RENDERED: JUNE 12, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000466-MR

RES-CARE, INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 17-CI-003880

JONATHAN THOMPSON; KURT A. SCHARFENBERGER; and THE SCHARFENBERGER LAW OFFICE APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND L. THOMPSON, JUDGES.

LAMBERT, JUDGE: This appeal arises from an employment case that was dismissed via summary judgment by the Jefferson Circuit Court. Res-Care, Inc., has appealed from the March 14, 2019, order denying its motion for attorney's fees and expenses. We affirm.

On July 25, 2017, Jonathan Thompson, through his attorney, Kurt A. Scharfenberger, filed a complaint against Res-Care alleging that Res-Care had retaliated against Thompson for complaining that patients had been neglected and thereafter wrongfully terminated his employment. Thompson also alleged that Res-Care had intentionally inflicted emotional distress through its actions. He sought compensatory damages; punitive damages; an award of statutory attorney's fees, costs, and expenses; and statutory interest. In June 2018, Res-Care filed a motion to compel discovery pursuant to Kentucky Rules of Civil Procedure (CR) 37.01(a), citing deficiencies in Thompson's response to interrogatories. As relates to this case, Res-Care contended that in his response to Interrogatory No. 11 Thompson failed to state that he had filed for Chapter 13 bankruptcy as reflected in the wage deductions while he was employed at Res-Care. Res-Care had previously tried to resolve this discovery dispute via a letter to Thompson's attorney dated November 3, 2017, but did not receive a response. Thompson ultimately served supplemental discovery responses on July 1, 2018, admitting that he had filed a Chapter 13 bankruptcy action in November 2016. No one appeared for the hearing on the motion to compel, and the court remanded the matter on July 18, 2018.

In August 2018, Res-Care filed a motion for summary judgment, citing Thompson's failure to disclose his wrongful termination and intentional infliction of emotional distress claims in his bankruptcy proceedings. Res-Care

argued that Thompson was therefore judicially estopped from asserting those claims in the present action. Res-Care further argued that Thompson had failed to respond truthfully to discovery requests related to bankruptcy filings in the last ten years. Res-Care cited to *Ledesma v. AT & T Corporation*, No. 2016-CA-000695-MR, 2018 WL 480764 (Ky. App. Jan. 19, 2018), in support of its motion, noting that the same attorney represented the plaintiff in *Ledesma* and in the present case. In *Ledesma*, this Court affirmed the summary judgment on judicial estoppel claims because the plaintiff had concealed her claims. Res-Care also argued that Thompson lacked standing because these claims belonged to the bankruptcy trustee.

Thompson responded to the motion for summary judgment, arguing that he was unaware of the lawsuit at the time he filed his bankruptcy and that Res-Care failed to establish he had a motive to conceal his bankruptcy claim. He claimed his omission was inadvertent. In reply, Res-Care stated that Thompson had a continuing duty to disclose changes in his assets to the bankruptcy court. Res-Care later filed a notice of supplemental authority, with an order in a factually similar case in another division of Jefferson Circuit Court (*Johnson v. Res-Care*, No. 17-CI-003879). In that case, the circuit court adopted Res-Care's arguments and dismissed Johnson's case based upon judicial estoppel and lack of standing.

On January 18, 2019, the circuit court granted Res-Care's motion and dismissed Thompson's action because his claims were barred by the doctrine of judicial estoppel due to his failure to disclose his case against Res-Care in his bankruptcy proceeding and because he lacked standing.

On January 28, 2019, Res-Care filed a motion for attorney's fees and litigation expenses pursuant to CR 11, arguing that Thompson's counsel had pursued a frivolous action and filed papers with the court without a reasonable basis. It argued that the conduct of both Thompson and his attorney evidenced bad faith in the pursuit of a frivolous claim and that Thompson's attorney failed to make a reasonable inquiry before pursuing his claims in the circuit court. In response, Thompson argued that, because his bankruptcy claim was brought under Chapter 13, his suit against Res-Care was not improper or frivolous. Additionally, Thompson disclosed his bankruptcy filing during the discovery phase of this case. He argued that *Ledesma* involved a Chapter 7 bankruptcy filing and was therefore distinguishable from the present case. The circuit court denied Res-Care's motion in an order entered March 14, 2019, and this appeal follows.

We considered the same issue with practically identical facts in *Res-Care, Inc. v. Johnson*, No. 2018-CA-001798-MR, 2019 WL 6650528 (Ky. App.

Dec. 6, 2019).[1] While the summary judgment in *Johnson* included language that the circuit court was adopting Res-Care's arguments *in toto*, we believe that the analysis and holding in *Johnson* should also apply to this case. Therefore, we shall adopt the following portion of *Johnson*:

> 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.

[1] We cite this unpublished opinion pursuant to CR 76.28(4)(c), which states: "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court."

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.

Johnson, 2019 WL 6650528, at *2-4.

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

THOMPSON, L., JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS WITH SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: I respectfully dissent from the majority opinion affirming the trial court's denial of sanctions pursuant to CR 11. Where sanctions are denied, our review is limited to a determination of whether the trial court abused its discretion. *Clark Equipment Co., Inc. v. Bowman*, 762 S.W.2d 417, 420 (Ky. App. 1988). Nevertheless, the trial court must still support its conclusions with adequate factual findings that are sufficient to allow meaningful appellate review. *Turner v. Andrew*, 413 S.W.3d 272, 279 (Ky. 2013). Since the trial court did not conduct an evidentiary hearing or make specific findings in this case, I cannot determine the basis for its conclusion that sanctions were not warranted.

The majority points to this Court's prior opinion in *Res-Care, Inc. v. Johnson*, No. 2018-CA-001798-MR, 2019 WL 6650528 (Ky. App. Dec. 6, 2019), in which the trial court also denied Res-Care's motion for CR 11 sanctions against the same counsel under identical circumstances. The panel in that case noted that Res-Care did not request additional findings, leaving the alleged error unpreserved.

Id. at *3. While I agree with this conclusion, the matter is still subject to review for manifest injustice. CR 61.02.

Res-Care has pointed to a disturbing pattern of conduct by counsel in bringing actions in circuit court without disclosing those claims in his clients' bankruptcy actions. Likewise, in this case, in *Johnson*, and in *Ledesma v. AT & T Corporation*, No. 2016-CA-000695-MR, 2018 WL 480764 (Ky. App. Jan. 19, 2018), the same counsel failed to respond timely to discovery requests concerning his clients' filing of those claims in bankruptcy court. In my opinion, this pattern warrants an evidentiary hearing to determine whether counsel brought these actions in bad faith or without due diligence. While the record does not compel this conclusion, counsel's repeated conduct merits closer scrutiny. Consequently, I believe that an evidentiary hearing is necessary to support any decision regarding the imposition of CR 11 sanctions. Following a hearing, the trial court would be in a better position to make a determination about counsel's conduct and if any sanctions would be appropriate. Therefore, I would reverse the trial court's denial of sanctions and remand for an evidentiary hearing and entry of factual findings on this matter.

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