STATE OF MICHIGAN

COURT OF APPEALS

DENNIS STEWART,

Plaintiff-Appellant,

v

KENT COUNTY CIRCUIT JUDGE and
LSI CREDIT UNION,

Defendants-Appellees,

and

JOHN HESS and HESS & HESS, P.C.,

Defendants.

UNPUBLISHED
October 15, 1996

No. 185426
LC No. 94-1110-NZ

Before: Fitzgerald, P.J., and O'Connell and T.L. Ludington,* JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants LSI Credit Union and Kent County Circuit judge. We affirm.

In September 1991, LSI filed suit against plaintiff to recover approximately $12,000 from loans upon which plaintiff defaulted. Defendant judge was assigned this case after two different district court cases were consolidated and transferred to circuit court. In September 1992, defendant judge granted summary disposition in LSI's favor. Plaintiff pursued an appeal of this order, but this Court subsequently dismissed the appeal on LSI's motion.

In March 1994, plaintiff, proceeding in propria persona, filed the instant suit against John Hess (his attorney in the previous proceeding), Hess' law firm, LSI, and defendant judge, alleging that LSI and defendant judge colluded to dismiss the earlier action against him, and that Hess and his law firm committed legal malpractice when representing him during a portion of the earlier action. Plaintiff was unable to effect service on either Hess or his law firm, so the trial court dismissed the suit against these

parties. In August 1994, LSI moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) on res judicata grounds. Similarly, defendant judge moved for summary disposition pursuant to the same court rules on the ground that he was judicially immune from plaintiff's suit. Moreover, LSI and defendant judge moved for sanctions against plaintiff under MCR 2.114, alleging that his action against them was patently frivolous.

On September 27, 1994, the trial court granted summary disposition in favor of defendants and found that plaintiff's lawsuit was indeed frivolous. On October 10, 1994, the trial court entered an order to this effect with respect to defendant judge, but this order was defective because it was submitted in violation of MCR 2.602(B)(3). On October 28, 1994, the trial court entered a similar order for LSI, but this order failed to note that LSI was entitled to sanctions. In December 1994, the trial court entered a new order for defendant judge to correct the earlier mistake. Plaintiff claimed an appeal from these orders, but he voluntarily dismissed it on the mistaken belief that defendants could no longer recover the aforementioned sanctions against him.

In March, defendants moved jointly for these sanctions. On March 30, 1995, the trial court entered an order awarding sanctions in defendant judge's favor. On April 17, 1995, the trial court entered a similar order in LSI's favor. With this procedural history in mind, we will analyze plaintiff's claims on appeal.

I

Plaintiff argues that the trial court erred when it awarded sanctions to defendants. We disagree. Every pleading of an unrepresented party must be signed by the party. MCR 2.114(B). This signature constitutes a certification that the pleading 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, and it is not being interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *Warden v Fenton Lanes, Inc*, 197 Mich App 618, 626; 495 NW2d 849 (1992). If a pleading is signed in violation of MCR 2.114, the party must be sanctioned. MCR 2.114(E).

Plaintiff first asserts that LSI was not authorized to receive such an award because the order granting summary disposition in its favor failed to memorialize LSI's entitlement to sanctions. Our review of the record shows that plaintiff knew that the trial court had ruled from the bench that LSI was entitled to the sanctions in question. An oral ruling has the same weight and effect as a written order. *McClure v H K Porter Co*, 174 Mich App 499, 503; 436 NW2d 677 (1988). Consequently, we find plaintiff's first assertion meritless.

Alternatively, plaintiff asserts that defendants' joint motion for sanctions was untimely because it was not filed within twenty-eight days of the entry of the orders granting summary disposition in favor of defendants. Plaintiff bases this argument upon his reading of MCR 2.625(I). This court rule provides:

> *When costs are to be taxed by the clerk, the party entitled to costs must, within 28 days after the judgment is signed*, or within 28 days after the entry of an order denying a motion for new trial or to set aside the judgment, present to the clerk
>
> (a) a bill of costs conforming to subrule (G),
>
> (b) a copy of the bill of costs for each other party, and
>
> (c) a list of the names and addresses of the attorneys for each party or of parties not represented by attorneys.
>
> In addition, the party presenting the bill of costs shall immediately serve a copy of the bill and any accompanying affidavits on the other parties. *Failure to present a bill of costs within the time prescribed constitutes a waiver of the right to costs.* [MCR 2.625(F)(2). Emphasis added.]

However, this rule is inapplicable in the given situation because defendants recovered sanctions pursuant to MCR 2.114, not costs under this court rule. Consequently, we find plaintiff's alternative assertion meritless.

II

Plaintiff next argues that defendants were not entitled to the cost and fees awarded as sanctions. We disagree. We find that this issue is unpreserved because plaintiff failed to raise it below. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 230; 532 NW2d 903 (1995). Thus, we need not review this issue. *Vander Bossche v Valley Pub*, 203 Mich App 632, 641; 513 NW2d 225 (1994). Nevertheless, we will review this issue because it is one of law and the facts necessary for this question's resolution have been presented. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992).

As noted above, plaintiff was sanctioned pursuant to MCR 2.114 for filing a frivolous lawsuit against defendants. Sanctions under this court rule may include payment to the opposing parties of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees. *Warden*, *supra* at 626. Thus, we review the award of these sanctions to determine whether the trial court abused its discretion in arriving at the amount of sanctions imposed. *Klco v Dynamic Training Corp*, 192 Mich App 39, 42; 480 NW2d 596 (1991).

Our review of the sanctions award shows that defendants were entitled to these costs and fees, save one. Defendant judge claimed reimbursement for the cost of improperly filing his first order granting him summary disposition. However, MCR 2.144(F) provides that defendant judge is entitled to only those costs and fees incurred as a result of plaintiff's frivolous filing. Because this cost was the result of defendant judge's own error, we find that he was not entitled to recover this cost. Nevertheless, the trial court did not abuse its discretion when it awarded this cost to defendant judge because plaintiff's failure to raise this issue below led to this error, not the trial court's passion or bias.

See *Model Laundries & Dry Cleaners v Amoco* Corp, 216 Mich App 1, 4; 548 NW2d 242 (1996). Correspondingly, we will not reverse the trial court's decision on this point.

III

Plaintiff asks this Court to reinstate his appeal from the orders granting defendants summary disposition because he would not have dismissed it had he known that defendants could still recover their sanctions against him. We decline. Plaintiff had fifty-six days in which to make this request, and the time period has long run. MCR 7.217(D).

Similarly, defendant judge asks this Court to sanction plaintiff under MCR 7.216(C)(1)(a) for bringing a vexatious appeal. We likewise decline. This Court has determined that the following rules must be applied when it is asked to find that an appeal is vexatious:

> Sanctions should be applied only "in plain cases." *In re Marx's Estate*, 201 Mich 504, 511; 167 NW 976 (1918). The abuse of the appellate process must be clear. *DAIIE v Ayvazian*, 62 Mich App 94, 103; 233 NW2d 200 (1975). A question raised on appeal is vexatious if the result is apparent and should have been apparent even to the appellant. *In re Greening Estate*, 9 Mich App 22; 155 NW2d 696 (1967).
>
> However, that does not mean that if an issue is found to lack merit, the appeal is a vexatious appeal, if the issue is not otherwise frivolous. *Wayne Co Jail Inmates [v Wayne Co Chief Executive Officer*, 178 Mich App 634, 666; 444 NW2d 549 (1989)]. An issue will not be considered frivolous if there is a dearth of clear Michigan authority. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 79; 467 NW2d 21 (1991); *Rice v Naimish*, 8 Mich App 698, 708; 155 NW2d 370 (1967). On the other hand, if the issue is so one-sided that no reasonable lawyer would contest it in good faith, the appeal may be frivolous. *Cardinal Mooney High School*, *supra*. [*McIntosh v Chrysler Corp*, 212 Mich App 461, 470-471; 538 NW2d 428 (1995).]

Sanctions are not appropriate in the present case because plaintiff's position on appeal is legally correct –- defendant judge should not have recovered the cost of filing the first order granting summary disposition because defendant judge's own error caused him to incur this expense. Plaintiff has failed to prevail on appeal with respect to this issue only because the issue was not raised below. Thus, while plaintiff has not prevailed on appeal, in light of the legal merit of his position with respect to this issue, we do not find his appeal to be vexatious.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Thomas L. Ludington