

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of E. L. SARDY

UNPUBLISHED
January 23, 2014

No. 312888
Oakland Circuit Court
Family Division
LC No. 2012-795657-NA

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Counsel for respondent father, Andrew Bossory, appeals as of right an order for sanctions entered after the trial court concluded that an emergency motion for recusal counsel filed violated MCR 2.114(D). We affirm.

During this termination of parental rights proceeding, Bossory (counsel) filed on behalf of respondent father (respondent) an emergency motion for recusal of the trial judge pursuant to MCR 2.003(C)(1)(a) and (b).¹ First, counsel argued that respondent would not receive a fair trial because the trial court had a longstanding history with respondent. In particular, counsel argued that the trial court had been involved in this matter for over four years and had presided over respondent's wife's petitions for personal protection orders. During those proceedings, counsel argued, "the trial court eventually granted a PPO request, specifically finding Respondent to be a 'bully,' and granting the PPO because Respondent was 'twice the size' of [his wife]." Thus, counsel argued, respondent "has demonstrable concerns that the trial court has formed an adverse, negative opinion of him arising from the information gleaned in the custody actions and his tumultuous relationship with [his wife]."

Second, counsel argued, "the trial court has failed to adhere to the appearance of impropriety standard as demanded by Canon 2 of the Michigan Code of Judicial Conduct." In

¹ MCR 2.003(C)(1) provides for disqualification of a judge if: (a) the judge is biased or prejudiced for or against a party or attorney, or (b) the judge, "based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556] US [868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct."

particular, counsel alleged that in a custody-related hearing held on August 22, 2012, the trial court demonstrated “its clear bias and prejudice against Respondent” by making “a comment on the record which chilled Respondent to his very core” The alleged comment made to respondent’s wife was: “In a few months, the issue will be moot and you will have full custody. You will be able to do whatever you want.” Counsel characterized the statement as “shocking” and argued that it illustrated a “guarantee that Respondent will not receive a constitutionally fair trial.” Further, counsel argued: “The clear bias and prejudice of the trial judge *requires* recusal.” (Emphasis in original.)

Third, counsel argued that “the trial court has engaged in a pattern of behavior wherein the court grants all respect and courtesy to the prosecution and guardian ad litem, while is overly dismissive and threatens contempt on counsel for Respondent when advocating for the *constitutional rights* of Respondent.” (Emphasis in original.) Counsel further argued that “the trial court routinely disrupts counsel for Respondent when making argument and grants the prosecutor an unfettered opportunity to present argument.” By way of example, counsel referred to a motion hearing held on September 12, 2012, during which the trial court “continually interrupted counsel,” “refused to listen” to counsel’s argument, “*threatened* to hold counsel in contempt,” and “accused counsel of being rude to [the] prosecutor and attorney guardian ad litem.” (Emphasis in original.) Counsel also referred to a hearing held on August 29, 2012, at which time his request for an adjournment was denied and the trial court made a statement “apparently projecting statements onto the [complaining witnesses] to bolster the ‘indicia of trustworthiness’ required to admit hearsay testimony.”

Fourth, counsel argued that the trial court refused to grant his stipulated motion to withdraw as respondent’s counsel because of financial hardship and instead set the motion for a hearing. At the hearing, the trial court granted the motion to withdraw, but then appointed him as “assigned counsel.” Counsel argued that “[n]ot only does this appointment smack of a vindictive action on the part of the court, it also threatens to jeopardize the attorney-client relationship” Counsel concluded his motion for recusal as follows: “From what has transpired so far, things are only set to get worse. By *appointing* the undersigned as counsel, the trial court has ensured Respondent is stuck with an attorney who for reasons unknown to the Respondent (and his counsel) has ‘got off on the wrong foot’ with the court, has been so far embarrassed, intimidated, and thwarted in his attempts to make a proper record and is guaranteed to fail to provide effective representation in this court. The actions of the trial court demonstrate a bias and prejudice against the Respondent and counsel – the trial court has made up its mind as to the guilt of the Respondent (as demonstrated in the August 22, 2012 custody hearing) and is doing all it can to ensure termination of his parental rights.” In support of counsel’s motion, he attached the affidavit of respondent.

