STATE OF MICHIGAN

COURT OF APPEALS

JOELLEN FOSTER-WOUTINEN and LINDA BESHEARS,

Plaintiffs/Counter-Defendants/Appellees/Cross-Appellants,

v

YVONNE JONES,

Defendant/Counter-Plaintiff/Appellant/Cross-Appellee,

and

JOHN K. THOMPSON, KELLY C. THOMPSON, JEANETTE THOMPSON, JEFF PALMER, MICHAEL ARMSTRONG, JESSE ARMSTRONG, SHARON L. COOK, BRUCE E. BEVIER, JR., JOSH GREENWOOD, BARBARA PETERAKIS, ANDREW MALTESE, ANDREW MELOCHE, MEGAN MELOCHE, STEPHEN W. COLEMAN, CYNTHIA L. COLEMAN, DANA R. HARTLEY, ANNETTE MURZIN, ROBERT H. CROLL, JANET B. CROLL, HASSAN ABBAS, KEVIN KOKKO, CAROLYN KOKKO, WILLIAM WOS, HELEN WOS, JOHN LAKE, PAULENE LAKE, and GENEVIEVE VORAN,

Defendants.

UNPUBLISHED
November 17, 2009

No. 285150
Oakland Circuit Court
LC No. 2007-083261-CH

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant, Yvonne Jones, appeals as of right the trial court's summary disposition order dismissing her counterclaims with prejudice, denying her request for sanctions, and dismissing plaintiffs' trespass and nuisance claims without prejudice. Plaintiffs, Joellen Foster-Woutinen and Linda Beshears, cross appeal this same order insofar as it dismissed their adverse possession

claim and failed to quiet title. We affirm this order in all respects, except the dismissal of Jones's prescriptive easement claim, and remand for further proceedings consistent with this opinion.

I. Background

This case arises out of a dispute over the use and ownership of land abutting Walled Lake known as Outlot A, a 20-foot wide parcel between Osprey Lane and Walled Lake in the Jenny Park subdivision of Commerce Township. Defendants (including Jones), residents of Jenny Park, have used Outlot A as a public access to Walled Lake since at least 1990. Plaintiffs, who own land (Lots 12 and 13) on both sides of Outlot A, claim sole ownership of Outlot A and seek to exclude defendants' use of that parcel. Jones maintains that plaintiffs failed to acquire lawful title to Outlot A and that she has the right use to that parcel.

The history of Outlot A can be traced back to 1936 when an Oakland Circuit Court order approved vacation of a portion of the Virginia Park subdivision, which Adam Lake and Joseph Wos subsequently purchased and platted in 1948. That platted portion became known as the Jenny Park subdivision. When Adam Lake died in 1949, his widow received a one-half interest in his estate and each of his four children received a one-sixth interest. At the time of his death, Adam Lake owned an undivided, one-half interest in the Jenny Park subdivision.

The parties to this case did not begin to appear on the scene until 1983, when Foster-Woutinen purchased Lot 13 in Jenny Park, adjacent to Outlot A. From the time of her purchase, a fence was placed along the border of Outlot A and Lot 12, making Lot 13 and Outlot A appear as one parcel, and Foster-Woutinen began using Outlot A without the permission of that parcel's owners at that time. By 1986, Jones had moved to Jenny Park and had also started using Outlot A for seasonal access to Walled Lake, per the representations of her real estate agent and Foster-Woutinen's housemate that Outlot A was a public easement. Notably, while Foster-Woutinen claimed that she had granted permission to Jones and other Jenny Park residents to use Outlot A from 1990 through 1998, Jones did not recall receiving any such permission, and in fact asserted that she not only never asked permission to use Outlot A, but she had also assisted with the upkeep of Outlot A. Other than a temporary fence erected in 1990, Jones denied that plaintiffs had attempted to block her access to Outlot A until placing a "No Trespassing" sign in May 2007.

In 2003, Beshears purchased Lot 12 (adjacent to Outlot A). Soon after moving in, Beshears sought to exclude both Jenny Park residents and nonresidents from using Outlot A to dock boats because she believed such use was inappropriate, and she did not like them there. Beshears went so far as to report Jones's use of Outlot A to the sheriff's department, in addition to her state representative, the DEQ, and the city of Walled Lake. She also told Jones to remove her boat because Outlot A was Beshears's property. Foster-Woutinen later informed Beshears that she had granted permission for other residents to use Outlot A, and Beshears, believing that such use diminished the value of the property, began researching the title chain of Outlot A.

Beshears testified that she discovered that Outlot A was privately owned since 1936. Title searches performed by Fidelity Commercial Services and Reliance Title Services (both retained by Beshears) in November 2006 and April 2007, indicated that Joseph Wos and Adam Lake (the plattors of the subdivision) were the "presumed owners" of Outlot A. Assuming that

the heirs of Joseph Wos and Adam Lake inherited Outlot A, Beshears and Foster-Woutinen contacted William and Helen Wos and John and Paulene Lake, the plattors' grandchildren, who were unaware that Outlot A even existed. Seeking to avoid costly and time-consuming litigation, Beshears and Foster-Woutinen offered to settle the adverse possession claim they had threatened against the Wos and Lakes for $6,000. The Wos and Lakes agreed and executed a warranty deed conveying their interests in Outlot A to Beshears and Foster-Woutinen on May 21, 2007. Notably, a title insurance company declined coverage to plaintiffs on Outlot A because, among other reasons, "the ownership was somewhat questionable" in identifying the heirs of the original proprietors. According to Beshears, no research was done to determine whether the Wos and Lakes could convey any interest in Outlot A.

On that same date, May 21, 2007, plaintiffs sent Jones and other Jenny Park residents a "Legal Notice" explaining that plaintiffs' original belief that Outlot A was a "utility easement" for the public was mistaken and that plaintiffs had subsequently purchased Outlot A after conducting a title search. Plaintiffs demanded Jones remove her dock and boat from Outlot A and instead use Lot 40 for her access to the lake. When Jones attempted to use Outlot A the next day, Beshears called the police, alleging an assault.

Soon after, plaintiffs initiated suit asserting their sole ownership of Outlot A and alleging trespass and nuisance in fact against defendants, and requesting the court quiet title to Outlot A. Jones subsequently filed her answer and counter complaint asserting the acquisition of a prescriptive easement to Outlot A. Through discovery, Jones uncovered that the Lakes did not have the interest in Outlot A they purported to grant in the warranty deed given the disposition of John Lake's estate in 1949. When plaintiffs refused Jones's demand to dismiss their claims and pay costs, Jones amended her counter complaint, adding claims of conspiracy/concert of action, abuse of process, intentional infliction of emotional distress (IIED), and frivolous action under MCL 600.2591.[1]

The parties subsequently filed cross motions for summary disposition on their claims and counterclaims. After hearing arguments on these motions, the court made the following findings: (1) plaintiffs conceded the warranty deed failed to convey all the interests of the persons related to the original plattors and sought to withdraw their claims to full ownership obtained by warranty deed from the Lakes and the Wos; (2) plaintiffs' adverse possession claim failed for lack of exclusivity; (3) Jones's prescriptive easement claim failed because Foster-Woutinen granted permission to subdivision residents to use Outlot A; (4) Jones's conspiracy

[1] In the interim, Genevieve Voran (one of Adam Lake's four children who received one-sixth of Adam Lake's interest in Outlot A upon his death) conveyed one-half of her interest in Outlot A to defendant Barbara Paterakis for the express purpose of providing Jenny Park Subdivision owners access to Walled Lake. Paterakis, in turn, quit claimed one-third of her interest in Outlot A to defendant Andrew Maltese. These conveyances occurred on November 2, 2007, and December 12, 2007, respectively. Plaintiffs subsequently stipulated to an order dismissing their claim of fee simple ownership with respect to Maltese and permitting plaintiffs to proceed with the remaining allegations to quiet title as tenants in common by virtue of the warranty deed granted by the Wos and the Lakes.

claim failed because Jones failed to show the existence of a conspiracy to accomplish an unlawful purpose; (5) Jones's abuse of process claim failed because her reliance on a police report was insufficient to create a genuine issue of material fact regarding an ulterior purpose in her criminal prosecution; and (6) the exclusion of defendants from Outlot A did not constitute the outrageous conduct required to support an IIED claim.

Based on these findings, the court dismissed all of Jones's counterclaims as well as plaintiffs' adverse possession claim, and permitted plaintiffs to withdraw their trespass and nuisance claims as well as their claim to quiet title based on the warranty deed. The court also declined to rule on the parties' motions for sanctions, noting that such motions could be refiled at a later date. Jones's motion for reconsideration was also denied. The instant appeals ensued.

II. Analysis

A. Dismissal of plaintiffs' trespass and nuisance claims without prejudice

Jones contends the trial court erred in dismissing plaintiffs' trespass and nuisance claims without prejudice under MCR 2.504(A)(2). This Court reviews the decision to grant voluntary dismissal under MCR 2.504(A)(2) for an abuse of discretion. *McKelvie v Mount Clemens*, 193 Mich App 81, 84; 483 NW2d 442 (1992). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"Under MCR 2.504(A)(2), an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper." *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 570; 525 NW2d 489 (1994). Dismissal under this subrule is without prejudice unless the order indicates otherwise. MCR 2.504(A)(2)(b). In deciding whether to grant a request for voluntary dismissal, "the trial judge is to weigh the competing interests of the parties along with any resultant inconvenience to the court from further delays." *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212; 196 NW2d 16 (1972) (discussing prior GCR 1963, 504.1(2)). "Normally, such a motion should be granted unless the defendant will be legally prejudiced by the result." *Id.*

Several cases provide useful guidance on this issue. For example, in *Rosselott v Co of Muskegon*, 123 Mich App 361, 374-375; 333 NW2d 282 (1983), the plaintiffs moved for voluntary dismissal of their case upon realizing their theories pleaded in the complaint were meritless, and that alternate theories would need to be researched and raised. After the court offered to voluntarily dismiss the arguably meritorious theories without prejudice and dismiss the rest of the complaint with prejudice, the plaintiffs indicated that they were not prepared for trial, and the trial court dismissed the entire action with prejudice. *Id.* at 375-376. This Court upheld the trial court's decision because the trial court's decision properly weighed the parties' competing interests, concluding that on balance the additional time and money the defendants would expend to prepare for a new trial would have been unfairly prejudicial. *Id.* at 376.

In *African Methodist Episcopal Church*, the defendants terminated their church membership pursuant to a court order obtained by the plaintiffs. However, this Court determined that the defendants had a meritorious defense to the plaintiffs' claim. *Id.* at 212. On remand, the trial court granted the plaintiffs' motion for voluntary dismissal without prejudice. *Id.* at 211-

212. On the defendants' appeal, this Court found that "[i]f plaintiffs do not wish to pursue their complaint, then a dismissal should seek to return the parties to their positions prior to the inception of this lawsuit. . . . Defendants have a right to an adjudication of this suit. They should not be forced to bear the expense of a new lawsuit in which they would be plaintiffs." *Id*. at 212-213.

Here, plaintiffs sought voluntary dismissal of their trespass and nuisance claims after conceding that the warranty deed granted by the Lakes and the Wos failed to convey all the interests of the original plattors of Outlot A. This concession is significant because a warranty deed is deemed to convey an interest in fee simple and "include[s] the usual covenants of title, including the covenant of seisin and of good right to convey, the covenant of quiet enjoyment, the covenant against encumbrances, and the covenant to warrant and defend the title." *McCausey v Ireland*, 253 Mich App 703, 707; 660 NW2d 337 (2002); MCL 565.151. Thus, plaintiffs' concession amounts to an admission that the warranty deed was defective. Further, when plaintiffs' concession is considered in conjunction with the court's finding that plaintiffs' adverse possession claim was meritless, the extent of the interest plaintiffs acquired in Outlot A is entirely unclear.[2]

Furthermore, it appears plaintiffs' failure to determine the extent of the Lakes' interest in Outlot A–and thus the extent of the interest plaintiffs acquired–was due to plaintiffs' own oversight. Indeed, Beshears admitted that she merely assumed the Lakes and Wos could grant a valid warranty deed and that she did not research the extent of their interests in Outlot A. Moreover, it was only after Jones's search of public records during discovery that plaintiffs conceded the warranty deed failed to convey the interests of the original plattors. A defendant may be prejudiced by a voluntary dismissal where there is an excessive delay and lack of diligence by the plaintiff in prosecuting an action. *Grover by Grover v Eli Lilly & Co*, 33 F3d 716, 718 (CA 6, 1994).[3]

