STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF ENVIRONMENTAL QUALITY and ATTORNEY GENERAL, Plaintiffs-Appellees,	UNPUBLISHED January 17, 2013
v	No. 309509 Ingham Circuit Court
COLE TIRE COMPANY, INC. and COLE VERNARD, Defendants-Appellants.	LC No. 02-000749-CE

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

Defendants, Cole Tire Company Inc. and Cole Vernard, appeal as of right the trial court's order denying their motion for reconsideration of the trial courts' orders granting attorney fees and a sanction award to plaintiffs, Department of Environmental Quality and the Attorney General. We affirm.

I. FACTUAL BACKGROUND

Defendants operated two scrap tire collecting sites. In 2002, plaintiffs initiated this lawsuit claiming that defendants were engaged in numerous violations of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, and were responsible for creating a public nuisance. Some of the alleged violations included the lack of bonding, lack of registration, lack of on-site access, improper storage, and that one of the sites had experienced a fire that left smoldering tire remnants.

After a lengthy procedural history, plaintiffs eventually filed a motion for partial summary disposition on the issue of liability pursuant to MCR 2.116(C)(10). To support their motion, plaintiffs attached two affidavits, one of which detailed an extensive list of violations of Part 169 of NREPA, MCL 324.16901 *et seq.*, including improper scrap tire storage, the lack of proper fencing and gates, lack of access to the piles for fire-fighting equipment, and the volume of scrap tires being in excess of the amount permitted. The affidavit also provided information about the fire that occurred at one of the sites, with remnants of the fire being left on the property and hazardous substances at concentrations in excess of what was permitted by Part 201, Part 115, and Part 31 of NREPA in the soil and groundwater at the site.

The trial court granted plaintiffs' motion for summary disposition only on its common-law public nuisance claim. Defendants were required to abate the nuisance. The trial court also granted plaintiffs attorney fees and costs, not for the actual physical cleanup of the scrap tires, but for the litigation up until the trial court's order clarifying that defendants were liable for the public nuisance and had to abate it. At a subsequent hearing on defendants' motion to compel regarding various discovery issues, the trial court agreed that defendants were entitled to a hearing pursuant to MCR 2.602(B)(3) on the amount of attorney fees and costs. The court, however, referred to the upcoming proceeding as more of an evidentiary hearing rather than an actual trial. After that hearing, defendants submitted a proposed order purportedly reflecting the trial court's ruling from the bench, stating that a jury trial should be scheduled. The trial court found that defense counsel behaved frivolously and intentionally when it submitted this proposed order that scheduled a jury trial, as it was clear that no jury trial would occur and that the court had not scheduled one. The trial court sanctioned defense counsel's firm $500 for filing the inaccurate proposed order. Defendants now appeal.

II. ATTORNEY FEES

A. Standard of Review

"The decision to award attorney fees, and the determination of the reasonableness of the fees requested, is within the discretion of the trial court." *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). Thus, we review the award of attorney fees and costs for an abuse of discretion. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 286; 761 NW2d 761 (2008); *Lavene v Winnebago Indus*, 266 Mich App 470, 473; 702 NW2d 652 (2005). Findings of fact are reviewed for clear error and questions of law are reviewed de novo. *Ypsilanti Charter Twp*, 281 Mich App at 286. "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id.*

B. Analysis

Generally, attorney fees are not recoverable unless they are authorized by a statute, court rule, or a common-law exception. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). Instructive in this case is this Court's opinion in *Ypsilanti Charter Twp*, 281 Mich App at 255, involving a public nuisance created by the defendant, who was pumping raw sewage from a containment area in a manner that was contaminating the Huron River. In analyzing the defendant's challenge to the award of attorney fees, this Court recognized that, despite the general rule that attorney fees are not recoverable, "recovery has been allowed in limited situations where a party has incurred legal expenses as a result of another party's fraudulent or unlawful conduct." *Id.* at 286 (quotation marks and citation omitted). In affirming the trial court's award of attorney fees, we stated that "[p]laintiff was forced to incur substantial costs and attorney fees to prosecute this matter, which originally arose out of defendant's illegal and egregious discharge of raw sewage into a public storm drain." *Id.* This Court found that because "[p]laintiff incurred substantial legal expenses as a result of defendant's unlawful conduct . . . [w]e cannot conclude that the circuit court's award of attorney fees for plaintiff fell outside the range of reasonable and principled outcomes." *Id.* at 287 (citations omitted).

Likewise in this case, plaintiffs incurred substantial costs and attorney fees in prosecuting this matter. When granting summary disposition based on public nuisance, the trial court specifically recognized that defendants had violated the law, as it was "undisputed that both of these sites are being operated in violation, clear violation in a number of ways of . . . Part 169." The trial court noted some of the numerous violations, including the environmental impact of the tire fire that was left to smolder on the property, the fact that there was no bond or registration, and that the tires were not being stored properly. Plaintiffs provided evidence establishing the overwhelming number of violations at both sites, including an affidavit from an Environment Quality Analyst who found that the fire at one of the sites left smoldering remnants that led to the contamination of the groundwater and soil. While defendants may not agree that their conduct was illegal or egregious, this difference of opinion is not enough to establish that the trial court erred when considering evidence to the contrary. Thus, just like this Court found in *Ypsilanti Charter Twp*, in light of defendants' illegal and egregious conduct, we cannot conclude that the trial court's award of attorney fees fell outside the range of reasonable and principled outcomes.

III. Sanctions

A. Standard of Review

Defendants next challenge the trial court's award of sanctions against defense counsel. "A trial court's finding that an action is frivolous is reviewed 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, the reviewing court is left with a definite and firm conviction that a mistake was made." *Attorney General v Harkins*, 257 Mich App 564, 575; 669 NW2d 296 (2003).

B. Analysis

Pursuant to MCR 2.114, "an attorney is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). Furthermore, "[s]anctions which may be imposed under MCR 2.114 include payment to the opposing party of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees. Costs incurred for having to file a motion for sanctions are included in such reasonable expenses." *Maryland Cas Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103, (1997) (internal citations omitted). Lastly, "[t]he determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted." *Jerico Const, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

Defendants submitted a proposed order pursuant to MCR 2.602(B)(3), a court rule that allows a party to file a proposed judgment within seven days after the granting of the judgment, or later if the court permits. This court rule provides that objections to the accuracy or completeness of the proposed order must specifically identify the error. MCR 2.602(B)(3). The trial court also must conduct a hearing when the proposed order does not comport with its decision. MCR 2.602(B)(3). The proposed order in the instant case, which purportedly reflects the trial court's opinion delivered from the bench, references the scheduling of a jury trial. The

trial court found that this was an intentional misrepresentation and was frivolous, which warranted sanctioning defense counsel $500.

Defendants contend that the trial court clearly erred because at the time defense counsel submitted the proposed order, they believed the trial court had yet to rule on the jury issue. However, even if defense counsel believed the trial court had yet to rule on the jury issue, representing in the proposed order that the trial court had ruled there would be a jury trial is a misrepresentation. Furthermore, when the trial court was rendering its decision from the bench, it stated that rather than a trial, the next hearing would be more like an evidentiary hearing. The trial court never stated that it was ordering a jury trial. Thus, defendants' subsequent submission of a proposed order scheduling a jury trial was baseless. Under these circumstances, we are not left with the definite and firm conviction that the trial court erred in finding that this groundless conduct was intentional and justified the award sanctions.

IV. CONCLUSION

The trial court did not err in awarding attorney fees and costs to plaintiffs. The trial court also did not err in ordering sanctions against defendants. We affirm.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Michael J. Riordan