By opinion and order entered October 3, 2012, the trial court denied the emergency motion for recusal of the trial judge. First, the court noted that, with regard to respondent’s wife’s petition for a PPO, the request was granted ex parte and without a hearing; thus, the accusations that the trial judge called respondent a “bully” and referred to respondent as “twice the size” of respondent’s wife were unsupported by the record. Second, the court rejected the argument that recusal was required because the trial judge presided over several proceedings in this matter, holding that MCR 3.703(D)(1) provides for a “one family, one judge” approach and MCL 600.1023 mandates the assignment of matters involving members of the same family to the

same judge. Third, the court noted that it had reviewed the video recording of the proceeding held on August 22, 2012, and the trial judge never told respondent's wife: "In a few months, the issue will be moot and you will have full custody. You will be able to do whatever you want." The court further held that the "allegation is patently false and sanctionable. [Counsel] had every opportunity to view the video at no charge before making that serious allegation but chose not to do so." Fourth, the court noted that it had reviewed the video recording of the September 12, 2012 motion hearing. Before the hearing, the court listed all of the motions before the court and respondent's counsel "consistently attempted to argue matters that were not before the court." The court further noted that it had allowed counsel to make extensive argument on the motions "but appropriately did not allow him to make cumulative and/or irrelevant argument on matters not before the court." Fifth, the court referred to the August 29, 2012 hearing and noted that the disputed statement was made by a witness, contrary to counsel's claim, and the court was "incredulous that Respondent continues to make serious allegations that he has not even attempted to substantiate." Sixth, the trial court noted that it was *because* respondent's constitutional rights to a fair trial (which was 19 days away) and effective representation were implicated that the court appointed counsel to represent respondent. Counsel had already agreed to the trial date, had represented respondent in numerous proceedings, and had reviewed the evidence in this matter. Accordingly, the trial court denied the emergency motion for recusal. Further, the trial court held that the motion violated MCR 2.114(D) because it was based on "totally unsubstantiated and unsupported allegations made by Respondent and signed by his counsel" The sanction amount was to be determined.

Thereafter, the trial court entered an opinion and order, assessing sanctions for four unsubstantiated allegations in counsel's emergency motion for recusal, including: (1) the claim that the trial court called respondent father a "bully" and said he was "twice the size" of his wife at a PPO hearing; (2) the claim that the trial court told respondent's wife that "[i]n a few months, the issue will be moot and you will have full custody" and "[y]ou will be able to do whatever you want;" (3) the claim that counsel was denied an opportunity to present his argument at a hearing on September 12, 2012; and (4) the claim that the court improperly projected a statement onto a witness because the witness did in fact testify to that statement. The court sanctioned counsel \$200 for each unsubstantiated claim, totaling \$800, holding that counsel could have reviewed the video recordings of the court proceedings before making the serious allegations of judicial misconduct. This appeal challenging the order for sanctions and the amount of sanctions followed.

The trial court's determination whether to impose sanctions under MCR 2.114 is reviewed for clear error. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). "A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Id.*

Counsel first argues that he was professionally obligated to advocate zealously for respondent, including by filing the motion for recusal. Further, counsel argues: "Although the trial court may have disagreed with assertions made to substantiate the motion for recusal, that disagreement should not rise to the level of interpreting a motion for recusal as a personal attack – counsel was ensuring that obligations to the client to litigate zealously were met." Moreover, counsel argues: "Unfortunately, the trial court did take the motion as a personal attack, became emotionally entangled in the recusal issue and imposed sanctions in retaliation." It appears, then,

that counsel is arguing on appeal that the trial court's order of sanctions was not supported by the law and was entered in "retaliation" for filing the motion for recusal.

It is beyond dispute that an attorney has a duty to serve his client zealously. However, that duty must be exercised within the confines of the Michigan Court Rules, as well as the Michigan Rules of Professional Conduct (MRPC). In this case, counsel signed a motion seeking recusal of the trial judge that was premised on several serious allegations of judicial misconduct as set forth above. In his motion for recusal, counsel impugned the honesty, impartiality, and integrity of the court in his arguments, which were presented in an extremely disrespectful manner and were permeated with hyperbole and inflammatory language. Even here on appeal counsel argues that the trial court imposed the sanctions against him in an act of "retaliation," rather than as a legitimate exercise of its authority under MCR 2.114(E). Counsel's conduct does not amount to "zealous advocacy." Rather, counsel's conduct amounts to a general lack of civility and respect for the trial court prohibited by the MRPC, including MRPC 3.5(d) which provides that a lawyer shall not "engage in undignified or discourteous conduct toward the tribunal." See also MRPC 8.2(a) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge") Further, as our Supreme Court discussed in *Grievance Adm'r v Fieger*, 476 Mich 231; 719 NW2d 123 (2006), "the law has reposed special stewardship duties on lawyers on the basis of the venerable notion that lawyers are more than merely advocates who happen to carry out their duties in a courtroom environment, they are also officers of the court. In this exclusive role, lawyers have special responsibilities in their relations with other officers of the court." *Id.* at 243. Accordingly, we admonish counsel for his disrespectful conduct and caution him against future antagonistic and accusatory behavior directed toward a court of law. Although the trial court imposed sanctions against counsel under MCR 2.114, the trial court also had the inherent authority to impose sanctions for attorney misconduct. See, e.g., *Maldonado v Ford Motor Co*, 476 Mich 372, 375-376; 719 NW2d 809 (2006); *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639-640; 607 NW2d 100 (1999).

