

RENDERED: OCTOBER 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001529-MR

DOUGLAS RANDALL BIGGS, SR.

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 05-CI-00246

JAMES BEARD, MARVELLE BEARD,
AND MARY ELLEN BIGGS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant Randall Biggs appeals from a judgment of the Taylor Circuit Court, pursuant to a jury verdict, awarding Appellees, James and Marvelle Beard, \$82,000. For the reasons set forth herein, we reverse the judgment and remand this matter to the trial court for further proceedings.

In July 2005, the Beards retained attorney Todd Spalding to file an action in the Taylor Circuit Court against Randall and his former spouse, Appellee Mary Ellen Biggs, to enforce two promissory notes. The first note, in the amount of \$26,000, was executed on May 11, 2003, by Mary Ellen in favor of the Beards. The second note, also executed on the same day, was for \$56,000 and was allegedly signed by both Randall and Mary Ellen.¹ At the time the Beard's action was filed against Randall and Mary Ellen, Spalding was representing Mary Ellen in her divorce proceedings against Randall, also in the Taylor Circuit Court. Spalding had previously represented Mary Ellen in a 2001 personal injury action.

Due to various continuances and other delays, the trial in this matter did not commence until May 26, 2010. On the morning of trial, Spalding, the Beards, Mary Ellen, and Randall's counsel were present. For reasons not disclosed in the record, Randall did not appear for the trial. Also, Mary Ellen was not represented by counsel.² Upon questioning by the trial court, Mary Ellen stated that Spalding was her attorney. However, Spalding immediately responded "but not on this case." Thereafter, Randall's counsel renewed a prior motion to disqualify Spalding based upon a conflict of interest. The motion was denied and the trial continued.

Mary Ellen's conduct during the proceedings could be characterized as bizarre, at best. The record reveals that she had undergone major brain surgery shortly before trial, and it was apparent that she was not fully cognizant of the

¹ In a post-trial affidavit, Mary Ellen disputed signing the \$56,000 note.

²

The record indicates that Randall's counsel initially represented both Randall and Mary Ellen.

proceedings. She initially insisted on sitting in the audience with potential jurors until instructed by the trial court to sit up front. Following voir dire by Spalding and Randall's attorney, the trial court and both attorneys assisted Mary Ellen in making peremptory strikes, suggesting names of those members to strike. Mary Ellen gave no opening statement but repeatedly attempted to interject inappropriate and prejudicial comments. Despite Randall's attorney's objections to the outbursts, the trial court never ruled on the objections nor admonished the jury.

During the Beard's case-in-chief, Mary Ellen was called as a witness. In response to Spalding's questioning, Mary Ellen admitted that she and Randall were liable to the Beards on both notes. She stated that she had received a settlement of \$30,000 in a personal injury case (wherein she was represented by Spalding) and had intended on giving such to the Beards. However, Mary Ellen claimed that Randall took the money and spent it on other bills. Mary Ellen stated that she wanted to repay the Beards but had been unable to do so because Randall had controlled the finances during the marriage. At the close of all evidence, the jury returned a verdict finding Mary Ellen and Randall jointly and severally liable on the \$56,000 note, and Mary Ellen solely liable on the \$26,000 note. Following the denial of his motion to alter, amend or vacate, Randall appeals to this Court as a matter of right.

Randall argues that the trial court erred in refusing to disqualify Spalding based upon the conflict of interest created by his representation of the Beards and Mary Ellen. Randall contends that because the instant action was clearly adverse

to Mary Ellen, his representation of the Beards violated Kentucky Supreme Court Rules (SCR) 3.130(1.7) and 3.130(1.9). Further, Randall claims that the trial court's and Spalding's assistance to Mary Ellen during the trial was erroneous. After reviewing the record and video of the trial, we must agree.

SCR 3.130(1.7) states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

With respect to former clients, SCR 3.130(1.9) states, in pertinent part:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

.....

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

There is no dispute that at the time the Beard's complaint was filed in 2005, Spalding was representing Mary Ellen in her divorce proceedings. Although the divorce was finalized in 2006, various motions were subsequently filed regarding Randall's failure to pay maintenance. However, it is unclear from the record if any motions or proceedings were pending at the time the instant trial commenced in 2010. Nevertheless, the Beards contend that whether Mary Ellen was a current or former client was irrelevant since Spalding's conduct did not violate either rule.

In *Lovell v. Winchester*, 941 S.W.2d 466, 468 (Ky. 1997), our Supreme Court observed that “[t]he lawyer/client relationship can arise not only by contract but also from the conduct of the parties. Courts have found that the

relationship is created as a result of the client's reasonable belief or expectation that the lawyer is undertaking the representation. Such a belief is based on the conduct of the parties.” It is abundantly clear from our review of the trial video that Mary Ellen believed Spalding was still her attorney. And, despite the fact that when Spalding was questioned about the apparent conflict at the beginning of trial he was quick to point out that he was not representing her in the instant matter, we are not convinced that she truly understood that fact. Mary Ellen’s conduct during her own testimony was that of a client answering her own attorney’s questions. The Beards even acknowledge that Mary Ellen was their key witness. Ironically, opposing counsel’s objection to Spalding’s leading questions was overruled on the grounds that Mary Ellen was an “adverse” witness.

In their brief to this Court, the Beards contend that even if Mary Ellen was considered Spalding’s client at the time of trial, the matters in which he represented her were wholly unrelated to the case at hand. However, the Commentary to SCR 3.130(1.7) provides, in pertinent part:

(6) Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.

We find no persuasive evidence that Mary Ellen consented, or even understood, that Spalding was undertaking representation directly adverse to her interests.

Furthermore, we find no merit in the Beards' claim that no true conflict existed because Mary Ellen acknowledged that she and Randall were liable on the notes and, thus, Spalding had no reason to believe that his representation of them would adversely affect his attorney/client relationship with Mary Ellen.

Interestingly, however, following the notice of appeal in this case, Mary Ellen filed an affidavit in the trial court stating that she was confused and unaware of the trial proceedings as a result of having just undergone brain surgery. Mary Ellen claimed that her testimony at trial was unreliable and that, specifically, she did not sign the \$56,000 promissory note. In fact, a cursory review of the two notes reveals that the signature on the \$56,000 note does not resemble the signature on the other note and, in fact, bears the name "Mary W. Biggs," rather than "Mary Ellen Biggs," as contained on the \$26,000 note. Given the circumstances at trial, we, too, question whether Mary Ellen's trial testimony was reliable.

We are of the opinion that the situation herein creates a perception of betrayal and disloyalty which cannot be condoned. In so doing, we are not expressing an opinion as to whether Spalding engaged in intentionally egregious conduct. However, regardless of whether this matter fits within the guise of SCR 3.130 (1.7) or (1.9), the goal of maintaining public confidence in our system of justice demands that courts prevent even the appearance of impropriety. In doing so, the client's perception of events is of paramount importance and overshadows the details of his attorney's conduct.

In *Lovell*, the Court reiterated that the appearance of impropriety remains an independent basis for assessing whether an attorney's duty of loyalty and confidentiality to a former client will likely be compromised by subsequent representation of another client. *Id.* at 468. As further noted by the Court in *O'Hara v. Kentucky Bar Association*, 535 S.W.2d 83 (Ky. 1976), “[t]he point is not whether impropriety exists, but that any appearance of impropriety is to be avoided.” In other words, we agree that the appearance of impropriety “is just as egregious as any actual or real conflict.” *Lovell* at 469 (citing *American Insurance Association v. Kentucky Bar Association*, 917 S.W.2d 568, 573 (Ky. 1996)). We are not persuaded that had an attorney other than Spalding questioned Mary Ellen, she would have so willingly accepted liability on behalf of herself and Randall. Clearly, she must have second-guessed her testimony, as is evidenced by the post-trial affidavit she filed. In any event, we must conclude that Randall was unquestionably prejudiced by Mary Ellen’s conduct, which was a direct result of Spalding’s participation in the matter.

Finally, although essentially rendered moot by our decision to reverse and remand this matter, we would express some concern over the trial herein proceeding despite a rather clear indication that Mary Ellen was suffering from a disability. Our review of the video leaves no question that she did not have a true understanding of what was occurring. While such problems may have been alleviated had she had her own counsel present, we suggest on retrial that a

consideration of Kentucky Rules of Evidence (KRE) 601 with regard to Mary Ellen's competency may be warranted.

For the reasons set forth herein, we reverse the judgment of the Taylor Circuit Court and remand this matter for further proceedings.

MOORE, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS BY SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. Mary Ellen Biggs, who would have been the party aggrieved by any conflict of interest, has not filed an appeal of the judgment. Additionally, there was more than adequate evidence that Appellant, Douglas Randall Biggs, Sr., executed the promissory notes which formed the evidentiary basis of the judgment against him. Finally, Randall Biggs failed to testify at the trial to dispute the authenticity of the promissory notes which formed the evidentiary basis of the judgment against him.

The parties dispute in their brief whether Mr. Spalding was actively representing Mary Ellen Biggs at the time of the trial; however, there is little dispute that at the time he filed the complaint in this litigation he was representing Mary Ellen Biggs in another action. This conduct may constitute an ethics violation, which would be subject to a separate proceeding, but is not a justification to set aside the judgment against Randall.

In conclusion, I believe that any error is harmless as to Randall who failed to testify to rebut the undisputed evidence of his debt to the Appellees, James Beard and Marvelle Beard.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES
JAMES BEARD AND MARVELLE
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NO BRIEF FOR APPELLEE
MARY ELLEN BIGGS