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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0730**

William Cahoon,
Appellant,

vs.

Abhe & Svoboda, Inc.,
Respondent.

**Filed November 19, 2012
Affirmed
Rodenberg, Judge**

Scott County District Court
File No. 70CV1120117

James W. Balmer, Duluth, Minnesota (for appellant)

Theresa Anne Peterson, Huemoeller and Gontarek, P.L.C., Prior Lake, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Following appellant's voluntary dismissal of a negligence action that was barred by the worker's compensation statute, both parties challenge the district court's award of

attorney fees in favor of respondent on a motion for sanctions under Minn. R. Civ. P. 11. We affirm.

FACTS

Appellant William Cahoon worked on a bridge-painting project for respondent Abhe & Svoboda Inc. (ASI) during July 2005. He was subsequently diagnosed with several forms of cancer. In late 2009, appellant filed worker's compensation claims against various employers (excluding ASI), alleging work-related injuries. Appellant settled those claims in March 2010. In September 2010, in response to an inquiry from appellant's trial counsel, ASI sent counsel a responsive letter on corporate letterhead noting that appellant had "worked on a crew, [s]ubcontracted and under the [s]upervision of [T.O.], on a small project . . ." during July 2005.

On July 15, 2011, appellant served a complaint on ASI seeking damages for injuries he sustained while working on the bridge-painting project. ASI filed an answer asserting that the action was barred by the worker's compensation statute. During the course of discovery, in October 2011, appellant received his complete personnel file from ASI. This file conclusively showed that appellant had been an employee of ASI, and the negligence action was therefore barred. *See generally* Minn. Stat. § 176.031 (2010) (providing that a worker's compensation claim is generally the exclusive remedy against employers for injuries arising in the course of employment).

On November 9, 2011, ASI served appellant's trial counsel with a notice of motion for rule 11 sanctions, asserting that the complaint was not warranted by existing law. *See generally* Minn. R. Civ. P. 11.03(a)(1). The notice indicated that ASI would

file the motion in 21 days unless appellant voluntarily dismissed the complaint. It further indicated a hearing date of December 15, 2011.

After filing a motion for summary judgment, ASI filed the motion for sanctions on December 12, 2011. That same day, appellant's trial counsel emailed ASI with an offer to dismiss the action if ASI would withdraw the motion for sanctions. ASI declined.

On December 14, 2011, appellant's trial counsel filed an affidavit opposing the motion for sanctions. She attested that she served the complaint on ASI because she believed the statute of limitations on third-party claims was about to run. After receiving ASI's notice of intent to seek sanctions, appellant's trial counsel conducted further research and attempted to speak with her client. She was not able to contact appellant until the week before December 14, 2011, as appellant had been undergoing cancer treatments. Counsel attested that she notified ASI as soon as she received appellant's consent to dismiss the complaint.

The district court held a hearing on the motion for sanctions on December 15, 2011. Appellant consented to the court dismissing the action but opposed the motion for sanctions. Neither party has supplied this court with a transcript of the hearing.

Following the hearing, ASI submitted an affidavit of counsel requesting attorney fees in the amount of \$6,320.50 as a sanction under rule 11. This amount represented the total work performed on the case.

The district court granted the motion for sanctions and awarded partial attorney fees.¹ It found that appellant's trial counsel became aware after serving the complaint that appellant had been an employee of ASI, and that the lawsuit therefore had no legal basis. At the point in time when counsel received the personnel file from ASI, in October 2011, that issue was no longer in question. Even though appellant's counsel received ASI's notice of intent to pursue sanctions in early November 2011, she did not agree to dismiss the complaint until December 15, 2011. The district court found that counsel delayed dismissal by attempting to negotiate with ASI for its withdrawal of the motion for sanctions.

The district court awarded ASI a portion of the claimed attorney fees, amounting to \$3,040. It reasoned that appellant's trial counsel "credibly presented evidence" that she was unaware of the employment relationship between appellant and ASI until late October or early November 2011, when she received appellant's personnel file and the notice of motion for sanctions. The court therefore granted ASI the attorney fees incurred from November 2011 through dismissal.

Both parties appealed.

¹ Minn. R. Civ. P. 11.03 authorizes the imposition of "an appropriate sanction upon the attorneys, law firms or parties" determined to have violated rule 11.02 or to have been "responsible for the violation." The district court's order and judgment provides that "Plaintiff William Cahoon" shall pay the attorney fees awarded as a sanction. No party has appealed the issue of whether the sanction against appellant rather than his trial counsel was proper, and so we do not address that issue.

DECISION

I.

Appellant argues that the district court abused its discretion in awarding sanctions pursuant to Minn. R. Civ. P. 11, and that appellant's counsel acted reasonably under the circumstances.

Rule 11 provides that, by signing a pleading, an attorney certifies that the claims and legal contentions are warranted by existing law. Minn. R. Civ. P. 11.02. The signature also certifies that the factual allegations “have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” *Id.* at 11.02(c). This rule imposes an affirmative duty on attorneys to investigate the factual and legal basis for their pleadings. *Uselman v. Uselman*, 464 N.W.2d 130, 142 (Minn. 1990).

If a party is found to have violated rule 11, sanctions are mandatory. *Radloff v. First Am. Nat'l Bank of St. Cloud, N.A.*, 470 N.W.2d 154, 156–57 (Minn. App. 1991), *review denied* (Minn. July 24, 1991). However, this court reviews a district court's grant or denial of sanctions under the abuse-of-discretion standard. *Id.* at 156. The district court has flexibility in resolving questions regarding the propriety of sanctions. *Uselman*, 464 N.W.2d at 145. Additionally, the district court is afforded broad discretion in determining the type of sanction imposed. *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782, 790–91 (Minn. App. 2003). Permissible sanctions include attorney fees in an amount necessary to accomplish the rule's purpose, which is to deter litigation abuses. *Uselman*, 464 N.W.2d at 142, 145.

In determining whether sanctions are appropriate, the district court must apply an objective standard. *Id.* at 142–43. It must analyze whether the party’s conduct was “reasonable[] under the circumstances.” *Id.* at 143. A relevant consideration is whether “the offender persisted in advancing a position while on notice that the position was not well grounded in fact or . . . law.” *Radloff*, 470 N.W.2d at 157 (quotation omitted).

Here, the district court did not abuse its discretion in imposing sanctions on the basis that appellant’s trial counsel persisted in advancing appellant’s legal position after she knew that it was not grounded in fact or law. Even though counsel became aware by early November 2011 that the complaint had no legal basis, she waited until December 15, the date of the hearing, to dismiss the action. By that time, respondent had incurred substantial costs in filing a motion for summary judgment, filing the motion for sanctions, and preparing for the hearing.

Appellant argues that his counsel was unable to contact him until the week before the hearing, as appellant had been undergoing cancer treatments. Appellant’s trial counsel attested in her affidavit, dated and filed December 14, 2011, that she was unable to reach appellant until “last week.” Thus, she obtained appellant’s consent to dismiss the complaint sometime during the week of December 5, 2011. ASI did not file the motion for sanctions until December 12, 2011. Counsel could have and should have dismissed the complaint immediately.

Appellant also argues that his trial counsel acted reasonably by offering to dismiss the complaint if ASI would withdraw its motion for sanctions. Trial counsel admitted receiving ASI’s notice of intent to seek sanctions. She was thus aware that ASI could file

the motion 21 days later (on November 30, 2011) unless she took corrective action. Yet she failed to inform ASI of her efforts to obtain appellant's consent to dismiss the complaint. She did not contact ASI's counsel or otherwise respond to the notice until December 12, 2011, nearly two weeks after the 21-day deadline and only days before the hearing. By this time, ASI had already filed the motions for summary judgment and for sanctions, incurring substantial expenses. Thus, the actions of appellant's trial counsel, in context, were not reasonable. Her late offer to dismiss the case (which she agrees that she knew was meritless) in exchange for withdrawal of the request for sanctions was not reasonable.

In sum, the record supports the district court's decision to impose sanctions. Appellant's trial counsel became aware that the complaint lacked a legal basis in late October or early November 2011. She waited until after the 21-day deadline, and indeed until after the motion for sanctions was filed, to contact ASI. Even though she was unable to promptly reach appellant regarding the motion for sanctions, counsel offers no explanation as to why she failed to communicate with ASI regarding her difficulty in communicating with her client. If she had informed ASI of the situation, its expenses would likely have been mitigated, or some other accommodation could have been considered. The district court did not abuse its discretion in concluding that sanctions were appropriate because the complaint lacked a legal basis in fact and law, and trial counsel's failure to take prompt corrective action was not reasonable under the circumstances.

II.

By notice of related appeal, ASI also challenges the award of sanctions. It maintains that the district court abused its discretion in failing to award it all of its claimed attorney fees. Instead, the court only awarded fees from November 2011 through dismissal, reasoning that appellant's trial counsel did not discover the employment relationship between appellant and ASI until late October or early November 2011.

As noted above, district courts have broad discretion in determining the appropriate sanctions necessary to deter future litigation abuses. *Gibson*, 659 N.W.2d at 790–91. Courts should “tailor any sanctions to the unique facts of an individual case to accomplish the fundamental purpose of the rule—deterrence.” *Uselman*, 464 N.W.2d at 145. In light of this purpose, courts should err on the side of imposing lesser sanctions, permitting some sanctionable conduct to escape discipline rather than risk “deterring legitimate or arguably legitimate claims.” *Id.* at 142. Relevant considerations include how much time the attorney had for investigation, whether the attorney had to rely on the client for information, and whether the attorney acted in bad faith. *Id.* at 143, 145.

In this case, the record supports the district court's determination that sanctions were not warranted prior to November 2011. The court found that appellant's counsel had not been aware of the employment relationship between ASI and appellant until that time. It observed that ASI had not been included in the worker's compensation settlement, indicating that counsel was not aware that ASI was appellant's former employer. The affidavit of appellant's trial counsel likewise reflected her initial belief

that the complaint against ASI was a third-party liability claim. She delayed filing the complaint until after the worker's compensation claims were settled, which she attested is her standard practice. By that time, the statute of limitations had nearly run. Counsel thus had limited time to investigate the factual basis for the complaint, and she presumably had to rely on appellant for information.

Additionally, there is no indication that appellant's trial counsel acted in bad faith prior to November 2011. Had the district court imposed broader sanctions, such action would have risked deterring arguably legitimate conduct. Additional sanctions would also risk effectuating punishment or cost-shifting rather than deterrence. Thus, the district court properly tailored the sanctions to accomplish the limited purpose of rule 11. *See Uselman*, 464 N.W.2d at 142. Its award of partial attorney fees comports with caselaw urging restraint in the imposition of rule 11 sanctions. *See id.* at 145 (noting that courts should "impose the least severe sanction necessary to effectuate the purpose of deterrence").

ASI argues that opposing counsel must have known of the employment relationship before filing the complaint because ASI sent that attorney a letter in September 2010 indicating that appellant had worked on the bridge-painting project. However, the letter to which ASI points did not conclusively establish that appellant was an employee of ASI. It stated that appellant had "worked on a crew, subcontracted and under the [s]upervision of [T.O.]." It further indicated that his file contained "only forms required for employment and payroll." The letter did not include those forms. Appellant's trial counsel acknowledged receiving the letter, but contended in her affidavit

that she engaged in a good-faith investigation of appellant's claims against ASI before filing the complaint. The district court found as a fact that counsel was not aware of the employment relationship until she obtained the complete personnel file from ASI in late October 2011, noting that ASI "was not included in the settlement of [appellant's] worker's compensation claims."

ASI also argues that the district court abused its discretion in relying on facts not in evidence. In its order, the court noted that appellant's trial counsel "credibly presented evidence that she was unaware that her client was employed by [ASI]" until around November 2011. The record contains no transcript of the December 15, 2011 hearing or any evidence or argument presented at the hearing, apart from the affidavit of appellant's trial counsel. As a result of the lack of a complete record, it is unclear what evidence was presented at the hearing, whether ASI objected to any evidence or argument, the response(s) to any such objections, and the court's ruling(s) on any such objections.

The appellant "bears the burden of providing a record sufficient to show alleged errors." *Collins v. Waconia Dodge, Inc.*, 793 N.W.2d 142, 146 (Minn. App. 2011), *review denied* (Minn. Mar. 15, 2011). ASI is the appellant with regard to the evidentiary issue, as it filed a notice of related appeal. Thus, it was ASI's responsibility to request a transcript of the hearing or, if none existed, to provide a statement of the proceedings summarizing the hearing. *See* Minn. R. Civ. App. P. 110.03 (providing that, if no transcript is available, "the appellant may prepare a statement of the proceedings from the best available means, including recollection"). As ASI has not provided a record sufficient to show that it objected to the challenged evidence below, it has waived the

issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts will not consider matters raised for the first time on appeal).

Similarly, ASI argues that the district court erred in relying on counsel's affidavit, which was filed only a day before the hearing. But as ASI failed to provide a record regarding the hearing, it is unclear from the record on appeal whether ASI objected to the late-filed affidavit. Also unknown is whether the district court was asked to permit a late filing by ASI in response to the late-filed affidavit under Minn. Gen. R. Pract. 115.07. Thus, ASI has not satisfied its burden of providing a record sufficient to show error with regard to its evidentiary challenges.

Affirmed.