STATE OF MICHIGAN

COURT OF APPEALS

SEAN M. CHALFIN,

Plaintiff,

v

JOSEPH J. JERKINS,
JOSEPH J. JERKINS LAW OFFICES,
LESLEY S. KRANENBERG, AND
KRANENBERG MCCARTHY, P.C.,

Defendants-Appellees,

and

BLASKE & BLASKE, P.L.C.,
THOMAS H. BLASKE, and
JOHN F. TURCK, IV,

Appellants.

UNPUBLISHED
March 25, 2008

No. 274168
Kalamazoo Circuit Court
LC No. 05-000598-NM

Before: Saad, C.J., and Smolenski and Borrello, JJ.

PER CURIAM.

In this legal malpractice case, appellants Blaske & Blaske, PLC, Thomas H. Blaske, and John F. Turck, IV, appeal the trial court's order dated October 13, 2006, granting sanctions in the amount of defendants' actual attorney fees and costs. Plaintiff Sean Chalfin does not appeal the award of sanctions or the underlying order granting summary disposition for his legal malpractice claim. For the reasons set forth in this opinion, we affirm the trial court.

Plaintiff retained defendants after he was charged with first-degree criminal sexual conduct (CSC). Defendants represented him throughout his subsequent CSC trial. During trial, plaintiff desired to admit the testimony of Dr. Haugen, an expert psychiatrist, who was to testify that plaintiff did not exhibit the behavioral and mental patterns of a typical rapist. Dr. Haugen's expert report, however, also described plaintiff's ideal sexual partner, which purportedly matched the description of the victim in the case. At some point before trial, plaintiff provided the police report from the CSC investigation to Dr. Haugen, which defendants believed tainted Dr. Haugen's testimony. A memorandum of understanding between plaintiff and defendants

indicates that defendants did not plan to introduce Dr. Haugen's testimony at trial due to plaintiff submitting to Dr. Haugen a copy of the CSC police report.

Seven days before trial, in violation of MCL 767.94a(d)(2), defendants submitted an amended witness list. This list included nine new witnesses, and removed several other witnesses. Before trial, the prosecutor moved to strike these late-disclosed witnesses. The trial court ultimately ruled to allow each of the late-disclosed witnesses to testify, but only if defendant first disclosed the expected substance of their testimony on the record and outside the presence of the jury. Defendants decided to disclose the proposed testimony of only one late-disclosed witness, and they never called Dr. Haugen as a witness. Plaintiff's CSC trial ended in a mistrial. Plaintiff thereafter obtained representation by a different attorney, and ultimately pleaded nolo contendere to the lesser charge of aggravated assault. Plaintiff was found guilty of aggravated assault and sentenced. The CSC charge was thereafter dropped.

After plaintiff's criminal trial, he failed to pay all of his legal bills to defendants. When defendant Jerkins sued plaintiff for the remaining fees, plaintiff attempted to defend himself by alleging that defendants made "grave legal mistakes" in the case. When plaintiff failed to appear at a hearing on a motion for summary disposition in that case, the trial court entered a default judgment against him. The trial court subsequently denied plaintiff's motion, which was based on these "critical mistakes during trial," to set aside the default judgment.

After the civil trial related to the amount of legal fees, plaintiff retained appellants to file this legal malpractice claim against defendants. The complaint alleged that defendants filed the amended witness list late, and as a result, all the late-disclosed witnesses were stricken and Dr. Haugen was not allowed to testify. Plaintiff further alleged that if Dr. Haugen had testified, plaintiff would have been acquitted of CSC, and his resulting nolo contendere plea to aggravated assault would not have been necessary.

Defendants filed an answer and moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), arguing that collateral estoppel based on plaintiff's nolo contendere plea and the judgment in the civil attorney fee cases barred his legal malpractice suit. In emails sent from defendants' attorneys to appellants, defendants explicitly informed appellants that plaintiff's claims were factually baseless, and they also provided a copy of the transcript from the motion hearing related to the prosecutor's motion to strike witnesses. Defendants further informed appellants that if the suit was not dismissed, they would be forced to seek sanctions for filing a frivolous claim. The lawsuit was not dismissed. Defendants subsequently moved for summary disposition pursuant to MCR 2.116(C)(10). Defendants also moved for sanctions against plaintiff and appellants.

After oral arguments related to the summary disposition motions, the trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). After a subsequent hearing related to defendants' motions for sanctions, the trial court awarded defendants' costs and actual attorney fees pursuant to MCR 2.114 and MCL 600.2591, finding that plaintiff's claim was not well grounded in the law or in fact, and that appellants failed to make a reasonable investigation into the factual and legal basis for the claim. This appeal ensued.

Appellants' first argument on appeal is that because plaintiff lost the motion for summary disposition based on difficult legal arguments rather than a factual insufficiency, sanctions are not warranted. From the outset, we note that appellants' argument is devoid of legal authority, factual support, or articulated rationales. Therefore, we find that appellants have abandoned this issue, and accordingly, we decline to address it. *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority.")

Appellants' next argument is that they conducted a reasonable investigation into the basis for the claim. In support of their argument, appellants cite an affidavit signed by plaintiff and dated six months after the complaint was filed; undated affidavits signed by several of plaintiff's friends, which were submitted to the trial court six months after the complaint was filed; and recordings of the afternoon session of the CSC trial that begin in the middle of the sentence, rather than where the clerk called the case. We review a trial court's finding that an action is frivolous and the resulting imposition of sanctions for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002); *BJ's and Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405 n 4; 700 NW2d 432 (2005). A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Whalen v Doyle*, 200 Mich App 41, 43; 503 NW2d 678 (1993).

Sanctions are authorized under MCR 2.114, which states:

> (A) **Applicability**. This rule applies to all pleadings, motions, affidavits, and other papers provided for by these rules . . . . In this rule, the term "document" refers to all such papers.
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> (D) **Effect of Signature**. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
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> (1) he or she has read the document;
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> (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
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> (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.
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> (E) **Sanctions for Violation**. 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 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.

Based on this rule, attorneys have an affirmative duty to "conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed." *Attorney Gen v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). Whether an inquiry is reasonable is determined by an objective standard; the attorney's subjective good faith is not relevant. *Id.* In *Lloyd v Avadenka*, 158 Mich App 623, 625-627; 405 NW2d 141 (1987), we applied the reasonable inquiry standard, and relied on a federal court's explanation of the reasonable inquiry requirement under the federal rules. We summarized:

> Unlike the subjective good faith of an attorney, 'reasonable inquiry' is an empirically verifiable fact or event, inasmuch as the court can examine the efforts undertaken by the attorney to investigate a claim prior to filing suit. The focus of such an inquiry is upon events that can be observed and verified to some extent: what the attorney learned from his client, what efforts he undertook to corroborate the client's account, and so on. Any determination of what constitutes a 'reasonable inquiry' depends largely on the particular facts and circumstances of a claim. [*Id*., summarizing *Mohammed v Union Carbide Corp*, 606 F Supp 252 (ED Mich, 1985).]

Where the facts alleged in the pleading are later discovered to be untrue, a prior reasonable inquiry is not invalidated. *Harkins*, *supra* at 576. However, where a reasonable inquiry was not conducted, sanctions can be awarded against both a party and his counsel. *John J Fannon Co v Fannon Products*, LLC, 269 Mich App 162, 168-169; 712 NW2d 731 (2005), citing MCR 2.114(D).

Here, after reviewing the entire record on appeal, we are not left with a firm conviction that the trial court made a mistake when it found that appellants failed to investigate whether the claim was grounded in fact before signing the complaint. The record reveals that the trial court file related to the CSC conviction, which was available when plaintiff's claim was filed, directly contradicted plaintiff's assertions. First, the prosecutor's motion to strike witnesses did not mention Dr. Haugen. Dr. Haugen was disclosed to the prosecutor more than ten days before trial, and the prosecutor did not first learn of Dr. Haugen's name and contact information when the amended witness list, containing nine new names, was filed. More importantly, had appellants reviewed the transcripts from the motion hearing they would have discovered that, contrary to their assertions, no witnesses were ever stricken by the trial court. Because plaintiff's whole claim was based on the assertion that defendants negligently allowed Dr. Haugen to be stricken from testifying, a simple review of the CSC trial record would have indicated that plaintiff's claim was not well-grounded in fact. In light of the fact that they proceeded to file this lawsuit, we are left to conclude that the appellants failed to conduct any such investigation.

Furthermore, appellants' argument on appeal that they relied on the affidavits included in the record is not persuasive. The only affidavit with a signature was signed in June of 2006, and all the other affidavits were undated, but submitted to the trial court in June 2006.[1] The

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[1] We note that we did not consider the affidavit of Jim Crawford because it was not contained in the lower court files, and a party may not expand the record on appeal. *Detroit Leasing Co v* (continued…)

complaint was filed in December 2005. Therefore, the affidavits provide no proof that appellants conducted any investigation before signing and filing the complaint. In light of the substantial evidence in the lower court record that contradicted plaintiff's claims, the lack of any affirmative evidence[2] to support or corroborate plaintiff's claims demonstrates that appellants could not have engaged in a reasonable investigation before filing the legal malpractice claim.

Finally, plaintiff raises the issue of when a trial court may ascertain that the filing of a particular lawsuit was frivolous. Plaintiff's assertions are rooted in the concept that attorneys should not be sanctioned for filing actions in reliance on their client's representations. We concur with this line of reasoning; however, in this case there were objective, verifiable facts which directly contradicted the affidavits of plaintiff's client. The trial court did not sanction plaintiff for the filing of the complaint, nor were the trial court's sanctions premised on plaintiff's reliance on affidavits. Rather, the awarding of sanctions was rooted in the trial court's finding that plaintiff failed to conduct any investigation into the assertions of their client, even after they had been presented with direct, verifiable evidence that his statements contained in his affidavit were false. Thus, it was the complete lack of undertaking any investigation which led the trial court to its conclusions, rather than the assertions on appeal by plaintiff that they were being punished for simply filing a complex lawsuit.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Stephen L. Borrello

(…continued)

City of Detroit, 269 Mich App 233, 237; 713 NW2d 269 (2005). However, we also note that consideration of this affidavit would not change our analysis because it was dated May 16, 2006, which is almost five months after the complaint was filed.

[2] We note that the purported absence of the trial court clerk's statement, calling plaintiff's CSC case, is not affirmative evidence of a second hearing, particularly in light of the fact that the trial court's log book shows that no such hearing took place.