STATE OF MICHIGAN

COURT OF APPEALS

GUY HISSONG and BETHANY HISSONG,

Plaintiffs-Appellees,

v

MARK R. DANCER,

Appellant,

and

STEWART BRYCE, CAROLYN BRYCE, COUNTY OF WEXFORD, WEXFORD COUNTY DEPARTMENT OF PUBLIC WORKS, and WEXFORD COUNTY LANDFILL,

Defendants-Appellees,

and

JILANE FENNER and FENNER REAL ESTATE, INC. a/k/a EXIT REALTY OF GREATER CADILLAC,

Defendants.

UNPUBLISHED
March 3, 2011

No. 294956
Wexford Circuit Court
LC No. 06-019885-CE

GUY HISSONG and BETHANY HISSONG,

Plaintiffs-Appellants,

and

JAMES P. O'NEILL,

Appellant,

v

No. 294997
Wexford Circuit Court

STEWART BRYCE, CAROLYN BRYCE, COUNTY OF WEXFORD, WEXFORD COUNTY DEPARTMENT OF PUBLIC WORKS, and WEXFORD COUNTY LANDFILL,

Defendants-Appellees,

and

JILANE FENNER and FENNER REAL ESTATE, INC. a/k/a EXIT REALTY OF GREATER CADILLAC,

Defendants.

LC No. 06-019885-CE

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

In this consolidated case, plaintiffs, their trial attorney, and their former trial attorney appeal orders of the trial court granting sanctions against them for filing a frivolous complaint. After granting summary disposition to defendants Stewart Bryce and Carolyn Bryce, the trial court ordered plaintiffs and their counsel to pay $11,958.81 in attorney fees and costs to the Bryces because the complaint was not well-grounded in fact and was not made after reasonable inquiry into the facts. The court later clarified that the attorney drafting the complaint for plaintiffs, Mark R. Dancer, and the attorney that replaced Dancer approximately six months later, James P. O'Neill, were jointly and severally liable with plaintiffs for the frivolous complaint. Plaintiffs, Dancer, and O'Neill appeal as of right. We affirm.

Dancer argues on appeal that the sanctions issued against him should be reversed because they were issued without due process. We disagree. Dancer was the attorney for plaintiffs who filed the initial complaint on September 14, 2006, but withdrew from representing plaintiffs on March 9, 2007. The trial court found that the complaint violated MCR 2.114 because it was not well-grounded in fact and plaintiffs failed to make a reasonable inquiry into the facts.[1] The trial court agreed that Dancer should be included in the sanctions because he filed the complaint that violated MCR 2.114.

[1] The 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).

MCR 2.114 does not provide a procedure to be followed before sanctions can be imposed, however, a party must receive some type of reasonable notice and opportunity to be heard prior to the imposition of sanctions. *Hicks v Ottewell*, 174 Mich App 750, 757-758; 436 NW2d 453 (1989). No person may be deprived of life, liberty, or property without due process of law. US Const, Am V; Const 1963, art 1, § 17; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). The due process concept is flexible, and analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks involved, and the private and governmental interests that might be affected. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993).

With regard to notice, due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Hicks*, 174 Mich App at 757. Here, Dancer was not noticed regarding the Bryces' motion for sanctions after the hearing on summary disposition, or regarding plaintiffs' motion for reconsideration and clarification of the sanctions. Dancer did know of an initial request for sanctions because the Bryces' answer to the complaint drafted by Dancer included a request for fees and costs for having to respond to a frivolous suit. However, Dancer left the case approximately five months after the Bryces' answer and the case proceeded to hearing on the Bryces' motion for summary disposition seven-and-a-half months after Dancer left the case. Because he was not involved in the case for a significant amount of time, Dancer was presumably not aware of how the case had progressed. Dancer was sanctioned after a motion requesting sanctions in September 2009 and motion for clarification of the sanctions in October 2009 of which he did not have notice. Dancer did not have adequate notice to apprise him of the pendency of these actions for sanctions and to afford him an opportunity to present his objections. See *Hicks*, 174 Mich App at 757.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time in any meaningful manner. *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976). Due process does not always require a prior hearing or an adversarial proceeding. *Westland Convalescent Ctr v Blue Cross Blue Shield of Mich*, 414 Mich 247, 269; 324 NW2d 851 (1982). The Court found in *Hicks*, 174 Mich App at 757-758, that defendants were not prejudiced by a lack of notice where defendants were given ample opportunity to present their arguments at a hearing.