Notwithstanding plaintiffs' oversight, however, on balance it cannot be said that the trial court's decision fell outside the range of reasonable and principled outcomes. First, unlike the plaintiffs in *Rosselott*, plaintiffs here continued prosecuting their other meritorious claims. Second, it is not clear at this stage in the proceedings that plaintiffs' trespass and nuisance claims lack merit. Indeed, while it is clear the warranty deed could not convey a fee simple interest, it appears that the Lakes and Woos had at least some, albeit minimal, interest that was conveyed. And there is no requirement that a property owner must have a fee simple interest to maintain an action in trespass or nuisance. See *Adkins v Thomas Solvent Co*, 440 Mich 293, 302-303; 487 NW2d 715 (1992) (nuisance is a nontrespassory invasion of another's *private interest* in the use and enjoyment of land); *Richey v Brown*, 58 Mich 435, 435-437; 25 NW 386 (1885) (tenants in

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[2] For example, evidence was presented below that the one-sixth interest of Adam Lake's son, Walter Lake, may have passed to his wife, Doris Lake, who may still be alive.

[3] This Court has looked to federal courts for guidance in interpreting MCR 2.504. See, e.g., *Bruce v Grace Hosp*, 96 Mich App 627, 631; 293 NW2d 654 (1980) (discussing prior GCR 1963, 504.1(2)).

common may maintain a trespass action). Thus, the claims of trespass and nuisance are at least arguably meritorious. Third, the dismissal did not place Jones in a position that differed from her position at the inception of the lawsuit as in *African Methodist Episcopal Church*.

Fourth, and most importantly, even though Jones may have to bear additional costs should plaintiffs refile their trespass and nuisance claims, the court permitted the parties to file motions for sanctions, costs, and attorney fees at a later date. This is significant because under MCR 2.504(D), a court is permitted to order that the costs incurred in an action previously dismissed be paid when a plaintiff commences an action based on or including the same claim that was previously dismissed against the same defendant. Thus, assuming the court enters such an order, it would not leave Jones without an avenue for compensation should plaintiffs refile their trespass and nuisance claims. We also note that "[t]he mere fact that the action may be refiled does not constitute 'prejudice,' for MCR 2.504 itself recognizes that refiling is likely to occur, and authorizes the court to impose such terms and conditions on the dismissal as the court deems proper to protect the defendant." 3 Longhofer, Michigan Court Rules Practice (5th ed), § 2504.5, p 53. In light of the foregoing, the trial court did not abuse its discretion in dismissing plaintiffs' trespass and nuisance claims without prejudice.

B. Jones's subsequent motion for sanctions

Jones maintains that the dismissal of the trespass and nuisance claims without prejudice effectively barred her from bringing a subsequent motion for sanctions and that it was error for the trial court to do so. This argument puts the proverbial cart before the horse. Indeed, the court made no ruling denying Jones's motion for sanctions, and indicated that a motion for sanctions could be refiled subsequently. This is an appropriate procedure. See *Maryland Casualty Co v Allen*, 221 Mich App 26, 30; 561 NW2d 103 (1997) ("So long as the request has been made before dismissal, the trial court can award attorney fees at a later date."); see also, *Ypsilanti Twp v Kircher*, 281 Mich App 251, 260, 286-287; 761 NW2d 761 (2008).[4]

C. Jones's cross motion for summary disposition

Jones next challenges the dismissal of her abuse of process, civil conspiracy/concert of action, IIED, and prescriptive easement claims. Initially, we note that with the exception of the prescriptive easement claim, which plaintiffs moved to dismiss under MCR 2.116(C)(10), plaintiffs moved to dismiss Jones's counterclaims under MCR 2.116(C)(8).

[4] While Jones maintains sanctions are appropriate under MCR 2.625 and MCL 600.2591, such an award is premature as she must prevail on the entire record. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 519-520; 556 NW2d 528 (1996), aff'd 458 Mich 582 (1996), quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice, pp 723-724. Additionally, we note that the Model Rules of Professional Conduct do not provide an independent basis to impose sanctions. *Watts v Polaczyk*, 242 Mich App 600, 607 n 1; 619 NW2d 714 (2000), citing MRPC 1.0(b).

> A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true. [*Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).]

This Court reviews de novo an appeal from an order granting a motion for summary disposition pursuant MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth documentary evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2 69 (2001).

i. Abuse of Process

To establish abuse of process, a plaintiff must allege "(1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). In setting forth such a claim, a bad or malicious motive is insufficient; rather, some corroborating act must demonstrate the ulterior purpose. *Young v Motor City Apartments Limited Dividend Housing Ass'n No 1 & No 2*, 133 Mich App 671, 682; 350 NW2d 790 (1984). This Court has described a meritorious abuse of process claim as "a situation where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure." *Bonner*, *supra* at 472, citing *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987).