Next, we turn to counsel's arguments in support of his claim that his emergency motion for recusal did not violate MCR 2.114(D), which provides in pertinent part:

The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that . . . to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document 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

"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." *Guerrero*, 280 Mich App at 677. The "reasonable inquiry" requirement is an objective standard and depends largely on the facts and circumstances. *Whalen v Doyle*, 200 Mich App 41, 42; 503 NW2d 678 (1993); *Davids v Davis*, 179 Mich App 72, 89; 445 NW2d 460 (1989). As this Court explained in *Lloyd v Avadenka*, 158 Mich App 623; 405 NW2d 141 (1987):

Unlike the subjective good faith of an attorney, 'reasonable inquiry' is an empirically verifiable fact or event, inasmuch as the court can examine the efforts

undertaken by the attorney to investigate a claim prior to filing suit. The focus of such an inquiry is upon events that can be observed and verified to some extent: what the attorney learned from his client, what efforts he undertook to corroborate the client's account, and so on. Any determination of what constitutes a 'reasonable inquiry' depends largely on the particular facts and circumstances of a given claim. . . . [B]ut the 'reasonable inquiry' standard, at the very least, requires some kind of investigation or affirmative conduct on the part of the attorney. [*Id.* at 630-631.]

Here, counsel argues that "the affidavit of respondent father in and of itself satisfies reasonable investigation requirements" with regard to the allegations set forth in counsel's motion for recusal. Counsel also argues that he "used the resources available to him in the time required to conduct investigation" and that "there was no apparent reason to disbelieve Respondent Father's statement of facts." These arguments are unavailing. Respondent father did not sign the motion. Because counsel signed the motion, counsel was required to conduct a reasonable inquiry into the factual basis for the allegations and then determine that they were well grounded in fact. As the trial court held, there were video recordings of the proceedings referenced in the motion for recusal and they were readily available for review. However, counsel did not watch the recordings before leveling his serious allegations of misconduct against the trial court, which included accusations of name calling, pre-judging the matter, and misrepresenting the testimony of a witness. And the "supporting" affidavit of respondent father in this acrimonious termination of parental rights case, which sets forth numerous serious and clearly self-serving accusations—that were not investigated or corroborated by counsel—did not satisfy counsel's affirmative duty to conduct a reasonable inquiry into the factual basis for the recusal motion. See *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 169-170; 712 NW2d 731 (2005). Thus, we reject counsel's claim that respondent father's affidavit alone satisfied "reasonable investigation requirements."

Further, we reject counsel's related claim that the transcript of the August 22, 2012 hearing supports the accusations set forth in respondent father's affidavit. That was a hearing on a motion filed by respondent's wife to modify custody and parenting time, as well as to change the child's school. The court held that it could not change the custody or parenting time because it only had temporary jurisdiction over the minor child, but noted that before jurisdiction was terminated, an appropriate custody and parenting time order would be in place. The court noted that "if the Department of Human Services at this point in time is seeking to terminate [respondent's] rights; if those rights are terminated, this is a moot issue . . . if she has sole legal and physical custody. If they aren't, then the Court would address at that time what's an appropriate custody/parenting time order" Thus, contrary to respondent father's claim in his affidavit, the trial court did not tell his wife "that in a few months, the issue would be moot and [she] would have full custody." And, contrary to counsel's claim on appeal, these comments were not "demonstrative of bias." The trial court was merely explaining the procedure that is followed and the reason for the ruling on the motion. Thus, the transcript does not establish a factual basis for the allegations set forth in counsel's motion for recusal. Further, as counsel admits, "review of the testimony did confirm that the trial court repeated statements made by the forensic interview[er];" thus, the allegation that the trial court improperly projected a statement onto a witness was likewise refuted by the record evidence.

