

STATE OF MICHIGAN
COURT OF APPEALS

HTC GLOBAL SERVICES, INC.,

Plaintiff-Appellee,

v

KAMLESH ASHER and GO WEB BUSINESS,
L.L.C., d/b/a MICHIGAN INDIA.COM,

Defendants,

and

MAROUN J. HAKIM,

Appellant.

UNPUBLISHED
December 10, 2013

Nos. 304096; 310575
Wayne Circuit Court
LC No. 09-020526-CZ

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

In Docket No. 304096, appellant, Maroun J. Hakim, an attorney, appeals as of right the trial court's order imposing monetary sanctions against him and his client, defendant Kamlesh Asher in the amount of \$9,600. In Docket No. 310575, Hakim appeals by leave granted the trial court's order imposing sanctions against him and his appellate counsel in the amount of \$1,500. We affirm both orders.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises from allegedly false and defamatory statements about plaintiff, HTC Global Services Inc., posted on a website in July 2009. Plaintiff filed a complaint against defendant Go Web Business, L.L.C. Michigan, d/b/a Michigan India.com, and John Doe, alleging that an anonymous individual posted false and defamatory statements about it on miindia.com. Plaintiff successfully moved for an order compelling Comcast Communications, L.L.C. to disclose the identity of John Doe and amended its complaint to name Asher.

Following a lengthy discovery period, plaintiff sought a default judgment and sanctions, arguing that Asher and Hakim abused the discovery process by failing to respond to a discovery request, failing to comply with a court order, and failing to provide testimony at a deposition. The trial court granted plaintiff's motion for default judgment at an October 8, 2010 hearing.¹ The trial court also awarded monetary sanctions against defendant and Hakim, in an amount to be determined at a later time, based on frivolous arguments, failure to respond to discovery requests, failure to comply with a court order, and for walking out of the deposition.

Asher moved to set aside the default and a hearing was held on November 12, 2010. The trial court found that defendant's affidavits were defective, that defendant previously made the same arguments, and that defendant failed to show palpable error. Upon plaintiff's request, the trial court indicated that it would consider further sanctions and would resolve the issue at a later date.

A trial on damages and sanctions was held on April 26, 2011. Plaintiff requested \$9,600 in taxable costs. Plaintiff indicated that the bill of costs detailed plaintiff's attorney's costs from September 22, 2010, to November 12, 2010, and that his attorney's hourly rate was \$250. The trial court entered a judgment in the amount of \$50,755.76, plus future statutory interest, against defendant. The trial court also ordered Asher and Hakim, jointly and severally, to pay \$9,600 for sanctions awarded on October 8, 2010, and November 12, 2010. On May 16, 2011, Hakim filed a claim of appeal with this Court.²

The court reporter for the October 8, 2010, hearing indicated that the notes for the October 8, 2010, hearing were unavailable. A hearing was held on March 2, 2012, to resolve the statement of facts. Hakim's counsel stated that the basis for his statement of facts was the transcript of the November 12, 2011, hearing and plaintiff's counsel's statements. The trial court found that the statement of facts did not reflect its rulings and accepted plaintiff's objections. It imposed further sanctions against Hakim in the amount of \$1,500.³

II. DOCKET NO. 304096

In Docket No. 304096, Hakim contends that the trial court erred by (1) imposing monetary sanctions against him for discovery violations and (2) imposing attorney fees based on the November 12, 2010, hearing, and in determining the amount of attorney fees.

¹ Hakim was not present at the October 8, 2010, hearing, and sent another attorney, John Simon, on his behalf.

² On July 20, 2011, this Court entered an order granting the motion to stay. *HTC Global Servs, Inc v Asher*, unpublished order of the Court of Appeal, entered July 20, 2011 (Docket No. 304096).

³ We granted Hakim's application for leave to appeal and ordered that the matter be consolidated with the pending appeal. *HTC Global Servs, Inc v Asher*, unpublished order of the Court of Appeal, entered March 1, 2013 (Docket No. 310575).

“We . . . review for an abuse of discretion a trial court’s decision whether to impose discovery sanctions. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes.” *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 677; 816 NW2d 464 (2012) (citations and internal quotation marks omitted). “This Court reviews any factual findings underlying a trial court’s decision for clear error. A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made.” *Hardrick v Auto Club Ins Ass’n*, 294 Mich App 651, 660; 819 NW2d 28 (2011) (citation and internal quotation marks omitted). “We review for clear error the trial court’s determination whether to impose sanctions under MCR 2.114.” *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008).

A. DISCOVERY VIOLATIONS AND MCR 2.114

Hakim contends that the trial court abused its discretion in awarding monetary sanctions because: (a) the trial court failed to review the circumstances, (b) the September 15, 2010, consent order regarding discovery was not properly entered, (c) plaintiff also violated the consent order, and (d) the deposition was terminated because plaintiff acted improperly. We disagree.

MCR 2.313(B)(2) provides that if a party fails to obey an order to provide or permit discovery, the trial court may order such sanctions as are just, including reasonable expenses and attorney fees caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. MCR 2.313(D)(1)(b) allows the trial court to similarly order such sanctions for failing to serve answers or objections to interrogatories, after proper service of the interrogatories. MCR 2.306(D)(2) permits the trial court to impose sanctions, including reasonable expenses and attorney fees, on a person who impedes, delays, or frustrates a deposition.

“Because the imposition of sanctions is discretionary, the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate.” *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). The factors that a court should consider include:

“(1) whether the violation was wilful or accidental; (2) the party’s history of refusing to comply with discovery requests . . .; (3) the prejudice to the defendant; (4) . . .; (5) whether there exists a history of plaintiff’s engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court’s order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice.” [*Id.* (citation omitted).]

MCR 2.114(E)⁴ provides:

⁴ MCR 2.114 was amended effective January 1, 2013.

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. The court may not assess punitive damages.

In *Guerrero*, this Court stated:

Pursuant to MCR 2.114(D), an attorney is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed. Under MCR 2.114(D), the signature of a party or an attorney is a certification that the document is “well grounded in fact and . . . warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law” and that “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.” The filing of a signed document that is not well grounded in fact and law subjects the filer to sanctions pursuant to MCR 2.114(E). MCR 2.114(E) states that the trial court “shall” impose sanctions upon finding that a document has been signed in violation of the rule. Therefore, if a violation of MCR 2.114(D) has occurred, the sanctions provided for by MCR 2.114(E) are mandatory. [*Guerrero*, 280 Mich App at 677-678 (citations omitted).]

The imposition of monetary sanctions for Asher and Hakim’s failure to provide discovery and walking out of the deposition did not constitute an abuse of discretion. Asher and Hakim violated MCR 2.313(B)(2) by failing to answer plaintiff’s discovery request by September 13, 2010, as required by the consent order. They also violated MCR 2.313(D)(1)(b) because plaintiff’s discovery request included interrogatories, which Asher failed to answer.⁵ The deposition transcript further reveals that Hakim and Asher left the deposition without reason. The trial court found that defendant and Hakim’s conduct egregious. Accordingly, the trial court was within its discretion to impose sanctions, including attorney fees.

Hakim claims that the September 15, 2010, consent order was not properly entered because the September 13, 2010, deadline contained in the order had already passed when the order was entered and it would have been impossible to comply with the order. However, although the consent order was not entered until September 15, 2010, there is evidence that the parties agreed to the order before that time and Hakim told plaintiff’s counsel to sign his name to the consent order in an email dated August 31, 2010. Because Hakim and defendant agreed to the consent order, they were aware of the September 13, 2010, deadline and were required to comply with the deadline, even though the order was not entered until September 15, 2010. The

⁵ Plaintiff incorrectly states that the trial court imposed sanctions pursuant to MCR 2.313(A), which is not applicable. Neither the statement of facts, nor the October 8, 2010, order cites MCR 2.313.

October 7, 2010, email from plaintiff's counsel to Hakim, attaching the consent order, does not change the fact that defendant and Hakim agreed to the order on August 31, 2010.

Hakim contends that the trial court's decision was unjust because plaintiff also violated the consent order, specifically its answers to interrogatories were vague and it did not produce the requested documents. Plaintiff initially failed to answer defendant's interrogatories or produce the requested documents and defendant filed a motion to compel. The consent order canceled the hearing on defendant's motion to compel. Plaintiff subsequently served its answers to defendant's interrogatories on September 13, 2010, in compliance with the consent order. Defendant never filed a subsequent motion to compel or sought sanctions against plaintiff for either serving vague answers or failing to produce the requested documents. The certified statement of facts does not indicate that Hakim raised these arguments at the October 8, 2010, hearing. Because defendant did not bring plaintiff's violations to the trial court's attention, the trial court did not give disparate treatment to the parties. Cf. *Thorne v Bell*, 206 Mich App 625, 635-636; 522 NW2d 711 (1994) (finding disparate treatment for identical violations of a scheduling order when the parties raised the same arguments necessitated a finding of abuse of discretion).

Hakim contends that the deposition was terminated because plaintiff acted improperly. The full transcript of the deposition was not provided. The pages available, however, do not reveal any improper conduct by plaintiff or plaintiff's counsel. According to the certified statement of facts, defendant failed to submit any affidavits or written statements supporting his arguments regarding the discussions held off of the record. Because there is no evidence that plaintiff or plaintiff's counsel acted improperly at the deposition, defendant's response to plaintiff's motion violated MCR 2.114.⁶ Accordingly, the trial court did not abuse its discretion in imposing monetary sanctions based on the discovery violations. The trial court reasonably imposed fees starting at the time of the preparation for the deposition.

B. FINDINGS OF FACT AND AMOUNT OF ATTORNEY FEES

Hakim also contends that the trial court abused its discretion in awarding sanctions based on the November 12, 2010, hearing, the total amount of sanctions must be reduced by \$3,100 for that error, and the total amount of sanctions must be reduced because plaintiff's trial counsel should not have charged for seven hours to prepare the motion for a default judgment. We disagree.

On April 26, 2011, the trial court imposed \$9,600 for sanctions awarded on October 8, 2010, and November 12, 2010.⁷ Hakim never argued that the total amount of sanctions was

⁶ Hakim contends that there could be no violation because the response was not filed with the trial court. However, the response was served on plaintiff and MCR 2.114(E) imposes sanctions for signing, not filing, a document in violation of the rule.

⁷ We reject Hakim's assertion that the trial court failed to award sanctions at the November 12, 2010 hearing. It is clear from our review of the record that the trial court awarded sanctions, with the amount to be determined at a later date.

improper based on the time plaintiff's counsel charged to prepare the motion for entry of default judgment. Because this issue was not raised before and addressed by the trial court, it is unpreserved. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). Unpreserved issues are reviewed for plain error affecting substantial rights. *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 381; 808 NW2d 511 (2011). There is no plain error regarding the amount of fees. Hakim contends that the amount must be reduced because plaintiff's counsel, who had over 20 years of experience, charged seven hours to prepare a two-page motion and five-page brief, which cited only one case. This amount was supported by plaintiff's bill of costs, to which defendant never objected or disputed. Defendant and Hakim failed to submit any evidence regarding the amount of sanctions. Hakim also fails to establish that seven hours was an unreasonable amount of time and does not argue what a reasonable amount of time would have been. The trial court did not err in awarding sanctions based on the bill of costs.

III. DOCKET NO. 301575

In Docket No. 301575, Hakim contends that the trial court erred by imposing monetary sanctions against him and his appellate counsel because his appellate counsel conducted a reasonable inquiry by relying on the transcript of the November 12, 2010, hearing to prepare the proposed statements of facts regarding the October 8 hearing. We disagree.

“An attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case.” *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995) (citations omitted).

The trial court imposed sanctions in the amount of \$1,500 against Hakim and his counsel for plaintiff having to object to their proposed statement of facts. The trial court found that Hakim's counsel did not rely on plaintiff's counsel's and the trial court's statements and the proposed statement of facts had “nothing to do with what was actually said and done.”

The trial court did not clearly err in imposing sanctions because Hakim and his counsel violated MCR 2.114. Hakim and his counsel filed three proposed statements of facts. At the March 2, 2012, hearing, the trial court indicated that it had not received the third proposed statement of facts. The trial court apparently imposed sanctions based on the first or second proposed statement of facts. Hakim's first and second proposed statements of fact were not “well grounded in fact.” *Guerrero*, 280 Mich App at 677-678 (citation and internal quotation marks omitted). Both statements left out the basis of the trial court's ruling. Based on the certified statement of facts, the first and second proposed statements did not include the trial court's questioning regarding the deposition and exhibits. It does not matter that defendant's third proposed statement of facts included the basis for the trial court's decision because Hakim and his counsel violated MCR 2.114 by signing the documents attaching the first two proposed statements of facts.

Hakim claims that his counsel conducted a reasonable inquiry by relying on the statements at the November 12, 2010, hearing. However, the November 12, 2010, hearing

included plaintiff's counsel's statements referring to the trial court's finding that defendant and Hakim's conduct was egregious. Hakim and his counsel omitted this finding. Hakim's counsel, who was not present on October 8, 2010, should have spoken with defendant or the lawyer that attended the October 8, 2010, hearing in order to include the relevant bases for the trial court's rulings. Thus, Hakim's counsel did not conduct a reasonable inquiry.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan