

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001676-MR

CATHY KELLEY

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE ROBERT J. JACKSON, JUDGE
ACTION NO. 96-CI-00157

JENNIFER GRUBBS; DAVID MARSHALL, ESQ.;
AND RANDALL GRUBBS

APPELLEES

OPINION
VACATING and REMANDING
** **

BEFORE: GUDGEL, CHIEF JUDGE; McANULTY, AND EMBERTON, JUDGES.

McANULTY, JUDGE: This is an appeal from the imposition of CR 11 sanctions against Appellant. We vacate and remand for proceedings consistent with this opinion.

Appellant Cathy Kelley represented Appellee Randall Grubbs (Mr. Grubbs) in a modification of child support case. During the proceedings, Appellant and her client were unable to attend two particular hearings at which visitation schedules were set, causing Mr. Grubbs to miss visitation with his son. Both times, Appellant claimed Appellee David Marshall, (Appellee), counsel for Appellee Jennifer Grubbs, (Ms. Grubbs), promised to cancel the hearings in light of the absence of Appellant and her client but did not do so.

After the disputes regarding the missed hearings and visits arose, Appellant filed a motion and supporting affidavit of counsel for the court to recuse, grant a change of venue, find Ms. Grubbs in contempt for violating the court's visitation orders and to award attorney's fees to Mr. Grubbs. The affidavit accused Ms. Grubbs and her counsel of different types of "unethical and contemptuous behavior," including agreeing to cancel hearings without actually doing so and failing to notify Appellant or Mr. Grubbs about visitation schedules.

It was this motion and affidavit that spurred Appellee to ask the court for CR 11 sanctions against Appellant. However, Appellant withdrew as Mr. Grubbs's attorney before the court considered Appellee's CR 11 motion. Appellant alleges that not long after her withdrawal from the case, she also severed all ties with her former firm and all its attorneys, including the attorney who took her place as Mr. Grubbs's counsel.

In April of 1999, more than a year after Appellant withdrew as Mr. Grubbs's counsel, an evidentiary hearing was held in the case. At this hearing, the judge heard arguments on Appellee's CR 11 claim. No one represented or spoke on behalf of Appellant. Appellant was not present at the hearing herself, and she claims she was never informed this hearing was to occur. Appellant alleges she first had notice about Appellee's CR 11 motion and affidavit on May 4, 1999, the day before the Garrard Circuit Court handed down the order imposing sanctions. This appeal followed.

First, we need to clear up a matter of dispute regarding the standard of review applied to evaluate CR 11 cases in Kentucky. Appellant asks us to apply the multi-tiered standard of review found in Clark Equipment Co., Inc. v. Bowman, Ky. App., 762 S.W.2d 417, 421 (1988). This multi-tiered standard has been recognized as the appropriate one for CR 11 review in Kentucky for more than a decade.

Though Appellee agrees this multi-tiered standard is the approach taken currently by Kentucky law, he would have us apply a single abuse of discretion standard, pursuant to the more recent U.S. Supreme Court Case involving the Federal Rule 11, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405; 110 S.Ct. 2241, 2261, 110 L.Ed.2d 359 (1990). Appellee argues that overturning the standard in Clark is sensible because Kentucky's CR 11 is so similar to the Federal Rule 11. Louisville Rent-A-Space v. Akai, Ky. App. 746 S.W.2d 85, 87 (1988). However, we are not persuaded by this argument.

This court considered – and summarily rejected – the across-the-board abuse of discretion approach in Clark. Clark, 762 S.W.2d at 421. Appellee has shown us no new reason why we should reconsider that decision or the use of the multi-tiered standard other than the contention that Kentucky's CR 11 is so similar to the Federal Rule 11. Louisville Rent-A-Space, 746 S.W.2d at 86. But incongruously, Appellee also bases a good portion of his argument supporting the sanctions imposed on Appellant on the vast differences between our CR 11 and the corresponding federal rule. Therefore, we find this argument to

be without merit, and we maintain that Kentucky courts should apply the multi-tiered standard to CR 11 review.

Though Appellant submits several issues for our review in this appeal, we will address only her claim that the CR 11 sanctions were imposed in violation of her right to procedural due process. Appellant alleges that since she was not aware of the April 1999 evidentiary hearing in which these sanctions were discussed, her due process rights have been violated. We agree.

Appellee contends, and the Garrard Circuit Court agreed, that no violation of due process occurs for lack of an evidentiary hearing if a defendant is notified in advance that sanctions may be impending, relying on a federal case, Union Planters Bank v. L & J Dev. Co., 115 F.3d 378 (6th Cir. 1997). However, we feel the case at bar is distinguishable from the Union Planters case. There, the discussion about sanctions apparently took place during a planned hearing in the course of the trial at which defendants and their counsel were presumably present. The defendants in that case had the opportunity to discuss the sanctions before the court with the movants, even though they were not given the benefit of a full evidentiary hearing.

In the case before us, the sanctions were discussed at a hearing occurring long after Appellant had withdrawn as counsel from the case. Another attorney had assumed representation of Mr. Grubbs, and as such, Appellant was not in attendance at the hearing. She was therefore unable to discuss the sanctions with the court or the movants. Appellant claims she had no idea the

sanctions were to be discussed, and indeed she had no idea any hearing was to occur at all. Furthermore, her response was seemingly limited to a memorandum of law filed with the court after the sanctions had already been imposed. Since this case is distinguishable from the Union Planters case, we feel its holding is not applicable here.

Instead, we find the imposition of sanctions under CR 11 to be analogous to court-ordered punishment for indirect contempt. This court recently said that indirect contempt charges "may be punished only in proceedings that comport with due process." Commonwealth v. Pace, Ky. App., 15 S.W.3d 393, 395. In Pace, the court agreed that a show cause hearing where the charged attorney was given an opportunity to explain his or her behavior was necessary before a trial court could decide whether that attorney was guilty of contemptuous behavior. We feel the same applies here. Thus, since Appellant was not given an opportunity before the sanctions were imposed to respond to the CR 11 charges, we believe her right of due process was violated.

Appellee next argues that even if Appellant was not properly notified before the original court hearing, she still received a full hearing after the sanctions were imposed that should satisfy Appellant's right to due process. Again, we disagree.

The U.S. Supreme Court has set forth a balancing test of sorts to determine whether processes provided before a party is deprived of his or her liberty or property are adequate under

the Constitution. This "due process calculus" was set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and Kentucky courts have accepted the Mathews analysis. Shaw v. Seward, Ky. App., 689 S.W.2d 37, 39 (1985). The Mathews test evaluates the importance of the following factors in determining what process is due:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

We believe in light of these factors, Appellant's due process right was not satisfied by a post-sanction hearing. Obviously, Appellant's private interest in the court's action was great; her job and her livelihood would clearly be affected by the imposition of monetary sanctions against her based on a rule created to curb abusive conduct in litigation. Also, without a hearing, Appellant had no opportunity to offer explanations or defenses for the motion and affidavit she filed, so the risk of an erroneous deprivation resulting therein is high. Finally, it would not have worked a financial or administrative hardship on the court to make sure that Appellant had notice of the sanctions to be discussed and to have requested her appearance at the April 8, 1999 hearing. In fact, it might have even saved the court time and money by possibly eliminating this appeal. As such, we

believe that to satisfy due process, Appellant should have been given notice of the hearing and an opportunity to appear before the sanctions were decided on and imposed by the court.

Additionally, though federal courts have recognized that a full hearing may not be necessary to impose Federal CR 11 sanctions, Kentucky courts have not held similarly. In Clark, this court said, "Considering the punitive nature of sanctions and 'the impact sanctions may have on a party or an attorney's career and personal well-being,' a trial court should not impose sanctions without a hearing and without rendering findings of fact." Clark, supra, at 421.

Finally, Appellee also alleges that even if Appellant was unaware of the April hearing, she was aware of the fact that a motion for sanctions had been filed, and as a reasonable attorney, she would have made an inquiry as to the status of that motion. We disagree.

Imposing sanctions on an attorney that may affect his or her professional and financial status is a very serious outcome to very serious charges. The determination of that outcome should not be left to whether an attorney is reasonable enough to check on the motion's status long after it is filed, after the attorney is no longer associated with the case, or after the attorney is no longer associated with anyone who is. Additionally, we feel providing notice serves an entirely different purpose than just making it easier for a defendant in a sanctions case to show up in court. As recently as 1999, one federal court has decided that notice works to, "put counsel 'on

notice as to the particular factors he must address if he is to avoid sanctions.'" Ping He Co. Ltd. v. Nonferrous Metals, Inc., 187 F.R.D. 121, 123 (S.D.N.Y. 1999). We agree with that court's analysis, and believe it applies here.

Because the imposition of sanctions by the Garrard Circuit Court is found to be in violation of Appellant's due process, we need not consider the other arguments brought before the court on appeal. Therefore, we vacate the judgment of the circuit court and remand this case for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

James L. Thomerson
Lexington, Kentucky

BRIEF FOR APPELLEES JENNIFER
GRUBBS AND DAVID RUSSELL
MARSHALL:

Jennifer O. True
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NO BRIEF FILED FOR APPELLEE
RANDALL GRUBBS