

STATE OF MICHIGAN
COURT OF APPEALS

FRANCIS WILLIAM WERTH

UNPUBLISHED
August 20, 1996

Plaintiff-Appellee,

v

No. 170204
LC No. 90-005418 DO

JOLENE KAY WERTH,

Defendant Third Party
Plaintiff-Appellee,

REED CITY TOOL & DIE, WERTH LEASING,
INC., PERFORMANCE PLASTICS, INC., and
CHINA CONNECTION, INC.,

Third Party Defendants-
Appellants,

and

H. WENDELL JOHNSON,

Appellant,

and

BEENE GARTER & COMPANY,

Appellee.

Before: McDonald, P.J., and Markman and C. W. Johnson*, JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

H. Wendell Johnson, attorney for Francis William Werth in the underlying divorce action, appeals as of right from an October 27, 1993, order requiring Johnson to pay the attorney fees incurred by defendants Jolene K. Werth and Reed City Tool & Die Corporation for services and expenses incurred in connection with an evidentiary hearing conducted by the court to determine who was responsible for the breakdown of the settlement placed on the record in the divorce action and to determine if any sanctions should be imposed. The court assessed sanctions against Johnson in the amount of \$144,321.63. We affirm in part, reverse in part and remand for further proceedings.

The trial court did not err in determining Johnson's conduct constituted a serious enough fraud on the court to warrant imposition of sanctions under the court's inherent authority. A trial court's exercise of its inherent judicial power to impose sanctions is reviewed for an abuse of discretion. *Chambers v Nasco, Inc*, 501 US 32; 111 S Ct 212; 115 L Ed 2d 27 (1991). Johnson does not challenge the authority of the court to award sanctions in circumstances where it determines there was bad faith. Instead, Johnson claims his actions did not rise to the level required for the court to award sanctions and, thus, the court abused its discretion by so ordering. We disagree. The court did not base its finding of fraud upon the court and determination to award sanctions on Johnson's failure to be more complete or to inform the court sooner that the "settlement had gone awry," but on his deliberate misrepresentations to the court.

The trial court's findings with regard to Johnson's misrepresentations are not clearly erroneous. *Townsend v Brown Corp*, 206 Mich App 257; 521 NW2d 16 (1994). When reviewing a trial court's findings of fact this Court recognizes the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C). Although the court found Johnson's "strategy" during settlement negotiations was "not unethical," it found Johnson's subsequent misrepresentations constituted fraud on the court. The findings were not inconsistent. The court did not base its finding that Johnson perpetrated a fraud upon the court and the parties on the conduct or testimony of Robert Jackson and Francis Werth, but upon Johnson's own conduct and contradictory and inconsistent testimony at the evidentiary hearing. Additionally, contrary to Johnson's intimation, motivation is not a necessary element of fraud. *Jim-Bob, Inc v Mehling*, 178 Mich App 71; 443 NW2d 451 (1989).

The award of attorney fees is neither excessive nor punitive. Johnson was sanctioned for fraud against the court and the parties, not for defending himself at the evidentiary hearing. As noted the court had the inherent power to hold an evidentiary hearing to determine whether a fraud had been committed upon the court. The court also possessed the power to award sanctions in the way of attorney fees and expenses incurred because of the fraud. *Chambers, supra*. The amount of the award was calculated by a reasonable method and did not constitute an abuse of discretion. *Jordan v Transnat'l Motor, Inc*, 212 Mich App 94; 537 NW2d 471 (1995).

We also find no denial of Johnson's procedural due process rights. Prior to the start of the evidentiary hearing, the court made the nature and scope of the hearing very clear. There was no question the court suspected a fraud had been committed and that the focus would be on Johnson's representations, Johnson did not object, did not request an adjournment and did not raise the issue that he was without representation. He had notice and an opportunity to present his objections. *Vicencio v Ramirez*, 211 Mich App 501; 536 NW2d 280 (1995).

Finally, a review of the court's opinion indicates the court in making its determination Johnson committed fraud upon the court applied the preponderance of the evidence standard of proof. However, fraud must be proved by clear, satisfactory and convincing evidence. *Jim-Bob, supra; Hi-Way Motor Co v Int'l Harvester*, 398 Mich 330; 247 NW2d 813 (1976). As this Court stated in *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995):

An evidentiary hearing is necessary where fraud has been alleged because the proof required to sustain a motion to set aside a judgment due to fraud is "of the highest order."

It is well established that the burden of proof of the "highest order" in a civil case is the clear and convincing evidence standard. See *In re Martin*, 450 Mich 204 , 227 n 21; 538 NW2d 399 (1995). Appellees have not presented a convincing argument that the standard is less for an attorney who commits a fraud on the court. We therefore conclude the trial court applied the wrong standard of proof.

Although there was no error in the court's findings of fact, because the court applied an improper standard of proof, we must vacate the court's order and remand the matter back to the court for consideration of the facts applying the proper standard of proof. A new evidentiary hearing is not necessary. The court is to review its original opinion and the existing record, and render a new opinion applying the clear and convincing standard.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction. Appellate costs to neither party.

/s/ Gary R. McDonald
/s/ Stephen J. Markman
/s/ Charles W. Johnson