

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

SHIRLEY LORRAINE SYMONDS,

Plaintiff,

v

File No. 04-23484-AZ
HON. PHILIP E. RODGERS, JR.

BOARD OF COUNTY ROAD COMMISSIONERS
OF THE COUNTY OF GRAND TRAVERSE,
WILLIAM SHORT, ROCHELLE DURGA and
VEDA J. WHEELOCK,

Defendants.

Richard L. Benedict (P10675)
Matthew L. Benedict (P63027)
Attorneys for Plaintiff

John N. Seaman, Jr. (P26274)
Attorney for Defendants Short, Durga and Wheelock

Richard W. Ford (P13569)
Attorney for Defendant Road Commission

DECISION AND ORDER DENYING
DEFENDANTS' MOTION FOR COSTS AND SANCTIONS

In 2002, Plaintiff's counsel filed an action on behalf of the plaintiff in *Reid v Grand Traverse County Road Commission*, Grand Traverse County Circuit Court File No. 02-22501-AZ. The *Reid* case involved the issue of whether the Mayfield Trail was a public, county road and, if so, of what width. In response to the defendant Road Commission's motion for summary disposition, the plaintiff produced affidavits to show that there was a genuine issue of material fact regarding whether the Mayfield Trail was used by the general public. Following a bench trial, the Court ruled in favor of the defendant and declared the Mayfield Trail a public, county road of 66 feet in width.

On February 18, 2004, this trespass case was filed. It, too, questions the status of the Mayfield Trail. The exhibits in this case are the same exhibits that were used by the defendant in

the *Reid* case to show the history of the Mayfield Trail and its transformation from a township road to a county road under the McNitt Act.

This case was scheduled for trial beginning on August 27, 2004. Instead of proceeding to trial, however, the parties advised the Court that "there is a settlement to adjourn until [September] 7th to see if some contingencies can be completed." The following exchange took place on the record:

MR. BENEDICT: "We have agreed with the Road Commission. We have agreed that the County Road Commission will open up the entire length of historic - - what they have been calling Historic Mayfield Trail, that's - -

THE COURT: That's from Clous Road to West Blair Town Hall.

MR. BENEDICT: It's the yellow line on my map and red line on Mr. Dillenbeck's map.

THE COURT: That's how it's described in the pleadings.

MR. BENEDICT: That they will have it passable for traffic by the end of the year, and that it will be finished by next spring. And if the - - if the Road Commission itself agrees to this, I understand they have a meeting next Wednesday, that the entire case then will be dismissed.

THE COURT: Do you envision it looking any different at its southern terminus than it does at its northern terminus, or will it all look like it does at the northern end?

MR. BENEDICT: Like the northern end. Also, there will be a sign posted at either end indicating seasonal road.

THE COURT: If the southern end of this is brought up to the same standard as the northern end is currently in, if the southern end is posted as a seasonal road, as the northern end currently is, this will be acknowledged to be a county road, a public road, and it will be maintained until further notice, or a public hearing is held, as a seasonal road?

MR. BENEDICT: Yes. Except we would like to have a seasonal road sign at the beginning of Mrs. Symond's property where it branches off from the pipeline right now.

THE COURT: An additional seasonal road sign.
Mr. Ford?

MR. FORD: That is my understanding, your Honor. I would like to clarify for the record that implicit in what Mr. Benedict is saying, the county would be receiving a 66-foot wide right-of-way. I'm not at all saying it's going to be opened up to that level, but that's what comes under the statute with a public road; I just want to make sure we're clear on that.

MR. BENEDICT: I agree with that. In case anybody wasn't listening, and the entire case would then be dismissed.

THE COURT: And with regard to the Road Commission, obviously you have a meeting coming up.

MR. FORD: There is a Board of Commissioners Road Commissioners meeting this coming Wednesday, and it will be placed on the agenda for their consideration.

MR. BENEDICT: And if they say no we come back to Court.

THE COURT: On the 7th of September.

MR. BENEDICT: Yes, at 2:00 in the afternoon.

THE COURT: Ms. Symonds is here.

MS. SYMONDS: Yes.

THE COURT: You have listened to what Mr. Benedict said, is that the agreement you made?

MS. SYMONDS: Yes.

THE COURT: Do you feel you have had sufficient time to meet with him and get your questions answered so you could make an intelligent decision how to proceed?

MS. SYMONDS: Yes.

THE COURT: And is it a voluntary decision as well?

MS. SYMONDS: Yes.

THE COURT: Mr. Ford, I know you are here acting on behalf of the Road Commission, but I believe Mr. Dillenbeck is here.

MR. FORD: Yes, your Honor.

THE COURT: You have the authority to enter into this agreement as he described it?

MR. DILLENBECK: Yes, your Honor.

THE COURT: I know neither you nor he wish to bind the Road Commission, but you do expect based on the way the case is that the approval will likely be done at the meeting next Wednesday?

MR. DILLENBECK: I expect it to be approved, your Honor.

THE COURT: All we have left, we have counsel for Mr. Short.

MR. GRUNST: Right here, Judge.

THE COURT: Mr. Grunst, you are being offered a dismissal without condition, I presume?

MR. GRUNST: I guess we'll accept that.

THE COURT: And, Mr. Seaman, you represent the Durgas, or Rochelle Durga and Ms. Wheelock?

MR. SEAMAN: It's actually Baatz, was Wheelock. I do represent those two. We do accept dismissal of [sic] that condition.

THE COURT: Anyone else I missed? All right. What we'll do is simply adjourn this until the 7th. In the event the contingency is met, then I'll look forward to this being drafted perhaps as a form of a consent judgment as opposed to a stip and order to dismiss so it's clear for posterity what the status of this is.

MR. BENEDICT: Make it recordable.

THE COURT: Exactly.

On September 7, 2004, a consent judgment dismissing the case with prejudice as to all Defendants was signed by the Court. The consent judgment does not award fees or costs.

On September 23, 2004, Defendants Durga and Baatz filed this motion for costs and sanctions, pursuant to MCR 2.114, which provides, in pertinent part, as follows:

(D) The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed 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.

* * *

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

If a pleading is signed in violation of MCR 2.114(D), the party or attorney, or both, *must* be sanctioned. MCR 2.114(E).

These Defendants claim that Plaintiff's counsel violated MCR 2.114(D)(2) because he signed the Complaint in this case when he knew from his involvement in the *Reid* case that the Complaint in this case was not "well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." The Defendants cite only the Court Rule in support of their position and rely upon what they argue was essentially a last-minute, voluntary dismissal by the Plaintiff. Defendant Short concurs in the motion, but also does not cite any authority in support. The Court made an initial ruling awarding sanctions under MCR 2.114 but gave the Plaintiff further time to brief the issue.

In response to the motion, the Plaintiff argues that (1) the motion is time-barred because it was not filed until after the case was dismissed; (2) costs are deemed included in settlement, MCR 2.625(H); and (3) sanctions for a frivolous claim are not appropriate under either MCR 2.114(F) or MCL 600.2591 because, regardless of the outcome in the *Reid* case, Plaintiff's counsel "did not

believe that the case was not meritorious. Counsel believed that the plaintiff would prevail at the time of trial.”

ISSUES

- I Whether the Defendants’ motion is time-barred; and
- II Whether these Defendants, after entering into a settlement agreement and executing a consent judgment, are entitled to costs and attorney fees under MCR 2.114.

I

Whether the Motion is Time-Barred

The Plaintiff contends that the Defendants’ motion is time-barred because the Defendants did not request costs or sanctions before the case was dismissed. The Plaintiff relies upon *Antonow v Marshall*, 171 Mich App 716; 430 NW2d 768 (1988) for the proposition that a request for sanctions under MCR 2.114 must be made prior to dismissal. In *Antonow*, a patient filed a medical malpractice action against several physicians and pharmacies. After one of the physicians was dismissed with prejudice and without costs, he filed a motion for sanctions on the ground that there was no factual basis for making him a defendant in the action. The Court held that the defendant’s motion for sanctions was untimely because he did not request sanctions prior to dismissal.

In *Maryland Casualty Co v Allen*, 221 Mich App 26; 561 NW2d 103 (1997), an uninsured motorist (UM) insurer brought a subrogation claim against the tort-feasor’s estate. After granting summary disposition to the estate on grounds that the claim was untimely, the Court granted the estate’s motion for sanctions. On appeal, the insurer argued that the defendant waived any right to sanctions under MCR 2.114(E) by not asserting his right to sanctions before entry of the order granting summary disposition. The plaintiff urged that the order granting summary disposition was a final order and disposed of all pending issues, including sanctions. The Court of Appeals disagreed, saying that it “recently rejected a similar argument, concluding that there can be more than one final judgment or order in an action. An order granting attorney fees after entry of an order disposing of the action is one example of it.” *Avery v Demetropoulos*, 209 Mich App 500, 502-503; 531 NW2d 720 (1994). Likewise, MCR 2.114 does not require that the issue of sanctions be decided before the order granting summary disposition is entered. The Court of Appeals went on to say:

We recognize that, to be timely, a request for sanctions **should** be filed before the action's dismissal. *Antonow v Marshall*, 171 Mich App 716, 719; 430 NW2d 768 (1988). However, here defendant complied with that rule by requesting sanctions at the time he filed his motion for summary disposition. **So long as a request has been made before dismissal, the trial court can award attorney fees at a later date.** *Antonow, supra*. [Emphasis added].

It is undisputed that the Defendants in the instant case did not request MCR 2.114 sanctions until after they had entered into a settlement agreement in open court and executed the consent judgment that was entered by the Court. Neither the settlement agreement nor the consent judgment mentions an award of costs or sanctions. The Defendants' motion for sanctions under MCR 2.114 is untimely.

II

Whether These Defendants, after Entering into a Settlement Agreement and Executing a Consent Judgment, Are Entitled to Costs and Attorney Fees under MCR 2.114.

A settlement agreement is binding when it is made in open court. MCR 2.507(H). According to the Court of Appeals in *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350-351; 605 NW2d 360 (2000):

An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts.' *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). 'The primary goal in the construction or interpretation of any contract is to honor the intent of the parties.' *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994).

* * *

In the absence of evidence that the issue was contemplated and agreed on at the time the settlement agreement was made, a party cannot unilaterally incorporate a provision.

Under usual contract principles, the Defendants are bound by the settlement agreement absent a showing of mistake, fraud, or unconscionable advantage. *Prichard v Sharp*, 51 Mich 432, 435; 16 NW 798 (1883); *Plamondon v Plamondon*, 230 Mich App 545; 83 NW2d 245 (1998); *Marvin v Marvin*, 203 Mich App 154, 157; 511 NW2d 708 (1993); *Meyer v Rosenbaum*, 71 Mich App 388,

393-394; 248 NW2d 558 (1976). The Defendants do not advance any claim that the settlement agreement was the result of mistake, fraud, or unconscionable advantage. See, *Michigan Bell Telephone Co v Sfat*, 177 Mich App 506, 515; 442 NW2d 720 (1989). (Employee could not challenge terms of settlement agreement, when these were read in open court and he voiced no objection to them.)

If the Plaintiff had sought permission to voluntarily dismiss this action against these Defendants, the Court could and would have entered an order of dismissal "on terms and conditions the court deems proper," i.e. payment of costs and attorney fees. MCR 2.504; *Mount Clemens*, 193 Mich App 81, 84-85; 483 NW2d 442 (1992); MCR 2.504. However, these Defendants did not request an award of costs and attorney fees. They were present in Court when the settlement was recited on the record, they agreed to it and they made no request for payment of their costs and attorney fees. In fact, they subsequently executed a consent judgment that does not award costs or attorney fees or reserve the issue.

CONCLUSION

While this Court would have awarded costs and attorney fees, if requested, it is constrained to follow the law. The request by the Defendants is untimely. Furthermore, the Defendants struck their bargain in open Court. They cannot now seek to unilaterally change the terms of that bargain. The Defendants' Motion for Costs and Sanctions is denied.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

12/16/04