STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

EMPIRE OIL & GAS, INC.,

Plaintiff,

vs

File No. 92-9633-CK
HON. PHILIP E. RODGERS, JR.

GLOBAL NATURAL RESOURCES CORPORATION OF NEVADA,

Defendant.
_____/

Peter J. Zirnhelt (P24847)
Attorney for Plaintiff

William M. McClintic (P17310)
Attorney for Defendant

DECISION AND ORDER

Plaintiff's complaint arose out of a dispute with Defendant regarding an interest in an oil well. The case was furiously litigated and the parties amassed over 4,000 pages of deposition transcript and voluminous documents. Each party spent well in excess of $100,000 on attorneys fees and costs. As the case progressed, the Defendant represented to Plaintiff and the Court that it could no longer justify continuing the litigation as the costs of doing so could not be justified in view of the deteriorating quality of the well and the stream of income it was anticipated to produce.

Defendant then offered to grant Plaintiff its interest in the well in accordance with the terms of the contractual agreement Plaintiff had sued upon. This was accomplished, and the Court dismissed the litigation recognizing that the parties had preserved the issue of sanctions. Plaintiff then filed a motion for sanctions in accordance with MCR 2.114(D)(2) and, upon reviewing Plaintiff's motion and brief, Defendant filed its own motion for sanctions claiming that Plaintiff's request was frivolous.

The Court has reviewed the parties' lengthy motions, briefs and affidavits pertaining to this issue and entertained their oral argument on February 14, 1994. The Court took the matter under advisement. It will now provide its findings of fact and conclusions of law. MCR 2.517.

The relevant portion of MCR 2.114 provides as follows:

> **(D) Effect of Signature.** The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
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> (1) he or she has read the pleading;
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> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the pleading 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
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> (3) the pleading is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
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> **(E) Sanctions for Violation.** If a pleading 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 pleading, including reasonable attorney fees. The Court may not assess punitive damages.
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> **(F) Sanctions for Frivolous Claims and Defenses.** In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

Frivolous actions are further defined in MCLA 600.2591. There, in providing the Court with the authority to award sanctions where a claim or defense is deemed frivolous, the legislature defined frivolous to include at least one of the following

conditions: (1) the party's primary purpose in initiating the action or asserting that the defense was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe that the facts underlying the party's legal position were in fact true or; (3) the party's legal position was to void of arguable legal merit. The legislature further noted that a prevailing party was that party who "wins on the entire record." MCLA 600.2591(3)(b).

Here, the Court is asked to make a determination regarding frivolous defenses in a file with thousands of pages of deposition transcript, voluminous exhibits and where neither a trial nor an evidentiary hearing was ever conducted. Indeed, neither party filed a motion for summary disposition.

To appropriately rule on Plaintiff's request, this Court has been asked to review deposition testimony and exhibits and, in the absence of a trial where the weight and credibility of the evidence could be determined by the Court, draw factual conclusions and make legal determinations which support a ruling that not only would Plaintiff have prevailed, but that the defenses asserted were frivolous. Neither the court rule nor the statute appear to contemplate such a herculean task.

To review this motion, the Court has considered the merit of the parties' respective legal positions and the affidavits and arguments put before it. Counsel for the Defendant described the investigation which he employed upon receipt of the Plaintiff's initial demand letter. Mr. McClintic's unrebutted claim is that the allegations of fact and defenses put forth by his client were predicated on more than 50 hours of inquiry by him over a two-month period. The effort he underwent included consultation with the client's principals, a review of documents and an analysis of the law. The Defendant may not have provided him with all the facts or his legal conclusions may have been in error, but the evidence does not suggest that Mr. McClintic's inquiry was less than reasonable, lacked diligence or failed to meet the applicable standard of care.

Recognizing that counsel did make a reasonable inquiry and

that his behavior cannot be used to substantiate a finding that the defenses were frivolous, the Court must look at the substance of the defenses. Here, the Court faces the daunting task of attempting to determine whether the claim was frivolous or well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. MCR 2.114(D). Temporally, this determination must be made at the time the answer was filed, not many months and several thousand pages of deposition transcript later. Louya v Beaumont Hospital, 190 Mich App 151, 162 (1991). Although Mr. McClintic vigorously argues the merit to his defenses and has never capitulated factually or legally, the Beaumont Hospital court wrote that:

> The mere fact that the attorney may doubt the possibility of success on the merits of a case, even at the outset of litigation, does not necessarily and logically lead to a conclusion that the claim is "frivolous" as defined by MCL 600.2591(3)(a)(ii); MSA 27A.2591(3)(a)(ii). Rule 3.1 of the Michigan Rules of Professional Conduct prohibits an attorney from instituting or defending a frivolous action. However, the comment to the rule also provides:
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> > The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because a lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail.
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> In our view, the statute at issue and the Rules of Professional Conduct should be read in harmony, if possible, to avoid the anomalous result of holding a lawyer personally liable for an opponent's costs and attorney fees after ethically representing a clients interest. . .
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> We will not construe MCL 600.2591; MSA 27A.2591 in a manner that has a chilling effect on advocacy or prevents the filing of all but the most clear-cut cases. Nor will we construe the statute in a manner that prevents a party from bringing a difficult case or asserting a novel defense, or penalizes a party whose claim initially appears viable but later becomes unpersuasive. Moreover, an attorney or party should not be dissuaded from disposing of an initially sound case which becomes less meritorious as it develops because

they fear the penalty of attorney fees and costs under this statute. Id. pp 162-163.

The parties are still at logger heads over the factual support for their claims and defenses. Plaintiff has filed a voluminous motion and brief supported by citations to exhibits contained in two bound notebooks. The Defendant argues that its case only improved with discovery and that the facts supported the legal contractual defenses.[1]

How then should the Court decide this case? Presented as a motion for summary disposition pursuant to MCR 2.116(C)(10), the Court could never grant summary disposition for either party. Assuming the facts in a light most favorable to the non-moving party, summary disposition would easily be precluded. Yet, this request for sanctions cannot be granted unless the Court makes factual findings and draws legal conclusions that would clearly be impermissible were it to assess the same claim for purposes of summary disposition.

In this Court's view, if a claim or defense is sufficiently grounded in fact and law to survive a motion for summary disposition, it was presumptively not frivolous when filed and the signature of counsel on that claim or defense is presumptively not a violation of MCR 2.114(D). For either party to prevail on their post-settlement motion for sanctions, then, that party must rebut this presumption and establish their entitlement to sanctions by a preponderance of the evidence. Neither party is capable of doing so without a trial on the merits. This trial court is hopeful that

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[1]Defendant's theory is that the Plaintiff expressed an interest in the well in a self-serving and nonbinding fashion by asserting that it was located in an area of mutual interest pursuant to a prior agreement. Yet, Plaintiff did not tender the funds necessary to participate "up front" and then "rode the well down" to determine its commercial viability before filing suit. Plaintiff vehemently denies these allegations and states that the Defendant was never candid in dealing with the Plaintiff and made a conscious decision to deny him any financial interest in this prospect long before the well was completed.

no appellate court will reach the anomalous conclusion that we must have a trial on the merits of a matter that was settled, even if by capitulation, as an adjunct to determining the propriety of awarding sanctions. Accordingly, the cross-motions for sanctions are denied.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 8/11/94