

RENDERED: JANUARY 22, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000533-MR

WALTER CALLIHAN

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 07-CI-00757

GRAYSON RURAL ELECTRIC
COOPERATIVE CORPORATION

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

THOMPSON, JUDGE: Walter Callihan appeals from an order of the Greenup
Circuit Court dismissing his complaint for lack of jurisdiction and imposing

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

sanctions against him for frivolous and repetitious filings. For the reasons stated herein, we affirm in part, reverse in part, and remand.

On November 1, 2007, Callihan filed a complaint against Grayson Rural Electric Cooperative Corporation (Grayson) and the Public Service Commission of Kentucky (PSC). According to the complaint, Callihan sought a court order forcing Grayson to sell electricity to him or, in the alternative, to eject Grayson from his residential service area and order the Kentucky Power Company to provide electric service to the area.

After Callihan filed a successful motion to recuse, Judge C. David Hagerman was appointed to preside over the case. Callihan then filed a motion to recuse Judge Hagerman, which was denied. In January 2008, Grayson and PSC filed motions for dismissal, arguing that the PSC, not the trial court, had exclusive jurisdiction over Callihan's claim pursuant to KRS Chapter 278. After Callihan filed a response, the trial court issued an order granting the motions to dismiss against Callihan.

The trial court's order, in pertinent part, provided the following:

Pursuant to KRS 278.040(2) PSC, an agency of the Commonwealth of Kentucky, has exclusive jurisdiction over the regulation of rates and service of utilities. KRS 278.260(1) vests original jurisdiction with the PSC over complaints pertaining to the rates or service of any utility. Carr vs. Cincinnati Bell Telephone, Inc., 651 S.W.2nd 126 (Ky.App. 1983). The statutory framework also places exclusive jurisdiction with the PSC for matters pertaining to the boundaries and territories in which retail electric suppliers may operate. The Greenup Circuit Court is not the proper forum in which to litigate

the subject matter of Callihan's complaint. Moreover, Callihan has failed to effect service of process on the Kentucky Attorney General pursuant to CR 4.04(6).

The trial court further ruled Callihan in violation of CR² 11 and ordered him to pay Grayson's attorney's fees and required him to obtain the leave of court before filing any further pleadings. This appeal followed.

Callihan contends that the trial court erroneously found that his complaint was within the exclusive jurisdiction of the PSC. He contends that his complaint was within the trial court's jurisdiction, because his complaint related to his electric service rather than the geographic boundaries of the service. We disagree.

“Kentucky has recognized the right of a customer to sue a utility in circuit court in certain instances but in other cases has held that jurisdiction was in the state regulatory commission.” *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126, 127 (Ky.App. 1983). KRS 278.040(2) provides that the jurisdiction of the PSC shall extend to all utilities and shall “have exclusive jurisdiction over the regulation of rates and service of utilities....” Generally, the PSC has exclusive jurisdiction regarding the quality or quantity of service but matters peculiar to an individual complainant are within the jurisdiction of the courts. *Id.* at 128.

After reviewing the record, we conclude that the trial court properly dismissed Callihan's complaint for lack of jurisdiction. Although Callihan disagrees, he failed to allege a personally peculiar claim permitting the trial court

² Kentucky Rules of Civil Procedure (CR).

to assert jurisdiction over the matter in dispute. While we recognize that Callihan's pleadings were *pro se* and imprecise, Callihan was required to state a claim sufficient to invoke the jurisdiction of the trial court but failed to do so. Ultimately, Callihan's request to require a particular utility company to service his residence lies within the exclusive jurisdiction of the PSC. *Cincinnati Bell, Inc.*, 651 S.W.2d at 128.

Callihan next contends that the trial court erred by imposing sanctions against him. Specifically, Callihan contends that the trial court's sanctions denied him due process, his rights provided under Kentucky law, and his rights provided under the Civil Rights Act of 1964. We disagree.

In its order dismissing Callihan's complaint and imposing sanctions, the trial court wrote the following:

Also before the Court is a motion by GRECC for costs and attorney fees against Callihan. Rule 11 of the Kentucky Rules of Civil Procedure provides, in part, that in signing a pleading a party is certifying that to the best of his knowledge, information, and belief formed after reasonable inquiry that the pleading 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 the pleading is not interposed for any improper purpose such as to harass or cause delay or needless increase in the cost of litigation. The subject matter of Callihan's complaint has been asserted in many prior actions in the Greenup Circuit Court, United States District Court and the Public Service Commission. All of these actions have resulted in denial of relief because they were not supported either factually or legally. It is unclear to the undersigned why Callihan persists in filing these silly actions. What is clear, however, is that these frivolous lawsuits require the time and efforts of judges,

deputy clerks, secretaries, process servers and various other court personnel, all of whom are compensated with public funds from the tax dollars of hard-working Kentuckians. These actions not only waste the taxpayer's resources but also cause parties who are wrongfully sued to incur costs of litigation, not to mention that it diverts the court's attention away from cases in which legitimate claims are being litigated.

On November 14, 2001, an order was entered in the United States District Court for the Eastern District of Kentucky by Hon. Joseph M. Hood addressing this very same conduct on the part of Callihan. Said order is attached hereto as Exhibit 1. Judge Hood found that Callihan has abused his right of access to the federal and state courts by filing frivolous lawsuits against officials, particularly judicial officers and the instant defendants (Commonwealth of Kentucky). The order went on to impose sanctions against Callihan pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. Section 1651(a). The order also enjoined Callihan from filing suits in federal or state court unless the suit met various criteria to ensure that it was in compliance with Rule 11.

On October 25, 2004, another order was entered in the United States District Court for the Eastern District of Kentucky by Hon. Karl S. Forester. A copy of same is attached as Exhibit 2. Referring to the previous order entered by Judge Hood, Judge Forester noted that Callihan had proceeded to file additional civil actions without having first paid (sic) sanctions and providing the requisite verification within the purview of Judge Hood's prior order. Judge Forester placed additional sanctions and conditions upon Callihan which are also appropriate in state court.

The Court has reviewed the affidavit submitted by counsel for GRECC and finds that the legal expenses for GRECC which were incurred in defending against this ridiculous action are reasonable and are in the amount of \$1,524.00. IT IS HEREBY ORDERED that Callihan is sanctioned pursuant to CR 11 and is to pay the

aforementioned amount to GRECC. In addition thereto, IT IS HEREBY ORDERED that the Greenup Circuit Court Clerk shall not accept any pleadings or filings from Callihan until he can show proof that he has paid the aforementioned sanction to GRECC. Any pleadings received by mail from Callihan are to be returned to him by the clerk unfiled. If the sanctions are eventually paid, the clerk shall not accept and file any pleadings tendered by Callihan until the Judge of the Greenup Circuit Court has reviewed same and determined that they are not in violation of CR 11 and can survive a motion to dismiss brought under CR 12.

The Court also heard sworn testimony from Carol Ann Fraley, President and Chief Executive Officer of Defendant, GRECC. The testimony, which the Court finds to be compelling and credible, demonstrates that Callihan has on multiple occasions entered the business office of GRECC and engaged in harassing behavior toward female employees to intimidate them. This conduct consists of standing over employees, speaking very loud and almost shouting, making threatening gestures and throwing papers. This Court, *sua sponte*, orders that Callihan is restrained from entering onto the business premises of Defendant GRECC and in the event he does so any peace officer is ordered to take Callihan into custody and lodge him in the Greenup County Detention Center until further orders of this court.

In reviewing the trial court's ruling, "we think where sanctions are imposed our role requires a multi-standard approach, that is, a clearly erroneous standard to the trial court's findings in support of sanctions, a *de novo* review of the legal conclusion that a violation occurred, and an abuse of discretion standard on the type and/or amount of sanctions imposed." *Clark Equipment Co., Inc. v. Bowman*, 762 S.W.2d 417, 421 (Ky.App. 1988). From a review of the record, Callihan has not disputed the factual findings of the trial court and the record

appears to support the trial court's factual findings. Thus, we conclude that the factual findings of the trial court were not clearly erroneous.

The test for abuse of discretion is whether the trial court's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000). The trial court documented Callihan's multiple unsuccessful filings of the same action which required Grayson to continuously expend its time and financial resources in defending a frivolous and repetitious action. Accordingly, we conclude that the trial court did not abuse its discretion by awarding attorney's fees.

Regarding the trial court's order prohibiting Callihan from filing all court actions until Grayson's attorney's fees are paid, we conclude that this sanction was overly broad because it unreasonably denied Callihan meaningful access to the courts considering that many less onerous remedies were available.

In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), the U.S. Supreme Court stated that courts of justice necessarily have certain implied powers due to the nature of the institution. Although our courts have not explored this area to the same extent as federal courts, it is clear that Kentucky courts have the statutory and inherent power to control the disposition of the actions on its dockets to provide timely and effective judicial administration. CR 11; *Rehm v. Clayton*, 132 S.W.3d 864, 869 (Ky. 2004).

Addressing the issue of restricting access to the courts based on judicial sanctions, in *Martin v. District of Columbia Court of Appeals*, 506 U.S. 1,

3, 113 S.Ct. 397, 398, 121 L.Ed.2d 305 (1992), the United States Supreme Court explained that every paper filed to a court requires some portion of its limited resources; and, thus, in cases where a *pro se* litigant files repetitious and frivolous claims, a court can bar his prospective filings to prevent the deleterious effect of such filings on its scarce judicial resources. When such restrictions are ordered, the Court expressed the opinion that sanctions should be limited to addressing the frivolous and repetitive matter necessitating the order. *Id.*

Similarly, the Sixth Circuit Court of Appeals, in *Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264 (6th.Cir. 1998), stated that “[t]here is nothing unusual about imposing prefiling restrictions in matters with a history of repetitive or vexatious litigation.” *Id.* at 269. While a court should “protect its ability to carry out its constitutional functions against the threat of onerous, multiplicitous, and baseless litigation,” a court’s restriction on prospective filings should not be overly broad to the extent of denying a petitioner meaningful access to the courts. *Abdullah v. Gatto*, 773 F.2d 487, 488 (2nd.Cir. 1985).

While the trial court properly imposed limitations on Callihan’s ability to file actions relating to his frivolous and repetitious claim, its blanket prohibition against Callihan filing any action impermissibly deprived Callihan of adequate access to our courts. As stated by multiple federal courts, the prohibition from filing actions must be constrained to the frivolous and repetition matter taxing the court’s resources. *Id.* While we are empathetic to the onerous plight of our

trial courts in handling vexatious litigants, litigants cannot be prevented from filing meritorious claims involving matters unrelated to their frivolous litigation. *Id.*

Moreover, the sanction in this case constituted a civil judgment in which Callihan was made personally liable for paying Grayson's attorney's fees. *Mays v. Commonwealth*, 363 S.W.2d 110, 111 (Ky. 1962) (a judgment rendered during proceedings which are civil in nature constitutes a civil judgment). Thus, the trial court, and Grayson, had multiple other methods to enforce the monetary judgment beyond a blanket prohibition from accessing the courts. *Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224, 1229 (6th.Cir. 1989) ("There is agreement among the circuits, with which we concur, that because deterrence, not compensation, is the principal goal of Rule 11, courts should impose the least severe sanction that is likely to deter."). Finally, we note that a trial court's ability to issue sanctions remains as active and robust as ever. We simply state that a court's complete barring by sanction of a litigant's right to file all claims should be its last resort. *Id.*

Finally, the trial court's implementation of a judicial screening process, where it reviews Callihan's prospective filings to ensure compliance with CR 11, was not erroneous. To the contrary, this judicial screening system establishes a process in which two competing aims can be reconciled: Callihan's future claims will receive individualized judicial review and the trial court can prevent the squandering of its limited resources by preventing repetitious and frivolous actions. *Feathers*, 141 F.3d at 269-70.

For the foregoing reasons, the Greenup Circuit Court's order dismissing Callihan's complaint, awarding attorney's fees, and establishing a judicial screening process is affirmed, but its decision prohibiting Callihan from filing all actions until paying Grayson's attorney's fees is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Walter Callihan, *Pro Se*
Argillite, Kentucky

BRIEF FOR APPELLEE:

W. Jeffrey Scott
Grayson, Kentucky