IN THE COURT OF APPEALS OF IOWA

No. 8-210 / 06-1695
Filed June 25, 2008

STEVE EVERLY,
Plaintiff-Appellant,

vs.

KNOXVILLE COMMUNITY SCHOOL DISTRICT,
MUSCO SPORTS LIGHTING, INC., and RANDY FLACK,
Defendants-Appellees.

Appeal from the Iowa District Court for Marion County, Dale B. Hagen, Judge.

Taxpayer appeals from district court rulings dismissing his petition for writ of certiorari and imposing sanctions against his attorney for violating Iowa Rule of Civil Procedure 1.413(1). **JUDGMENT AFFIRMED; WRIT ANNULLED.**

Kathryn S. Barnhill of Barnhill & Associates, P.C., West Des Moines, for appellant.

Andrew J. Bracken of Ahlers & Cooney, P.C., Des Moines, for appellees Knoxville Community School District and Randy Flack.

Kimberly J. Walker and Christian S. Walker of Faegre & Benson, L.L.P., Des Moines, for appellee Musco Sports Lighting, L.L.C.

Heard by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

MILLER, P.J.

Steve Everly appeals from district court rulings dismissing his petition for writ of certiorari against Musco Sports Lighting, L.L.C. (Musco) and imposing sanctions against his attorney for violating Iowa Rule of Civil Procedure 1.413(1). We affirm the judgment of the district court dismissing Everly's certiorari action against Musco. We treat his challenge to the sanctions as a petition for writ of certiorari, grant the petition, and finding no merit to the challenge, annul the writ.

I. BACKGROUND FACTS AND PROCEEDINGS.

In May 2006 Everly, as a taxpayer, filed a petition for writ of certiorari against Knoxville Community School District, its superintendent, Randy Flack, and Musco, challenging the school district's acceptance of a bid from ABC Electric (ABC) to replace the lighting at the school's football field. ABC's bid proposed installing a lighting system manufactured by Musco. The petition alleged that the school district's acceptance of ABC's bid violated Iowa's competitive bidding statute and was fraudulent because Musco's products did not conform to the bid specifications, which Everly asserted were altered to discriminate in favor of Musco.[1] Everly was an unsuccessful bidder on the project.

Musco filed a motion to dismiss the certiorari petition, arguing it was not a proper party to the action and a writ of certiorari could not be issued against it under Iowa Rule of Civil Procedure 1.1401. Musco also argued the district court did not have subject matter jurisdiction, and Everly lacked standing to challenge

[1] Everly also filed an application for a temporary injunction, seeking an order from the court enjoining the defendants from proceeding with the project using the Musco lighting system. The district court denied Everly's request for a temporary injunction.

the bidding procedures. Everly resisted, asserting that his status as an unsuccessful bidder did not affect his status and ability, as a taxpayer, to challenge the bidding procedures. At the hearing on the motion to dismiss, Everly dismissed his claims against the school district and Flack. Following the hearing, the district court entered a ruling granting Musco's motion to dismiss. The court concluded that Everly did not have standing to bring the certiorari action against Musco, "a private entity who was not a party to the contract that [Everly] claims is illegal."

After the district court dismissed Everly's petition for writ of certiorari, Musco filed a motion for costs and attorney fees as a sanction against Everly and his counsel under rule 1.413(1). Before the district court ruled on the motion, Everly filed a notice of appeal from the court's dismissal of his certiorari petition. The court thereafter entered a ruling granting Musco's motion and ordering Everly's counsel to pay $649.17 in costs and $46,754.70 in attorney fees to Musco as a sanction for violating rule 1.413(1). Everly also appeals this ruling. Our supreme court consolidated the two appeals.

Everly claims on appeal that the district court erred in granting Musco's motion to dismiss because (1) he had standing as a taxpayer to challenge the bid procedures, (2) Musco was a proper party to the certiorari action, and (3) the school district and Flack were not properly dismissed from the case. Everly also claims the court erred in sanctioning his attorney by awarding Musco attorney fees.

II. SCOPE AND STANDARDS OF REVIEW.

We review a motion to dismiss for the correction of errors at law. *See* Iowa R. App. 6.4; *Turner v. Iowa State Bank & Trust Co.*, 743 N.W.2d 1, 3 (Iowa 2007).

> A motion to dismiss is sustainable only when it appears to a certainty the pleader has failed to state a claim upon which any relief may be granted under any state of facts provable under the allegations. The motion admits the allegations and waives any ambiguity or uncertainty in the pleading. The allegations are construed in their light most favorable to the pleader, and doubts are resolved in his favor.

Curtis v. Bd. of Supervisors, 270 N.W.2d 447, 448 (Iowa 1978) (reviewing motion to dismiss certiorari petition); *accord Hoefer v. Sioux City Cmty. Sch. Dist.*, 375 N.W.2d 222, 223 (Iowa 1985).

III. MERITS.

A. Motion to Dismiss.

The district court's ruling dismissing Everly's petition for writ of certiorari was primarily based on its conclusion that Everly lacked standing to bring the certiorari action against Musco because "he has . . . failed to establish that he has been injured in a special manner that is unique from the general public." We cannot agree with this conclusion as "[t]axpayers are almost universally acknowledged as having suffered sufficient injury in fact to confer standing." *Berent v. City of Iowa City*, 738 N.W.2d 193, 203 (Iowa 2007); *see also Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 865 (Iowa 2005) (citing the "well-established rule that 'a taxpayer may maintain an action in his own name to prevent unlawful acts by public officers which would increase the amount of taxes he is required to pay, or diminish a fund to which he has contributed'" (citations omitted)).

Although Everly was an unsuccessful bidder on the project, he filed the petition for writ of certiorari in his status as a taxpayer. We must therefore conclude that he had standing to challenge the legality of the bidding procedures in this case. *See Elview Constr. Co., Inc. v. N. Scott Cmty. Sch. Dist.*, 373 N.W.2d 138, 141-42 (Iowa 1985) (finding that although plaintiff lacked standing as an unsuccessful bidder to challenge bidding procedures, he did have standing as a taxpayer).

However, "a successful party in the district court may, without appealing, save the judgment in whole or in part based on grounds urged in the district court but not included in that court's ruling." *Interstate Power Co. v. Ins. Co. of N. Am.*, 603 N.W.2d 751, 756 (Iowa 1999); *see also DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (stating we may affirm a district court ruling on a ground urged but not relied upon by the court). In addition to arguing that Everly did not have standing to challenge the bidding procedures, Musco also asserted in its motion to dismiss that the district court could not issue a writ of certiorari against it under rule 1.1401. We agree.

Rule 1.1401 states:

> A writ of certiorari shall only be granted when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded proper jurisdiction or otherwise acted illegally.

Neither party contends there is an applicable statute authorizing a writ of certiorari in this case. Thus, our focus is on whether Musco is "an inferior tribunal, board or officer, exercising judicial functions" within the meaning of rule 1.1401.

The phrase "judicial functions" is not construed in a strict or technical sense. *Hoefer*, 375 N.W.2d at 224. In order to support a certiorari proceeding,

the action of the challenged entity is only required to be quasi-judicial. *Id.* In *Buechele v. Ray*, 219 N.W.2d 679, 681 (Iowa 1974), our supreme court identified several factors to be considered in determining whether an action is judicial or quasi-judicial in nature: (1) whether "the questioned act involves a proceeding in which notice and opportunity to be heard are required"; (2) whether "a determination of rights of parties is made which requires the exercise of discretion in finding facts and applying the law thereto"; or (3) whether "the challenged act goes to the determination of some right the protection of which is the peculiar office of the courts."

