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CASE NO. A05-2020

State of Minnesota
In Court of Appeals

PROGRESSIVE INSURANCE COMPANY,
Appellant,

vs.

EDGAR VILLAFANA PALLARES,
Respondent,

PROGRESSIVE INSURANCE COMPANY,
Appellant,

vs.

PEDRO SANCHEZ, ANETH GALINDO, FRANCISCO MARTINEZ, ELIZUR GARCIA, ELMER MINERO, BLANCA BONAVIDES, PEDRO FERNANDEZ, MARIA CASTREJON, LUIS PALLARES,
Respondents.

RESPONDENT'S BRIEF AND APPENDIX

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Hoppe v. Klapperich, 28 N.W.2d 780 (Minn. 1974).

Peterson v. Hinz, 605 N.W.2d 414 (Minn. App. 2000).

STATEMENT OF THE LEGAL ISSUES

I. Whether the District Court erred in awarding sanctions because of Appellant's claim that the motion was untimely.

Trial Court's Ruling: The District Court did not rule on this issue because it was not properly presented to the Court by Appellant.

II. Whether the District Court erred in awarding attorneys fees based on the assertion of frivolous claims by the Appellant and its attorney.

Trial Court's Ruling: The District Court awarded sanctions against Appellant's attorney.

III. Whether additional sanctions should be awarded either by this Court, or upon remand to the District Court, because of Appellant's continued pursuit of frivolous claims on appeal.

Trial Court's Ruling: The District Court did not reach this issue.

STATEMENT OF THE CASE

Two cases have been joined in this appeal.

In Progressive Ins. Co. v. Sanchez, et. al., case No. A06-59, Progressive Insurance Company ("Progressive") appeals from the Order of the District Court dated November 18, 2005 which confirmed nine No-Fault arbitration awards in favor of Respondents and denied the motion of Appellant Progressive to vacate or stay the arbitration awards. Appellants are appealing that decision

In Progressive Ins. Co v. Pallares, case No. A05-2020, Progressive appeals from the order of the District Court dated August 8, 2005 as supplemented by the order dated September 6, 2005 which confirmed an arbitration award dated December 21, 2004.

After the commencement of the appeal in Palleras, the District Court entered its Order dated November 27, 2005 in which it awarded sanctions against Appellant's attorney for bringing a frivolous claim. Appellant now appeals from that Order and has submitted a supplemental Appellant's Brief on that issue alone. Respondent now files this responsive brief, asking the Appellate Court to affirm the sanctions Order, and to impose additional sanctions for the continued pursuit of this frivolous claim on appeal.

STATEMENT OF THE FACTS

The prior briefs which have been filed with this Court set out the facts relating to the central issues in this case and they will not be repeated here. See the Statement of

Facts contained in Respondent's Brief in Case No. A05-2020. The facts stated below relate to the issue of sanctions as raised in the brief to which this responds.

On August 16, 2005, Appellant requested reconsideration of the District Court's Order of August 8, 2005, which denied Appellant's motion to vacate the arbitration award. See A7-9. On that same date, Respondent served Appellant with a Notice of Sanctions and Demand for Withdrawal. See A5-6.

Appellant failed to take corrective action and continued to pursue this frivolous claim. It failed to withdraw any of the claims which it continued to assert. It failed to amend any of its pleadings. It filed this appeal and continues to pursue this appeal to the present.

On October 10, 2005, Respondent filed and served its Motion for Sanctions. See A15-37. This motion was heard on November 10, 2005 before Judge Burke. On November 27, 2005 Judge Burke issued its Order for Sanctions, finding that the claim which Appellant has pursued herein to be frivolous, thus warranting sanctions. See A46-50.

Appellant has now filed its Motion for Sanctions with this Court, seeking additional sanctions based on Appellant's continued pursuit of this frivolous claim on appeal. The Motion asks this Court to declare this appeal frivolous and causing unnecessary delay. It further asks this Court to either determine the amount of sanctions to be awarded or, in the alternative, to remand that issue back to the District Court for its determination.

STANDARD OF REVIEW

The appellate court will only reverse a district court's decision to award sanctions if the district court abused its discretion. Gibson v. Coldwell Banker Burnet, 659 N.W.2d 782, 787 (Minn. App. 2003).

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion when it awarded sanctions to Respondent. Respondent's motion for sanctions was timely. The motion conformed with the requirements of the Minnesota General Rules of Practice for District Court. Moreover, the Appellant had ample time to correct its mistakes and withdraw not only its letter for reconsideration but also this appeal. More importantly, any delay in filing the motion for sanctions was caused by Appellant's attorneys own misleading conduct surrounding the non-existent "protective order" and the allegation of fraud which the Appellant's attorney has continued to fail to provide any supporting legal or factual evidence to support its claim of this so-called fraud.

The District Court did not abuse its discretion by ruling that the Appellant's motion for vacating the arbitration award was frivolous. Again, Appellant failed to plead its claim of fraud with specificity as required by the Rules. Indeed, it failed to file a single pleading and failed to offer a single piece of evidence to support its conclusory allegation of fraud.

Finally, Respondent now requests that this Court impose additional sanctions against Appellant and its attorney for continuing with this frivolous appeal. Appellant's tactics have admittedly sought to delay the proceeding in these two claims.

Appellant seeks a determination that this appeal is frivolous and for the sole purpose of delay. Appellant asks this Court to determine the amount of additional sanctions, or in the alternative, t0 remand this matter back to the District Court for determination as to the appropriate amount of additional sanctions that should be awarded.

ARGUMENT

I. THE DISTRICT COURT'S CONSIDERATION OF THE RESPONDENT'S MOTION FOR SANCTIONS WAS TIMELY.

A. Respondent's Motion was timely in that it was duly served in compliance with the notice provisions of the General Rules of Practice for District Courts §115.04.

Appellant's assertion that the District Court erred in awarding sanctions because the motion was untimely is, in and of itself, frivolous and worthy of additional sanctions. The General Rules of Practice for District Courts, Rule §115.04 require that such motions shall be filed with the Court and served upon the opposing party 14 days before the hearing on the motion.

Appellant complied with that Rule in all respects. Respondent's motion for sanctions was filed with the court on October 10, 2005. The hearing was not held until November 10, 2005. A total of 31 days passed between when the motion was filed and when the hearing was held. Thus, Respondent more than complied with the 14 day requirement.

B. Respondent's Motion was also timely in that it was duly served while Appellant still had an opportunity to correct its misconduct.

Appellant's Brief does not clearly state the precise nature of its claim that the motion for sanctions was "untimely", except for the statement that "it asked Appellant and its counsel to perform actions that were not possible to do or correct at the time." This contention is, in and of itself, frivolous and squarely false. After receiving that Notice of Sanctions, Appellant and its attorney continued to pursue the motion for reconsideration and to pursue this appeal. They were given a fair opportunity to correct this misconduct and did not do so. They continue to pursue this frivolous claim to the present.

Appellant had the opportunity to correct its misconduct. Appellant admits that it received the Notice of Motion for Sanctions on August 17, 2005. Appellant admits that the District Court did not rule on Appellant's request for reconsideration until September 6, 2005. Accordingly, Appellant had an opportunity to withdraw that motion and failed to do so.

More importantly, Appellant filed its Notice of Appeal after receiving that sanctions notice and has continued to pursue this appeal to the present time. Accordingly, Appellant's claim that it has had no opportunity to withdraw this frivolous claim is, itself, frivolous.

C. Appellant should be estopped from claiming that the motion was untimely as any delay was caused by Appellant's own misconduct.

The misconduct of Appellant and its counsel prevented Respondent from having any opportunity to seek sanctions earlier. First, Appellant never did file any pleadings which alleged the basis of its claim of fraud. Without any such pleadings, Respondent

had no idea whether the claim yet to be asserted might or might not be frivolous. It was not until it became apparent that Respondent would never file any pleading alleging fraud with particularity and specificity that Respondent had any opportunity to place Appellant on notice of a claim for sanctions.

Secondly, Appellant's counsel made material misrepresentations concerning the non-existent "protective order" from Federal Court, claiming that it was prevented from disclosing the facts which formed the basis of its claim of fraud. This so-called "protective-order" only allowed Appellant to file a complaint in federal court under seal. It in no way prevented Appellant from disclosing any fact related to the federal court matter.

Here, Appellant never did come forth with pleadings to support its claim of fraud. It sought to justify its delay in filing any such pleadings by claiming that it was prevented from doing so by the non-existent "protective order". Even after it became apparent that there was no such "protective order" and that the order claimed to be a "protective order" had been lifted, Appellant still failed to file any pleadings alleging with particularity and specificity the claim of fraud. It was this delay, perpetrated by Appellant that prevented Respondent from giving notice of sanctions earlier.

It is submitted that Appellant should be estopped, by its own misconduct, from claiming untimeliness where its own misconduct has directly caused the delay. The doctrine of equitable estoppel should be applied in this case. Equitable estoppel is a doctrine used at the discretion of the court and is intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights.

Brekke v. THM Biomedical, Inc., 683 N.W.2d 771, 777 (Minn. 2004). For equitable estoppel to be applicable, the following elements must be met: 1) there must be conduct, language or silence amounting to a representation or a concealment of material facts; 2) these facts must be known to the party estopped; 3) the truth concerning these facts must be unknown to the other party; 4) the conduct must be done with the intention or the expectation that it will be acted upon 5) he must in fact act upon it; and 6) it is acted upon in such a manner as make his position worse. Id.

The factual record establishes that Appellant's conduct met each of the requirements for the application of the doctrine of equitable estoppel. First, Appellant falsely asserted that there was a "protective order". Secondly, the truth or falsity of that statement was certainly known to Appellant. Thirdly, the truth or falsity was unknown to Respondent because Appellant's attorney asserted that he was prevented by the so-called "protective order" from disclosing any information about it. Fourthly, this misrepresentation was made for the clear purpose of seeking a delay in the proceedings in District Court. Fifthly, the District Court did act in reliance upon this misrepresentation by delaying the proceedings below on several occasions. Finally, Respondent relied on the misrepresentations to his detriment. As a result of Appellant counsel's misrepresentation, Respondent has been forced to wait for his arbitration award and endure a long court process that was intended to be avoided through arbitration. Additionally, Respondent's counsel and his staff have spent considerable time on this matter as a result of Appellant's misrepresentations.

Appellant should not be allowed to make material misrepresentations to the Court and the opposing party which are relied upon and then later claim that a motion for sanctions based on those misrepresentations was untimely. Similarly, the Appellant should not be allowed to claim fraud, fail to disclose specific factual or legal allegations, and then claim that the motion for sanctions was untimely when Respondent should have known that there was no factual basis for such an allegation. This is especially true where, as here, Respondent sought sanctions promptly after learning that there there was no "protective order" preventing the disclosure of any facts and no factual basis for the claim of fraud. Again Appellant cannot take advantage of its own misconduct.

An attorney is an officer of the court and is held to a far higher standard than members of the public generally. Accordingly, misrepresentations by Appellant's attorney to the Court are of far greater gravity than otherwise. A lawyer shall not knowingly make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. Minn. R. Prof. Conduct 3.3(a)(1). A lawyer has a duty of candor toward the tribunal and as an officer of the court a lawyer has an obligation not to undermine the integrity of the justice process. Id. at comment 2.

Attorneys are officers of the court and their first duty is to the administration of justice. An attorney at law is an officer of the court. The nature of his obligations is both public and private. His public duty consists in his obligation to aid the administration of justice. Hoppe v. Klapperich, 28 N.W.2d 780, 791 (Minn. 1974).

As an officer of the Court Appellant's attorney has a duty to be forthright and candid with the Court. Appellant's attorney failed to perform this duty by misleading the court and Respondent's counsel regarding the so-called "protective order." It continued to mislead the Court by alleging fraud, yet not disclosing any supporting factual or legal evidence of such fraud. Appellant's attorney has clearly failed to aid in the administration of justice and by misleading the court has undermined the integrity of the court.

Nevertheless, it is important to note that, even after this cloud had been lifted, and the misrepresentations were cleared up, Appellant continued to pursue its motion for reconsideration at the District Court level and this appeal. That conduct justifies an award of additional sanctions.

II. IT WAS NOT ERROR FOR THE DISTRICT COURT TO RULE THAT SANCTIONS WERE JUSTIFIED ON THE BASIS OF APPLELLANT'S ASSERTION OF A FRIVOLOUS CLAIM WITHOUT A SPECIFIC FINDING OF BAD FAITH.

A. A finding of bad faith is not a pre-requisite to an award of sanctions.

Appellant seems to contend that a finding of "bad faith" is a pre-requisite to an award of sanctions. That claim is simply not supported by any case law. Even the case primarily relied upon by Appellant, Peterson v. Hinz, 605 N.W.2d 414, 417 (Minn.App.2000) squarely and expressly rejects that claim. As stated by the Peterson court, a finding of bad faith is not required:

> *Respondent erroneously insists that Rule 11 sanctions cannot be imposed without a subjective showing of bad faith, such as a knowingly false*

pleading or a pleading made for ill purposes such as harassment. Uselman flatly contradicts respondent's position.
***
In sum, the objective standard under Rule 11 permits the imposition of sanctions for the filing of a meritless claim, without a finding of subjective bad faith. But the objective standard does not mandate sanctions in such a circumstance.

The language could not be clearer. A finding of bad faith is not required in order to impose sanctions. Appellant clearly argues that a specific finding of bad faith is required to impose sanctions. That contention is directly contrary to existing case law and is completely without merit.

B. The conduct of Appellant and its Attorney certainly justifies an award of sanctions.

The totality of the misconduct of Appellant and its attorney is overwhelmingly egregious. They claim to have "evidence of fraud", which clearly was never disclosed to a single one of the arbitrators in these combined cases. This alleged evidence was never disclosed, by pleading or evidence, to either of the District Court judges in these combined cases. Even now on appeal, they have failed to reveal any of the so-called evidence of fraud.

The only claim that appellants and its attorney have made is basically that "we asserted a claim of fraud in our pleadings in Federal Court" and, consequently, everyone must accept the truth of those allegations. Further, they assert that because they have filed pleadings in Federal Court, all state court proceedings should automatically be stayed. No principle of law is more basic to the American judicial system than that

pleadings must be proven by competent evidence. Without evidence, allegations are simply "empty cymbals and hollow drums".

III. ADDITIONAL SANCTIONS SHOULD BE AWARDED AGAINST APPELLANT AND ITS ATTORNEY BECAUSE OF THE CONTINUED PURSUIT OF A FRIVOLOUS CLAIM ON APPEAL.

A. This Court can, and should, impose additional sanctions under Minn. R. App. P. 138.

The magnitude of the Appellant's frivolity is huge. They seek to overturn some eight valid arbitration awards. It has attempted to make a mockery out of the system of No Fault arbitration which was established by the Minnesota Supreme Court over 30 years ago.

This Court is limited in its authority to award sanctions under Minn. R. App. P. 138 to appeals which are 'taken merely for delay". Here, the record clearly demonstrates the fact that Appellant has repeatedly, in both cases below, requested a stay of the proceedings until conclusion of the Federal Court action. That fact alone establishes clearly and unequivocally that Appellant's purpose in this appeal is to simply delay these proceedings. Further, the Appellant's repeated request for continuances is also evidence of its attempts to delay these proceedings.

B. In the alternative, this Court should remand this matter back to the District Court for the determination of what if any additional sanctions are appropriate.

Because this Court is limited in its authority to award sanctions to cases of delay, Respondent requests that this Court also, in addition to Rule 138 sanctions, remand this

matter back to the District Court for further sanctions in accordance with Minn. Stat. 549.211 and Minn. R. Civ. P. 11.

CONCLUSION

This appeal should fail for numerous reasons. First, Respondent's motion for sanctions was timely in that it complied with the General Rules of Practice for District Court Rule 115.04. Further, Respondent's motion was timely in that Appellant had ample time to correct its mistake and withdraw its letter for reconsideration of the Judge's Order and it had ample time to withdraw this appeal. In addition, Appellant should be estopped from claiming timeliness as any delay in the motion for sanctions was caused by Appellant's own misconduct.

Secondly, this appeal should fail because it is frivolous. The District Court did not abuse its discretion by finding that the Appellant's motion to vacate and its continued effort to vacate the arbitration award through its letter of reconsideration were frivolous. Moreover, case law is clear that a finding of bad faith is not a prerequisite for issuing sanctions.

Thirdly, Appellant's conduct is so egregious that an award of sanctions is justified. The Appellant's attorney misled the court by claiming there was a "protective order," when in fact there was not one. Appellant's attorney further misled the court by making an allegation of fraud without any supporting factual or legal evidence. Appellant's attorney still has not offered any evidence of this alleged fraud.

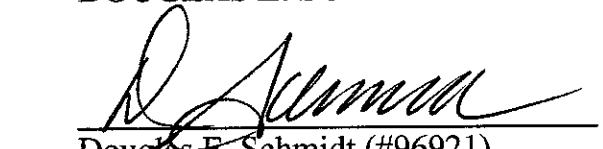
Finally, this court should award additional sanctions against Appellant and its attorney for continuing with this frivolous appeal and continuing to intentionally delay

abiding by the District Court Order and continuing to intentionally delay paying the arbitration award to Respondent.

It is respectfully requested that this court affirm the decision of the District Court and that this Court award additional sanctions against Appellant and its attorney, and any other such relief as the Court deems warranted.

Dated: May 8, 2006

Respectfully Submitted By:
DOUGLAS E. SCHMIDT & ASSOCIATES



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).