Next, counsel argues that the motion for recusal was well grounded in fact as evidenced by the trial court's conduct against him during hearings on various motions. Specifically, counsel refers to a hearing conducted on September 12, 2012, at which time the trial court held oral argument on counsel's motions to adjourn trial, extend discovery, and compel discovery. Following a fairly extensive discussion regarding the motions that consisted primarily of counsel's arguments, the trial court ruled. After noting that the petition in this matter was in effect since April of 2012, that the matter had already been adjourned, and that the discovery cutoff date had passed, the trial court denied the motions. Despite the ruling, counsel continued to argue that he was entitled to additional discovery and insisted that another adjournment was necessary. Although the trial court requested that counsel move on with the hearing, counsel continued to argue with the trial court. The court eventually advised counsel that he was being disrespectful and would be held in contempt. Thus, contrary to counsel's claims, he was provided with an opportunity to present his arguments, but they were rejected by the trial court. Instead of accepting the trial court's decision, counsel continued his argument in defiance of the court's directive; thus, we reject counsel's claim that the trial court's conduct provided a sufficient factual basis for his recusal motion.

Next, counsel argues that he should not have been sanctioned for alleging in his motion that the trial court called respondent a "bully" and said that respondent was "twice the size" of his wife at a PPO hearing. In support of his argument, counsel states that the trial court's holding that the PPO was granted ex parte "is a deliberate misstatement by the trial court – an intentional 'half-truth' designed to retaliate against and sanction Appellant." Counsel contends that a hearing was held on September 17, 2009, regarding the August 28, 2009 issuance of a PPO. According to counsel, at that hearing the trial court made statements "that provided a basis in fact to file the motion for recusal." Those statements were: (1) "something took place that was not good, the police were called;" (2) "significant in my mind to take responsibility [and] you did plead guilty to domestic violence;" and (3) "this is not a big lady – the interaction will be viewed differently and I'm going to err on the side of caution and not terminate the personal protection order." Counsel argues that it is clear that the "trial court 'pegged' [respondent] as a domestic abuser, and was using the termination petition as the vehicle to prevent him from further contact with the complaining witness and her mother." We disagree and conclude that, contrary to counsel's argument, he failed to prove that the trial court called respondent a "bully" and said that respondent was "twice the size" of his wife when the trial court granted respondent's wife's request for a PPO.

In summary, for all of the reasons discussed above, the trial court did not clearly err in concluding that counsel's emergency motion for recusal violated MCR 2.114(D). See *Guerrero*, 280 Mich App at 677.

Finally, counsel argues that the amount of sanctions imposed constituted improper punitive damages, indicative of the trial court's bias and prejudice against counsel. We disagree.

The amount of an award of sanctions is reviewed for an abuse of discretion. *Vittiglio v Vittiglio*, 297 Mich App 391, 408; 824 NW2d 591 (2012) (citation omitted). An abuse of discretion occurs only when the trial court's decision falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

The trial court assessed sanctions against counsel pursuant to MCR 2.114(E), which 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 . . . an appropriate sanction The court may not assess punitive damages.

According to the plain language of the court rule, the imposition of a sanction under MCR 2.114 is mandatory upon a finding that a document was signed in violation of the court rule. The purpose of the court rule is “to deter attorneys and parties from advancing frivolous legal claims, defenses, and documents, without stifling their good-faith efforts at pursuing novel or arguable legal theories.” *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 719; 591 NW2d 676 (1998). Here, the trial court concluded that MCR 2.114(D) was violated; thus, the court was required to impose “an appropriate sanction,” but not punitive damages. It is within the trial court’s discretion to determine an appropriate sanction, including the amount of the sanction.

The trial court determined that the appropriate sanction was \$200 for each of the four unsubstantiated claims in counsel’s motion for recusal, totaling \$800. As discussed above, counsel’s motion for recusal specifically challenged the honesty, impartiality, and integrity of the trial court and was permeated with hyperbole and inflammatory language. Instead of setting forth his arguments in a professional manner, counsel chose to attack the trial court, and particularly the trial judge, displaying an extreme lack of civility and respect for the court. The accusations of judicial misconduct were very serious yet they were made without any investigatory effort to confirm their accuracy. Accordingly, under the facts and circumstances of this case, we cannot conclude that the trial court abused its discretion in assessing a sanction of \$800 for the unsubstantiated claims in counsel’s motion for recusal.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly