STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

AUTO-OWNERS INSURANCE COMPANY
and RICK MEYER CONSTRUCTION
COMPANY, L.L.C.,

Plaintiffs,

v

File No. 05-6972-NZ
HON. PHILIP E. RODGERS, JR.

C & M INSURANCE SERVICES, INC.,
and MARK AVERY, jointly and severally,

Defendants.
/

Peter C. Payette (P18732)
Attorney for Plaintiffs

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Attorneys for Defendants

DECISION AND ORDER
DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION
AND GRANTING DEFENDANTS' REQUEST FOR SANCTIONS

This action was filed on August 5, 2005. On January 18, 2006, the Defendants filed a Motion for Summary Disposition. The Court heard the oral arguments of counsel on March 6, 2006, granted the Defendants' motion and reserved ruling on the Defendants' request for sanctions. On March 21, 2006, the Plaintiffs filed a Motion for Reconsideration. The Court issued a pre-hearing order, giving the Defendants14 days from the date of the order to file and serve a response and giving the Plaintiffs 21 days from the date of the order to file and serve a reply. These time limits have now expired.

On March 30, 2006, the Defendants filed a Brief in Support of its Request for Sanctions. On April 13, 2006, the Plaintiffs filed a Reply Brief in Response to the Defendants' Brief in

Support of its Request for Discovery [sic] Sanctions. The Court will discuss these issues separately.

I.

MOTION FOR RECONSIDERATION

MCR 2.119(F), entitled Motions for Rehearing and Reconsideration, reads in pertinent part, as follows:

> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The Court having now reviewed all documents submitted, dispenses with oral argument, pursuant to MCR 2.119(E)(3), and issues this written decision and order.

The Court finds that the motion presents the same issues ruled on by the Court, either expressly or by reasonable implication. The Court does not find that a palpable error has been demonstrated and that a different disposition of the motion must result from the correction of an error. MCR 2.119(F)(3).

The Plaintiffs' motion for reconsideration is denied.

II.

REQUEST FOR SANCTIONS

The Defendants contend that the Plaintiffs and their counsel filed this lawsuit in contravention of MCR 2.114 and MCL 600.2591. The Defendants rely upon their initial responsive pleading of affirmative defenses; their contacts with Plaintiffs' counsel wherein they requested a voluntary dismissal; the Plaintiffs' pre-trial statement in which they concede that they "may require additional time to determine whether or not Defendants are the appropriate parties;" and Plaintiffs inability to produce any admissible evidence in response to the Defendants' motion for summary disposition as required by MCR 2.116(G)(1)(ii) that would have defeated the motion.

Under Michigan law, a party that maintains a frivolous suit or asserts frivolous defenses is subject to sanctions under applicable statutes and court rules. Under MCL 600.2591(3):

> (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. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002), quoting MCL 600.2591(3)(a).

MCR 2.625(A)(2) provides:

> In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.

MCR 2.114(D) provides:

> 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.

MCR 2.114(E) provides:

> 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.

MCR 2.114(F) provides in part:

> 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 imposition of sanctions under MCR 2.114 is mandatory upon a finding that a pleading was signed in violation of the court rule. *In re Forfeiture of Cash & Gambling Paraphernalia*, 203 Mich App 69, 73; 512 NW2d 49 (1993).

The purpose of imposing sanctions for asserting frivolous claims "is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 723; 591 NW2d 676 (1998). In the context of Fed R Civ P 11 ("Rule 11"), which imposes similar requirements on attorneys and parties and imposes similar sanctions for violations as MCR 2.114 does, the United States Supreme Court noted that "[b]aseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay." *Cooter & Gell v Hartmarx Corp*, 496 US 384, 398; 110 S Ct 2447; 110 L Ed 2d 359 (1990). Similarly, a federal court observed that "sanctions awarded under Rule 11 . . . are essentially deterrent in nature, imposed in an effort to discourage dilatory tactics and the maintenance of untenable positions." *Prewitt v Alexander*, 173 FRD 438, 441 (ND Miss 1996).

Here, Plaintiffs' counsel may have initially entertained the idea that his clients' had a valid claim against these Defendants. As this Court said when it ruled upon the Defendants' Motion for Summary Disposition:

> In making a determination that this motion has to be granted, because it essentially sits here unopposed, the Court has some real concerns. If there is a valid assignment, and that's not before the Court today, I do believe there is a prima facie case that could be shown of professional negligence on behalf of the agent who wrote the coverage for EC&S. Now, whether or not that claim would ever get anywhere, I mean, you need an affidavit establishing the standard of care and the violation. You would need an affidavit, perhaps from a different person, about the existence of the coverage and what it would cost. And perhaps the response would ultimately be "yeah, that was discussed and they couldn't afford it," who knows. But what happens here we're piling speculation on inference and wrapping it in conjecture, which the Court has been told it simply cannot do. Under those circumstances with regard to the Court rule, the Court is restrained to grant the motion.

However, counsel's initial thoughts were quickly laid to rest by Defendants' counsel when he filed his responsive pleading and when he sought a voluntary dismissal. Any doubt as to the validity of the Plaintiffs' claim most certainly evaporated when time and again counsel was unable to find an expert who would go on record supporting the Plaintiffs' claim.

At the hearing on March 6, Plaintiffs' counsel admitted "[W]e have not filed an adequate response." "[T]he Defendants' counsel says we have nothing to respond to - - - to their motion that has any substance, and that's correct." To this the Court commented:

> With regards to the issue of sanctions, I will have that specially briefed. And perhaps they [Plaintiffs] can provide a better explanation at this point of how we get to the point of at least arguing the motion today where you [Plaintiffs] have no expert, and EC&S won't sign affidavits.

Unfortunately Plaintiffs' counsel did not even try to explain why he had no expert. Instead, he treated the Defendants' motion for sanctions as a motion for *discovery* sanctions under MCR 2.313.

Plaintiffs' suit had no established legal merit, although it might have served to advance a good-faith argument for the extension or modification of existing law. Nonetheless, having filed suit, they continued to pursue their claim, going so far as to respond to and defend against a motion for summary disposition, without any evidence that would substantiate their claim. Counsel knew he had no evidence to support the Plaintiffs' claim and yet he proceeded anyway. Defendants are entitled to sanctions.

The Court has considered the Defendants' request for reimbursement of attorney fees in the amount of $20,123.32. However, counsel has not submitted an itemized statement, showing work performed, the hourly rate charged and the fee incurred. In addition, the Defendants have not submitted an affidavit that the fees are reasonable and were necessarily incurred. The Court is, therefore, unable to consider the guidelines set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), see also *Morris v Detroit*, 189 Mich App 271, 278-279; 472 NW2d 43 (1991), and cannot adequately assess the reasonableness of the fees.

While the Defendants are entitled to sanctions, the Court is unprepared to rule on the amount of the sanctions. The Defendants shall within 14 days of the date of this decision and order, file and serve an itemized statement and a supporting affidavit. The Plaintiffs shall within 21 days of the date of this order, file and serve specific objections to the itemized statement or

affidavit. Once these have been received, the Court will rule on the amount of the sanctions without the need for any further oral argument. MCR 2.119(E)(3).

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 4/20/06