Jones asserts that both the filing of the civil suit underlying this appeal and plaintiffs' contact with the Walled Lake police were initiated for the ulterior purposes of enhancing the value of plaintiffs' lots adjoining Outlot A and to exclude Jones and other residents from Outlot A. Regarding the civil suit, assuming plaintiffs' motives as alleged by Jones to be true, the fact that plaintiffs' filed suit to enhance their property value or exclude others from property is hardly a purpose collateral to actions to quiet title or allegations of trespass and nuisance. *Bonner*, *supra* at 472. On the contrary, the reason for requesting a court to quiet title and for alleging trespass and nuisance relates directly to the so-called "ulterior purpose" that Jones asserts. Thus, there was no abuse of process underlying the instant civil action.

With respect to plaintiffs' contact with police, Jones claims that although plaintiffs summoned the police ostensibly to report an assault by Jones, the ulterior motive was actually to obtain a *de facto* injunction enforced against Jones by police and to gain an advantage in the

instant civil action. Arguably, the facts could support such a conclusion. Indeed, Beshears admitted to police that she did not "want[] to pursue possible criminal charges [regarding the alleged assault]. . . but only wanted the people kept off her property." Additionally, the police report indicates that plaintiffs informed the responding officer of the controversy surrounding Outlot A and provided the "Legal Notice" pertaining to plaintiffs' warranty deed-based ownership claim.

Notwithstanding this, we need not determine whether such actions constituted an ulterior motive. This is because even if plaintiffs were duplicitous in summoning the police, it is the misuse of process rather than the initiation thereof that establishes abuse of process. See *Friedman v Dozorc*, 412 Mich 1, 30 n 18; 312 NW2d 585 (1981), quoting 3 Restatement Torts, 2d, § 682, comment a, p 474. Consequently, Jones's abuse of process claim is meritless on this score for failure to allege an improper act. *Friedman*, *supra* at 31. We affirm the trial court's bare bones treatment of this issue as having reached the right result albeit for the wrong reason.[5] *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

ii. Civil Conspiracy/Concert of Action

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003), aff'd 472 Mich 91 (2005) (quotation marks and citation omitted). To establish civil conspiracy, "it is necessary to prove a separate, actionable tort." *Id*. Here, the separate tort alleged is abuse of process. As previously noted, Jones failed to establish an actionable abuse of process claim. Therefore, Jones's civil conspiracy claim fails as a matter of law.

Jones counters that plaintiffs sought to exclude her from Outlot A despite their knowledge that the warranty deed was invalid given that: title professionals warned plaintiffs of the dubious nature of warranty deed; plaintiffs wrote to the grantors expressing questions regarding the adequacy of the title; and plaintiffs failed to make exclusive use of Outlot A. However, such facts and the inference that plaintiffs knew their deed was invalid–standing alone–cannot establish civil conspiracy where Jones has proved no underlying tort. Thus, these arguments fail.

iii. IIED

"To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3)

[5] In dismissing the abuse of process claim, the trial court merely held that the police report failed to establish a genuine issue of material fact, but did not address the civil aspect of the allegation. Although the court looked outside the pleadings to reach this conclusion, Jones's claim should have been dismissed under MCR 2.116(C)(8) for failure to state a claim on which relief could be granted for the reasons previously set forth.

causation, and (4) severe emotional distress." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004) (quotation marks and citation omitted). Regarding these requirements,

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" [*Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 350-351; 351 NW2d 563 (1984), quoting Restatement 2d, § 46, comment d; see also *Hayley*, *supra* at 577.]

Additionally, "liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities." *Mino v Clio School Dist*, 255 Mich App 60, 80; 661 NW2d 586 (2003). It is within the province of the trial court to initially determine whether conduct is sufficiently extreme and outrageous to permit recovery; however, if reasonable persons could differ on whether conduct was sufficiently extreme and outrageous, it is for the jury to determine whether the conduct has been sufficiently extreme and outrageous to result in liability. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999).

We reject Jones's contention that plaintiffs' summoning the Walled Lake Police, which led to her having to defend against criminal charges and the instant case, as well as plaintiffs' "baldly false and fraudulent pleading" constitute sufficiently outrageous conduct to support IIED. Numerous jurisdictions, including our own, have found that in such a litigious society, groundless and underhanded litigation tactics are not sufficiently outrageous conduct as a matter of law. See *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 626-627; 403 NW2d 830 (1986); see also, *Harrison v Luse*, 760 F Supp 1394, 1402-1403 (D Colo, 1991), aff'd, 951 F2d 1259 (CA 10, 1991) (filing a lawsuit did not amount to actionable outrageous conduct under Colorado law even assuming the claim was frivolous and groundless); *Church of Scientology of California v Siegelman*, 94 FRD 735, 740-41 (SD NY, 1982) (New York law does not permit IIED claims based on threats of lawsuits and commencement of frivolous action).

iv. Prescriptive Easement

An easement is the use of another's land for a specified purpose. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 678-679; 619 NW2d 725 (2000). An easement by prescription requires elements similar to adverse possession with the exception of exclusivity. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). Thus, to establish an easement by prescription, the use must be open, notorious, adverse, and continuous for a period of fifteen years. MCL 600.5801; *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995).

The trial court dismissed Jones's prescriptive easement claim on the grounds that the parties agreed that Jones's use was permissive.[6] However, while the trial court was correct in stating the general rule that "permissive use of another's property . . . will not create a prescriptive easement[,]" *Plymouth Canton Community Crier*, *supra* at 679, this does not mean that any permission suffices to undercut a prescriptive easement claim. Indeed, this Court has explained that the "use [must be] inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder [for trespassing] . . . ." *Id*. at 681 (quotation marks and citations omitted).

This is significant in this case because during the time that plaintiffs assert that Jones used Outlot A with their permission, they had no ownership interest in that parcel. Indeed, plaintiffs not only withdrew their warranty deed claim, but–as is set forth later in this opinion–their adverse possession claim is also mertiless. Consequently, without an ownership interest in Outlot A during the period of time at issue, plaintiffs' alleged permission to Jones had no effect on the true owner's rights to Outlot A and right to maintain a cause of action against an intruder to Outlot A. In light of this, plaintiffs' alleged permission could not destroy Jones's prescriptive easement claim. The trial court erred in holding otherwise.

D. Plaintiffs' claim to quiet title

On cross appeal, plaintiffs assert the trial court erred in failing to adjudicate their quiet title claim. This Court reviews a claim to quiet title, which is equitable in nature, de novo. *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996).

Under MCL 600.2932, the Legislature codified quiet title actions and authorized suits in circuit court to determine competing land interests. Civil actions under this section are governed by MCR 3.411. Pursuant to MCR 3.411(D)(1), "[a]fter evidence has been taken, the court shall make findings determining the disputed rights in and title to the premises." Here, the court dismissed plaintiffs' quiet title claim made under a theory of adverse possession and noted that plaintiffs had withdrawn their quiet title claim made pursuant to the warranty deed. While plaintiffs contend the court's failure to determine the parties' disputed rights and title to Outlot A contravened MCR 3.411(D)(1), plaintiffs admit that the crux of this argument is that their "claim of ownership pursuant to their deed still needs to be adjudicated." However, the court's order clearly provides that plaintiffs withdrew their quiet title claim based on the warranty deed. Thus, there was no disputed rights or title for the court to adjudicate on this ground.

In any event, MCR 3.411(D)(1) requires the court to determine disputed rights and title "after evidence has been taken . . . ." As previously noted, however, it is entirely unclear based

[6] Jones disputes that plaintiffs granted her permission to use Outlot A. Contrary to the trial court's finding, it appears from the record that a genuine issue of material fact exists on this point. However, as will be explained, resolution of whether plaintiffs granted permission is immaterial.

on the evidence what interests plaintiffs actually have in Outlot A. Thus, any adjudication of rights in and title to Outlot A would be premature. There was no error.[7]

E. Plaintiffs' adverse possession claim

This brings us to plaintiffs' final assignment of error: that the trial court erred in dismissing their adverse possession claim on the ground that Foster-Woutinen permitted other subdivision residents to use Outlot A. Plaintiffs are correct that the trial court misapplied the law, but such a conclusion does not render their adverse possession claim successful, *per se*. *Taylor*, *supra* at 458.

To establish a claim by adverse possession, a claimant must establish by clear and cogent evidence that possession was actual, visible, open, notorious, exclusive, continuous, hostile and under a cover of a claim of right, and uninterrupted for the statutory period of 15 years. *Thomas v Rex A Wilcox Trust*, 185 Mich App 733, 736-737; 463 NW2d 190 (1990); MCL 600.5801. "Whether adverse possession is established depends upon the facts of each case and the character of the premises." *Id*. at 737 (quotation and citation omitted). Here, the only ground upon which the trial court dismissed plaintiffs' adverse possession claim was for failure of exclusivity based on Foster-Woutinen's permission to defendants to use Outlot A.

Although Michigan case law has not clearly defined "exclusivity," our Supreme Court has found that this requirement is not necessarily destroyed merely because parties other than the claimant have used the land at issue during the 15-year statutory period. *Pulcifer v Bishop*, 246 Mich 579, 583-584; 225 NW 3 (1929). As *Pulcifer* explained:

> [The defendant] claims title by adverse possession to that part of the river bank across the highway and in front of his parcel. His evidence is that he built and maintained a landing or dock, and steps leading down the bank to the same, that he installed a water pipe, that he cut weeds and kept clean that portion of the beach, and used the same, all this for many years, longer than the statutory period. He did it under a claim of ownership long asserted. The dock was replaced from time to time until about 1914, when he hired a spile driver and made a permanent dock extending into the river nearly 100 feet. There is evidence that he warned many people to keep off the premises in question. There is also evidence that some persons, especially his neighbors, used the dock and the beach at times without protest from said defendant. In view of the well-known tendency of people to make rather free use of shores and beaches, we think defendant exercised all control of these premises that reasonably could be expected in view of their character. [*Id*.[8]]

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[7] While plaintiffs make much of Jones's intent to build a marina on Outlot A and her trouble in securing the necessary permits, that has no bearing on whether the court violated MCR 3.411(D).

[8] Consistent with this approach to exclusivity, other jurisdictions have also found that a claimant's permission to other parties for occasional or minor use of the land at issue does not (continued…)

In light of *Pulcifer*, the trial court erred in reasoning that Foster-Woutinen's permission to friends and neighbors to use Outlot A destroyed the exclusivity requirement of adverse possession, *per se*. Indeed, the common thread in the authority cited is that where a claimant "exercise[s] all control of [the] premises that reasonably could be expected in view of their character," *Pulcifer, supra* at 584, permitted use by others (whether tacit or explicit) is not, *ipso facto*, fatal to a claim of adverse possession. In light of this, we must look to whether Foster-Woutinen "exercised all control of [Outlot A] that reasonably could be expected in view of [its] character," *id.*, to determine whether Foster-Woutinen satisfied the exclusivity requirement.

On this score, Foster-Woutinen testified that she both expressly permitted and prohibited other residents' use of Outlot A, used Outlot A for social activities such as playing with her children and driving an all terrain vehicle (ATV) in the wintertime, and that she also maintained the grass, planted flowers, and even hydroseeded the parcel in 1990.[9] Notwithstanding this, however, it was Jones and other residents who seasonally constructed a dock on Outlot A and Jones and her ex-husband who maintained the grass around the dock. Jones even testified that her children planted flowers on Outlot A.

Thus, Jones and other residents not only used Outlot A in a manner similar to the neighbors' use of the beach and dock in *Pulcifer*, but Jones also seasonally improved Outlot A by building a dock and maintaining the area around it like the adverse claimant in *Pulcifer*. When this is considered in light of the similarity of the character of the parcels in the instant case and *Pulcifer*, it is a stretch to say that Foster-Woutinen "exercised all control of these premises that reasonably could be expected in view of their character[,]" *id.*, when Jones and other residents exercised control over Outlot A in the manner similar to the adverse claimant in *Pulcifer*.

Furthermore, even if Foster-Woutinen granted permission to use Outlot A as plaintiffs repeatedly assert (and Jones disputes), it can hardly be said that such permission was for occasional use or for the purposes of allowing Jones and others to perform minor functions on the land. *Almond v Anderegg*, 276 Or 1041, 1047; 557 P2d 220 (1976); *Hinds v Slack*, 293 Ala 25, 29; 299 So2d 717 (1974). Regardless, plaintiffs' "Legal Notice" betrays that Jones and other residents' use of Outlot A exceeded the scope of any permission that Foster-Woutinen allegedly granted. As the notice provided in relevant part:

> I [Foster-Woutinen] DID CONFRONT A FEW INDIVIDUALS REGARDING OUT LOT A AND THE "WALK TO THE LAKE" ISSUE. WE DISCUSSED WHAT WAS THIS [SIC] OUT LOT AND WHO HAD ACCESS TO IT. I

(…continued)

necessarily foreclose a claim of adverse possession. See, e.g., *Almond v Anderegg*, 276 Or 1041, 1047; 557 P2d 220 (1976) ("occasional allowing of defendant and others to use the roadway does not destroy the element of exclusive possession"); *Hinds v Slack*, 293 Ala 25, 29; 299 So2d 717 (1974) (allowing apparent titleholders "to come and go and perform minor functions on the land" did not prevent possessors from acquiring title by adverse possession).

[9] Notably, the hydroseeding occurred despite a letter from the City of Walled Lake to a neighbor, which noted that the hydroseeding was conducted "without the permission of all the property owners in the subdivision."

> ALWAYS STATED IT WAS A UTILITY EASEMENT. *OF COURSE, WE DIFFERED ON OUR INTERPRETATION OF THIS OUT LOT A. I LET IT GO AND THINGS WENT ON AS USUAL – THE EASEMENT WAS A DOCKING POINT FOR THE BACKLOT OWNERS OF JENNY PARK SUB.*
>
> TIMES CHANGE, PEOPLE COME AND GO. OUR NEW NEIGHBORS, LINDA [BESHEARS] AND ROGER, ADJACENT TO OUT LOT A DID NOT LIKE THE "BOAT DOCKING" ON OUT LOT A. *OUT LOT A NOW BECAME A MAJOR ISSUE IN OUR NEIGHBORHOOD. ARGUMENTS BROKE OUT, THE DEQ WERE [SIC] NOTIFIED, THE NEIGHBORHOOD WAS UNSETTLED.*
>
> * * *
>
> LINDA [BESHEARS] DECIDED TO TAKE THIS MATTER UP LEGALLY, SO HERE IS THE LEGALITIES ON OUT LOT A [SIC]. OUT LOT A IS PRIVATELY OWNED. . . . *IT WAS NEVER A "FREE" FOR ALL.*
>
> * * *
>
> I CAN'T CONTROL OTHER PEOPLE AND WHAT THEY DO. I HAVE DONE NOTHING BUT TRY TO HELP ALL OF YOU, AND *EVERY SUGGESTION I MADE OVER THE YEARS WAS IGNORED.* [Emphasis added, capitalization retained from original.]

Thus, in this "Legal Notice," plaintiffs admit that the parties differed in their interpretation of Outlot A such that arguments ensued, but that Foster-Woutinen "let it go" whereupon other residents continued using the parcel and "things went on as usual." Such is hardly an exercise of control over property over which one claims ownership – especially where the notice relegates Foster-Woutinen's own attempt to assert her claim of control to the realm of mere suggestion. In view of this notice, therefore, it appears the scope of any "permission," or at least defendants' respect for such permission, was insufficient to show the exercise of reasonable control over the premises. For this reason, the trial court properly dismissed plaintiffs' adverse possession claim, albeit for the wrong reason. *Taylor*, *supra* at 458.[10]

Before concluding, we note that there is no evidence that Beshears was involved with Outlot A before 2003 when she purchased Lot 12. Thus, as the statutory period of adverse

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[10] Plaintiffs contend that the "Legal Notice" is "without legal significance" because it fails to show Foster-Woutinen's intent as the adverse claimant. However, the issue of intent goes to whether an adverse claimant possessed the property under the cover of a claim of right as opposed to whether the claimant possessed the property exclusively. *Ennis v Stanley*, 346 Mich 296, 305; 78 NW2d 114 (1956); see also Black's Law Dictionary, (6th ed.), p 170. The "Legal Notice" is of legal significance as it sheds light on whether Foster-Woutinen exercised all reasonable control over Outlot A in view of its character. Thus, this argument fails.

possession is 15 years, the trial court should have initially dismissed plaintiffs' adverse possession claim with respect to Beshears before ruling on the merits. Regardless, as stated throughout this opinion, we may affirm where the trial court reached the right result for the wrong reason. *Taylor*, *supra* at 458.

III. Conclusion

We affirm the challenged order in all respects, with the exception of the dismissal of Jones's prescriptive easement claim, and remand that claim for further proceedings consistent with this opinion. No costs, neither party having prevailed in full.

We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello