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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001208-MR

JAMES L. THOMERSON;
ALBERT F. GRASCH, JR.;
AND GRASCH LAW, PSC — APPELLANTS

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-00119

COMMONWEALTH OF KENTUCKY,
EX REL., JACK CONWAY, IN HIS
OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF KENTUCKY — APPELLEE

AND NO. 2014-CA-001216-MR

ABC, INC. A/K/A
NATIONAL COLLEGE
OF KENTUCKY, INC. — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-00119

COMMONWEALTH OF KENTUCKY,
EX REL., JACK CONWAY, IN HIS
OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: ABC, Inc. a/k/a National College of Kentucky, Inc. ("College") and James L. Thomerson, Albert F. Grasch, Jr. and Grasch Law, PSC ("Thomerson and Grasch") bring these separate appeals from orders of the Franklin Circuit Court imposing sanctions on the College pursuant to KRS[1] 367.290 and on the attorneys pursuant to CR[2] 37.02. Since both appeals emanate from the same circuit court case number, we have associated the two cases for judicial economy.

The Kentucky Consumer Protection Act is intended "to protect the public interest and well-being of both the consumer public and the ethical sellers of goods and services." KRS 367.120(1). It has been broadly construed to curtail "unfair, false, misleading or deceptive practices in the conduct of commerce[.]'" *Commonwealth ex rel. Chandler v. Anthem Ins. Companies, Inc*., 8 S.W.3d 48, 54 (Ky. App. 1999) (quoting *Commonwealth v. North American Van Lines, Inc*., 600 S.W.2d 459, 462 (Ky. App.1979)). The Act empowers the Office of the Attorney

[1] Kentucky Revised Statutes.

[2] Kentucky Rules of Civil Procedure.

General ("OAG") to issue subpoenas and investigative demands to effectuate the Act's intent. KRS 367.240; KRS 367.250.

College is a for-profit entity providing post-secondary education to approximately 1,000 students at six campuses in Kentucky and three in Indiana. It is one of several such entities the OAG is investigating for alleged "unfair, false, misleading, or deceptive acts or practices." Thomerson and Grasch provided legal representation to College.

In December 2010, the Attorney General issued a civil investigative demand ("CID") to College containing fifty requests for information and records. College, using the pseudonym "ABC, Inc.," responded by filing a petition in Franklin Circuit Court to quash the CID, arguing it was an "unreasonable investigative action," or, in the alternative, the scope of the CID should be modified and narrowly restricted. College also moved to seal the proceedings. The Attorney General disputed College's right to file its petition under a pseudonym and also moved to dismiss the petition. Ultimately, the trial court granted summary judgment in favor of the Attorney General and directed College to comply with the CID.

College appealed. A panel of this Court rendered an opinion on August 24, 2012, holding the Attorney General was authorized to issue the CID, but College had not been given an adequate opportunity to contest the CID's

scope. The case was consequently reversed in part and remanded for the trial court to consider the scope of the CID. The Supreme Court denied further review on April 17, 2013.

Upon remand, the OAG sent a letter to counsel for College stating:

> the Attorney General continues to assert that the CID's areas of inquiry are entirely proper and well within the Attorney General's authority. We therefore request your client's complete response to the CID, including the production of all responsive documents. If your client still maintains that the scope of the CID is overbroad or unreasonable, however, then by May 10, please articulate with specificity your client's objection(s) to any individual demand(s) so that we may attempt to reach a compromise prior to returning to Franklin Circuit Court.

College responded by serving discovery requests on the Attorney General, accompanied by a letter asserting the scope of the CID was overly broad and unreasonable and should, therefore, be modified under KRS 367.240(2). The Attorney General moved for an order pursuant to KRS 367.290, requesting an injunction barring College from conducting further business and for a protective order quashing the discovery requests. College moved to compel discovery.

Following a hearing on these motions, the trial court entered an order on July 3, 2013, finding the following matters were within the lawful scope of the Attorney General's consumer protection authority under KRS Chapter 367:

> College's practices in soliciting enrollment of students through advertising, promotional materials, and direct contact with prospective students. This includes

> information disseminated by National College concerning its graduation and job placement rates, financial aid, and other financial incentives for students, and National College's practices in distributing financial aid and collecting student accounts payable.

The court ordered College to answer all CID questions it did not challenge because it believed the questions exceeded the permissible scope of the inquiry as detailed by the court, and to file objections to the others, on or before July 15, 2013. The trial court also ordered the authorized officer or designee who signed the statement setting forth the answers and objections to testify at a hearing and explain the College's concerns.

On July 15, 2013, College filed a CR 59.05 motion, asking the trial court to vacate its July 3 order; grant its motion to compel to permit College to "fully and fairly" litigate the CID's reasonableness and scope; to allow College to conduct discovery pursuant to the Civil Rules; and to order the Attorney General to respond fully to discovery requests within ten days. College simultaneously responded to the CID stating it objected to the procedure set forth in the July 3 order, and

> more particularly, objects to it being compelled to go forward with this litigation, both in stating and describing objections to the CID requests and in being compelled to testify and justify . . . its contention that particularly (sic) requests are unreasonable and improper, without being permitted to conduct discovery on the issues of the reasonableness and scope of the CID requests.

College objected to the scope of twenty-five CID questions; responded to eight questions; and asserted it had already produced information responsive to seventeen questions in a case filed in Fayette Circuit Court.[3]

The trial court denied the CR 59.05 motion and proceeded with a hearing on July 26, 2013, at which Steven Cotton, Vice President of College, testified, in the College's view, certain requests in the CID were beyond the permissible scope or topics of inquiry based on the language of KRS 367.240(1), the language contained in the trial court's June 3, 2013 order, and four topics set forth in the Court of Appeals' Opinion.

The trial court entered an order on July 31, 2013, finding all fifty CID requests were within the appropriate scope of the Attorney General's inquiry. It characterized College's response as unreasonable and obstructionist because it refused to answer any interrogatory not precisely targeting information directly and specifically listed in the Court of Appeals' Opinion, or the trial court's July 3 order.

> National College ignored the plain directive of this Court's July 3, 2013 Order, which made clear that National College was to answer any questions reasonably related to whether its conduct in the marketplace

[3] On September 27, 2011, the OAG filed suit in Fayette Circuit Court alleging College advertised false and misleading job placement rates on a website in violation of the Consumer Protection Act. *Commonwealth v. National College of Kentucky, Inc.*, No. 11-CI-4922. The current status of this litigation is not discussed by any party.

> included practices that are "false, misleading or deceptive" under the broad prohibition of KRS 367.170. In deciding to limit its responses to the specific examples listed by the Court as illustrative, National College failed to meet its obligation to provide information in a reasonable manner. Moreover, National College failed and refused to answer some questions that were directly and specifically within the precise scope of the specific examples listed in the Court of Appeals ruling, such as inquiries regarding the transferability of credits, further indicating litigation tactics that are designed to obstruct and delay the lawful investigation of the Attorney General.

The trial court ordered College to produce full and complete answers to all fifty interrogatories by August 5, 2013, and gave the Attorney General until August 7, 2013, to determine if the responses were complete and adequate. If they were not, the Attorney General was to file a motion setting forth its intent to pursue sanctions. The trial court also scheduled a status conference for August 9, 2013, directing Cotton to reappear.

College filed a notice of appeal of the July 3 and July 31, 2013 orders and a motion for emergency interlocutory relief under CR 65.07(6), prompting the Attorney General to renew his motion for sanctions against College and to request CR 11 sanctions. On August 8, 2013, College filed amended answers to the twenty-five questions to which it had previously objected. Cotton did not appear for the status conference held on August 9, 2013, at which the parties discussed

whether the trial court retained jurisdiction to enforce its prior orders in light of the notice of appeal filed by College.

The trial court issued an order on August 12, 2013, noting College had chosen to appeal what the court considered to be a non-final ruling since it lacked finality language and did not dispose of all pending issues. The trial court noted College had again failed to follow orders of both the trial court and this Court by not responding to lawful interrogatories. College supplemented its responses on August 19, 2013; the trial court gave the OAG until August 30 to evaluate those. The trial court also ordered the parties to meet and confer regarding any discovery issues outstanding after August 30, 2013.

Ultimately, College withdrew its appeal of the July 3 order and the opinion and order entered on July 31, 2013. The OAG continued to question the information and materials provided by College and filed an affidavit asserting College's responses were incomplete. The trial court held in abeyance the Attorney General's motion for sanctions to give College time to comply.

On August 30, 2013, the Attorney General filed a supplemental affidavit asserting College's responses to the CID were incomplete. The parties submitted an agreed order extending the deadline to resolve remaining disputes. College supplemented its responses on September 30, 2013.

The Attorney General also requested certain data—previously provided in hard copy—be provided in an electronic format. College maintained this request implicated the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The parties submitted extensive memoranda regarding the impact of FERPA on College's ability to provide identifiable student data and educational information.

A hearing on the OAG's renewed motion for sanctions occurred on October 16, 2013. Thereafter, the trial court entered an opinion and order on December 3, 2013, directing College to fully comply with the CID and imposing a fine of $1,000 per day from July 31, 2013, until full compliance with the CID was certified to the court by the Attorney General. If College complied with the CID within ten days, that portion of the fine exceeding $10,000 would be probated. The trial court also imposed a sanction of $10,000 against Thomerson and Grasch under CR 11. College and Thomerson and Grasch filed motions to alter, amend or vacate.

By order entered on June 24, 2014, the trial court found College had finally tendered full and adequate responses to the CID on February 11, 2014. The court imposed a sanction of $1,000 per day—tolled for the holiday period—from August 5, 2013, to December 23, 2013, for a total of $147,000. It denied Thomerson and Grasch's motion except insofar as it modified the basis for

imposing the $10,000 sanctions from CR 11 to CR 37.02. Appeals by College and Thomerson and Grasch followed.

College appeals from (1) the opinion and order entered by the trial court on December 3, 2013, awarding the OAG sanctions against College; (2) the order entered on June 24, 2014, granting in part and denying in part College's motion to alter, amend or vacate the opinion and order entered December 3, 2013; (3) the order entered on July 31, 2013, ruling on the appropriateness of the Attorney General's requests in the CID; and, (4) the order entered on July 3, 2013, ruling on the scope of the CID. Thomerson and Grasch appeal from (1) the opinion and order entered on December 3, 2013, imposing a $10,000 sanction against them; and, (2) the order entered on June 24, 2014, denying their motion to alter, amend or vacate that portion of the opinion and order entered December 3, 2013, sanctioning them.

2014-CA-001216-MR

The trial court imposed sanctions on College under KRS 367.290, which provides as follows:

> (1) If any person fails or refuses to file any statement or report, or to obey any subpoena or investigative demand issued by the Attorney General, the Attorney General may, after notice, apply to a Circuit Court and, after hearing thereon, request an order:
>
> > (a) Granting injunctive relief to restrain the person from engaging in the advertising or

> sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation; and
>
> (b) Vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of this Commonwealth or revoking or suspending the certificate of authority to do business in this Commonwealth of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and
>
> (c) Granting such other relief as may be required, until the person files the statement or report, or obeys the subpoena or investigative demand.
>
> (2) Prior to issuance of any final order the person charged with failing to answer the investigative demand or subpoena pursuant to KRS 367.240 or 367.250 shall be afforded an opportunity for a hearing on the merits of the demand or subpoena. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

KRS 367.290.

College argues *de novo* review is the appropriate standard for the trial court's legal conclusion that a violation justifying sanctions occurred. However, the cases upon which College relies for this contention, *Clark Equip. Co. v. Bowman*, 762 S.W.2d 417, 421 (Ky. Ct. App. 1988), and *Yeager v. Dickerson*, 391 S.W.3d 388, 395-96 (Ky. Ct. App. 2013), concern imposition of sanctions under

CR 11. The plain language of KRS 367.290(2) provides disobedience of a final order imposing a sanction or penalty will be treated as a "contempt" of court; consequently, that is the standard we must apply. "[T]rial courts have almost unlimited discretion in exercising their contempt powers and we will not disturb a trial court's exercise of its contempt powers on appeal absent an abuse of that discretion." *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007). *Lanham v. Lanham*, 336 S.W.3d 123, 128 (Ky. App. 2011). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted). "Although this Court recognizes the breadth of a trial court's inherent authority to compel compliance with its orders through its contempt power, that power is not unlimited." *Robison v. Theele*, 461 S.W.3d 772, 776-77 (Ky. App. 2015). "In *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993), the Supreme Court of Kentucky cautioned that a court must make appropriate findings of fact supporting imposition of sanctions." *Id*. at 777.

College raises the following allegations of error: (1) the trial court failed to independently assess College's compliance with the CID, instead abdicating its decision-making role to the OAG; (2) imposing sanctions was improper because College complied with the CID; (3) as a matter of law, KRS 367.290 was erroneously applied retroactively, and the sanctions imposed

impermissibly resembled criminal contempt; (4) the penalty amount was excessive, and consequently an abuse of discretion; and, (5) the trial court failed to comply with the mandate of this Court that College be given an opportunity to debate the scope of the CID. For reasons expressed below, we affirm.

I. Did the trial court abdicate its authority by allowing the OAG to assess whether College had complied with the remaining CID requests; did the trial court make adequate findings of fact supporting imposition of sanctions.

College levels a two-pronged attack—the trial court abdicated its authority by allowing the Attorney General to determine whether College's responses to the CID were adequate and, it made insufficient findings of fact to justify imposition of sanctions. In its order of December 3, 2013, the trial court stated College could avoid imposition of full sanctions if—within ten days—the OAG certified College's responses to the CID were complete. On January 31, 2014, the Attorney General filed an Update stating College's supplemental responses were deficient and urging imposition of full sanctions. In its order entered June 24, 2014, the trial court mentioned the OAG's Update and that College had tendered additional responses on February 11, 2014, which the Attorney General had certified as complete two days later. The trial court stated it should not have been necessary for the Attorney General to request certain information again in January after finding the supplementation December 11, 2013, was materially deficient.

College argues the trial court should have made independent findings as to whether the supplemental responses were adequate, and its decision to rely instead on the OAG's Update warrants automatic reversal of all sanctions. According to the trial court's June 24, 2014 order, the material tendered by College on December 11, 2013, consisted of approximately 3,500 pages of "additional material." As a practical matter, due to the sheer volume of material, the trial court did not abuse its discretion in relying on the OAG to determine whether the responses were adequate.

Although the trial court relied on the Attorney General to determine whether the responses to the remaining unanswered CID requests were adequate, the trial court made lengthy and detailed findings of fact based on the entire history of the case in support of its ultimate decision to impose sanctions. The order of December 3, 2013, includes a chronological chart, painstakingly detailing the history of College's failure to comply with the CID. The trial court held numerous hearings to allow College to present its objections to the scope of the CID, including one at which it heard the testimony of College's Vice President. The trial court deemed his explanations inadequate. Its findings are fully supported by the record and more than adequate when measured by the standards applied in the cases relied upon by College—for example, *Bowman*, 762 S.W.2d at 421, in which a panel of this Court affirmed a trial court's refusal to impose discovery sanctions

under CR 11 where the plaintiff had filed a meritless lawsuit against her former employer, and *Turner v. Andrew*, 413 S.W.3d 272 (Ky. 2013), in which imposing discovery sanctions under CR 37.02 led to dismissal of underlying actions.

The fact that the trial court relied on the Attorney General to determine whether College had complied with the remaining CID requests was not an abuse of discretion in light of the sheer volume of the documents produced, the amount of time that had already passed, and the detailed findings the trial court had already made. Furthermore, College was given ample opportunity to present its arguments regarding its compliance with the remaining requests in its motion to reconsider. The trial court fully considered College's arguments, concluding that had College complied with the CID within ten days of the order, it would have a legitimate basis for seeking a reduced penalty.

II. Did the trial court err in ruling College should be sanctioned.

A. Did College substantially respond to the CID before entry of the December 3, 2013 order.

College argues it substantially complied with the CID within forty-seven days of the trial court's July 3, 2013 order, one day less than the forty-eight days originally allowed on the face of the CID, and it was, therefore, error to impose sanctions under KRS 367.290(1) which only permits sanctions if a CID recipient has entirely failed or refused to respond. "A statute should not be interpreted so as to bring about an absurd or unreasonable result. The policy and

purpose of the statute must be considered in determining the meaning of the words used." *Kentucky Indus. Util. Customers, Inc. v. Kentucky Utilities Co*., 983 S.W.2d 493, 500 (Ky. 1998). Obviously, the purpose of the statute is to encourage full, not partial, compliance with court orders in consumer protection matters.

In its June 24, 2014 order, the trial court stated its motive in imposing sanctions was to persuade College to fully and adequately respond to the CID. After the July 2013 hearing on the CID's scope, the trial court ordered the responses due on August 5, 2013. It is undisputed College did not submit full and adequate responses to the CID until February 11, 2014. The trial court stated if College had responded within ten days of its December 3, 2013 order, the total sanction would have been just $10,000; not $147,000.

The trial court's orders did not state partial compliance would avoid sanctions. The trial court properly used its power under KRS 367.290 to encourage College to fully comply with the CID, and imposed sanctions only after College repeatedly failed to do so.

College takes exception to the trial court's reference to delays caused by the invocation of FERPA and the filing of an earlier appeal, both of which stalled delivery of complete CID responses to the OAG another two years. We agree the delay caused by the appeal did not justify the imposition of sanctions, but it did behoove College to act promptly once this Court's Opinion became final.

Similarly, the FERPA issue on its own did not justify sanctions, but it was part of a broader pattern of dilatory behavior outlined by the trial court that justified imposition of sanctions.

B. Whether College specifically complied with the December 3, 2013 order regarding Requests 2, 6, 11, and 45.

College argues it fully complied with the December 3, 2013 order and disputes the finding it failed to fully answer CID Requests 2, 6, 11 and 45. College contends the Attorney General's arguments involved a constantly moving and sometimes inconsistent interpretation of its requests, and the remaining "issues" were so insignificant the trial court committed reversible error in increasing the sanctions imposed from $10,000 to $147,000 for College's alleged failure to fully comply with these specific requests.

CID Request 2 asked College to "[i]dentify your owners and explain your corporate organizational structure, including any parent companies, affiliates, and subsidiaries." The Attorney General found College's response was inadequate because it did not explain the management structure of each entity, including titles and identity of those in authority. College argues it was never told this type of information was required to fully respond to this request.

But the Attorney General found further deficiencies in the response to Request 2. The Update the OAG submitted to the trial court pointed out neither Response 2 nor Response 11 referenced or explained the Indiana Campuses;

Response 2 did not identify College of Business and Technology as an affiliate of College; and Response 2 did not fully identify all schools operated under the College name.

As to Request 11, which asked College to "state whether any affiliated organization is operating a school under your name. If so, identify the affiliated organization and the schools it is operating and their locations and addresses[,]" the Attorney General found College's response deficient because it did not include information regarding Kentucky or Indiana campuses operated by College. The Attorney General also argued College did not list all schools operated by "affiliated organizations" under the "National College" brand. Based on the Attorney General's prior arguments, College identified the campus location of any affiliate using the name "National College," but no school locations operating under a different name, such as "University of Fairfax." The OAG's Update also stated, most importantly, the responses did not fully identify all schools operated under the actual "National College" name which apparently included several campuses in Virginia and Tennessee.

Next, College addresses Request 6, which asked College to "identify all businesses, organizations, or entities which you operate under an assumed name." College omitted its Kentucky and Indiana campuses from its response. The Attorney General noted these campuses were also omitted from the response

to Request 11, concluding "failure to identify these campuses in either response can only be seen as a continuation of the semantic gamesmanship which the Court has previously criticized." The OAG also noted College had failed to explain its relationship to "National College Services, Inc.," an entity repeatedly referenced by College in the Fayette Circuit Court action as possessing relevant documents.

Finally, National College addresses Request 45, which asked it to "provide any statistical data you may have regarding the employment or job placement rate for graduates from your school in their field of study for the years 2007, 2008, 2009 and 2010." The Attorney General stated the response provided by College was incomplete because out of thirty individual spreadsheets, nineteen included the column "Employ Start Date" and eleven did not. "This information is relevant to properly determining graduate placement and pursuant to your accreditor ACIC's standards, it should be retained by National College." The Attorney General also objected to the fact that one of the columns in the spreadsheets entitled "Prog Vers" contained numerous codes but there was no index or reference to identify the program or degree. The OAG also asked for an explanation of the distinction in another column between a student as NOTAPP or NOTAPP2.

National College argues the "Employ Start Date" information was neither within the scope of the request nor necessary to determine placement rates.

It further claims it provided an index of abbreviations used in the spreadsheets within a letter dated September 30, 2013. College argues these minor points did not justify a finding it had failed to comply with the CID or the opinion and order entered on December 3, 2013. College argues the trial court compounded its error by failing to make findings explaining how it had failed to comply, even though the College did request a hearing on the compliance issue.

The trial court decided the responses were incomplete on the basis of the Attorney General's Update. Our review of the material shows there is substantial evidence to support this finding and the trial court did not abuse its discretion in accepting the Attorney General's findings.

III. Did the trial court apply KRS 367.290 improperly on a retroactive basis.

National College argues the trial court improperly applied KRS 367.290 retroactively, because the opinion and order dated December 3, 2013, imposed sanctions to run from July 31, 2013, four months earlier, until full compliance with the CID was certified to the court by the Attorney General. But, as the Attorney General has pointed out, at the conclusion of the hearing on July 23, 2013, the trial court ordered College to tender good-faith responses to all fifty requests in the CID and indicated if National failed to do so the trial court was prepared to impose significant sanctions. KRS 367.290(1)(c) authorizes a trial court to sanction an entity for failure to comply with a CID by granting such other

relief as may be required until the person files the statement or report, or obeys the subpoena or investigative demand. National College knew as early as July 23, 2013, it could avoid sanctions by fully complying with the CID. The sanctions were imposed prospectively from July 31, 2013, until the College complied with the CID requests.

National College further argues the sanctions improperly resembled criminal contempt because they were imposed to punish past acts rather than to compel future action. *See Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996). But College could have avoided the sanctions entirely by complying with the trial court order entered July 31, 2013. The trial court plainly stated it would conduct a hearing on sanctions if the College failed to comply with the stated deadlines. The due process rights of the College were not implicated because it was fully on notice any sanctions were contingent on its own conduct. "The U.S. Supreme Court has held that because those cited with contempt 'carry "the keys of their prison in their own pockets,"' the offense is civil rather than criminal contempt." *Kentucky River Cmty. Care, Inc. v. Stallard*, 294 S.W.3d 29, 31 (Ky. App. 2008). The trial court threatened to impose sanctions—not to punish—but to encourage College to respond to the CID, thus acting fully in accordance with the aims of KRS 367.290, and the purpose of civil contempt, which is "to compel some action." *Id*.

Finally, College argues the amount of sanctions imposed was an abuse of discretion. It points to the fact that the case involved many issues of first impression and there is a dearth of case law addressing CIDs. It reiterates the Attorney General was allowed to certify compliance, and the sanctions were imposed notwithstanding what it describes as the "trivial nature" of the deficiencies in the responses following entry of the opinion and order on December 3, 2013. It further contends the trial court inadequately followed the appellate mandate by failing to provide College a proper opportunity to debate the CID's scope. Finally, College argues the amount of sanctions imposed is not reasonably related to any aspect of the case and is not comparable to the $500 criminal penalty authorized for failure to obey a CID under the Kentucky Consumer Protection Act. KRS 367.990. Once the first appeal was resolved, National College was given months to comply with the CID. The severity of the sanction reflects the trial court's efforts to compel the College to comply with the CID. It was well within the trial court's discretion to conclude a lesser sanction would have had no effect on the course of litigation.

2014-CA-001208-MR

In its opinion and order of December 3, 2013, the trial court imposed sanctions against Thomerson and Grasch pursuant to CR 11 in the amount of $10,000. Thomerson and Grasch filed a CR 59 motion arguing imposition of

sanctions was improper, but if a monetary sanction was imposed it should be under CR 37 because the trial court's analysis essentially treated the conflict over the CID as a discovery dispute. The motion stated, "if the Court believes that Movants acted wrongly in this discovery matter and that the Attorney General incurred substantial additional costs due to Movants' actions, which could have been avoided by additional 'candor and cooperation' on the part of Movants, CR 37 would be an appropriate basis upon which to award sanctions." In its order of June 24, 2014, the trial court granted the motion in part and modified the basis of the sanctions from CR 11 to CR 37.02.

On appeal, Thomerson and Grasch acknowledge the standard of review for orders relating to pretrial discovery is abuse of discretion, but argue no discovery occurred in this case, no orders relating to discovery were entered, and their challenge to the CID was not a pretrial discovery dispute at all. Consequently, they contend this Court should review imposition of sanctions *de novo*. It is axiomatic that "[t]he appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1978), *overruled on other grounds Wilburn v. Commonwealth*, 312 S.W.3d 321, 325 (Ky. App. 2010). Thomerson and Grasch successfully moved the trial court to impose sanctions under CR 37.02; they cannot now complain because it did so, nor seek a more advantageous

standard of review. "A trial court 'has broad discretion in addressing a violation of its order[s]' regarding discovery, and this Court reviews the trial court's determination of the appropriate sanction for abuse of that discretion." *Turner v. Andrew*, 413 S.W.3d 272, 279 (Ky. 2013).

In the order entered June 24, 2014, granting the attorneys' motion in part to impose sanctions under CR 37.02, the trial court stated as follows:

> CR 37.02(3) states, "the court shall require the party failing to obey the order or the attorney advising him or both to pay reasonable expenses, including attorney's fees, caused by the failure . . . ." When a hearing was finally held on the scope of the CID, National College and its counsel still could not present any legitimate objections on its claim that the CID was invalid. At that point, it became abundantly clear that National College, through counsel, was attempting to delay a valid investigation by the Attorney General. After a review of the comprehensive litigation process, it was unreasonable under the circumstances for Grasch Law's attorneys to continue to engage in obstructionist litigation tactics that resulted in substantial delay in the compliance of National College with the Court's prior orders and its obligations under the Consumer Protection Act. In this respect, the Court is especially mindful that when the hearing was held on the scope of the CID, there were absolutely no reasonable grounds asserted to support withholding the requested documents, and thereafter, it took National College until February 11, 2014, to comply with a CID that all other for profit colleges responded to in a matter of days after being served. National College's responses to the CID requests were continuously deficient and counsel could not establish a credible basis for the incompleteness. Thus this Court is justified in imposing $10,000 in sanctions pursuant to CR 37.02(3) for Grasch Law's lack of cooperation and failure to

> comply with this Court's order for the timely production of the requested documents.

Thomerson and Grasch raise a general argument that there are minimal statutory and case law authorities addressing the issues presented by National College's challenge to the CID. They contend they were consequently compelled to base their arguments on novel interpretations of the law which the trial court unfairly construed as "obstructionist tactics." Among the "novel issues" presented, they list the impact and effect of language in the Kentucky Consumer Protection Act relating to the permissible scope of a CID; whether the recipient of a CID has the right to conduct discovery pursuant to the Civil Rules; the impact of the earlier Court of Appeals' Opinion on the scope of the CID; and, whether College was warranted in filing the action under a pseudonym and seeking to proceed anonymously. They challenge nine specific events relied upon by the trial court for the imposition of sanctions, arguing they were fully justified in raising and litigating these matters. Of these nine events, appellants argue four cannot form the basis of a CR 37.02 sanction: (1) College's attempted use of a pseudonym; (2) College's motion for contempt seeking to stop the Attorney General from making statements identifying the College as the petitioner in the case; (3) College's request to take discovery regarding permissible scope of the CID following the first appeal; and, (4) College's asserted objections based on scope to some, but not all, the CID requests.

As we have already stated, the trial court originally imposed sanctions against Thomerson and Grasch under CR 11. Appellants themselves successfully moved the trial court to impose the sanctions under CR 37.02 instead. They now argue on appeal the trial court erroneously treated several of these events as discovery violations under CR 37.02. Under these circumstances, this Court will not review these purported abuses of discretion by the trial court when it acted precisely as appellants themselves requested.

As to the remaining issues, appellants themselves acknowledge the trial court did not list litigation of the FERPA issue as a basis for imposing the sanction. It will not, therefore, be considered here.

The remaining issues to be reviewed for abuse of discretion are as follows: (1) arguments asserted by College regarding permissible scope of the CID; (2) the trial court's reliance on a bar complaint filed by College against the Attorney General that is not in the record; and (3) the trial court assigning fault to appellants for the inability of the parties to resolve litigation through the normal course of negotiation and compromise of disputed discovery issues.

In its December 3, 2013, opinion and order, the trial court stated as follows in partial support of its decision to impose sanctions on Thomerson and Grasch:

> The Court of Appeals held that the CID was lawfully issued and remanded this matter for a hearing on the

> scope of the CID, which National College again and again maintained was "unreasonable and unjustified." *At the hearing on the scope of the CID*, however, National College made no arguments supporting their insistence that the CID was overly broad and burdensome, but instead argued that they were entitled to take discovery from the Attorney General to adequately challenge the scope of the CID. The Court finds that National College had no good faith basis for asserting that the scope of the CID was overly broad or burdensome, and filed pleadings challenging the scope of the CID for the improper purpose of causing unnecessary delay.

[Emphasis added]. Thomerson and Grasch maintain this was an incorrect statement because they argued the CID's scope was overly broad during a hearing on July 26, 2013. However, the hearing to which the trial court referred in the above-quoted passage occurred more than three weeks prior on July 1, 2013. At that hearing, National College argued it was entitled to take discovery from the Attorney General to challenge the scope of the CID—as reflected in the trial court's opinion and order. The trial court entered an order on July 3, 2013, requiring College to answer all CID requests or file specific objections to the scope of the investigation on or before July 15, 2013. National College responded to twenty-five of the requests and simultaneously filed a motion to alter, amend or vacate.

In any event, appellants argue the trial court simply disagreed with their approach, which was to argue the scope of the CID was limited by language in the Court of Appeals' Opinion, and the trial court's own opinion of July 3, 2013.

In its order of July 31, 2013, entered after the July 26 hearing, the trial court concluded all the CID requests were reasonable, and National College had failed to provide any legitimate basis for insisting the CID requests were unreasonable in scope, and had even refused to answer some questions which were clearly within the precise scope of the specific examples listed in the Court of Appeals ruling. The trial court further found the Vice President of the College, who had testified at the hearing on July 26, 2013, was unable to "articulate any legitimate basis" for College's objections. Under the circumstances, the trial court did not abuse its discretion in finding objections to the scope of the CID were filed for the improper purpose of causing unnecessary delay, nor in imposing sanctions after appellants failed to comply with the trial court's orders.

Secondly, Thomerson and Grasch argue the trial court improperly relied on a bar complaint they filed against the Attorney General as evidence to support its finding they created a climate of ill will, personal animosity and distrust making it impossible for the litigation to be resolved through the normal process of negotiation and compromise of disputed discovery issues. The bar complaint is not in the record. The trial court also relied, however, on the fact the appellants sought sanctions against the Attorney General, who the trial court described as having done nothing "but attempt to fairly enforce the consumer protection laws of this state." The trial court did not abuse its discretion in concluding under the

circumstances counsel had crossed the line from zealous advocacy into obstruction, delay, and harassment, and that such tactics, if allowed to continue, would make consumer protection law a dead letter.

Finally, appellants object to the trial court faulting them for the inability of the parties to resolve litigation through the normal course of negotiation and compromise of disputed discovery issues. They argue National College had the right to litigate the validity and scope of the CID, and they had no ability to compel any party to settle on any issue. They also object to the trial court's references to the lengthy delay in the case caused by College's pursuit of an appeal. As we stated earlier when addressing a similar argument raised by the College, the delay caused by the appeal did not justify imposition of sanctions. Nonetheless, the Court of Appeals' Opinion became final on April 17, 2013. The College did not fully respond to the CID until February 11, 2014. Although the trial court fully recognized and acknowledged the legal skill and ability of the attorneys and their duty to zealously represent their clients, the trial court did not abuse its discretion in attributing much of the unnecessary delay in the case to their litigation tactics.

Orders entered by the Franklin Circuit Court on July 3, 2013; July 31, 2013; and June 24, 2013, as well as an opinion and order entered by the same court on December 3, 2013, are hereby affirmed in both cases.

ALL CONCUR.

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