STATE OF MICHIGAN

COURT OF APPEALS

DAVID SUTTON, Plaintiff-Appellant,	UNPUBLISHED October 25, 2016
v	No. 328038 Oakland Circuit Court
ADVANCE PHARMACEUTICAL, INC., Defendant-Appellee.	LC No. 2014-144679-CZ

Before: FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ.

O'BRIEN, J. (*dissenting*).

I respectfully dissent.

MCR 2.114 "applies to all pleadings, motions, affidavits, and other papers provided for by [the Michigan Court Rules]." MCR 2.114(A). It provides, in pertinent part, that "[t]he signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that," "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[.]" MCR 2.114(D)(2). "If a document is signed in violation of this rule, the court . . . on its own initiative, shall impose . . . an appropriate sanction, which may include an order to pay to the other party . . . the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." MCR 2.114(E). Applying those rules to the facts of this case, it is apparent that the circuit court found that plaintiff's motion to enter a default judgment against defendant on an unfiled and unserved amended complaint was not "well grounded in fact" or "warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law[.]" MCR 2.114(D)(2). Thus, the circuit court, on its own initiative, was permitted to impose an appropriate sanction. MCR 2.114(E). Accordingly, I cannot conclude that the circuit court abused its discretion in doing so.

My colleagues avoid this conclusion by sympathizing with what they perceive as plaintiff's good-faith confusion. They conclude that "it is apparent that plaintiff did not bring his motion for an improper purpose," that "there is nothing to suggest his purpose was improper," that "it appears that plaintiff sincerely believed he had followed the proper procedure and did not understand the technical problem presented," that "we can see how the situation may be confusing, as plaintiff's motion to amend had been filed and contained the amended allegations

he wished to pursue," and that, "[a]t worst, it was a technical error made based on misunderstanding of the court rules." In my view, this Court should defer to the circuit court's credibility determinations, if any, in this regard. See *In re Stafford*, 200 Mich App 41, 42; 503 NW2d 678 (1993). Indeed, plaintiff has not asserted, whether it be before the circuit court or this Court, that he pursued his motion based on a good-faith misunderstanding of the law at issue here. Instead, the record reflects that plaintiff simply blames defendant for his own failure: "[W]hat happened here was that [defendant] decided to change the rules . . . ." Furthermore, an improper purpose is not required under MCR 2.114(D)(2), the subsection that I believe is most appropriate under the facts and circumstances of this case. While I agree with my colleagues when they state that pro se litigants are held to less stringent standards when it comes to sanctions, I do not agree that those less stringent standards allow plaintiff to claim ignorance in light of what are relatively straightforward procedural rules. See *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 2d 251 (1976).

I also believe that our review on appeal is limited by the issues raised by plaintiff on appeal. See *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). In his brief on appeal, plaintiff raises two questions presented:

> a. Did the circuit court err in not considering the (indigent) petitioner's inability to pay before imposing a monetary sanction, because the party allegedly acted frivolously in advocating its position?
>
> b. Did the circuit court err in not determining whether a claim is frivolous under MCL 600.2591, as directed by MCR 2.625(A)(2)?

Plaintiff's arguments in his brief, in his reply brief, and in his supplemental brief are limited to these questions presented as well. The answer to the first question presented is no—as the majority recognizes, "nothing requires the trial court to consider plaintiff's economic status." The answer to the second question presented is also no—as the majority also recognizes, "the trial court imposed sanctions pursuant to MCR 2.114," not MCR 2.625 or MCL 600.2591. Thus, while it does appear that the circuit court may have mistakenly imposed $500, not $400, in sanctions pursuant to MCR 2.114(D)(2), defendant has not raised any argument in that regard. Had he, I would likely conclude that a remand to address that disparity would be necessary.

Finally, because I do not agree that the circuit court abused its discretion in imposing sanctions pursuant to MCR 2.114(D)(2), I also do not agree that the circuit court's order of dismissal must be reversed. Plaintiff claims that because the circuit court abused its discretion in imposing sanctions with respect to his frivolous motion, the circuit court's order of dismissal must also be reversed. Consequently, because I disagree with respect to the circuit court's imposition of sanctions, it follows that I also disagree that reversal is required for that reason. Additionally, as alluded to above, I am not prepared to usurp the circuit court's role in making credibility determinations. My colleagues paint a portrait of plaintiff as an innocent and confused pro se litigant who got the raw end of a deal. I think the record paints a bit different picture. Defense counsel emailed plaintiff in an attempt to alert him of his allegedly good-faith confusion. Plaintiff nevertheless pursued his motion. At the hearing on that motion, the circuit court questioned plaintiff in hopes of understanding the confusion: "I guess I just need an answer to that question; did you file a first amended complaint with the Court? Yes or no? Yes

or no?" One would expect, based on the majority's opinion, that plaintiff would admit that he had not, apologize for his confusion, and proceed accordingly. Instead, though, he started a back-and-forth confrontation with the circuit court, interrupting the circuit court with what he "thought," blaming defendant for "chang[ing] the rules," and accusing the circuit court of "argu[ing] for the other side[.]"

In sum, I am of the view that the majority opinion does not accurately reflect the deference that applies to the issues raised by plaintiff in this appeal. Accordingly, I would affirm the circuit court's order of dismissal.

/s/ Colleen A. O'Brien