

RENDERED: DECEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001798-MR

RES-CARE, INC.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 17-CI-003879

HEATHER JOHNSON; KURT A.
SCHARFENBERGER; AND THE
SCHARFENBERGER LAW OFFICE

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: Res-Care, Inc. appeals from an order of the Jefferson Circuit Court denying its motion for attorney's fees, costs, and expenses.

Heather Johnson, a former employee of Res-Care who brought a wrongful termination suit against the company, failed to disclose she was engaged in Chapter 13 bankruptcy proceedings. Her suit was dismissed via summary

judgment, but Res-Care argues that the trial court applied the wrong standard in refusing to impose sanctions on Johnson and her counsel pursuant to Kentucky Rules of Civil Procedure (CR) 11 (“Rule 11”).

Res-Care provides medical and life support services for persons in need of long-term care. Johnson was a Direct Support employee whose duties included administering medication, cooking, cleaning, and providing transportation.

In September 2016, Johnson filed a voluntary petition for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Kentucky. The petition form included a question asking whether she owned or had any legal or equitable interest in “[c]laims against third parties, whether or not you have filed a lawsuit or made a demand for payment,” and listed as examples “[a]ccidents, employment disputes, insurance claims, or rights to sue.” Johnson replied “No” and certified her answers in the petition as true under penalty of perjury. Her bankruptcy plan was confirmed on December 21, 2016.

On July 10, 2017, Johnson’s employment with Res-Care was terminated after a fellow staff member reported that she had exhibited physical and verbal aggression toward an elderly client. On July 25, 2017, Johnson filed a complaint against Res-Care in Jefferson Circuit Court, asserting claims of wrongful termination and intentional infliction of emotional distress (IIED). She

was not represented by the same attorney as in the bankruptcy proceedings.

Johnson did not notify the Bankruptcy Court of her lawsuit.

On October 25, 2017, Johnson responded “No” to an interrogatory from Res-Care asking her to state whether she had filed for bankruptcy in the past ten years and, if so, to identify the specific bankruptcy case.

When Res-Care discovered wage deductions had been made from Johnson’s paycheck for remittance to the bankruptcy trustee while she was employed at Res-Care, counsel for Res-Care sent a letter to Johnson’s counsel on November 13, 2017, asking whether Johnson had responded truthfully to the interrogatory regarding bankruptcy. Johnson and her counsel did not respond to the letter.

On November 15, 2017, the Bankruptcy Court conducted a hearing to determine whether Johnson’s confirmed plan should be modified as she was not making her required bankruptcy payments in a timely fashion. She did not inform the Bankruptcy Court of the lawsuit against Res-Care. On November 30, 2017, the Bankruptcy Court dismissed her case for failure to make plan payments and formally closed the case on January 19, 2018.

On June 27, 2018, Res-Care filed a motion to compel Johnson to provide full and complete answers and responses to Res-Care’s first set of discovery requests.

On July 1, 2018, Johnson filed supplemental discovery responses stating she had filed a “[C]hapter 13 bankruptcy in the Eastern District of Kentucky on or about July 10, 2012,” and the case was “discharged on or about September 12, 2016.”

On August 3, 2018, Res-Care filed a motion for summary judgment claiming that Johnson’s claims were barred by the operation of judicial estoppel due to her failure to disclose any potential causes of action against Res-Care in her bankruptcy case and because she lacked standing as her claims belonged to the bankruptcy trustee. Res-Care’s motion also alleged that Johnson had pursued frivolous claims she concealed from the Bankruptcy Court and had deliberately misled Res-Care during the discovery process. Johnson responded that her failure to report her claims to the Bankruptcy Court was the result of “mistake or inadvertence.”

The trial court granted Res-Care’s motion, signing an order tendered by Res-Care and adding the statement, “The Court adopts Res-Care’s arguments *in toto.*”

Res-Care thereafter filed a motion seeking an award of attorney’s fees, costs, and expenses pursuant to Rule 11 against Johnson, her counsel, and her counsel’s law firm. Johnson’s counsel responded that Johnson, as a Chapter 13 debtor, had the right to pursue the employment lawsuit in her own name, and that

counsel made a reasonable inquiry into matters that might impact the lawsuit. He attached an affidavit stating that the law office “made a specific inquiry into Plaintiff’s claims prior to filing suit[,]” and “a specific inquiry into any pending or potential bankruptcy.” It also stated that prior to filing suit, the law office gave Johnson a notice which stated in bold capital letters: “If you file for bankruptcy within 5 years of filing this lawsuit you must list this as a pending law suit on your petition for bankruptcy. Failure to do so will result in your case being thrown out and dismissed.”

The trial court denied Res-Care’s motion for sanctions, stating that Johnson’s case lacked any merit, but did not abuse the system. This appeal by Res-Care followed.

Rule 11 provides in pertinent part that:

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. . . . 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.

CR 11.

“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), *as modified* (Mar. 22, 2013) (citing *Clark Equipment Co., Inc. v. Bowman*, 762 S.W.2d 417, 420 (Ky. App. 1988)). “It is intended only for exceptional circumstances.” *Id.*

“The test to be used by the trial court in considering a motion for sanctions is whether the attorney's conduct, at the time he or she signed the allegedly offending pleading or motion, was reasonable under the circumstances.” *Id.* at 312-13.

“Where a trial court denies a motion for sanctions under CR 11, this Court's review is limited to a determination of whether the trial court abused its discretion.” *Id.* at 313. The test for abuse of discretion is whether the trial judge's decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

Res-Care argues that the trial court applied the wrong standard in determining whether a Rule 11 violation occurred when it concluded there was no

“abuse of process.” Res-Care contends that under the correct legal standard of reasonable conduct, Johnson’s counsel indisputably pursued frivolous claims by repeatedly hiding his client’s involvement in bankruptcy proceedings and by misrepresenting the status of those proceedings. Res-Care argues that by adopting *in toto* its motion for summary judgment, the trial court implicitly held the lawsuit was frivolous and without merit, and consequently sanctions were not optional but were mandated under Rule 11. As further proof that counsel knew the claims were frivolous and would be dismissed, Res-Care points to an unpublished opinion of this Court involving another of the same attorney’s clients in the same circuit court division. *See Ledesma v. AT & T Corporation*, No. 2016-CA-000695-MR, 2018 WL 480764 (Ky. App. Jan. 19, 2018). In *Ledesma*, the Court affirmed the circuit court’s holding that the appellant’s employment discrimination case was barred by the doctrine of judicial estoppel because she had failed to disclose her involvement in Chapter 7 bankruptcy proceedings.

Res-Care did not ask for a hearing on its motion for sanctions nor did it ask the trial court to make factual findings regarding whether Johnson’s attorney’s conduct was reasonable under the circumstances. Our case law has emphasized the importance of a hearing when sanctions are to be imposed: “In Kentucky, trial courts are not required to make findings when ruling on motions, CR 52.01; but in certain circumstances, especially when granting relief, it is

incumbent upon the trial court to make findings on matters raised by motion.

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 Equipment*, 762 S.W.2d at 420-21 (quotation marks and internal citations omitted).

After the entry of the trial court's order denying the motion for sanctions, Res-Care did not bring the alleged error to the trial court's attention or request findings, which it could have done by filing a motion pursuant to CR 59.05. Under these circumstances, the alleged error is not preserved. *Id.* at 421 (citing *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982)).

Res-Care contends that reversal is nonetheless mandated under *Louisville Rent-A-Space d/b/a A Storage Inn v. Akai*, 746 S.W.2d 85, 87 (Ky. App. 1988). In that case, the trial court held a hearing on a Rule 11 motion at which the appropriate standard for determining whether sanctions were warranted was debated. The trial court eventually ruled it would not impose sanctions because counsel's actions did not evidence bad faith. A panel of this Court reversed, finding clear error because the court plainly applied the wrong standard. But the issue of which standard to apply was specifically argued before the trial court in *Akai*. In the case before us, in the absence of a hearing or findings, it is not possible to discern whether the trial court considered the reasonableness standard.

The trial court's decision was, however, fully in keeping with Rule 11's fundamental purpose: to preserve the integrity of the court. "It is true that there are some instances in our case law where attorney's fees have been awarded and approved on appeal. However, the only appropriate award of attorney's fees as a sanction comes when the very integrity of the *court* is in issue." *Bell v. Commonwealth, Cabinet for Health and Family Services, Dept. for Community Based Services*, 423 S.W.3d 742, 749 (Ky. 2014) (emphasis in original). We believe this is a determination uniquely within the purview of the trial court's discretion. "Rule 11 sanctions are to be used only in extraordinary circumstances and this Court has previously emphasized that it is not a vehicle to obtain relief by one who has suffered damages by simple negligence in the filing of a lawsuit or by the filing of a meritless lawsuit." *Yeager v. Dickerson*, 391 S.W.3d 388, 395-96 (Ky. App. 2013) (quotation marks and citation omitted).

The trial court decided that Johnson's lawsuit did not constitute an abuse of the system, *i.e.*, did not intrude on the power and integrity of the court. A decision on our part that sanctions were mandatory would be an impermissible intrusion on this exercise of discretion.

For the foregoing reasons, the Jefferson Circuit Court's order denying Res-Care's motion for attorney's fees and expenses is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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