STATE OF MICHIGAN

COURT OF APPEALS

ATHI NARAYAN, M.D., Plaintiff-Appellee,	UNPUBLISHED June 16, 2011
v	No. 296310 Macomb Circuit Court
MOUNT CLEMENS REGIONAL MEDICAL CENTER, Defendant-Appellant.	LC No. 2008-001503-CK

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment entered on January 13, 2010, but is challenging an order entered on June 11, 2009,[1] which directed defendant to pay attorney fees and costs to plaintiff after the court declared a mistrial on the ground that defense counsel improperly agreed to a stipulation of fact before trial that was absolutely contrary to defendant's position and defense of the case. We affirm.

Plaintiff is a board certified neonatologist and had staff privileges at defendant's hospital. On September 5, 2007, defendant suspended plaintiff's hospital privileges for 14 days, alleging that he violated a hospital policy. Plaintiff requested an administrative hearing on the suspension, which defendant denied. By letter dated September 17, 2007, plaintiff was advised that his privileges would be reinstated effective September 20, 2007, and that his "privileges as a specialist on this medical staff will be exercised via the consultation policy as outlined in the memorandum of 9/9/07 regarding 'Pediatrics / Neonatology Physician Coverage.'" Plaintiff allegedly believed that this letter advised that he was not being returned to full-staff privileges; rather, he was being reinstated with improperly limited consultation-only privileges.

On April 4, 2008, plaintiff filed a six-count complaint alleging breach of contract, tortious breach of contract, violation of public policy, intentional infliction of emotional distress, tortious interference with advantageous business relationship or expectancy, and defamation. On February 2, 2009, the trial court denied defendant's motion for summary disposition brought

[1] The scope of an appeal from a judgment includes any orders entered by the court prior to the judgment. See *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

under MCR 2.116(C)(10) with regard to all counts of plaintiff's complaint. During that hearing the trial court noted that defendant had the right to temporarily suspend plaintiff for not following hospital policy, but that plaintiff had the right to have his request for a fair hearing in that regard granted. The court noted that the only issue before it was what damages, if any, resulted from plaintiff not having the requested hearing. With regard to the issue of damages, plaintiff's counsel indicated that plaintiff had been working with full privileges before the suspension but, after the suspension, he "was returned on a consultation only arrangement and was denied the opportunity to provide the same services he had been providing prior."

On March 5, 2009, the trial court entered an order which stated that defendant had the right to temporarily suspend plaintiff, but did not have the right to deny his request for a hearing in connection with the suspension. The order also required the parties to submit "briefs on the measure of damages for the suspension and lack of hearing" and trial—limited to the issue of damages—was scheduled for May 12, 2009.

Thereafter, the parties filed their briefs regarding the issue of damages, as well as various motions in limine. Plaintiff's brief on damages included extensive discussion and argument pertaining to the purported fact that, following the suspension and upon reinstatement, defendant reduced plaintiff's privileges to consultation-only privileges, a significant limitation which greatly impacted his ability to practice medicine at the hospital. Plaintiff also filed a motion in limine requesting that defendant be prohibited from asserting at trial that plaintiff's privileges were not reduced or that such reduction was unrelated to the suspension. In its May 1, 2009 response to plaintiff's motion in limine, defendant stated: "Moreover, Plaintiff complains that his privileges should not have been reduced to consulting and he should have continued with full active privileges, meaning he would have been able to violate the Transfer Policy (as well as many others) again. The consultation only limitation would require another physician to make the decision on transfer, for example."

On May 5, 2009, a hearing was held with regard to the motions in limine. Plaintiff's counsel indicated that he had requested that defendant be prohibited "from making any representations at trial that the limitation in [plaintiff's] privileges to consultation weren't for any basis other than the suspension." Plaintiff's counsel noted that defendant's brief in response to his motion in limine admitted that "the consultation only was as a result of the suspension" and a stipulation in that regard was reached by the parties. Defense counsel agreed saying, "yeah, that's accurate." The resulting order, entered on that date, provided, in relevant part, as follows: "Plaintiff was reinstated from suspension with consultation only limitation on his privileges."

A jury trial began on May 12, 2009. On May 13, 2009, opening statements were made. Defense counsel's opening statement included the following:

> Now, something else happened at the same time that affected [plaintiff's] practice, and Doctor Khadr and Doctor Housel will also tell you about a departmental policy on consultation. Before the letter agreement we referred to and the agreement that [plaintiff] could round on patients and participate around, the hospital had a consultation policy and that consultation policy was a neonatologist only served as a consultant, and one of the things that happened at the same time is that [plaintiff] received a letter saying that the hospital was going

> to go back to the same policy before that neonatologists were serving as consultants, and one of the things that you'll be asked to decide in the case is whether the board reduced [plaintiff's] privileges to consulting only, or whether his consulting privileges came from some other source, because the question is did the board reinstate him with full privileges or was a consulting restriction caused by something else. So listen to see if you hear testimony that if he had not been suspended that consultation limitation wouldn't have been imposed.

During the trial proceedings of May 14, 2009, extensive discussion was held off the record regarding plaintiff's allegation that he was reinstated with consultation-only privileges. Defendant was attempting to introduce evidence and argue that there was no limitation on plaintiff's privileges after he was reinstated—a position contrary to even defendant's opening statement. Plaintiff's counsel objected, citing to the stipulated order entered in that regard prior to trial. The trial court noted that defense counsel agreed to the unambiguous language in the stipulated order which stated that "Plaintiff was reinstated from suspension with consultation only limitation on his privileges." Defense counsel appeared to argue that the stipulation was being misinterpreted; she meant that plaintiff's privileges were reinstated and, as before the suspension, he had to exercise his privileges through the consultation policy. Defense counsel repeatedly insisted that she "never, ever, agreed to anything other than his privileges were reinstated, and exercising his privileges through the consultation policy is exactly what he had before the suspension because whatever exists in the consultation policy is what exists before." The trial court disagreed with defense counsel's interpretation of the plain language, noting that the word "limitation" is a precise word and the phrase "consultation only limitation on his privileges" is unambiguous. The trial court ruled that defendant could not "dispute the fact that he was reinstated from suspension with consulting only limitations on his privileges."

Later in the May 14, 2009 trial proceeding, the issue of the "consultation only limitation" stipulation arose again. Because of the confusion over the stipulation, the court requested that the court reporter transcribe a portion of the May 5, 2009 hearing. After reading a portion of that hearing as to how the stipulation resulted in an order, the court declared that the stipulation "seems pretty accurate." It appears that the confusion related to the fact that there was a consultation policy generally applicable to all active staff members, but within that policy there were three specific categories of privilege: (a) consultation only with no right to write orders and the attending physician retains responsibility for the patient, (b) consultation and participation with rights to write orders, but the attending physician retains responsibility for the patient, and (c) management where the patient's care is transferred to another physician who becomes the attending physician. Plaintiff contended, as the trial court previously held, the stipulation clearly indicated that upon reinstatement plaintiff's privileges were limited to the first category of privilege—consultation only. Defense counsel argued that the stipulation merely referred to the consultation policy itself, not the categories within that policy.

Then the trial court reviewed the September 17, 2007 reinstatement letter, and held that, contrary to the stipulated order, the letter did not indicate that plaintiff's privileges were reduced to consultation-only privileges; the letter merely stated that his privileges were governed by the consultation policy itself—which was generally applicable to all staff members. The court stated that the language of the stipulated order was not consistent with the provisions of the letter and that defense counsel had been mistaken to agree to the stipulated order. Plaintiff's counsel

indicated that defense counsel actually typed the stipulated order after about four hours of argument and that he relied on that order in the preparation of his entire case; specifically, the stipulated fact that plaintiff was reinstated with less than full privileges after his suspension. The trial court indicated its understanding of plaintiff's position and contemplated declaring a mistrial in fairness to the parties. Plaintiff objected, expressing satisfaction with the order. The court determined that the stipulation was a mistake of significant impact and stated to defense counsel: "I'm going to grant a mistrial and you're going to pay the cost [of] the preparation for this trial. This is absolutely language that you agreed to that is not consistent with your argument or your position." However, then defense counsel admitted to the trial court that at some time prior to the entry of the disputed stipulated order of May 5, 2009, she *did* believe that plaintiff had been reinstated with consultation-only privileges to prevent him from violating the transfer policy again—as set forth in defendant's response to plaintiff's motion in limine discussed above. Defense counsel stated: "I would agree there was a time when I believed those were the facts and there was a time that I said that . . . ." In light of defense counsel's admission that it was her belief at some time before the stipulated order was entered that plaintiff's reinstatement was subject to a consultation-only limitation, the court stated that it was not going to declare a mistrial because defense counsel had the authority to enter the order based upon her belief of fact and "therefore it stands that this limitation existed."

Trial proceedings continued on May 15, 2009 and May 19, 2009. However, during the May 19 proceeding, the issue of the stipulated order arose again. Defense counsel claimed that the stipulated order was submitted in error and accepted the responsibility for that error; however, defense counsel wanted to introduce evidence that contradicted the stipulated fact, i.e., that plaintiff's privileges were limited to consultation-only upon reinstatement. Upon plaintiff's objection, additional discussion out of the presence of the jury occurred. Defense counsel argued that there was, in fact, no limitation on plaintiff's privileges upon reinstatement "[s]o to perpetuate what appears to be an error, albeit one that my office was responsible for, I don't think is the right way to proceed." Defense counsel later stated, "But again I say to the Court that an error was made." The trial court responded that it was more than an error—it is "an admission when it is a stipulation of counsel being included in an order." The court concluded that the purportedly mistaken admission "goes to the entire crux of plaintiff's case" and "[t]here's no reason to go on with this." And "Your defense now takes away their entire -- your new defense from the midst of this trial." The court then declared a mistrial and indicated to defendant's attorneys that they would be responsible for plaintiff's costs with regard to the trial because, as the court later advised the jury, defense counsel agreed to the stipulated order although it was contrary to their defense of this case.

At a hearing held on June 11, 2009, the trial court reiterated that the reason for the mistrial was the unilateral mistake of defense counsel agreeing to a stipulation on behalf of their client that was "absolutely contrary" to their client's position and the defense of plaintiff's case. The mistrial was declared to avoid "an absolute manifest injustice" that would result to defendant as a consequence of defendant's attorneys' actions. And, through no fault of his own, plaintiff incurred attorney fees and costs associated with the several days of trial that defense counsel was required to reimburse. The court acknowledged that retrial was necessary which made calculating the sanction difficult. However, the court concluded that an award of $45,000 in attorney fees and $10,000 in costs for trial preparation was "a reasonable figure in light of the length of time that was associated with the trial and the trial preparation with both counsel on

behalf of plaintiff." After defense counsel failed to pay the attorney fees as directed, on July 27, 2009, the trial court entered another order directing compliance "forthwith" and denied a defense motion for stay. Defendant filed an application for leave to appeal the July 27, 2009 order, as well as a motion for stay, which were denied. *Narayan v Mount Clemens Regional Med Ctr*, unpublished order of the Court of Appeals, entered September 3, 2009 (Docket No. 293465).

After various motions were filed by the parties, a second jury trial was conducted in December of 2009. The jury concluded that plaintiff did not prove his breach of contract claim in that he did not establish that his privileges to practice were restricted or limited on reinstatement. However, the jury concluded that plaintiff did prove his tortious interference claim by establishing that two of his business relationships were tortiously interfered with by defendant and plaintiff was awarded $20,000. On January 13, 2010, the final judgment on the verdict was entered closing the case. This appeal followed.

First, defendant does not challenge the trial court's actual decision to declare a mistrial. Rather, defendant argues that the trial court erred as a matter of law in awarding plaintiff attorney fees and costs because "[n]o statute, court rule or other authority for an award of fees applies here." We disagree.

In its argument on appeal defendant relies primarily on the American rule in support of its claim of error. In particular, defendant states: "There is no court rule, statute, case or other exception to the American rule that permits a court to assess costs and attorney fees against one party merely because the court declares a mistrial or because an attorney makes a 'unilateral mistake' or because the court sets aside a phrase in a stipulated order." However, review of the record clearly demonstrates that the trial court imposed the fees and costs as a sanction pursuant to MCR 2.114. This Court reviews a trial court's decision to impose sanctions under MCR 2.114 for clear error. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008).

MCR 2.114(C) provides that every document submitted by a party must be signed and MCR 2.114(D) states that the signature constitutes a certification by the signer that the document was read and "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact . . . ." MCR 2.114(E) provides:

> 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 to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees.

In this case, the stipulated order that caused a mistrial to be declared by the trial court was signed by defense counsel and submitted for entry by the trial court. The stipulated order, according to defense counsel and the trial court, included a significant factual inaccuracy, i.e., it was not "well grounded in fact." See MCR 2.114(D). Although defense counsel later admitted that, at some time before the order was entered, she also had believed that plaintiff was reinstated with consultation-only privileges, clearly such belief was not formed after "reasonable inquiry." Defendant's representatives, including the author of the reinstatement letter, surely knew the terms of plaintiff's reinstatement and should have been consulted by defense counsel at some

time before the stipulated order was agreed to by her and then entered by the court. MCR 2.114(E) states that the trial court "shall" impose sanctions where a document has been signed in violation of the rule. See, generally, *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010). Consequently, where a violation of MCR 2.114(D) has occurred, sanctions under MCR 2.114(E) are mandatory. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997); *Contel Sys Corp v Gores*, 183 Mich App 706, 710-711; 455 NW2d 398 (1990). Thus, not only was the trial court's imposition of sanctions authorized by court rule, it was not clearly erroneous in light of the record evidence discussed above.[2]

And we reject defendant's next claim that the amount of attorney fees and costs imposed as a sanction constituted an abuse of discretion. See *Maryland Cas Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103 (1997). Under MCR 2.114(E), the trial court is required to impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees."

In this case, the mistrial was declared on the ground that defense counsel agreed to and signed a stipulated order days before trial which included the stipulated fact that "Plaintiff was reinstated from suspension with consultation only limitation on his privileges." On the third day of trial, defense counsel challenged that stipulated fact as being untrue or inaccurately interpreted. Eventually, defense counsel admitted that, in fact, before the stipulated order was entered, she did believe that "those were the facts." Accordingly, the trial court did not declare a mistrial at that time, as it had contemplated, because "defense counsel had the authority to enter the order based upon her belief of fact." On the fifth day of trial, defense counsel again challenged the stipulated fact, claiming that it was submitted in error and accepted full responsibility for the interjection of that error into the proceedings. The court eventually declared a mistrial and advised defendant that it would be responsible for plaintiff's resulting costs with regard to the trial. Defendant did not object. Thereafter, plaintiff submitted a lengthy brief, as well as supporting documentation, requesting attorney fees totaling $74,031.25 and costs in the amount of $11,453.44.[3] The trial court conducted two hearings with regard to this matter and, after considering the fact that some of the claimed expenses would be associated with the retrial of this case, finally concluded that plaintiff was entitled to an award of $45,000 in attorney fees related to this several day trial that was aborted, as well as $10,000 in costs. Under the facts of this case, we conclude that the trial court imposed an appropriate sanction that

[2] We note and reject defendant's repeated assertions in its appeal brief that plaintiff's claim that he was reinstated with consultation-only privileges was asserted for the first time at trial, was "bogus," was created by the trial judge, and constituted "a deliberate, intentional and opportunistic misrepresentation." Plaintiff repeatedly raised this issue throughout the lower court proceedings, before trial. Further, defense counsel referenced "that consultation limitation" during her opening statement, and admitted that she *also* had believed that plaintiff was reinstated with consultation-only privileges.

[3] Plaintiff had two attorneys present during the course of the trial and, according to the submitted time records, one attorney's hourly rate was $350, and the second attorney's hourly rate was $225.

included an order to pay plaintiff's reasonable expenses incurred because of the erroneous stipulation of fact that caused a mistrial; thus, the award did not constitute an abuse of discretion. See MCR 2.114(E); *Maryland Cas Co*, 221 Mich App at 32.

Finally, defendant argues that plaintiff never raised the claim that his privileges were reduced or limited and that such claim "was, in fact, invented by the trial judge on the first day of trial." Clearly this issue is not only without merit, but completely disingenuous. The lower court record is replete with plaintiff's claim that his privileges were limited to "consultation only" after his reinstatement. For example, in oral arguments conducted on a discovery motion held on November 3, 2008, plaintiff argued that "after they terminated his letter agreement, they also said you can only come back as a consultant . . . ." In plaintiff's January 20, 2009 response to defendant's second motion for summary disposition, plaintiff argued that "after he returned from suspension, [plaintiff] was permitted only to work as a 'consultant.'" In defendant's reply brief to plaintiff's response to that motion, defendant stated: "Plaintiff says he was permitted to return as a consultant only, but fails to explain how that constitutes wrongful action." At the February 2, 2009 hearing on defendant's motion for summary disposition, plaintiff's counsel argued that plaintiff's damages also arose from the consultation-only limitation. In plaintiff's April 28, 2009 brief regarding the measure of damages, he claimed repeatedly, throughout his brief, that his privileges were reduced to consultation-only privileges. In plaintiff's motion in limine, also filed on April 28, 2009, he claimed that he was reinstated with consultation-only privileges and requested that any evidence to the contrary be prohibited at trial. In defendant's May 1, 2009 response to plaintiff's motion in limine, defendant stated: "Moreover, Plaintiff complains that his privileges should not have been reduced to consulting and he should have continued with full active privileges, meaning he would have been able to violate the Transfer Policy (as well as many others) again." The disputed stipulated order entered on May 5, 2009, even indicated that "Plaintiff was reinstated from suspension with consultation only limitation on his privileges." Moreover, defense counsel admitted that, at some time prior to the entry of the May 5, 2009 order, she believed that plaintiff was reinstated with consultation-only privileges. Accordingly, defendant's argument that plaintiff never raised such a claim and that the trial court "invented" the claim on the first day of trial is completely without merit.

Affirmed. Costs to plaintiff as the prevailing party. MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens