IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

SHIRLEY A. CEMONI,

Appellant,

v. Case No. 5D19-3629

DARA L. RATNER,

Appellee.

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Opinion filed June 18, 2021

Appeal from the Circuit Court
for Orange County,
Lisa T. Munyon, Judge.

Jeffrey M. Byrd, of Jeffrey M. Byrd, P.A., Orlando, for Appellant.

Dale T. Gobel, of Gobel Flakes, LLC, Orlando, for Appellee.

NARDELLA, J.

Shirley A. Cemoni ("Appellant") appeals three trial court orders entered after the jury returned a verdict in her favor. Although we affirm in all respects, we write to address Appellant's first argument on appeal: that the trial court erred in denying her request for sanctions against Dale Gobel,

Esq., ("Gobel") who Appellant argues engaged in bad faith conduct resulting in a mistrial by misstating facts and referencing inadmissible evidence.

This case stems from a 2009 motor vehicle accident between Appellant and Dara L. Ratner ("Appellee"). Eight years after the accident, the case finally proceeded to trial with the Honorable Renee A. Roche presiding and Gobel representing Appellee.

During the first week of trial, Gobel argued that an earlier 2006 motor vehicle accident caused the injuries Appellant claimed to have suffered in the subject 2009 accident with Appellee. In support, Gobel told the jury that Appellant "made claims for injuries" after the 2006 accident. He also asked Appellant's husband about her "legal claim"[1] from the 2006 accident. Complementing these misleading statements, Gobel repeatedly discussed in detail a letter from Dr. Matthew Imfeld assigning Appellant a permanent impairment rating after the 2006 accident ("impairment letter"), but never laid a foundation for the letter's admission into evidence. Appellant's counsel, Jeffrey Byrd, Esq. ("Byrd"), timely objected to Gobel's misstatements and

[1] Appellant and her husband deny that she ever made a legal claim for injuries because of the 2006 accident or received any compensation for bodily injuries. Appellee's only evidence to suggest otherwise is the impairment letter written from Dr. Matthew Imfeld to a local attorney assigning Appellant a permanent impairment rating from the 2006 accident.

references to inadmissible evidence but provided no legal basis and the objections were overruled.

After the first week of trial, Byrd filed a written motion for mistrial, which provided the legal basis for his previously raised objections. With the benefit of a proper legal basis, Judge Roche questioned Gobel about the evidence he could present to support his statement that Appellant "made claims for injuries" after the 2006 accident and how he would admit into evidence the impairment letter he repeatedly referenced the first week of trial. Gobel was unable to provide support for his misstatement or identify a valid ground for admitting the impairment letter. Nevertheless, Judge Roche made no findings of fact and chose not to grant Appellant's motion on its merits. Instead, she suggested that Gobel stipulate to a mistrial, which he ultimately did, thereby causing Judge Roche to declare a mistrial.

When the case was finally re-tried, the Honorable Lisa T. Munyon presided. The second jury returned a verdict in Appellant's favor. After judgment was entered, Appellant filed a motion for sanctions against Gobel. In it, Appellant argued that Gobel engaged in bad faith conduct during the first trial by stating that Appellant made a "legal claim" in relation to her 2006 accident and referencing the impairment letter because he knew or should have known that such evidence was either inaccurate or inadmissible.

Accordingly, Appellant argued that Gobel's conduct led to the mistrial and, therefore, he should be sanctioned by paying the attorney's fees Appellant incurred because of the misconduct. *See Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002) (holding that a trial court has inherent authority to impose attorney's fees against a party's attorney for bad-faith conduct in the course of litigation); *see also Robinson v. Ward*, 203 So. 3d 984, 986 (Fla. 2d DCA 2016).

After holding an evidentiary hearing on Appellant's motion for sanctions against Gobel, Judge Munyon entered an order denying the motion. On appeal, Appellant argues that because Judge Munyon did not preside over the first trial, she lacked firsthand knowledge about the events forming the basis of the motion for sanctions and therefore her ruling should be reviewed de novo. As Appellant argues, there is a line of cases that depart from the abuse of discretion standard where a successor judge rules on a matter over which he or she did not preside. *See OIL, LLC v. Stamax Corp.*, 220 So. 3d 1198, 1200-01 (Fla. 4th DCA 2017) (applying de novo review, rather than abuse of discretion review, when considering a successor judge's ruling on a motion for disqualification where the predecessor judge held an evidentiary hearing on the motion but did not enter an order following the hearing); *Lindon v. Dalton Hotel Corp.*, 113 So. 3d 985, 987 (Fla. 5th

DCA 2013) (explaining that the discretion afforded to successor judge's ruling on a motion for new trial is diminished because he or she "is in no better position than an appellate court to make the decision"); *Nat'l Healthcorp Ltd. P'ship v. Close*, 787 So. 2d 22, 26 (Fla. 2d. DCA 2001) ("Because the order awarding a new trial was entered by a successor judge on the basis of a study of the record, the discretion of the trial court to set aside the jury's verdict is significantly diminished in this case.").

While this case involves a different type of motion, that fact does not distinguish it from *OIL*, *Lindon*, and *Nat'l Healthcorp.* Here, for Judge Munyon to rule on the motion for sanctions, she, like the successor judges in *OIL*, *Lindon*, and *Nat'l Healthcorp*, was required to review the matters giving rise to the motion, *i.e.*, the first trial and the hearing on the motion for mistrial because she did not preside over either proceeding. However, unlike the successor judges in *OIL*, *Lindon*, and *Nat'l Healthcorp*, Judge Munyon had more than a cold record. Having presided over the second trial, Judge Munyon could better determine the propriety and potential impact of Gobel's actions in the first trial. Additionally, Judge Munyon also held an evidentiary hearing on the motion for sanctions. Therefore, we cannot say that Judge Munyon was "in no better position than an appellate court to make the

decision" on the motion for sanctions. *Lindon*, 113 So. 3d at 987. Given this distinction, de novo review is not appropriate.

A trial court possesses inherent authority to award attorney's fees for bad faith conduct against a party's attorney. *See Moakley*, 826 So. 2d at 224. This inherent authority "is reserved for those extreme cases where a party acts 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998) (citing *Foster v. Tourtellotte*, 704 F.2d 1109, 1111 (9th Cir. 1983)). "In exercising this inherent authority, an appropriate balance must be struck between condemning as unprofessional or unethical litigation tactics undertaken solely for bad faith purposes, while ensuring that attorneys will not be deterred from pursuing lawful claims, issues, or defenses on behalf of their clients or from their obligation as an advocate to zealously assert the clients' interests." *Moakley*, 826 So. 2d at 226.

In light of the foregoing, Judge Munyon was within her discretion in deciding that this case was not one of the extreme cases that warranted the imposition of sanctions. *See Nedd v. Gary*, 35 So. 3d 1028, 1029 (Fla. 4th DCA 2010) (explaining that sanctions pursuant to the court's inherent authority is "rarely applicable" because it is reserved for those "extreme cases" where the court finds "egregious conduct" or "bad faith" (quoting

Bitterman, 714 So. 2d at 365)). Gobel's mischaracterizations were limited. First, he referred to a non-existent legal claim during his opening statement and while cross-examining Appellant's husband, but he did not raise that issue any more after Appellant's husband denied the existence of a legal claim related to Appellant's 2006 accident. Second, although the impairment letter Gobel repeatedly referenced was inadmissible in the first trial, it was reasonable to believe that Appellant would admit to the underlying facts contained in the letter during cross-examination, thus reducing any prejudice from his repeated references. Indeed, Appellant acknowledged some of the facts contained in the impairment letter, including the impairment rating she received after her 2006 accident, during the second trial. Moreover, Byrd's initial oral objections during the first trial did not include a legal basis and were thus overruled. Accordingly, we affirm Judge Munyon's order denying Appellant's request for an award of attorney's fees.

AFFIRMED.

EVANDER, C.J., concurs.
COHEN, J., concurs and concurs specially, with opinion.

COHEN, J., concurring specially.

We have the most unusual circumstance of having two cases[2] involving the same trial lawyers in the same oral argument session with an overlapping theme—the lack of professionalism by the lawyers involved. Despite that overlapping theme, consolidation was not appropriate due to their procedural postures and differing substantive issues, both of which were distinct from the professionalism concerns. However, the lawyers' conduct merits discussion, and as such, I write to address what has occurred in both cases.

The two lawyers at the heart of these matters are Jeffrey Byrd and Dale Gobel. It is clear from these cases as well as others we have reviewed in the past, that when on opposite sides of the same case, they are nothing short of a nightmare for presiding judges.

In my view, the instant cases establish a continuing pattern of conduct by Mr. Gobel designed to provoke the granting of mistrials. Mr. Gobel has occasioned more mistrials in these two cases alone than most lawyers will have in an entire career. That does not include additional mistrials Mr. Gobel

[2] In addition to this case, see Bowers v. Tillman, No. 5D19-1757 (Fla. 5th DCA June 18, 2021).

has obtained in other cases referenced in attachments to the records on appeal.

Mr. Byrd's message at oral argument was that whatever a court allows will continue to occur. He is correct. But the irony in that message is not lost on this Court, considering we have repeatedly criticized Mr. Byrd's own unprofessional conduct in prior cases, particularly as it relates to his closing arguments. See Vickers v Thomas, 237 So. 3d 412, 415 (Fla. 5th DCA 2017); Rasinski v. McCoy, 227 So. 3d 201, 202 n.1 (Fla. 5th DCA 2017); see also, Beekie v. Morgan, 751 So. 2d 694, 695-96 (Fla. 5th DCA 2000) (noting that Mr. Byrd's antics could be characterized as 'Beavis–and–Butthead' like, or to put it in milder terms, uncivilized.").

Unfortunately, our affirmance in these two cases may be viewed as enabling the very conduct denounced by the trial judges involved and set out in the majority opinions.[3] But affirmance should not be seen as approval. See Rasinski, 227 So. 3d at 202 n.1 ("We emphasize that our affirmance on this issue should not be interpreted as condoning plaintiff's counsel's conduct . . . .").

[3] In one case, the trial court described Mr. Gobel's tactics as unprofessional mischaracterizations of the evidence. In the other, the trial court expressed concern over the conduct, demeanor, and lack of professionalism of both lawyers and noted that each had violated pretrial orders "in numerous ways."

The difficulty from the perspective of an appellate court is our standard of review. A trial court's decision on whether to impose sanctions against a lawyer based on trial misconduct is reviewed for an abuse of discretion. See Boca Burger, Inc. v. Forum, 912 So. 2d 561, 573 (Fla. 2005). And as all appellate practitioners know, that is a highly deferential standard. Had the trial court imposed sanctions against Mr. Gobel for his conduct in causing mistrials in each of these cases, that same appellate standard would be utilized.

We reject Mr. Gobel's proffered explanation that his conduct is nothing more than zealous representation on behalf of his clients. The bar is full of lawyers zealously representing their clients who do not resort to the types of behavior and tactics employed by Mr. Gobel. "Zealous advocacy cannot be translated to mean win at all costs, and although the line may be difficult to establish, standards of good taste and professionalism must be maintained while we support and defend the role of counsel in proper advocacy." Fla. Bar v. Buckle, 771 So. 2d 1131, 1134 (Fla. 2000).

Despite our affirmance of the trial courts' decisions not to impose sanctions against Mr. Gobel, it is time that such behavior stops. The publishing of these opinions should serve notice on lawyers and trial courts that such conduct will not, and must not, be condoned. If the imposition of

sanctions is what it will take, so be it. See e.g., Moakley v. Smallwood, 826 So. 2d 221, 226–27 (Fla. 2002) (holding that trial courts have inherent authority to impose attorney's fees against lawyer for bad faith conduct even in absence of specific rule or statute authorizing imposition of such fees, where bad faith conduct has caused opposing party to unnecessarily incur attorney's fees and/or costs); Robinson v. Ward, 203 So. 3d 984, 989–90 (Fla. 2d DCA 2016) (affirming trial court's imposition of sanctions against defense counsel where counsel repeatedly violated court's directions and exposed jury to inadmissible evidence, resulting in trial court having to grant new trial).