IN THE COURT OF APPEALS OF IOWA

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No. 8-027 / 97-496

FILED
MAR 27 1998
CLERK SUPREME COURT

VINCENT MARK GRUBBS,
Plaintiff-Appellant/Cross-Appellee,

vs.

KWIK SHOP, INC.,
Defendant-Appellee/Cross-Appellant,

CITY OF WEST DES MOINES, IOWA, DALE BUCK, and ELIZABETH FIORI,
Defendants.

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge.

Vincent Grubbs appeals, and Kwik Shop, Inc. cross-appeals a district court order imposing monetary sanctions against Grubbs and his attorney for filing a frivolous civil suit against Kwik Shop. **AFFIRMED.**

Robert A. Wright, Jr. of the Wright Law Firm, Des Moines, for appellant.

Bernard L. Spaeth, Jr. and John F. Fatino of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Heard by Sackett, P.J., and Streit and Vogel, JJ.

VOGEL, J.

Vincent Grubbs appeals, and Kwik Shop, Inc. cross-appeals a district court order imposing monetary sanctions under Iowa Rule of Civil Procedure 80(a), against Grubbs and his attorney, Robert A. Wright Jr., for filing a frivolous civil suit against Kwik Shop. Grubbs contends the district court abused its discretion in imposing sanctions. Kwik Shop contends the value of the sanctions should have been higher and seeks appellate attorney fees. Because we conclude the allegation contained in Grubbs' petition failed to state a cause of action under which Grubbs could sufficiently demonstrate a right of recovery, we uphold the sanctions.

Background facts. Grubbs and a companion became involved in a physical confrontation with a police officer, Dale Buck, at a West Des Moines Kwik Shop which was witnessed by the store clerk, Elizabeth Fiori. As a result of the incident, Grubbs was convicted of assault causing bodily injury and sentenced to one year in prison.

Grubbs appealed the conviction and filed a civil law suit against the City of West Des Moines, Dale Buck, Kwik Shop, Inc., and Elizabeth Fiori alleging assault and battery, false arrest and imprisonment, malicious prosecution, abuse of process, the tort of outrage, defamation, and deprivation of civil rights under color of law.

The district court dismissed all of the claims against Fiori and Kwik Shop. Fiori and Kwik Shop then filed an application for monetary sanctions against Grubbs

and his attorney under Iowa Rule of Civil Procedure 80(a) alleging Grubbs had filed a frivolous petition. The district court found that Grubbs' counsel failed to make a reasonable inquiry into the law prior to filing the civil suit, that the legal positions taken by Grubbs were implausible and without merit. The court granted Kwik Shop's motion for sanctions ordering Grubbs and his counsel to pay $3500 to Kwik Shop.

Scope of review. We review issues involving sanctions for an abuse of discretion. *Mathias v. Glandon*, 448 N.W.2d 443, 445 (Iowa 1989).

I. Imposition of sanctions. Grubbs argues the district court abused its discretion in assessing Rule 80(a) sanctions against him and his counsel as his counsel made a reasonable inquiry into the law and his claims were valid causes of action brought in good faith.

Iowa Rule of Civil Procedure 80(a) states, in relevant part, that counsel's signature to every pleading:

> shall be deemed a certificate that: Counsel has read the motion, pleading or other paper; that to the best of Counsel's knowledge, information, and belief, formed after reasonable inquiry, it 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 that it is not interposed for any improper purpose . . . .

Id.

The reasonableness of the inquiry is based on an objective standard and is measured at the time of filing of the paper. *Harris v. Iowa Dist. Court, Johnson County*, 570 N.W.2d 772, 776 (Iowa App. 1997). The test is reasonableness under the

circumstances, and the standard used is that of a reasonably competent attorney. *Id.* (citing *Weigel v. Weigel*, 467 N.W.2d 277, 281 (Iowa 1991)).

In reviewing whether the trial court abused its discretion, we evaluate the reasonableness of Wright's pre-filing inquiry, the petition, and his leave to amend the petition. We note at the inception of this discussion we do not question Wright's good faith utilized in zealously asserting his client's claims; however, wrongful motive is not necessary to filing a frivolous claim. *See Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 208 (Iowa 1995). Nor is willfulness required. *See In re Estate of Lau*, 442 N.W.2d 109, 112 (Iowa 1989).

We agree with the district court's Ruling on Defendants' Motion for Sanctions which states, in part:

> The Court concludes that there was no reasonable inquiry into the law prior to filing this matter. Some of Plaintiff's claims were missing critical allegations necessary to maintain the causes of action . . . Under no circumstances could it be argued from an objective standpoint that the legal positions taken by the Plaintiff were plausible . . . Furthermore, as demonstrated by this Court's ruling, the legal analysis set forth in the resistance was without legitimate basis.

We now examine Wright's legal inquiries into the law based on facts known to him before filing the petition claiming multiple causes of action against Kwik Shop and Fiori.[1] We begin by noting the Petition states that Grubbs was "not found guilty

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[1] Wright argues that his petition to amend included the necessary facts and law to overcome any allegations relating to his alleged frivolous claims. We cannot agree.

of the charges." This contradicts the factual reality that Grubb was convicted, although at the time of filing, the appeal was pending.

Grubbs' claims against Fiori and Kwik Shop were based on Grubbs' belief that Fiori testified falsely at the criminal trial. First, any claims Fiori testified falsely must not stand in a later civil action as such testimony is absolutely privileged. *Spencer v. Spencer*, 479 N.W.2d 293, 295-96 (Iowa 1991). Second, if Fiori acted alone, Kwik Shop could not be implicated as a defendant. Grubbs then belatedly asserts a conspiracy theory but offered no factual support to substantiate the conspiracy theory. Other claims attorney Wright makes similarly suggest that he did not make a reasonable inquiry in to the law prior to filing the civil action.

We find no factual support for Grubbs' claim of intentional infliction of emotional distress claim. There was no evidence presented demonstrating either Kwik Shop or Fiori engaged in outrageous behavior, that they intended to cause or possessed a reckless disregard of the probability of mental distress, that they caused severe emotional harm, and that there was a causal relationship between the defendants' conduct and the mental distress allegedly inflicted on Grubbs. *See Meyer v. Nottinger*, 241 N.W.2d 911, 918 (Iowa 1976). We note our supreme court has steadfastly maintained the requirement that the defendant's conduct be extreme and outrageous and mere insults, bad manners, or hurt feelings are not sufficient. *See, e.g., Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 357 (Iowa 1989); *Bossuyt v. Osage*

Farmers Nat'l Bank, 360 N.W.2d 769, 777 (Iowa 1985); Restatement (Second) of Torts § 46 cmt. d (approvingly cited in *Roalson v. Chaney*, 334 N.W.2d 754, 756 (Iowa 1983)) and cmt. j (1965).

Neither is there any factual support for Grubbs' defamation claim based on the pleadings in this case. Additionally, we do not recognize the tort of outrage in Iowa, so this claim must also fail. The fact that Wright tried to bring an action under this rubric of non-existing law indicates a reasonable inquiry into the law was not conducted. It could not be reasonably argued, based on the facts of this case, the tort of outrage could be implemented in an effort to extend or modify Iowa's current tort law.

The malicious prosecution count of the Petition likewise is not supported by the pleadings. Grubbs did not allege Kwik Shop or Fiori instigated or procured the prosecution. Grubbs was convicted of the crime charged by the jury at the time of the filing, and thus it could not reasonably be asserted there was no probable cause for Grubbs' prosecution. There are no facts that frame Kwik Shop or Fiori as maliciously bringing suit against Grubbs. The abuse of process claim was unsubstantiated.

Regarding Grubbs' civil right contentions, we note a claim cannot lie against Kwik Shop for any alleged conduct of Fiori as the doctrine of *respondeat superior* does not apply to claims brought under 42 U.S.C. § 1983. Under *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)), when a §1983 claim for

alleged unconstitutional conviction or imprisonment requires a finding that a criminal conviction or sentence is validly obtained, there can be no cause of action unless the conviction or sentence "that would be impugned has already been 'reversed on direct appeal, expunged by executive order, invalidated by a state tribunal authorized to make such a determination, or called into question by a federal court's grant of a writ of habeas corpus.'" *Anderson v. County of Montgomery*, 111 F.3d 494, 498 (7th Cir. 1997) (quoting *Heck*, 512 U.S. at 487, 114 S. Ct. at 2372, 129 L. Ed. 2d at 394). Thus, "a § 1983 cause of action attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated [or reversed]." *Heck*, 512 U.S. at 489-90, 114 S. Ct. at 2374, 129 L. Ed. 2d at 396. The convictions in this case were not invalidated and were in fact affirmed by this court. Thus, the claims under this section cannot be properly considered and would not have been brought in the exercise of reasonable inquiry into the law.

Nor can we consider the claims brought pursuant to 42 U.S.C. § 1986 as the limitations period had lapsed. We also find the civil rights claims cannot stand under 42 U.S.C. § 1981 as Wright failed to allege racial discrimination or racial animus thereunder.

We acknowledge the fact Wright spent more than twelve hours researching his case before filing the petition; however, time spent on research could not have conceivably accorded Wright sufficient support for his case as all the claims fail on

the pleadings. Legal or factual support for such pleadings should have been made in his brief in resistance to plaintiff's motion to strike. Because of the foregoing reasons, we affirm the district court's imposition of sanctions against Grubbs and counsel Wright.

II. Fees. Kwik Shop argues the district court erred in awarding attorney fees of $3500, which is substantially lower than the $10,000 incurred by Kwik Shop. Kwik Shop also requests that upon affirmance of the district court judgment, this case be remanded to the district court for assessment of appellate attorney fees.

A. Sanction fees. Rule 80(a) mandates the imposition of a sanction upon finding a violation, however, this Rule grants the district court discretion to determine the amount of the appropriate sanction. *See, e.g., Citizens Bank v. Harden*, 439 N.W.2d 677, 683 (Iowa App. 1989); *O'Ferral v. Trebal Motors Corp.*, 45 F.3d 561, 564 (1st Cir. 1995) (holding district court's determination of sanctions were well within the wide latitude allowed for remedial judgments; the figure was "practically nominal but was large enough to serve as a warning and deterrent to counsel."). Here, the trial court stated it would be "justified" in awarding the full amount of attorney fees and costs but found $3500 was "sufficient to serve the purpose of Rule 80." We agree and note that a rule 80(a) sanction serves other purposes than restitution of fees and costs. Therefore, notwithstanding the court's finding that the actual fees incurred

were reasonable and necessary, we find the district court was within its discretion in imposing a $3500 sanction against Grubbs and attorney Wright.

B. Appellate attorney fees. While this court has previously considered a remand for determination of attorney fees appropriate in the context of frivolous claims (*see Citizens State Bank v. Harden*, 439 N.W.2d 677, 683 (Iowa App. 1989)), we decline to remand for purposes of judicial efficiency. We award Kwik Shop $1000 in appellate attorney fees jointly and severally against Vincent Mark Grubbs and Robert A. Wright, Jr..

Having carefully considered all issues before us on appeal, we affirm the district court's order in its entirety.

AFFIRMED.