

STATE OF MICHIGAN
COURT OF APPEALS

PHILLIP M. SCHULTZ,

Plaintiff-Appellee,

v

HAZEL PARK RACING ASSOCIATION, INC,

Defendant-Appellant.

UNPUBLISHED

November 17, 2000

No. 212980

Oakland Circuit Court

LC No. 96-532026-CZ

JOHN SHAWAY,

Plaintiff-Appellee,

v

HAZEL PARK RACING ASSOCIATION, INC,

Defendant-Appellant.

No. 213514

Oakland Circuit Court

LC No. 95-532024-CZ

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

WHITE, J. (*concurring and dissenting*).

The circuit court initially determined that Shaway's action was frivolous. The Court stated:

Having reviewed the file, the Court finds that the plaintiff's action was frivolous because his legal position was devoid of arguable legal merit. First, plaintiff failed to file a timely response to the defendant's motion. Second, plaintiff expressly withdrew the late response with the direction that the Court not consider it in ruling on the defendant's dispositive motion.

Third, a review of the response reveals that the plaintiff did not cite one case supporting its position that the defendant was obligated to pay on the tickets under any of the theories pled in the complaint. In fact, in his motion for reconsideration the plaintiff acknowledged that the issues of law and fact raised in a late response were, quote, "novel," end of quote.

Fourth, both this Court and another judge of this circuit found no legal merit in any of the claims alleged, albeit on different grounds. Footnote one.

Footnote. Another bettor, Phillip Schultz, placed several bets on winning horses in the first race in Hollywood Park after the race was over and filed a complaint identical to the one filed by Shaway. That case, 96-532026-CZ, was assigned to Judge Schnelz, who granted defendant's motion for summary disposition about a month after this Court had ruled on its motion in this case.

Accordingly, the Court finds the defendant is entitled to costs.¹

When defendant sought to enter an order assessing the costs and fees against counsel as well as Shaway, relying on MCL 600.2529(1); MSA 27A.2591(1), the court heard argument and stated that it would examine the statute at the next break in proceedings. Later, the court returned to the record and stated:

The Court has examined the Court Rules, examined the pleadings and the records and files in this case. It would appear to the Court that the lawyer who filed the lawsuit on behalf of his client at the time that he filed the lawsuit only knew what his client had told him and that was that his client presented the lawyer with winning race track tickets that were not honored and, therefore, filed suit on behalf of this client and did sign the Complaint believing at the time in good faith, that his client had a valid cause of action. A lawyer acting in good faith who reasonably believes that his client has a legitimate basis in fact for filing a lawsuit acts in good faith and should not be sanctioned. Motion denied.

Plaintiff's counsel had earlier submitted a brief detailing counsel's efforts to investigate the claim before filing suit.

Plaintiff's counsel argues that the court's statement at the last hearing regarding counsel's good faith reveals that the court reconsidered the matter and revised its earlier assessment that the action was frivolous. Counsel argues that because the court ultimately found that the action was filed in good faith, sanctions should not have been assessed against Shaway or counsel, and therefore the court did not err in refusing to assess sanctions against counsel. I find it impossible to reconcile the court's initial statements and its statement at the last hearing. The finding of frivolousness was based on the conclusion that the action was devoid of arguable legal merit, a matter involving counsel's judgment.² Yet, at the subsequent hearing, the court appears to have reviewed the file and to have concluded based on that review that counsel commenced the action

¹ The court denied the actual motion without prejudice because defendant failed to substantiate the amount requested. Defendant renewed the motion with supporting material and, at a hearing held two weeks after the initial hearing, the court awarded costs or expenses of \$1279.69 and attorney fees of \$16,580.

² In its initial ruling, the court made no findings regarding Shaway's purpose in initiating the action or his belief in the truth of the facts underlying the action.

in good faith, in reliance on the information given him. Shaway has not filed a cross-appeal³ and therefore the award of sanctions against him stands uncontested. However, counsel raises the issue that the predicate for awarding sanctions against him, i.e., that the action was frivolous, is belied by the court's comments at the last hearing. Rather than order the imposition of sanctions against counsel based on a finding of frivolousness, I would remand for clarification of the court's seemingly inconsistent findings.

In all other respects, I concur with the majority.

/s/ Helene N. White

³ Shaway has filed bankruptcy.