The Bryces contend that the trial court had ample evidence with which to determine that the complaint was not adequately grounded in facts gained from a reasonable inquiry by plaintiffs and their counsel, as required by MCR 2.114. Indeed, the trial court was able to consider evidence in the pleadings, documents, and a motion hearing regarding the validity of the complaint. This information included plaintiffs' response to the Bryces' request for admissions, which was submitted by Dancer. Despite the ample evidence that the trial court considered in determining that the complaint should be dismissed, the court's sanctions were based on conclusions that the complaint was not well-grounded in fact and that plaintiffs and Dancer failed to make reasonable inquiry into the facts because plaintiffs did not have any evidence that the Bryces knew the well water on their property was contaminated. Dancer was not specifically allowed the opportunity to demonstrate to the court what inquiry he made into the facts of the case.

However, the absence of a hearing can be harmless error where the outcome of the case could not have been altered. *Feaster v Portage Pub Sch*, 210 Mich App 643, 655-656; 534 NW2d 242 (1995), rev'd on other grounds 451 Mich 351 (1996), citing *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 641; 506 NW2d 920 (1993). Here, the trial court found that the complaint was not reasonably investigated as required by MCR 2.114. Although Dancer did not present the extent of his investigation to the trial court, the extent of the investigation does not necessarily determine whether the investigation was reasonable. Dancer's investigation was not reasonable because the complaint did not state facts that could support plaintiffs' allegations against the Bryces. All of the facts necessary to determine the outcome of this issue were known to the parties and to the trial court. The trial court reviewed the documents and heard the arguments submitted on behalf of plaintiffs and determined that the allegations were not adequately based in facts. The procedural rules of the trial court's motion practice resulted in a determination on the adequacy of Dancer's complaint based on a consideration of all the facts and arguments applicable to the case. Any facts that supported plaintiffs' allegations would have been before the trial court; therefore, Dancer suffered no prejudice in not further arguing the merits of his complaint before the trial court. See *Hicks*, 174 Mich App at 757-758. The absence of further argument by Dancer regarding the validity of the complaint did not result in a violation of rights to procedural due process. See *Feaster*, 210 Mich App at 655-656; *Verbison*, 201 Mich App at 641.

Plaintiffs next argue that the trial court erred by finding that "[p]laintiffs and their counsel filed a complaint that was not well grounded in fact and failed to make reasonable inquiry into the facts required by MCR 2.114." We disagree.

A trial court's decision to impose a sanction is reviewed to determine if it is clearly erroneous. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). A decision 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. *Id*. The amount of a sanction is reviewed for an abuse of discretion. *In re Costs & Attorney Fees*, 250 Mich App 89, 106; 645 NW2d 697 (2002). An abuse of discretion occurs when a decision results in an outcome falling outside the principled range of outcomes. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 625; 750 NW2d 228 (2008).

MCR 2.114(D)(2) provides:

> The 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.

If a pleading is signed in violation of MCR 2.114(D), the party or attorney, or both, must be sanctioned. MCR 2.114(E). The frivolous claims provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003).

In reviewing a sanction under MCR 2.114, the relevant inquiry is whether the trial court erred, based on findings of fact, in concluding that the court rule had been violated and, therefore, that the imposition of a sanction was required. *Contel Sys Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). Here, the trial court found:

> If the Plaintiffs did not have any evidence that the Defendants knew the well water on their property was contaminated, then they filed a frivolous lawsuit. If they had such evidence, they could have and would have produced it in response to the Defendants' motion for summary disposition. Because they were not able to produce such evidence, the Court granted summary disposition for the Defendants. Plaintiffs and their counsel filed a complaint that was not well grounded in fact and failed to make reasonable inquiry into the facts required by MCR 2.114. The Court hereby grants the Defendants' Amended Motion for Sanctions and Costs.

