STATE OF MICHIGAN

COURT OF APPEALS

DONALD SMITH and EVELYN SMITH,

Plaintiffs,

and

VERNON GUINDON and CAROLE GUINDON,

Plaintiffs-Appellants-Cross-Appellees,

v

MARK YORK and BRENDA YORK,

Defendants-Appellees-Cross-Appellants.

UNPUBLISHED
October 3, 2013

No. 304260
Monroe Circuit Court
LC No. 09-027496-CZ

DONALD SMITH, EVELYN SMITH, VERNON GUINDON, and CAROLE GUINDON,

Plaintiffs-Appellants,

v

MARK YORK and BRENDA YORK,

Defendants-Appellees.

No. 304619
Monroe Circuit Court
LC No. 09-027496-CK

Before: GLEICHER, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

In docket no. 304260, plaintiffs Vern and Carole Guindon appeal as of right the trial court order granting costs and fees to defendants Mark and Brenda York.[1] Defendants filed a cross-appeal, contending that fees were proper and the trial court correctly granted summary disposition.

In docket no. 304619, the Guindons and plaintiffs Donald and Evelyn Smith appeal by leave granted the trial court order granting summary disposition to defendants. Consistent with this Court's order granting leave to appeal, the issues in this docket are limited to those raised in the application and amended application, which are the statute of limitations and claims relating to the removal of the lilac bushes.

On this Court's motion, these appeals were consolidated for appellate review. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

The Smiths were neighbors of the Yorks and owned property with an easement running along the eastern portion. The easement was for ingress and egress. The Guindons, also neighbors of the Smiths, were easement holders. The Smiths and the Guindons initiated this instant action against the Yorks for declaratory and injunctive relief, as well as a claim for trespass. According to plaintiffs, defendants had repeatedly trespassed on the Smiths' property and removed a fence on the property, cut down lilac bushes on the property, and built a dirt berm that partially infringed on the easement.

Defendants, however, denied any wrongdoing and eventually filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Defendants alleged that they were acting on behalf of Ronald Silveira, another property owner in the area who also had easement rights. According to defendants, Silveira had requested that they maintain the easement, which included general maintenance and removing any obstructions. Plaintiffs, however, claimed that they had no knowledge of such an agreement.

The trial court granted defendants' motion for summary disposition regarding the removal of the fence and the construction of the berm occurring in 1997 or 1998, because they were outside of the three-year statute of limitations period the trial court found applicable. The trial court also found that any claim relating to the lilac bushes was baseless, as defendants were acting pursuant to Silveira's directive to maintain the easement. The trial court also found that defendants were entitled to costs and fees under MCL 600.2591(1), totaling $2,560.

In docket no. 304260, the Guindons appeal as of right the order of attorney fees and costs. Defendants also filed a cross-appeal, contending that fees were proper and the trial court

[1] Only the Guindons filed a claim of appeal in docket no. 304260, and appealed from the trial court's order of settlement regarding defendants' bill of costs. MCR 7.202(6)(a)(iv) and MCR 7.203(A)(1). Thus, this Court's jurisdiction in that docket is limited to the issue of attorney fees and the Guindons.

correctly granted summary disposition. In docket no. 304619, the Guindons and the Smiths appeal by leave granted the trial court's substantive ruling of dismissal. On this Court's own motion, these appeals were consolidated for appellate review.

II. STATUTE OF LIMITATIONS

A. Standard of Review

Plaintiffs first contend that the trial court erred in granting summary disposition based on the statute of limitations for their claims relating to the berm. This Court reviews a motion for summary disposition de novo. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6; 614 NW2d 169 (2000). As this Court stated in *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010):

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [(Footnotes omitted).]

B. Analysis

Plaintiffs first argue that the trial court erred in applying the three-year statute of limitations period found in MCL 600.5805 to their claim for the construction of the berm, and should have applied the 15-year statute of limitations period set forth in MCL 600.5801(4). Defendants, however, respond that plaintiffs are mischaracterizing their complaint because they alleged an action for trespass, not recovery of land. Defendants also claim that *Terlecki v Stewart*, 278 Mich App 644, 654; 754 NW2d 899 (2008), is controlling, and stands for the proposition that the continuing wrongs doctrine was completely abrogated in *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 266; 696 NW2d 646 (2005), which applies in trespass actions. See *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 285; 769 NW2d 234 (2009).

The trial court did not err in finding that the statute of limitations barred plaintiffs' claim relating to the berm on the easement. Plaintiffs erroneously rely on MCL 600.5801 and the 15-year statute of limitations period. That statute applies when parties "bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands[.]" MCL 600.5801. This Court has explained that "MCL 600.5801 extends, in the statutory context, [the] longstanding common-law recognition of the doctrine of adverse possession[.]" *Beach v Lima Twp*, 283 Mich App 504, 512; 770 NW2d 386 (2009). "The true nature of a plaintiff's claim must be examined to determine the applicable statute of limitations." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 457; 761 NW2d 846 (2008) (quotation marks and citation

omitted). The gravamen of an action is determined by reading the complaint as a whole, and this Court will examine the whole complaint to determine the exact nature of the claims. *Id.*

In the instant case, plaintiffs pleaded claims for declaratory and injunctive relief and for trespass. While their requested relief included the removal of the "dirt that was piled" on their property, the gravamen of the complaint was trespass. They repeatedly alleged that defendants' actions constituted trespass, and they should be enjoined from doing so in the future.[2] Plaintiffs' complaint contains no allegations related to reclaiming or quieting title to their land, and simply does not include language consistent with the nature of the claim contemplated by MCL 600.5801.

Further, this Court has held that the statute of limitations for trespass actions is three years. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 279. Plaintiffs, however, contend that they alleged a continuing trespass. This Court's opinion in *Terlecki, supra*, is instructive. The plaintiffs' land in that case was flooded because the defendants negligently replaced a spillway in 1997, and partially capped a pipe before November 2001. *Terlecki*, 278 Mich App at 647. Although not observable at first, the plaintiffs noticed that some of their trees began dying in 2001, and they discovered the elevated spillway in 2005. *Id.* at 647-648. The plaintiffs filed suit in 2005 and argued that their claim was not barred by the statute of limitations because the flooding of their property was a continuing tort of trespass or nuisance. *Id.* at 652, 653.

This Court held that the plaintiffs' claim for money damages fell squarely within the three-year statute of limitations period of MCL 600.5805(10). *Id.* at 652. This Court held that "a continuing wrong is established by continual tortious *acts*, not by continual harmful effects from an original, completed act." *Id.* at 655 (emphasis in original) (quotation marks and citation omitted). Thus, this Court found that there were only two distinct tortious acts of replacing the spillway in 1997 and capping the culvert in 2001, with "[t]he flooding and tree damage since 2001 [being] merely the harmful effects of the completed tortious acts." *Id.* at 656.

One year after *Terlecki*, this Court further clarified that "*Garg* and its progeny completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state, including in nuisance and trespass cases." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 288. This Court also reaffirmed that "according the accrual statute, the period of limitations begins to run from the time the claim accrues, which is the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id.* at 279

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[2] During oral argument appellants contended, citing *Longton v Stedman (after remand)*, 196 Mich 543; 162 NW 947 (1917), that this Court could remand the case because plaintiffs brought an action to abate a continuing trespass, so the action should remain available until the defendants had extinguished plaintiffs' easement by adverse possession (15 years). *Longton* would be controlling but for the rulings in *Garg*, 472 Mich at 266 and *Terlecki*, 278 Mich App at 654. This Court recognizes that reading *Terlecki* can cause confusion because it contains a major typographical error on page 654. It references to MCL 500.5805, part of the insurance code, rather than MCL 600.5805, the statute of limitations. *Terlecki*, 278 Mich App at 654.

(quotations marks and citation omitted); see also MCL 600.5827 (a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.").

In other words, "the accrual of the claim occurs when both the act and the injury first occur, that is when the wrong is done." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 291 (quotation marks and citation omitted). Here, the act and the injury first occurred when defendants built the berm on plaintiffs' property, which occurred sometime around 1997 or 1998. Because the statute of limitations began to run when the claim accrued in 1997 or 1998, plaintiffs' claim is barred by the three-year statute of limitations as they did not initiate this lawsuit until July 1, 2009. Therefore, the trial court did not err in finding that any claim based on the berm was barred by the statute of limitations.

III. LILAC BUSHES

A. Standard of Review

Plaintiffs next contend that the trial court erred in granting defendants' motion for summary disposition regarding the destruction of the lilac bushes.[3] A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotations marks and citations omitted). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

B. Analysis

Of initial importance is that plaintiffs are precluded from arguing on appeal that Silveira was not an easement holder. At the motion for summary disposition hearing, plaintiffs repeatedly stated that Silveira was an easement holder and that he had the right to use the easement. While plaintiffs now attempt to negate that admission and suggest that Silveira did not have a right to use the easement, they have waived that argument because a party's "position

[3] In their complaint, plaintiffs also alleged that defendants were operating a trucking business using the easement and had cut down a maple tree on the Smiths' property. However, on appeal, plaintiffs do not assert or analyze these issues. Plaintiffs also state that they are no longer seeking recovery for the removal of the fence.

on appeal is untenable [when] it is contrary to the position he took in the lower court." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 455 n 1; 733 NW2d 766 (2006).

Plaintiffs also raise several challenges to defendants' and Silveira's affidavits. However, even assuming, *arguendo*, that defendants were acting pursuant to a proper grant of authority, there are genuine issues of material fact regarding the removal of the lilac bushes. Although an easement is the right to use the land of another for a specified purpose, it "does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement." *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). Thus, "[t]he owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner's rights." *Morrow v Boldt*, 203 Mich App 324, 329; 512 NW2d 83 (1994). However, this involves a balancing test, as an easement holder likewise has rights that include "all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement." *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 41-42; 700 NW2d 364 (2005) (quotation marks and citation omitted). This includes a duty to maintain the easement for safe travel. *Morrow*, 203 Mich App at 329-330.

Here, defendants claim that pursuant to Silveira's directive, they were maintaining the easement by removing the lilac bushes. While it is true that the servient estate's rights are paramount to those of the dominant estate, defendants ignore that "[t]he owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner's rights." *Morrow*, 203 Mich App at 329. Instead, defendants' argument is that the servient estate cannot use the land subject to the easement for any purpose, regardless of whether that use conflicts with the easement.

Moreover, as noted above, an easement holder only has "such rights [that] are incident or necessary to the reasonable and proper enjoyment of the easement." *Blackhawk Dev Corp*, 473 Mich at 41-42 (quotation marks and citation omitted). While the removal of the lilac bushes may have been incident or necessary to the reasonable and proper enjoyment of the easement, defendants presented no evidence to that effect. There was a graveled portion of the easement that was used for egress and ingress, and defendants presented no evidence that Silveira used anything but that gravel portion. There also was no evidence that the lilac bushes obstructed Silveira's use of the easement in any way. Because defendants failed to provide any evidence that removal of the lilac bushes was necessary or incident to the reasonable and property enjoyment of the easement, there is a genuine issue of material fact regarding whether defendants were entitled to remove the lilac bushes.[4]

[4] However, we note that any claim for injunctive relief on behalf of the Smiths is now moot. Because the Smiths no longer own the property, any claim they asserted to enjoin future trespass is now moot. "An issue becomes moot when a subsequent event renders it impossible for the appellate court to fashion a remedy." *Kieta v Thomas M Cooley Law Sch*, 290 Mich App 144, 147; 799 NW2d 579 (2010). Yet, "[i]t is well settled that a plaintiff who establishes the tort of trespass may recover money damages from the trespassing defendants" and that a trespass may

IV. ATTORNEY FEES

A. Standard of Review

In docket no. 304260, the Guindons appeal from the trial court order awarding costs and fees to defendants. "This Court reviews a trial court's finding regarding whether an action is frivolous for clear legal error. A decision 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." *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35; 666 NW2d 310 (2003) (citation omitted).

B. Analysis

In its memorandum of law attached to its order awarding attorney fees, the trial court invoked MCL 600.2591(1) as the basis for awarding costs and fees. That statute, in relevant part, provides:

> (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.
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> ***
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> (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.

An initial problem with the trial court's ruling is that, as the court itself noted in footnote two of its memorandum of law, the court never actually found that plaintiffs' behavior was

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be found when defendants "exceeded the scope of their easement[.]" *Wiggins v City of Burton*, 291 Mich App 532, 558, 559; 805 NW2d 517 (2011); *Schadewald*, 225 Mich App at 40. Therefore, the Smiths may be entitled to damages if they are successful at trial.

frivolous. While the trial court stated that defendants could seek attorney fees under MCL 600.2591(1), it failed to make the requisite finding that this action was frivolous.[5]

Furthermore, even if we were to construe the trial court's statements as a finding that the action was frivolous, that finding was in error. As discussed above, the claims relating to the lilac bushes have legal merit. Just because Silveira submitted an affidavit indicating that he gave defendants the authority to act on his behalf did not necessitate a finding that defendants' behavior constituted reasonable use of the easement. Moreover, while the claims relating the berm are barred by the statute of limitations, "[n]ot every error in legal analysis constitutes a frivolous position" and merely because this Court "concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position." *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002). The trial court also stated that it was not considering the parties' history, indicating that the basis for awarding fees was not harassment claims.

Because the trial court failed to make the requisite finding that this action was frivolous and because plaintiffs have prevailed in part, we are left with the definite and firm conviction that the trial court erred in awarding fees under MCL 600.2591. However, only the Guindons are appellants in docket no. 304260, appealing as of right the trial court's order of fees. Moreover, in docket no. 304619, the Smiths and the Guindons did not raise a challenge to attorney fees in their statement of the questions involved, and an issue is not preserved for appeal when it is not set forth in the statement of the questions involved. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Therefore, only the Guindons are entitled to relief on this issue.

V. STANDING

In docket no. 304260, defendants contend on cross-appeal that the Guindons lacked standing as mere easement holders to assert the interests of the fee owners, the Smiths. However, the only issue properly within this Court's jurisdiction in that appeal was the issue of attorney fees.[6] Defendants offer no specific arguments that the Guindons lacked standing to appeal attorney fees and costs awarded against them, as they are an "aggrieved party." *Kieta v Thomas M Cooley Law Sch*, 290 Mich App 144, 147; 799 NW2d 579 (2010).

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[5] Furthermore, the trial court based its ruling on Silveira's affidavit attached to defendants' motion for summary disposition, but "[t]o determine whether sanctions are appropriate" pursuant to MCL 600.2591, "it is necessary to determine whether there was a reasonable basis to believe that the facts supporting the claim were true *at the time the lawsuit was filed*[.]" *Louya v William Beaumont Hosp*, 190 Mich App 151, 162; 475 NW2d 434 (1991) (emphasis in original).

[6] The Guindons appealed as of right from the postjudgment order awarding attorney fees and costs, which was appealable as of right under MCR 7.202(6)(a)(iv) and MCR 7.203(A)(1). Thus, this Court's jurisdiction in docket no. 304260 is limited to the issue of attorney fees and costs.

Further, the Guindons had standing to assert the substantive claims in this litigation. As stated in *Groves v Dep't of Corrections*, 295 Mich App 1, 5; 811 NW2d 563 (2011):

> [A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Here, the Guindons are easement holders and as such, they had a substantial interest in determining what rights defendants had to maintain the easement, place objects on the easement, or remove objects from the easement. In other words, the Guindons had "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large[.]" *Groves*, 295 Mich App at 5. Based on their status as an easement holder, the Guindons were entitled to seek judicial determination of whether defendants were permitted to place encroachments, such as the berm, on the easement. See e.g. *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 512; 810 NW2d 95 (2011) ("whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment") (quotation marks and citation omitted).[7] Moreover, considering the trial court's ruling granting summary disposition to defendants and allowing the berm to remain on the easement, the Guindons were an aggrieved party in terms of this appeal. See *Kieta*, 290 Mich App at 147.

VI. VEXATIOUS APPEAL

Defendants request sanctions against plaintiffs and their appellate attorney for a vexatious appeal. Pursuant to MCR 7.216(C):

> (1) The Court of Appeals may, on its own initiative or on the motion of any party filed under MCR 7.211(C)(8), assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
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> > (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or

[7] Further, this Court has previously acknowledged that an easement holder may maintain an action for trespass. See *Marathon Pipe Line Co v Nienhuis*, 31 Mich App 407; 188 NW2d 120 (1971).

> (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.

Thus, according to MCR 7.216(C), sanctions for a vexatious appeal may be awarded on this Court's own initiative or when a party files a motion under MCR 7.211(C)(8). *Edge v Edge*, 299 Mich App 121, 129 n 4; 829 NW2d 276 (2012). Pursuant to MCR 7.211(C)(8), "[a] party's request for damages or other disciplinary action under MCR 7.216(C) must be contained in a motion filed under this rule. A request that is contained in any other pleading, including a brief filed under MCR 7.212, will not constitute a motion under this rule." Thus, a request for sanctions for a vexatious appeal must be made in a proper motion. *Prentis Family Found v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005).

In the instant case, defendants requested vexatious sanctions in their cross-appeal in docket no. 304260 and their appellate brief in docket no. 304619. However, they did not file a motion pursuant to MCR 7.211(C)(8) for sanctions based on vexatious proceedings. Furthermore, sanctions would not be warranted on this Court's own initiative. "Because plaintiffs' appeal was successful in part, it was not vexatious, and defendants' requests for damages on this basis are denied." *Tingley v 900 Monroe, LLC*, 266 Mich App 233, 256; 731 NW2d 427 (2005) vacated on other grounds 474 Mich 1104 (2006).

VII. CONCLUSION

The trial court properly found that the statute of limitations barred plaintiffs' claims relating to the berm. However, the court erred in dismissing plaintiffs' claims relating to the lilac bushes, as there is a genuine issue of material fact regarding whether defendants' actions constituted trespass. Furthermore, the trial court erred in granting costs and fees pursuant to MCL 600.2591. The Guindons also had standing below and on appeal, and vexatious sanctions are not warranted. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause
/s/ Michael J. Riordan