

STATE OF MICHIGAN
COURT OF APPEALS

JAMES E. MCCARTHY, as Successor
Conservator of the Estate of RUSS VITALE, JR.,

UNPUBLISHED
February 8, 2002

Petitioner-Appellee,

V

No. 220024
Wayne Circuit Court
LC No. 87-802698

RUSSELL F. VITALE, DEBORAH VITALE,
JOSEPH VITALE, and MAE VITALE,

Respondents-Appellants,

and

KIM MCINTOSH and AUTO-OWNERS
INSURANCE COMPANY,

Respondents.

JAMES E. MCCARTHY, as Personal
Representative of the Estate of RUSS VITALE,
JR., Deceased,

Petitioner-Appellee,

V

No. 220025
Wayne Circuit Court
LC No. 94-531639-SE

RUSSELL F. VITALE, DEBORAH VITALE,
JOSEPH A. VITALE, and MAE S. VITALE,

Respondents-Appellants,

and

KIM MCINTOSH and AUTO-OWNERS
INSURANCE COMPANY,

Respondents.

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Respondents Russell Vitale, Sr., Deborah Vitale, Joseph Vitale, and Mae Vitale appeal as of right from an order of summary disposition requiring payment of damages of \$1,323,000. We vacate that order and remand.

In 1981, Kim McIntosh gave birth to Russell Vitale, Jr. Russell, Jr. suffered from hydrocephalus. Russell Vitale, Sr., and McIntosh divorced in 1982. Russell, Sr., took custody of Russell, Jr., and provided him care and support. Russell, Sr., brought a medical malpractice action against his son's doctors. In 1987, that suit was settled for \$615,000.¹ An estate was created for Russell, Jr., and Russell, Sr., was named conservator.

In 1990, McIntosh filed a petition to remove Russell, Sr., as conservator based on his failure to file reports detailing his care for the child. A guardian ad litem was appointed to review Russell, Sr.'s handling of the estate. The guardian ad litem determined that, after filing one inventory, Russell, Sr., filed no accounts for the estate. It was also determined that Russell, Sr., used money belonging to the estate to purchase a home, two rental properties, and a van. The home was purchased from Russell, Sr.'s parents. There were no other assets of the estate and no separate estate bank account. The guardian ad litem concluded that Russell, Sr.'s actions "may have been well-intentioned [but] his conduct as fiduciary in this matter falls below acceptable standards." It was recommended that Russell, Sr., be removed as fiduciary and a successor appointed. Thereafter, attorney James McCarthy was appointed successor conservator.

McCarthy filed a petition to surcharge Russell, Sr., or Auto-Owners Insurance, the company that issued his surety bond, for the funds belonging to the estate. McCarthy later amended the petition to include Russell, Sr.'s wife, Deborah, for aiding and abetting him in misappropriating funds, and Russell, Sr.'s parents, Joseph and Mae Vitale, on the theory that they should have known their house was purchased with misappropriated money.

In 1994, Russell, Jr., died. The conservatorship was terminated and a decedent's estate was opened, with the above referenced claims against the Vitales as the estate's only assets. McCarthy was appointed personal representative of the decedent's estate. Eventually, the parties stipulated to the terms of an order of surcharge, thereby settling any claims against the Vitales.

On June 23, 1997, the probate court entered a stipulated amended order of surcharge. As part of that stipulation, McCarthy was to receive \$50,000 in attorney fees. Russell Vitale, Sr., and Deborah Vitale were to pay McCarthy \$35,000 and the bonding company was to pay him

¹ The proceeds of the settlement were distributed as follows: \$218,035.34 to the attorneys involved, \$100,000 to Russell Vitale, Sr., and \$296,964.66 to Russell Vitale, Sr., as next friend of Russell Vitale, Jr.

\$15,000. The stipulation provided that the \$35,000 amount owed to McCarthy by Russell and Deborah Vitale was to be paid through proceeds of the sale of the rental property located in Pontiac. When it came to light that the Pontiac property had been sold at a prior tax sale, McCarthy claimed the Vitales perpetrated a fraud with respect to the terms of the order of surcharge and petitioned to have the order set aside. The probate court set aside the order of surcharge and eventually granted summary disposition for the estate.

On appeal, the Vitales challenge the probate court's decision to set aside the order of surcharge and to order damages of \$1,323,000. The circumstances of the prior tax sale of the Pontiac property made payment to McCarthy through proceeds of the sale of that property impossible. However, based on the record presented in this case, we conclude the circumstances did not warrant a wholesale setting aside of the order of surcharge. A stipulation entered into by parties to a lawsuit has the effect of a binding contract. *Limbach v Oakland Co Bd of Rd Comm'rs*, 226 Mich App 389, 394; 573 NW2d 336 (1997). Thus, Russell Vitale, Sr., and Deborah Vitale were contractually obligated to pay McCarthy partial fees in the amount of \$35,000. The sale of the Pontiac property was merely an agreed upon means of satisfying this amount. Thus, despite the fact that the Vitales could not transfer valid title to the Pontiac property, there was sufficient meeting of the minds with respect to the amount owed McCarthy to form an enforceable contract. See *Limbach, supra*.

We remand this case for enforcement of the terms of the stipulation between Russell Vitale, Sr., Deborah Vitale and McCarthy. The probate court shall determine the amount still owed McCarthy under the terms of the order of surcharge.² In determining the proper means of enforcement, the court shall consider whether the Vitales committed fraud upon the court in regard to their agreement to transfer title to the Pontiac property. The court should hold an evidentiary hearing to determine whether statements made by the Vitales on the record or documents filed by the Vitales in regard to the Pontiac property were fraudulent and deserving of sanctions. See *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). If the court determines that the Vitales' conduct in regard to failing or refusing to disclose the circumstances of the tax sale warrants sanctions, the court may, in its discretion, order such sanctions that are deemed appropriate. See *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639-641; 607 NW2d 100 (1999) (recognizing that trial courts have "inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney."), MCR 2.114(E), and MCR 5.114; see also *In re Sloan Estate*, 212 Mich App 357, 363 n 2; 538 NW2d 47 (1995). Sanctions may be imposed as requalification for actual fees owed or as a deterrent against future misconduct. See *Persichini, supra*, and *DaFoe v Michigan Brass & Electric Co*, 175 Mich App 565, 567; 438

² It is undisputed that Russell Vitale, Sr., and Deborah Vitale paid \$135,000 to the estate. The couple mortgaged their Riverview property as required under the order of surcharge. McIntosh was paid \$125,000 due her under the order from the proceeds of that mortgage. It is not clear from the record whether the additional \$10,000 paid by Russell and Deborah was applied to the \$35,000 due McCarthy or to other fees and expenses set forth in the order of surcharge. In any event, it is evident that Russell and Deborah did not satisfy their obligation to McCarthy under the order of surcharge.

NW2d 270 (1989). If sanctions are deemed appropriate, such sanctions shall be commensurate with Russell and Deborah Vitale's original \$35,000 obligation to McCarthy. The court's order requiring payment of \$1,323,000, plus interest and costs is not commensurate with the original \$35,000 amount owed by Russell and Deborah Vitale to McCarthy.³ The court may also award as a sanction a reasonable attorney fee to compensate McCarthy for professional time wasted as a consequence of any fraud found by the court to have been committed by the Vitales. Other amounts originally due under the order of surcharge, but paid by the Vitales,⁴ should not be considered in the enforcement of the amount due and owing McCarthy.

Accordingly, we vacate the probate court's order setting aside the order of surcharge and remand for enforcement of Russell Vitale, Sr., and Deborah Vitale's obligation to pay McCarthy's partial fees. We also vacate the order for summary disposition, which imposed excessive damages. MCR 7.216(7).

Vacated and remanded. We do not retain jurisdiction. No costs on appeal shall be awarded to either party.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

³ It is unclear whom the probate court intended to be entitled to payment of the \$1,323,000 judgment. McCarthy brought the motion for summary disposition in his capacity as conservator of Russell, Jr.'s estate. Russell, Sr., is an heir to that estate. McIntosh received the monies due her under the stipulated order of surcharge. No party has been damaged to the extent of \$1,323,000, and that amount does not represent an appropriate amount of sanctions due McCarthy. Moreover, the lower court record suggests \$891,000 of that judgment was imposed as the result of the Vitales' improper use of the medical malpractice settlement funds. We disagree that such damages are appropriate given that the stipulated order of surcharge was the parties' means of settling the matter of the Vitales' improper use of Russell, Jr.'s funds. That stipulation represents a binding agreement. As discussed, only a portion of McCarthy's fees remains unpaid.

⁴ See, *supra*, n 2.