Plaintiffs argue that the trial court erred because it failed to account for the reasonable inquiry that Dancer conducted before filing the complaint alleging that the Bryces committed fraud, misrepresentation, and breach of contract in selling property to plaintiffs that was later determined to have a contaminated water supply. Dancer reports that he reviewed documents and media reports regarding contaminations in the area of the property, interviewed plaintiffs, and analyzed documents acquired through numerous Freedom of Information Act requests to governmental agencies. Plaintiffs state that they learned the Bryces had disclosed in 2000 there was a test well on their property, but claimed the well belonged to them and could be abandoned while negotiating with plaintiffs in 2003. Plaintiffs also assert that the Bryces represented that they had the best water in the world, and that the price of the property was below market value because Stewart Bryce was a builder who needed cash for another project.

However, the trial court specifically found plaintiffs' complaint frivolous because there was no evidence presented that the Bryces knew the ground water was contaminated. Plaintiffs' inquiry into the facts was not reasonable because it did not pertain to evidence that demonstrated that the Bryces knew of the contamination. Further, plaintiffs' inquiries may have pertained to facts involving the other defendants in the case. Significantly, despite the statements in the complaint of misrepresentations from plaintiffs that the trial court assumed to be true for purposes of the summary disposition motion, the offered evidence could not have substantiated the counts of the complaint against the Bryces because they did not pertain to any knowledge of the Bryces that the groundwater on the property was contaminated, which was necessary to establish plaintiffs' claims against them for fraud, misrepresentation, and breach of contract.

In fact the evidence discovered established that the Bryces could not have known that the groundwater was contaminated when they conveyed the property to plaintiffs. In 1990, due to concerns over potential contamination from a nearby landfill, the county installed a "test well" on what would become the Bryces' property. The county's temporary easement for use of the well expired ten years later. The Bryces represented in a sellers' disclosure statement that the property was three-quarters of a mile from a landfill, that there was a test well on the property, and that they did not know of any environmental contamination. Recent appraisals on the property also stated there were no known environmental issues. After plaintiffs acquired the property in 2004, they asked the county about the well on their property, but the county did not

know of the well. After visiting the property, the county confirmed the well was a test well. Subsequent testing revealed that plaintiffs' water was the second well in the area since 1990 that revealed contaminated drinking water. There was no evidence that anyone knew the water was contaminated before 2004, making it impossible to demonstrate that the Bryces defrauded plaintiffs when selling the property.

Plaintiffs also argue that the trial court made three affirmative findings that were erroneous. Plaintiffs argue that the trial court relied on the following findings in determining that plaintiffs and Dancer did not conduct a reasonable inquiry before filing the complaint: (1) in plaintiffs' response to defendants' request for admissions, plaintiffs denied a duty to investigate the Bryces' knowledge of contamination; (2) the "test" well on the property was not tested by the county until after plaintiffs purchased the property; and (3) plaintiffs did not present direct evidence of the Bryces' knowledge of contamination in response to the summary disposition motion. However, the trial court did not indicate it was relying on these "findings" to make its determination. The trial court did not state these alleged facts as findings at all, but mentioned them as it was recounting the positions of the parties prior to issuing its decision. As stated above, the trial court relied on its finding that plaintiffs did not produce evidence that the Bryces knew the water on the property was contaminated to determine that the complaint was not well-grounded in fact after a reasonable inquiry into the facts. Additionally, there was factual support in the record for these "findings." Nonetheless, the trial court did not rely on these statements in making its determination and these facts do not contradict the trial court's finding that plaintiffs possessed no evidence to demonstrate that the Bryces knew the well was contaminated.

Whether an attorney or party has violated the "reasonable inquiry" standard of MCR 2.114(D)(2) depends largely on the facts and circumstances of the claim. *Whalen v Doyle*, 200 Mich App 41, 42; 503 NW2d 678 (1993). A reasonable basis to believe that the facts supporting the claim were true at the time of the complaint is required. *Louya v William Beaumont Hosp*, 190 Mich App 151, 162-163; 475 NW2d 434 (1991). That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry. *Harkins*, 257 Mich App at 576. Here, however, the trial court does not dispute the accuracy of plaintiffs' allegations. The trial court found there were no facts supporting that the Bryces knew the water was contaminated. Despite evidence that possible contamination was an issue in the area, the evidence demonstrated that the well, disclosed to plaintiffs, was not even tested for contaminants until after plaintiffs purchased the property. The trial court's finding was not in error and was dispositive regarding plaintiffs' claims at the time of the complaint. The Bryces' disclosure that they did not know of any contamination on the sellers' disclosure statement was not the same, as alleged by plaintiffs, as the Bryces claiming the property was not contaminated. The trial court did not clearly err in finding the complaint to be frivolous.

Dancer argues that the court erred in holding him jointly and severally liable for the full amount of a frivolous lawsuit. Dancer argued that only $3,929.50 of the Bryces' $11,639.81 in attorney fees were incurred while Dancer represented plaintiffs, and he had no influence on the case beyond his date of withdraw. Dancer suggests that discovery, which he was not a part of, revealed that plaintiffs could not prove their claim. However, the trial court found the complaint frivolous because no facts were offered to support the claim, including prior to discovery when Dancer was involved. The imposition of joint and several liability for attorney fees and costs is permissible under Michigan law. *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162,

172; 712 NW2d 731 (2005). The evidence demonstrated that Dancer participated in initiating a frivolous lawsuit and the amount of the trial court's sanction was not an abuse of discretion.

Plaintiffs' trial counsel, James P. O'Neill, argues that the trial court erred by sanctioning him for asserting a frivolous position. O'Neill argues that the trial court should not have sanctioned him for his zealous advocacy of plaintiffs' position. However, even though O'Neill was required to represent his clients with zeal according to MRPC 1.3, he was also prohibited from asserting frivolous civil actions and signing documents that were not formed after reasonable inquiry and not well-grounded in fact. MCR 2.114; MCL 600.2591(1). O'Neill argues that he reviewed the complaint and examined the supporting documents to determine that the complaint was well-grounded in fact and warranted under existing law. O'Neill further stated that he could not be sanctioned under MCR 2.114 because he did not sign the complaint, and sanctions are only issued under MCR 2.114 for signing a document in violation of the rule. MCR 2.114(E).

However, the trial court not only found that the complaint was frivolous, but that O'Neill opposed the Bryces' motion for summary disposition where he "continued to espouse the same frivolous position that the Plaintiffs had taken from the inception." O'Neill did sign plaintiffs' answer to the Bryces' motion for summary disposition, which continued to assert plaintiffs' position as found in the complaint. Signing the answer to the Bryces' motion for summary disposition and asserting the same position found to be frivolous is in violation of MCR 2.114. In *John J Fannon Co*, 269 Mich App at 170-171, this Court found it was proper to sanction an attorney joining a case without legal merit and evidentiary support 18 months after the complaint was filed for violating MCR 2.114 by signing pleadings that continued the litigation. The trial court did not clearly err in sanctioning plaintiffs and O'Neill for maintaining plaintiffs' position after Dancer was replaced.

O'Neill asserts that he properly argued that the Bryces falsely claimed that the well was free to plaintiffs, that the Bryces should have identified the well as a county test well, and that the sellers' disclosure statement had not been updated in three years. However, the sellers' disclosure statement stated that there was a test well on the property and that it was less than a mile from a landfill. Additionally, according to MCL 565.955(1), the Bryces were required to disclose only what they knew. Most significantly, as discussed above, plaintiffs did not present facts indicating that the Bryces knew the water on their land was contaminated. Therefore, the trial court did not clearly err in finding that plaintiffs' claims, as argued by O'Neill, were frivolous.

O'Neill also argues that the trial court acted improperly in not holding a hearing to determine the amount of the attorney fees and costs awarded. However, O'Neill received the bill of costs and supporting affidavit with an amended motion for sanctions and costs. O'Neill does not dispute the trial court's notation, in deciding sanctions without oral argument, that plaintiffs did not object to the amount of the fees and costs nor did they request a hearing on them. If the trial court has sufficient evidence to determine the amount of attorney fees and costs, an evidentiary hearing is not required. *John J Fannon Co*, 269 Mich App at 171.

O'Neill also argues that there was no justification to include him in joint and several liability for sanctions because he substituted for Dancer and had only limited activity prior to the

motion for summary disposition. However, the trial court specified that O'Neill was included because the Bryces incurred additional attorney fees and costs as a result of O'Neill continuing to espouse the same frivolous position as the complaint when opposing summary disposition. The imposition of joint and several liability for attorney fees and costs is permissible under Michigan law. *John J Fannon Co*, 269 Mich App at 172. The trial court did not abuse its discretion in the amount plaintiffs and O'Neill were sanctioned or in imposing joint and several liability.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh