

NOT DESIGNATED FOR PUBLICATION

STEPHEN SCOTT TEMES

NO. 03-CA-1130

VERSUS

FIFTH CIRCUIT

LOUISIANA STATE BOARD OF NURSING

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 589-565, DIVISION "K"
HONORABLE MARTHA SASSONE, JUDGE PRESIDING

COURT OF APPEAL,
FIFTH CIRCUIT

JANUARY 27, 2004

FILED JAN 27 2004

WALTER J. ROTHSCHILD
JUDGE

Walter J. Rothschild
CLERK

Panel composed of Judges Edward A. Dufresne, Jr., James L. Cannella
And Walter J. Rothschild

STEPHEN C. JUAN

3232 Edenborn Avenue

Metairie, Louisiana 70002

COUNSEL FOR STEPHEN SCOTT TEMES, PLAINTIFF/APPELLANT

E. WADE SHOWS

KRISTIN B. BERNARD

Shows, Cali & Berthelot, L.L.P.

644 St. Ferdinand Street (70802)

P.O. Drawer 4425

Baton Rouge, Louisiana 70821

COUNSEL FOR LOUISIANA STATE BOARD OF NURSING,
DEFENDANT/APPELLEE

AFFIRMED IN PART;
AMENDED IN PART.

WJR
EADY
gpc

On January 7, 2003, Stephen Scott Temes, through his attorney, Stephen Juan, filed a "Petition for Judicial Review and for Injunctive Relief," seeking to prohibit the Louisiana State Board of Nursing ("Nursing Board") from suspending his nursing license. According to Mr. Temes, the Nursing Board had previously placed him on one year of probation, which included the conditions that he abstain from using illegal drugs and that he submit to random drug testing. Thereafter, Mr. Temes took several random drug tests and one of them tested positive for an illegal substance. The Nursing Board suspended his nursing license as a result of this test.

In his petition, Mr. Temes denied the allegations that he used illegal drugs and sought a temporary restraining order, prohibiting the Nursing Board from suspending his nursing license prior to a hearing. Counsel for Stephen Temes, Stephen Juan, asserts that the trial judge to whom the case was allotted was not in her office when the petition requesting a restraining order was filed. Therefore, he went to the duty judge who signed and issued the temporary restraining order, prohibiting the Nursing Board from suspending Stephen Temes' license pending a hearing.

On January 17, 2003, the Nursing Board filed a “Motion to Dissolve Temporary Restraining Order,” asserting that the Nursing Board had not been notified that Mr. Temes would be filing a request for a temporary restraining order, and that the Nursing Board was not notified that a restraining order had been issued until it received a fax from Mr. Temes’ employer, St. Charles General Hospital, on January 15, 2003.¹ The Nursing Board further argued that the petition did not meet the requirements of law, that it should be dissolved, and that the Nursing Board was entitled to damages, attorney fees, and costs for wrongful issuance of a restraining order. At the hearing on this matter on January 29, 2003, the trial court found that the Motion to Dissolve was moot because the restraining order had expired, and the plaintiff’s Motion for Preliminary Injunction was denied due to his failure to file the proper pleadings. On March 13, 2003, the plaintiff filed a “Motion to Dismiss” seeking to dismiss his lawsuit with prejudice, which was granted by the trial court.

On March 24, 2003, the Nursing Board filed a “Motion for Sanctions, Attorney’s Fees and Costs” asserting that it sustained considerable expenses as a result of the filing of the Petition for Judicial Review and Injunctive Relief. The Nursing Board sought sanctions, damages, and attorney fees, because the Nursing Board was not notified of the filing of the petition or issuance of the temporary restraining order until January 15, 2003 when it received a fax from Mr. Temes’ employer.

At a hearing on May 5, 2003, the trial court found in favor of the Nursing Board and assessed plaintiff’s counsel, Stephen Juan, with \$1,000 in sanctions and \$1,500 in attorney fees, to be paid to opposing counsel within 30 days of the signing of the judgment. It is from this ruling that plaintiff’s counsel, Mr. Juan, appeals.

¹ According to counsel for the Nursing Board, the Board was not served with a copy of the petition and restraining order until January 22, 2003.

DISCUSSION

On appeal, Mr. Juan contends that: 1) the trial court was clearly erroneous in assessing a \$1,000.00² sanction against him, and 2) the imposition of \$1,500.00³ in attorney fees was excessive and clearly wrong.

Mr. Juan admits that the pleadings he filed on Mr. Temes' behalf were "inartfully crafted and incorrectly styled." However, he argues that the trial court should not have imposed sanctions against him, because the Nursing Board did not suffer any needless or extra costs due to these pleadings. We disagree.

LSA-C.C.P. art. 3603 provides:

A. A temporary restraining order shall be granted without notice when:

1. It clearly appears from the specific facts shown by a verified petition or by supporting affidavit that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and
2. The applicant's attorney certifies to the court in writing the efforts which have been made to give notice or the reasons supporting his claim that notice should not be required.

B. The verification or the affidavit may be made by the plaintiff, or by his counsel, or by his agent.

When Mr. Juan filed the verified petition requesting a temporary restraining order, he did not notify the Nursing Board that these pleadings were being filed and he did not certify to the court in writing any efforts that he made to notify the Nursing Board or any reasons why notice should not be required. At the hearing on the Motion for Sanctions and Attorney's Fees, Mr. Juan stated, "As far as the notice issue, Judge, yeah, it was poorly done." He also admitted that he should not have sought a restraining order in this matter and that the pleading that he filed was "improperly styled," "carelessly done," and "inartfully pled." However, he claims

² Mr. Juan actually states that the sanction was \$1,500.00, but the judgment and the record reveal that it was, in fact, a \$1,000.00 sanction.

³ Mr. Juan asserts that the award of attorney fees was \$1,000.00, but the judgment and the record reveal that the award was \$1,500.00 in attorney fees.

that sanctions should not have been imposed because the Nursing Board did not suffer any damages.

Although the Nursing Board may not have suffered damages as a result of the issuance of the restraining order, there is indeed a risk of serious injury and/or damages to the public if a registered nurse is allowed to practice while under the influence of illegal substances.⁴ Therefore, it was imperative for counsel for the plaintiff to notify the Nursing Board that he was seeking an order to allow Mr. Temes to continue his employment.

Pursuant to LSA-C.C.P. art. 863(B), when an attorney or party signs a pleading, he certifies that: 1) he has read the pleading; 2) it is well grounded in fact to the best of his knowledge, information, and belief, after making a reasonable inquiry; 3) the pleading is warranted by existing law or good faith argument for extension, modification, or reversal of existing law; and 4) the pleading is not intended for any improper purpose, such as to harass or cause unnecessary delay or needless increase in cost of litigation. Sanchez v. Liberty Lloyds, 95-956 (La. App. 1 Cir. 4/4/96), 672 So. 2d 268, 272, writ denied, 96-1123 (La. 6/7/96), 674 So. 2d 972. In order to comply with the pleading certification requirements of art. 863, the signing attorney must make a reasonable inquiry into the facts and must satisfy himself that the pleading is factually and legally responsible. John W. Fisk Co. v. Michel, 97-2105 (La. App. 4 Cir. 3/25/98), 709 So. 2d 1061, 1064. Subjective good faith does not satisfy the duty to make an objective reasonable inquiry into the facts and the law. Alombro v. Alfortish, 02-1081 (La. App. 5 Cir. 4/29/03), 845 So. 2d 1162, 1168, writ denied, 03-1947 (La. 10/31/03), 857 So. 2d 486.

A trial court may award sanctions against an attorney who signs a pleading without making a reasonable inquiry into the facts and the law. Cavin v. Harris

⁴ We are not suggesting that the allegations of drug use by Mr. Temes were valid. The record does not contain sufficient information to determine whether these allegations were warranted or not.

Chevrolet, Inc., 95-1878 (La. App. 1 Cir. 5/10/96), 673 So. 2d 654, 658.

Generally speaking, a trial court has great discretion in deciding whether or not to impose sanctions. Bonilla v. Commodore Cruise Lines, Ltd., 02-2182 (La. App. 4 Cir. 4/2/03), 844 So. 2d 1025, 1029, writs denied, 03-1226, 03-1356 (La. 9/5/03), 852 So. 2d 1037. In order to determine the appropriate amount of a sanction, four factors must be considered: (1) the conduct that is being punished or is sought to be deterred by the sanction; (2) the expenses or costs that were caused by the violation; (3) whether the costs or expenses were "reasonable" as opposed to self-imposed, mitigatable, or the result of delay in seeking court intervention, and (4) whether the sanction is the least severe sanction adequate to achieve the purpose of the rule under which it was imposed. Alombro v. Alfortish, *supra* at 1170.

In the present case, Mr. Juan filed a pleading seeking a temporary restraining order on behalf of his client, Mr. Temes, without notice to the Nursing Board. This pleading did not contain his certification in writing that he made an effort to give notice to the Nursing Board or reasons why notice should not be required. Mr. Juan does not deny that he failed to notify or attempt to provide notice to the Nursing Board. Mr. Juan admits that the pleading was "carelessly done," which indicates that he did not make a reasonable inquiry into the law, particularly the procedure required for obtaining a temporary restraining order. Accordingly, we find that Mr. Juan did not comply with the pleading certification rule set forth in LSA-C.C.P. art. 863, and the trial court did not abuse its discretion in imposing a sanction upon Mr. Juan. However, we have considered the factors for determining whether a sanction is appropriate, and we find that a \$1,000.00 sanction is excessive and an abuse of the trial court's discretion. Accordingly, we amend the judgment of the trial court to impose a \$250.00 sanction in lieu of the \$1,000.00 sanction.

Mr. Juan also argues that the assessment of \$1,500 in attorney fees against him was excessive and clearly wrong. He claims that the Nursing Board did not incur any additional attorney fees due to the issuance of the temporary restraining order.

LSA-C.C.P. art. 3608 provides:

The court may allow damages for the wrongful issuance of a temporary restraining order or preliminary injunction on a motion to dissolve or on a reconventional demand. *Attorney's fees for the services rendered in connection with the dissolution of a restraining order* or preliminary injunction may be included as an element of damages whether the restraining order or preliminary injunction is dissolved on motion or after trial on the merits. (Emphasis added.)

Additionally, LSA-C.C.P. art. 863(D) permits the trial court to order attorney fees to be paid to the opposing party when a party is sanctioned for violating the pleading certification rule.

Mr. Juan contends that the pleading was “incorrectly styled,” and that the notice issue was “poorly done,” but he should not be sanctioned because it was not intended for any improper purpose and no harm resulted. However, the word “wrongful” in LSA-C.C.P. art. 3608 authorizing an award of damages, including attorney fees, for wrongful issuance of injunctive relief simply means “incorrect” or “the result of a mistake,” and does not imply malice or bad faith. Arco Oil & Gas Co., v. DeShazer, 98-1487 (La. 1/20/99), 728 So. 2d 841, 844.

After Mr. Temes' employer notified the Nursing Board that a temporary restraining order had been issued prohibiting the suspension of Mr. Temes' nursing license, the Nursing Board filed a Motion to Dissolve Temporary Restraining Order and counsel for the Nursing Board appeared for a hearing on January 29, 2003. Although this pleading would not have been necessary if Mr. Juan had not obtained the restraining order, the Nursing Board would have had to file an answer

to the plaintiff's Petition for Judicial Review and would have likely had to appear for at least one hearing.

The Nursing Board later filed its Motion for Sanctions, Attorney Fees, and Costs based on the issuance of the restraining order without notice, and counsel appeared for a hearing on May 5, 2003. This pleading would not have been necessary if Mr. Juan had not obtained the restraining order without notice to the Nursing Board. However, it was the Nursing Board's decision to incur these additional expenses when it filed this motion and had the matter set for a hearing.

Counsel for the Nursing Board filed an "affidavit Supporting Attorney's Fees" asserting that \$3,025.00 plus court costs was billed to the Nursing Board for legal services rendered in this case. The trial court awarded approximately one-half of these fees, \$1500.00, to the Nursing Board. However, after a thorough review of the record, we find that the Nursing Board did not incur \$1,500.00 in additional attorney fees due to the improper issuance of a temporary restraining order, and it was an abuse of the trial court's discretion to order this excessive award. Therefore, we reduce the award of attorney fees to be paid to counsel for the Nursing Board by Stephen Juan from \$1,500.00 to \$500.00.

DECREE

For the reasons set forth above, we affirm the judgment of the trial court, ordering Stephen Juan to pay a sanction and attorney fees to counsel for the Louisiana State Board of Nursing. However, we amend the sanction and reduce it to \$250.00. Further, we amend the award of attorney fees and reduce it to \$500.00.

AFFIRMED IN PART; AMENDED IN PART.



EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. MCMANUS
WALTER J. ROTHSCHILD

JUDGES

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

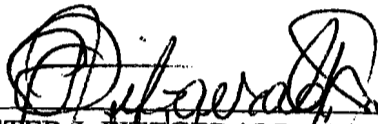
GLYN RAE WAGUESPACK
FIRST DEPUTY CLERK

JERROLD B. PETERSON
DIRECTOR OF CENTRAL STAFF

(504) 378-1400
(504) 378-1498 FAX

CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY JANUARY 27, 2004 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:


PETER J. FITZGERALD, JR.
CLERK OF COURT

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
Domestic Mail Only; No Insurance Coverage Provided

For delivery information visit our website at www.usps.com

0BFCA1A30USE

Postage	\$
Certified Fee	

Rt (Endors) E. Wade Shows
Sheri M. Morris
Restrict (Endors) Attorneys at Law
644 St. Ferdinand Street
Total f Baton Rouge, LA 70802

Sent To
Street, Apt. No.; or PO Box No.
City, State, ZIP+4

PS Form 3800, June 2002 See Reverse for Instructions

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
Domestic Mail Only; No Insurance Coverage Provided

For delivery information visit our website at www.usps.com

0BFCA1A30USE

Postage	\$
Certified Fee	
Postmark Here	

Stephen C. Juan
Attorney at Law
3232 Edenborn Avenue
Metairie, LA 70002

Street, Apt. No.; or PO Box No.
City, State, ZIP+4