It is clear from the pleadings that Musco is not an "inferior tribunal, board, or officer, exercising judicial functions." Everly's petition for writ of certiorari simply alleges that Musco is a sports lighting manufacturer whose products were to be used by the successful bidder in the school district's lighting project. Although it is the "nature of an act, not identity of the board or tribunal charged with its performance, which determines whether or not a function is judicial or quasi-judicial," *Buechele*, 219 N.W.2d at 681, the petition does not allege any acts by Musco that could be considered judicial or quasi-judicial in nature.[2]

[2] Everly nevertheless claims Musco was a proper party to the certiorari action because "[w]hile, strictly speaking, only the tribunal whose act it is sought to examine is a necessary defendant, other parties," such as Musco, "may and must be brought in if their rights are to be adjudicated." In support of this claim, Everly argues Musco was a necessary party to the certiorari action because it was a "third party beneficiary of the contract between the school [district] and ABC, a real party in interest," even though ABC was not named as a defendant in the action. We need not and do not address this issue because it was not raised by Everly in its resistance to Musco's motion to dismiss. Nor was it ruled upon by the district court in its ruling dismissing the certiorari action. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) *("*It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Instead, the petition focuses on the allegedly illegal acts performed by the school district and its superintendent in the bidding process. Though a certiorari action may have been proper as to those parties, *see Hoefer*, 375 N.W.2d at 225, Everly dismissed them from the lawsuit at the hearing on Musco's motion to dismiss, stating,

> And as a practical matter, to assist in a housekeeping issue, plaintiffs would hereby dismiss their claims against Knoxville Community School District and Randy Flack without prejudice. So that will simplify the motion to dismiss, as well as the motion to amend the petition.[3]
>
> . . . .
>
> THE COURT: So we are left with the claim against Musco Lighting, correct?
>
> MS. BARNHILL: Correct.

We reject Everly's claim that the school district and Flack "were never properly dismissed from the case." His argument that the school district and Flack were dismissed "as a condition of the granting of [the] motion to amend the petition" is belied by the above-quoted exchange between Everly's attorney and the court at the motion to dismiss hearing. We also find Everly's argument "that dismissal must be in the form of a written notice of dismissal and that an oral motion will not suffice" to be without merit. The cases cited by Everly in support of that argument are based on an Ohio rule of civil procedure requiring a plaintiff to file a notice or stipulation of dismissal. *See* Ohio Civ. R. 41(A)(1). Our rules of civil procedure governing dismissals contain no such requirement. *See, e.g.,* Iowa R. Civ. P. 1.943. Furthermore, our courts routinely accept oral motions to dismiss. *See, e.g., Mlynarik v. Bergantzel*, 675 N.W.2d 584, 587 (Iowa 2004) (reviewing oral motion to dismiss).

[3] Prior to the hearing, Everly filed a motion to amend the petition, seeking to assert a class action claim alleging fraudulent inducement of contract against Musco only.

In light of the foregoing, we conclude that the district court did not err in dismissing Everly's petition for writ of certiorari. The writ was not specifically authorized by a statute, nor did the petition allege any facts that would establish Musco was an "inferior tribunal, board, or officer, exercising judicial functions," as alternatively required by rule 1.1401. Thus, certiorari did not lie to challenge Musco's allegedly illegal acts in the bidding process.

B. Attorney Fee Award.

We turn next to Everly's claim regarding the district court's award of attorney fees as a sanction against his attorney under rule 1.413(1). He argues his counsel "had a good faith argument that was presented against all defendants including Musco that was well grounded in fact and law." He further argues the court's award of attorney fees was unconscionable and "will produce an even greater chilling effect to taxpayer oversight."

Preliminarily, we note that this claim should have been brought by petition for writ of certiorari. *Hearity v. Iowa Dist. Court*, 440 N.W.2d 860, 862 (Iowa 1989). However, we treat the notice of appeal as a petition for writ of certiorari, Iowa R. App. P. 6.304; *Hearity*, 440 N.W.2d at 863, and we grant the petition. We therefore review the assignment of error in a certiorari context. *Hearity*, 440 N.W.2d at 863.

The district court's order imposing sanctions under rule 1.413(1) is reviewed for an abuse of discretion. *Mathias v. Glandon*, 448 N.W.2d 443, 446 (Iowa 1989). We find such an abuse when the court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Schettler v. Iowa Dist. Court*, 509 N.W.2d 459, 464 (Iowa 1993). In this context,

"unreasonable" means not based on substantial evidence. *Id.* Any erroneous applications of law within the exercise of that discretion will be corrected by this court. *Weigel v. Weigel*, 467 N.W.2d 277, 280 (Iowa 1991). If we find such error or abuse of discretion, we may 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. Iowa R. Civ. P. 1.1411.

Rule 1.413(1) requires the signer of a petition to have read the petition, be acting without improper motive, and

> certify that to the best of his knowledge, information, and belief, formed after a reasonable inquiry, the pleading . . . is (1) well grounded on the facts and (2) warranted either by existing law or by a good faith argument for the extension, modification, or reversal of existing law.

Weigel, 467 N.W.2d at 280 (citation omitted). The reasonableness of the inquiry necessarily turns on the facts available at the time of filing, and whether the filing was based on a plausible view of the law. *Id.* The test is an objective one of reasonableness under all relevant circumstances, *id.* at 281, including those factors set forth in *Mathias*, 448 N.W.2d at 446. If rule 1.413(1) has been violated, the court must impose sanctions, which may include an order to reimburse the other party for reasonable expenses and attorney fees. *Harris v. Iowa Dist. Court*, 570 N.W.2d 772, 776 (Iowa Ct. App. 1997).

The district court determined Barnhill violated rule 1.413(1) because "it is apparent that this lawsuit is not well grounded in fact and is not supported by appropriate case law or good faith argument for the extension, modification or reversal of existing law." The court found the cases cited by Barnhill in support of her argument that Everly could maintain his certiorari action against Musco were

"easily distinguished" and inapplicable, which "should have been apparent to plaintiff and his attorney from the very beginning." The court further noted that "[n]ot only are the cases distinguishable, the secondary source that plaintiff cited is either incorrectly cited or it does not stand for what plaintiff proposes." We find no abuse of discretion by the district court.

As we previously stated, the petition for writ of certiorari filed by Barnhill did not allege any facts that would establish Musco was an "inferior tribunal, board or officer, exercising judicial functions" as required by rule 1.1401. Furthermore, Barnhill did not cite any facts available to her at the time she filed the petition that would provide her with a reasonable factual basis for filing a certiorari petition against Musco, a mere supplier to a successful bidder for public work. Nor did she cite any applicable existing law or advance any good faith argument for the extension, modification, or reversal of such law that would support the filing of a petition for writ of certiorari against Musco. Finally, there are no facts in the record supporting Barnhill's argument that she "did not have an extraordinary amount of time to devote to a reasonable inquiry of the facts in this case [d]ue to the nature of the public bidding, the awarding of the contracts and the quick moving bidding." *See Mathias*, 448 N.W.2d at 446 (stating the court considers the amount of time available to the attorney to investigate the facts and research the law in determining whether a reasonable inquiry was made).

We therefore conclude the district court did not abuse its discretion in ordering Barnhill to pay $46,754.70 in attorney fees to Musco as a sanction for violating rule 1.413(1). We note, as the district court did, that "the amount billed

as attorney fees appears to be high." However, although Everly asserts such an award is unconscionable and will have a "chilling effect to taxpayer oversight,"[4] he does not challenge the reasonableness of the amount of attorney fees awarded. *See* Iowa R. Civ. P. 1.413(1) (stating sanctions for violating the rule include awarding the opposing party a "reasonable attorney fee"). We therefore annul the writ of certiorari.

IV. CONCLUSION.

We affirm the district court's dismissal of Everly's petition for writ of certiorari against Musco under rule 1.1401. We find no merit to the challenge to imposition of sanctions against Everly's attorney. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED; WRIT ANNULLED.

[4] We need not and do not address this claim as Everly does not cite any authority in support of it. Iowa R. App. P. 6.14(1)(*c*) ("[F]ailure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."); *Olson v. Sumpter*, 728 N.W.2d 844, 849 (Iowa 2007) (holding failure of party to cite authority in support of a contention on appeal resulted in waiver of the argument).