

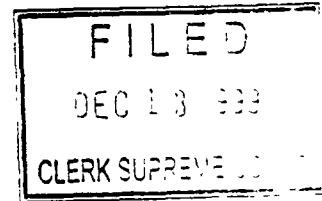
IN THE COURT OF APPEALS OF IOWA

No. (9-149) 97-0241
Filed December 13, 1999

FRANCIS J. PICRAY, JR.,
Plaintiff-Appellant,

vs.

CITY OF DES MOINES, IOWA,
NELDA MICKLE, REGINALD SIPFLE,
HAROLD SMITH, WILLIAM McLAUGHLIN,
JERRY THOMPSON, and BRUCE BERGMAN,
Individually and as Agents for City of
Des Moines, Iowa,
Defendants-Appellees.



Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,
District Judge.

Plaintiff appeals from a district court order dismissing his petition and requiring plaintiff to file a bond before filing any further lawsuit related to the City's failure to hire him. Plaintiff contends the bond requirement is a prohibited sanction and violates the 14th Amendment of the United States Constitution. **WRIT ANNULLED.**

Francis J. Picray, Des Moines, pro se.

Mark Godwin, Des Moines, for appellees.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

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MILLER, J.

The district court dismissed the Plaintiff-Appellant Francis Picray, Jr.'s petition on grounds that his claims were barred by the statute of limitations and by both issue preclusion and claim preclusion. As part of sanctions pursuant to Iowa R. Civ. P. 80, the district court also ordered Picray to post a \$9,500 bond before filing any new lawsuit arising out of the same facts (the City's failure to hire him in 1989) and concerning the defendants involved in this lawsuit and certain previous lawsuits. Picray has appealed. In previous orders in this case the Iowa Supreme Court considered the defendants' Iowa R. App. P. 23(b) motion. The Supreme Court affirmed as to all issues except the issue of a prospective bond as a sanction under Iowa R. Civ. P. 80, which it reserved for determination in this appeal. We treat Picray's appeal as a petition for writ of certiorari. We annul the writ.

The controversy between the plaintiff and defendants has been ongoing for the past seventeen years. In 1982 the City of Des Moines (hereafter City) fired Picray from his job for alleged incompetency, inefficiency, negligence in the performance of duties, insubordination, and falsification of employment applications. *See City of Des Moines v. Iowa Dept. of Job Serv. and Picray*, # 85-919 (Iowa App. June 25, 1986). Picray sought unemployment benefits, but was initially disqualified by the claims deputy. *Id.* Picray appealed and the hearing officer reversed and awarded benefits. *Id.* The City appealed to the Iowa Department of Job Service Appeal Board, which affirmed the hearing officer. *Id.* On judicial review the district court affirmed,

as did this court on appeal. *Id.* This court found that while the City had proved that Picray was balky and argumentative, it had not proved that he harbored a willful disregard for the employer's interest. *Id.* Finding substantial evidence to support the decisions of the agency, this court affirmed the award of unemployment benefits to the claimant. *Id.*

On June 30, 1989, Picray submitted an application for re-employment with the City. The City would not consider him for rehire, because of the facts and circumstances that led to his 1982 firing.

In July 1991 Picray sued the city and several employees in the Iowa District Court for Polk County. He grounded his suit in claims that the City had improperly denied him the right to apply for the job, much less be considered for it. Partial summary judgment was rendered against him in April 1992, and a final entry of summary judgment against him disposed of the remainder of the claims in September 1992. In October 1993 this court affirmed the entries of summary judgment. The Iowa Supreme Court denied his request for further review, and the United States Supreme Court denied certiorari. *See Picray v. City of Des Moines*, 511 U.S. 1085 (1994).

In July 1994 Picray again sued the City, several employees of the City, and the city legal department in Iowa District Court for Polk County. As the claims made in his lawsuit were centered on the City's refusal to rehire him in 1989, claims which

had been disposed of in the 1991 case, summary judgment was entered against him in December 1994.

In July 1994 he sued the same defendants in the United States District Court for the Southern District of Iowa. His claims again centered on the City's refusal to rehire him in 1989. Summary judgment was rendered against him in April 1995. He moved the court to reconsider, claiming the state court summary judgments were obtained by fraud. The United States District Court denied his motion.

In July 1994 Picray also filed a motion to amend his petition in the 1991 case, which had already been decided at both the trial and appellate levels. The trial court denied that motion. Picray sought reconsideration. Reconsideration was denied. Picray again unsuccessfully appealed to the Iowa Supreme Court.

In October 1995 Picray sued the City and several city employees again in the Iowa District Court, attempting to overturn the judgment in the 1991 case. In February 1996 the district court found his petition to be frivolous. That action was, however, still pending at the time of the trial court's hearing on motions in this case, apparently awaiting a hearing or decision concerning sanctions.

In November 1996 Picray filed this lawsuit in the Iowa District Court for Polk County. He again sued the City and several city employees. The claims related to the City's failure to rehire him in 1989. Later in November of 1996, he amended his petition to include additional defendants, including Mark Godwin, attorney for the defendants in both this lawsuit and in the lawsuit Picray had filed in October 1995.

All defendants filed motions, which included motions for dismissal. The district court sustained the motions on statute of limitations grounds, as well as grounds of issue preclusion and claim preclusion, on January 10, 1997. In the January 10 order the court also imposed a sanction of \$650 attorney fees for the defendants' attorneys, pursuant to Iowa R. Civ. P. 80(a). It also ordered as a rule 80 sanction that, without first filing a bond in the amount of \$9,500, Picray not file any lawsuit in the Iowa District Court arising out of the City's failure to rehire him in 1989 or any fact or circumstance growing out any previous suit against the City brought by him against the City, its independent boards or commissions, the City's present or former employees, and present or former employees of the City's independent boards or commission.¹ Picray then filed this appeal.

The appellees filed a motion to affirm pursuant to Iowa R. of App. P. 23(b). The supreme court summarily affirmed the district court in part and denied the motion in part. *See Picray v. City of Des Moines*, No. 97-241 (Iowa August 22, 1997). The

¹The order did not specify whether the sanction was imposed under rule 80(a) or (b). Rule 80(a) provides in relevant part that a "signature to [a] motion, pleading, or other paper shall be deemed a certificate that ... to the best of [the signer'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, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. ... If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee.

motion was denied with respect to the issue of the prospective bond as a sanction under Iowa R. Civ. P. 80. We limit our consideration to that issue.

We treat the notice of appeal as an application for issuance of a writ of certiorari. *See Hearity v. Iowa Dist. Ct.*, 440 N.W.2d 860, 862-63 (Iowa 1989) (holding review of district court order imposing sanctions is by application for issuance of a writ of certiorari); *Harris v. Iowa Dist. Ct. for Johnson County*, 570 N.W.2d 772, 774 (Iowa App. 1997) (same). **We grant the writ and review the assignments of error in a certiorari context. *Harris*, 570 N.W.2d at 774. We proceed in this case as if the proper form of review had been sought. Iowa R.App. P. 304 We will sustain a writ of certiorari when an inferior tribunal has exceeded its jurisdiction or otherwise acted illegally. *Harris*, 570 N.W.2d at 776. We may sustain the proceedings below, annul the proceedings wholly or in part, or prescribe the manner in which either party may proceed, but we may not substitute an amended order for that of the district court. *Id.***

We ordinarily review the trial court's orders regarding sanctions for abuse of discretion. *Slade v. M.L.E. Inv. Co.*, 566 N.W.2d 503, 505 (Iowa 1997); *Breitbach v. Christenson*, 541 N.W.2d 840, 845 (Iowa 1995). **Our supreme court has already affirmed that part of the trial court's ruling that decided that a sanction or sanctions are appropriate. *See Picray v. City of Des Moines*, No. 97-241 (Iowa August 22, 1997). The sole question before us is whether Iowa R. Civ. P. 80 allowed the trial court to order as a sanction that Picray file a \$9,500 bond before filing another lawsuit**

against some or all previous defendants, based on claims which are identical or extremely similar to previously dismissed ones. For reasons discussed below we find that the district court imposed the sanction in question pursuant to Iowa R. Civ. P. 80(a). Because the question before us is one of whether or not Iowa R. Civ. P. 80(a) permits the bond requirement as a sanction, we believe our scope of review in this case is for correction of errors at law pursuant to Iowa R. App. P. 4.

Our supreme court held in *Slade v. M.L.E. Inv. Co.*, 566 N.W.2d 503, 506-7 (Iowa 1997) that a prospective bond cannot be ordered under rule 80(b). In *Slade*, the Supreme Court looked to the plain language of rule 80(b) and concluded that “[w]e believe the language referring to a party ‘commencing an action’ and authorizing the court to ‘stay the proceedings’ clearly indicates the rule is designed to provide relief in actions that already have been filed rather than in possible future lawsuits.” *Slade*, 566 N.W.2d at 506. Because the sanction in question cannot be imposed under rule 80(b) and the district court did not specify whether it was ordered under rule 80(a) or (b), we must first decide whether it was ordered under rule 80(a) or 80(b).

In the introductory paragraph of its January 10, 1997 ruling and in its conclusions of law in that ruling, the district court spoke of a motion to dismiss, a motion to stay proceedings and impose bond under section 617.16 of the Code and Iowa R. Civ. P. 80(b), and a motion for sanctions under Iowa R. Civ. P. 80(a). In its introductory paragraph it also spoke of a motion for more specific statement. The order portion of that ruling contains four very similar headings. The court’s order

sustains a “motion to dismiss”, denies as moot a “motion to stay proceedings”, denies as moot a “motion for a more specific statement”, and separately sustains a “motion for sanctions”. Because the motion to stay proceedings expressly referred to Iowa R. Civ. P. 80(b) and was denied, and the motion for sanctions expressly referred to Iowa R. Civ. P. 80(a) and was sustained, it becomes clear that the district court imposed the sanction in question under Iowa R. Civ. P. 80(a). We turn to the question whether the district court erred in some manner asserted by Picray in requiring as a sanction the filing of a bond of \$9,500 before again filing a lawsuit which is identical or extremely similar to the previously dismissed ones.

Although the Iowa Supreme Court cited its *Slade* decision in its August 22, 1997 order, neither party briefed or argued whether the language of rule 80(a) permits a court to order a prospective bond as a sanction for filing frivolous lawsuits. Picray only contends that on its face and as applied rule 80(a) violates his rights to due process of law and equal protection of the law under the 14th Amendment (to the United States Constitution). However, he does not cite authority or make reasoned argument in support of either his “facial” or “as applied” attacks. We could consider his claims waived. See Iowa R. App. P. 14(a)(3). We will instead, however, consider his claims in the general terms in which he makes them.

We will not reach the constitutional issues unless necessary. See *Shortridge v. State*, 478 N.W.2d 613 (Iowa 1991) (ordinarily, we prefer to avoid deciding cases on constitutional grounds if another resolution is possible). We therefore first

determine whether the language of rule 80(a) prohibits the sanctions which the trial court imposed in this case.

Like the court in *Slade*, we look to the plain language of the rule. Relevant portions are quoted above. The rule identifies "a reasonable attorney fee" as something that may constitute or be a part of a sanction that may be imposed, but the only limiting language is that any sanction which is imposed be "appropriate". There is nothing else in the rule which prohibits any particular sanction or type or class of sanction that the court might find appropriate under the particular facts of a case. We therefore conclude that rule 80(a) does not prohibit the sanction which the trial court imposed.

Picray urges that the Due Process Clause of the Fourteenth Amendment does not allow such a bond requirement. The Due Process Clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein. *Holmes v. Conway*, 241 U.S. 624, 631, 36 S.Ct. 681, 683, 60 L.Ed. 1211, 1214 (1916); *Louisville & Nashville R.R. v. Schmidt*, 177 U.S. 230, 236, 20 S.Ct. 620, 622, 44 L.Ed. 747, 750 (1900). A state "is free to regulate procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, 678 (1934); *see also West v. Louisiana*, 194 U.S. 258, 263, 24 S.Ct. 650, 652, 48 L.Ed. 965, 970 (1904). **Decisions of the Supreme**

Court of the United States, however, have imposed some restrictions on state procedures, one area within which they have done so being the so-called “right to access the courts.”

The right to access the courts is grounded "in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violation of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579, 94 S.Ct. 2963, 2986, 41 L.Ed.2d 935, 964 (1974). Other United States Supreme Court cases hold that, at a minimum, due process requires that absent countervailing state interests of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. *See Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). “Wherever one is assailed in his person or his property, there he may defend.” *Windsor v. McVeigh*, 93 U.S. (3 Otto) 274, 277, 23 L.Ed. 914, 915 (1876). Although “[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,” as Mr. Justice Jackson wrote for the Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), “there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane*, 339 U.S. at 313, 70 S.Ct. at 656-57, 94 L.Ed. at 872.

Due process does not, of course, require a hearing on the merits in every civil case. *See Boddie*, 401 U.S. at 377, 91 S.Ct. at 786, 28 L.Ed.2d at 119. A state may impose certain conditions, consistent with the Due Process Clause, on the right to maintain litigation. *See, e.g., Windsor v. McVeigh*, 93 U.S. (3 Otto) 274, 23 L.Ed. 914 (1876) (default judgment against a defendant who fails to appear); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909) (dismissal of suit when without justifiable excuse, plaintiff violates procedural rule requiring the production of evidence).

Similarly, the state may, consistent with the Due Process Clause, impose conditions on the instigation of litigation. The United States Supreme Court has considered circumstances under which access to courts may and may not be conditioned on payment of fees or filing of bonds. In *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.1528 (1949), the Supreme Court upheld against a due process challenge a Connecticut statute that required a bond be posted for the costs and fees incurred by the corporation in a shareholder's derivative action.

The Supreme Court said:

[i]t cannot seriously be said that a state makes such unreasonable use of its power as to violate the Constitution when it provides liability and security for payment of reasonable expenses if a litigation of this character is adjudged to be unsustainable. ... Of course, to require security for the payment of any kind of costs or the necessity for bearing any kind of expense of litigation has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met.

***Cohen*, 337 U.S. at 552, 69 S.Ct. at 1228, 93 L.Ed. at 1539 (1949).**

Another type of case deals with a situation in which the State has monopolized the avenues of settlement of disputes between persons by prescribing judicial resolution. In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), the dispute involved the fundamental interests of marriage and its dissolution. The Supreme Court held that “given the basic position of the marriage relationship in this society’s hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts.” *Boddie*, 401 U.S. at 378, 91 S.Ct. at 784, 28 L.Ed.2d at 116 (1971). The Court qualified its holding when it stated “[t]he legitimacy of the States’ monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain.” *Boddie*, 401 U.S. at 375-376, 91 S.Ct. at 784, 28 L.Ed.2d at 117. The Court then focused on whether there were sufficient countervailing justifications for the State’s procedural requirements. It found that the “[s]tate’s interest in the prevention of frivolous litigation is substantial, [and] its use of court fees ... to allocate scarce resources is rational.” Nevertheless, it found that “[n]one of these considerations is sufficient to override the interests” of those whose only resolution of differences must be by judicial means. *Boddie*, 401 U.S. at 381, 91 S.Ct. at 778, 28 L.Ed.2d at 121. Other cases follow the same reasoning. See *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202,

68 L.Ed.2d 627 (1981) (state-mandated paternity suit); *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (parental status termination proceeding); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (permanent termination of parental custody).

Later, in *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973), the United States Supreme Court considered a statutory requirement of payment of filing fees to file a bankruptcy petition. The Court held that the statute which required a filing fee had a rational basis and did not deny indigents equal protection of the laws or due process of law. *United States v. Kras*, 409 U.S. 434, 444-46, 93 S.Ct. 631, 638, 34 L.Ed.2d 626, 636 (1973). The Court emphasized that “[r]esort to the court . . . is not Kras' sole path to relief. *Boddie's* emphasis on exclusivity finds no counterpart in the bankrupt's situation.” *Id.*

We now apply the analysis of these cases to the case at hand. In essence, Picray argues that by requiring him to post a \$9,500 bond before filing any other lawsuits involving the same set of facts and the same defendants, he is denied his right to access the courts. We disagree, finding the situation in this case more akin to *Cohen and Kras* than to *Boddie*. There are alternative, non-judicial avenues in which Picray could have attempted to resolve his differences with the city and other defendants. He could have sought resolution through negotiated agreement. *Cf. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973). He could have requested to mediate or arbitrate, even though the city did not need to agree to do so.

The state has a great interest in controlling or reducing frivolous litigation. See *Sprous v. Iowa Dist. Court*, 595 N.W.2d 777, 779 (Iowa 1999) (“We emphasize our continued satisfaction with [Rule 80(b)], and note again the manifest need for it in order to address the cases that continue to stagger our courts.”); *Hearity v. Iowa Dist. Court*, 440 N.W.2d 860, 864 (Iowa 1989). Such suits further crowd an already overburdened docket and waste valuable judicial resources.

The district court’s determination that this lawsuit is frivolous has been affirmed by the Iowa Supreme Court. See *Picray v. City of Des Moines*, No. 97-241 (Iowa August 22, 1997). Picray has now filed five lawsuits which center on the same set of operative facts. The fourth of these suits was found to be frivolous by the district court. By 1996, when Picray filed this fifth suit, the statute of limitations had clearly expired on all claims he attempted to assert. Additionally, claim and issue preclusion applied to this lawsuit and the claims made in it. We concur with the district court’s statement that this “action can only be to harass or intimidate or embarrass the defendants, because it serves no other purpose at law or at equity.”

We therefore find that there are sufficient countervailing justifications for the district court, by use of rule 80(a), to have required Picray to post a \$9,500 bond before instituting new litigation involving the same defendants and same underlying facts. We conclude this bond requirement does not offend the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

WE ANNUL THE WRIT OF CERTIORARI.