2006). A trial court's decision to grant summary disposition under MCR 2.116(C)(6) is reviewed de novo. *Fast Air, Inc v Knight*, 235 Mich App 541, 543; 599 NW2d 489 (1999). The question whether res judicata bars a subsequent suit is a question of law that is reviewed de novo. *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

Res judicata applies broadly in Michigan to bar subsequent actions between the same parties concerning issues that actually were, or reasonably should have been, addressed and decided in a prior action. *Id.* at 380. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007).

Appellants' argument concerns the requirement that both actions involve the same parties. Appellants assert that because this Court vacated the June 24, 2003, judgment, no class existed when they filed their claim on March 15, 2006, and, therefore, they were not a party to the prior action. However, as discussed above, this Court's prior opinion did not affect the class certification; the class was certified, appellants did not opt out, and they were parties to the prior action. For the same reason, summary disposition was appropriate under MCR 2.116(C)(6) (another action has been initiated between the same parties involving the same claim) and (C)(7) (barred by release).

2. Sanctions

Appellants also contend that the trial court erred in granting defendant's request for sanctions pursuant to MCR 2.114(E) and MCL 600.2591. We agree in part. Although the trial

court did not err in imposing sanctions, it did err in denying appellants' request for an evidentiary hearing on the amount of sanctions.

a. Imposition of Sanctions

MCR 2.114(E) requires the trial court to impose sanctions if it finds that a party or attorney signed a pleading that was not well grounded in fact or law, or was filed for an improper purpose. See MCR 2.114(D)(2), (3). Determining whether this occurred requires the trial court to make a finding of fact. See *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). Similarly, MCL 600.2591 requires the trial court to award fees and costs to the prevailing party if it finds that a claim was frivolous. This determination also requires the trial court to make a factual finding that takes into consideration the particular circumstances of the case. See *Powell Prod, Inc v Jackhill Oil Co*, 250 Mich App 89, 94-95; 645 NW2d 697 (2002). "Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 depends on the facts of the case," and review of a trial court's finding of frivolity is for clear error. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002).

Defendant's sole argument for seeking sanctions against appellants is that plaintiffs filed the second complaint knowing that the judgment in the prior case resolved the same claims brought by a certified class, which included appellants. In response, appellants assert that they filed their own complaint against defendant because they legitimately believed that, when they did so, there was no certified class in the prior action. Their argument for why there was no certified class is premised on numerous procedural errors in the prior case including that this Court's opinion vacating the June 24, 2003 judgment, operated to vacate the class certification. As defendant points out, however, this argument is essentially an argument that the trial court made errors in the prior case. And appellants argued in the prior case that these errors had occurred. But the trial court heard these arguments and disagreed. So even if appellants believed that the trial court had made errors in the prior case, the proper means for addressing those errors was to appeal, which they properly did in the consolidated appeal addressed above. Appellants' filing of their own complaint was at least an improper use of the court system even if it was not done maliciously. As such, we conclude that the trial court's decision to award sanctions was not clear error.

b. Amount of Sanctions

Appellants also contend that the trial court erred in denying their request for an evidentiary hearing on the amount of attorney fees. In *Miller v Meijer, Inc*, 219 Mich App 476, 479-480; 556 NW2d 890 (1996), this Court held the circuit court erred by refusing to hold an evidentiary hearing because

[w]here . . . [the opposing party] challenges the reasonableness of the fee requested, the trial court should inquire into the services actually rendered before approving the bill of costs. Although a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is. [Citations omitted.]

However, more recently, this Court held that a trial court did not abuse its discretion by failing to hold an evidentiary hearing because the trial court had sufficient evidence to determine the

amount of attorney fees and costs. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 171; 712 NW2d 731 (2005). In reaching this conclusion, this Court noted that the defendant had submitted billing reports, which set forth the work performed in detail, and the trial court was “very familiar with the history of the litigation and the amount of work required by plaintiff maintaining this frivolous litigation.” *Id.*

At first blush, it appears that this case is similar to *Fannon*: defendant submitted a list of the work performed and the billing rates and the trial court was very familiar with the history of the litigation, having presided over the prior case. However, in this case, the list demonstrates what appears to be an unusual amount of time for a single summary disposition motion. Further, it is just a list, and not an actual billing report. Additionally, the hourly rates of \$405 for a senior attorney and \$195 for an associate could be explored. Accordingly, we vacate the award of sanctions and remand for an evidentiary hearing.

We affirm the revised final judgment in docket number 269529. In docket number 272637, we affirm the order granting summary disposition and the trial court’s decision to impose sanctions, but vacate the order awarding sanctions and remand for an evidentiary hearing. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Kirsten Frank Kelly