RENDERED: FEBRUARY 14, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001447-MR

PERSELS & ASSOCIATES, LLC;
ROBERT REID GILLISPIE; AND
K. DAVID BRADLEY, JR. APPELLANTS

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NOS. 10-CI-00550 AND 11-CI-00502

CAPITAL ONE BANK, (USA), N.A.;
CITIBANK, SOUTH DAKOTA, N.A. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Persels & Associates, LLC appeal the Daviess Circuit Court's findings and imposition of sanctions based on the trial court's determination that the respondents violated Kentucky Rules of Civil Procedure (CR) 11. After careful consideration, we affirm.

BACKGROUND

This case originated with two debt collection cases, which were consolidated for the purposes of deciding the CR 11 issue. The cases are *Capital One Bank v. Sarah Jackson* (hereinafter the "Jackson Case") and *Citibank, South Dakota v. David Thomas* (hereinafter the "Thomas Case").

Initially, Sarah Jackson and David Thomas, separately, retained Persels & Associates, LLC (hereinafter "Persels") to represent them in collection cases. Persels is a national law firm organized in Maryland and engaged primarily in unsecured debt collection cases such as a credit card debt. To provide services to clients, Persels hires local counsel to assist their clients when creditors file suit.

Here, after Persels was retained by the parties, it hired K. David Bradley and Robert Gillespie, attorneys licensed to practice in Kentucky, to provide limited representation for these litigants in the above-styled cases. K. David Bradley represented Sarah Jackson, and Robert Gillespie represented David Thomas. The terms of the Jackson and Thomas' limited representation agreement with Persels specifically noted that neither Bradley nor Gillespie were required to sign a pleading, enter an appearance, or attend a court proceeding.

On July 11, 2011, the trial court *sua sponte* entered an order in the Jackson case that required Bradley, Jackson's attorney, to appear before the court and show cause as to the reason he should not be held in contempt for his failure to sign the pleadings and enter an appearance. Bradley appeared as ordered.

Similarly, on October 31, 2011, in the Thomas case, the trial court entered another show cause order for Gillespie, Thomas' attorney, to also appear in court.

At this juncture, the trial court permitted Persels to intervene as a third party respondent in both cases. Further, the trial court issued an order consolidating the two cases and providing "preliminary findings of fact." Thereafter, Persels pursued a writ of prohibition with our Court based on Persels' contention that the trial court did not have jurisdiction. Following the motion for a writ of prohibition, Persels made a motion for the trial court judge to recuse himself.

Following the Court of Appeals denial of the writ, the trial court held a hearing on July 3, 2012 at which Persels, Bradley, and Gillespie presented evidence. On July 27, 2012, the trial court entered an order titled "Finding that Respondents violated Civil Rule 11; Sanctions." Persels, Bradley, and Gillespie now appeal this order. While Capital One Bank (USA), N.A. and Citibank, South Dakota, N.A. are the named appellees, no response brief was filed by any appellee. The original party plaintiffs, Jackson and Thomas, and the respondent banks have no interest in the appeal as the underlying case has been resolved.

STANDARD OF REVIEW

Appellate review of a trial court's actions related to CR 11 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).

ANALYSIS

On appeal, Persels argues that the trial court erred when it determined that the attorneys violated CR 11 and issued sanctions; the trial court's findings regarding the retainer agreement were clearly erroneous; and finally, that the trial court judge erred by failing to recuse himself from ruling on his *sua sponte* show cause orders. We address these issues sequentially.

CR 11

We begin with an evaluation of the trial court's findings in support of their imposition of sanctions under CR 11. Our review indicates that the trial court accurately described the pleadings in both cases. Further, it is undisputed that neither Bradley nor Gillespie signed the pleadings in the case at hand. And as described by the trial court, the pleadings carried the following unsigned notation in small typeset at the end of the documents:

> This document was prepared by, or with the assistance of, an attorney licensed in Kentucky and employed by Persels & Associates, LLC/Persels & Associates, PLLC(NC) – 800-498-6761.

Therefore, the trial court accurately made findings in the case at hand and the findings were not clearly erroneous.

The next issue consists of a *de novo* review of the legal issues involved in the determination that a violation has occurred under CR 11. We begin by observing that CR 11 does not provide substantive rights to litigants but is a procedural rule designed to curb abusive conduct in the litigation process. *Lexington Inv. Co. v. Willeroy*, 396 S.W.3d 309, 312 (Ky. App. 2013).

In the case at hand, Persels, a law firm and a foreign limited liability company, was retained by Kentucky residents to handle debt collection cases. The design of the law firm is to provide unbundled legal services to persons for the limited purpose of assisting with the negotiation of settlements of unsecured debt. To do so, Persels hires attorneys licensed in other States to draft the pleadings for the clients. According to Persels and the attorneys involved herein, the contracts between Persels and their clients mandate that local counsel not sign the pleadings. Hence, Persels maintains that because of these contract provisions, the obligations of CR 11 do not apply to local counsel.

The legal questions are answered by CR 11 itself. The rule provides:

> Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. . . . The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it 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 it is not interposed for any improper purpose,

> such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The plain meaning of the rule is that pleadings must be signed by the attorney that prepares them.

Persels' practice of providing limited representation to its clients does not abrogate this obligation under the Kentucky Rules of Civil Procedure nor did Persels offer any legal authority from Kentucky or otherwise to support its position that limited representation changes the effect of this civil rule or any other. Moreover, because the clients entered into a contract that specified Persels attorneys would not sign pleadings or make an appearance, it is not sufficient to change the requirements under CR 11. It is indisputable that a court cannot enforce an illegal contract. *S.J.L.S. v. T.L.S.,* 265 S.W.3d 804, 821 (Ky. App. 2008). Any contract that ignores or changes the application of the civil rules is not legal. Thus, in contravention to Persels' position, we hold that pursuant to CR 11, the attorneys who prepared the pleadings must sign them.

Since the attorneys violated CR 11, the rule states:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. The Court shall postpone ruling on any Rule 11 motions filed in the litigation until after entry of a final judgment.

First, we observe that, contrary to Persels' arguments about the trial court's lack of authority to require that the attorneys sign the pleadings, CR 11 itself states that "the court, upon motion or upon its own initiative" may act. Second, the rule says that the court "shall impose" a sanction. We hold that the trial court appropriately applied the law in determining the efficacy of a CR 11 violation and imposing a fine of $1.00 on each attorney.

With regard to the amount of the sanction, clearly the imposition of a fine of $1.00 on each attorney is neither onerous nor an abuse of discretion. Persels proffers many reasons to support its position. We are not persuaded by these arguments. With regard to Persels' claim that the trial court is usurping the Supreme Court's rule-making authority by imposing CR 11 sanctions, CR 11 is not part of the discipline process for members of the Bar. As noted above in *Willeroy*, CR 11 is a procedural rule designed to curb abusive conduct in the litigation process.

For instance, in the case at bar, the limited legal representation demonstrates problems with litigation. Jackson, notwithstanding her limited representation, experienced a default judgment because although Bradley prepared the pleadings, she did not file them with the Daviess Circuit Court. Even though Bradley posits that he instructed her to do so, she did not and experienced adverse consequences.

Next, Persels argues that the trial court's actions were outside the scope of its authority and imposed restrictions on the future practice of law by

Kentucky lawyers. But, the trial court by enforcing the civil rules was plainly acting within its purview. In *Naïve*, the Court said:

> The proper application and utilization of [the Rules of Civil Procedure] should be left largely to the supervision of the trial judge, and we must respect his exercise of sound judicial discretion in their enforcement.

Naive v. Jones, 353 S.W.2d 365, 367 (Ky. 1961). Moreover, in accord with this line of reasoning, Persels asserts that the trial court's actions directly contradicted Supreme Court Rules (SCR) 3.130, which Persels argues directly authorizes limited scope engagements. However, SCR 3.130, Rule 1.2(c) does not alleviate the requirement for an attorney to sign pleadings that he or she assisted in drafting.

In addition, we disagree with Persels' assertion that the trial court's decision interferes with persons representing themselves *pro se*. In fact, such persons must sign the pleadings, also.

Lastly, regarding Persels' contention that the trial court's enforcement of CR 11 harms indigent parties from receiving legal assistance, we, again, disagree. The Kentucky courts have made great efforts in assuring access to the courts for indigent individuals. Certainly, Jackson and Thomas were not indigent. Persels' clients are people with debt problems not indigent people. In fact, Persels is making money on its services. Persels charged Jackson a one-time legal fee of $200 plus a monthly administrative fee of $50 and a contingency fee of 30% net saved on the settlement of her debts. Persels charged Thomas $3,283.

The rationale behind CR 11 is to regulate the litigation process so that pleadings are valid for everyone – indigent or not. Second, *pro se* clients, indigent or not, must follow the rules of civil procedure, too. Unfortunately, the solution for providing legal service for indigent clients is much broader and more complex than this case. Undoubtedly, a decision to authorize limited representation through unbundled legal services in Kentucky would likely necessitate a review of the rules of practice, and perhaps, amendments to the civil rules. Such a course of action is not impeded or prevented by the actions of the Daviess Circuit Court in enforcing CR 11.

In conclusion, the trial court was not clearly erroneous in its findings nor did it abuse its discretion in the imposition of its sanction. In sum, we concur with the legal reasoning of the trial court and hold that pleadings prepared with the assistance of an attorney in the Commonwealth must be signed by the attorney.

Findings concerning the retainer agreement

An appellate court reviews findings of fact under a clearly erroneous standard. Trial courts have much discretion when making findings of fact. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. Findings of fact are clearly erroneous when they are not supported by substantial evidence. *Stanford Health & Rehabilitation Center v. Brock*, 334 S.W.3d 883, 884 (Ky. App. 2010). Substantial evidence is evidence

which has sufficient probative value to induce conviction in the mind of a reasonable person. *Id*.

Persels specifically objects to the trial court's assessment that Thomas paid Persels a fee as consideration for Persels to negotiate with the credit card company to accept a payment plan. In its findings about the Thomas case, the trial court gleaned from the 26-page agreement between Thomas and Persels the following terms: "you have retained us to resolve your unsecured debt"; "this retainer agreement begins when you accept these terms and conditions in Maryland . . ."; "once the balances have been accumulated in your attorney escrow account . . . [Persels] will contact your creditors regularly to try and get them to accept a payment plan"; "the creditor's collection efforts may include filing a law suit against you. In the event you are sued, we will assist you in preparing an answer to such suit and will negotiate with the creditor's attorney on your behalf. We will <u>not</u> go to court with you or file an appearance on your behalf as the cost of doing so would be prohibitive. We will advise you on what the creditor can do . . . and work with you to revise your debt reduction plan if it is necessary . . . ; more complex legal services like answering interrogatories . . . may be billed separately but at vastly reduced rates."

Persels does not challenge any specific finding by the trial court. We believe that the trial court's conclusory statement that Thomas paid Persels $3,283.00 to procure a payment plan from the credit card companies is supported by substantial evidence, and as such, not clearly erroneous. Furthermore, looking

at the findings, under the section labeled "Pleadings in the Thomas Case," the trial court lists a thorough synopsis of the actions by Persels through its agent, Gillespie.

In addition, the trial court's determination that Persels imposed on the clients the contract provision that it and its agents would not appear in court was also not clearly erroneous. Besides Thomas' statement that he would have liked an attorney in court with him, the contract was prepared by Persels and not the clients. Obviously, the terms were tendered to the clients and not the reverse. Lastly, the trial court did not err in its findings that although a notation in the pleadings gave general information about Persels, no individual attorney – Kentucky or Maryland, is identified nor is any signature provided.

Motion to recuse

Persels alleges that the trial judge, under KRS 26A.015, should have recused because of personal bias or prejudice. Review of a recusal order is not a mere ministerial act by the judge; it involves a substantive legal decision about the validity of the order. *Appalachian Regional Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 55 (Ky. 2007). The standard for determining whether a motion to recuse is legally sufficient is whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. *Dean v. Bondurant*, 193 S.W.3d 744, 747 (Ky. 2006).

Moreover, the burden of proof required for recusal of a trial judge is an onerous one. There must be a showing of facts of a character calculated

seriously to impair the judge's impartiality and sway his judgment. The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal. *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001).

Persels, however, does not specify the actions the circuit court judge took, other than ruling adversely on his motions, that would constitute bias or prejudice sufficient to warrant recusal. Therefore, we find no error in the circuit court judge's refusal to recuse.

CONCLUSION

For the forgoing reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William G. Deatherage, Jr.
Hopkinsville, Kentucky
Joyce A. Merritt
Lexington, Kentucky

NO BRIEF FOR APPELLEE