

NOT DESIGNATED FOR PUBLICATION

GERALYN BREAU-FACIANE * **NO. 2018-CA-0467**
VERSUS *
WALTER I. WILLARD, * **COURT OF APPEAL**
ESQUIRE, THE WILLARD * **FOURTH CIRCUIT**
FIRM, PLC AND ABC *
INSURANCE COMPANY * **STATE OF LOUISIANA**

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-11440, DIVISION "E"
Honorable Clare Jupiter, Judge

Judge Paula A. Brown

(Court composed of Chief Judge James F. McKay, III, Judge Roland L. Belsome,
Judge Paula A. Brown)

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**JUDGMENT VACATED;
REMANDED
DECEMBER 5, 2018**

This case arises out of sanctions assessed against Appellant, the law firm of Rodney & Etter, LLC (“Rodney & Etter”).¹ Rodney & Etter appeals the district court’s judgment which granted the Motion for Sanctions, Attorney’s Fees and Costs filed on behalf of Plaintiff/Appellee, Geralyn Breaux-Faciane (“Plaintiff”), ordering Rodney & Etter to pay a \$500.00 sanction to the Civil District Court for the Parish of Orleans (“Civil District Court”) and \$67.00 in court costs to Plaintiff. For the reasons that follow, we vacate the judgment and remand the matter to the district court for proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL HISTORY

In December 2014, Plaintiff filed a legal malpractice action against Defendants, Walter I. Willard and the Willard Law Firm (collectively, “Mr. Willard”). Mr. Willard hired John Etter (“Mr. Etter”) and Roy Rodney (“Mr. Rodney”) of the Rodney & Etter law firm as his defense counsel.

¹ Rodney & Etter is also sometimes referenced herein as “the firm.”

Plaintiff filed a motion for summary judgment on or about May 10, 2016.² The defense opposed the motion for summary judgment, arguing in part that discovery was incomplete. The district court denied the motion for summary judgment on November 7, 2016. Thereafter, on November 18, 2016, Plaintiff filed a motion for a pre-trial scheduling conference to establish certain cut-off dates and prompt the completion of discovery, pursuant to La. C.C.P. art. 1551.³ (*See also*

² Plaintiff filed an amended motion for summary judgment on September 16, 2016. This opinion collectively references the original motion for summary judgment and the amended motion for summary judgment as the “motion for summary judgment.”

³ At the time of Plaintiff’s filing of the motion for scheduling conference, La. C.C.P. art. 1551 provided, in pertinent part, the following:

A. In any civil action in a district court the court may in its discretion direct the attorneys for the parties to appear before it for conferences to consider any of the following:

- (1) The simplification of the issues, including the elimination of frivolous claims or defenses.
- (2) The necessity or desirability of amendments to the pleadings.
- (3) What material facts and issues exist without substantial controversy, and what material facts and issues are actually and in good faith controverted.
- (4) Proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence.
- (5) Limitations or restrictions on or regulation of the use of expert testimony under Louisiana Code of Evidence Article 702.
- (6) The control and scheduling of discovery including any issues relating to disclosure or discovery of electronically stored information, and the form or forms in which it should be produced.

C. If a party’s attorney fails to obey a pretrial order, or to appear at the pretrial and scheduling conference, or is substantially unprepared to participate in the conference or fails to participate in good faith, the court, on its own motion or on the motion of a party, after hearing, may make such orders as are just, including orders provided in Article 1471 (2), (3), and (4). In lieu of or in addition to any other sanction, the court may require the party or the attorney representing the party or both to pay the reasonable expenses incurred by noncompliance with this Paragraph, including attorney fees.

La. C.C.P. art. 1471).⁴ The district court fixed the scheduling conference for January 24, 2017, with a handwritten notation that “[a]ttorneys must appear in person.”

Plaintiff’s counsel, Taetrece Harrison (“Ms. Harrison”), and Mr. Etter appeared at the scheduling conference. The district court issued a Scheduling Order, which Ms. Harrison signed. Mr. Etter did not; instead, he wrote the following in the designated area for the “attorney’s signature:” “not signed, . . . due to lack of authority to consent to discovery dates.” The next day, January 25, 2017, Rodney & Etter filed a motion for an *in camera* status conference. Rodney & Etter requested the status conference to address concerns about the firm’s continued representation of Mr. Willard; to inform the district court of facts

⁴ La. C.C.P. art. 1471 provides, in pertinent part, the following:

- A. If a party or an officer, director, or managing agent of a party or a person designated under Article 1442 or 1448 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Article 1464 or Article 1469, the court in which the action is pending may make such orders in regard to the failure as are just, including any of the following:
 - (1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.
 - (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.
 - (3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a final default judgment against the disobedient party upon presentation of proof as required by Article 1702.
 - (4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

relating to Mr. Willard's disability; and to consider actions the firm should take to protect Mr. Willard's interests. The district court scheduled the status conference for February 6, 2017. Plaintiff's counsel attended the status conference; however, no representative from Rodney & Etter appeared.

On March 15, 2017, Rodney & Etter filed a "motion to continue pending deadlines, motion for appointment of curator, and motion for emergency status conference," which was scheduled for a hearing on March 31, 2017 at 1:30 p.m. As for the firm's request for an emergency status conference, the district court denied the request, noting that "counsel did not appear at 2/[6]/17^[5] status conference he requested on 1/25/17." The district court granted the firm's request for a hearing on the motion and ordered all counsel to appear on March 31, 2017 at 1:30 p.m. for the hearing.

On March 31, 2017, Ms. Harrison and Mr. Rodney participated in a telephone status conference.⁶ At the conclusion of the conference, the attorneys verbally agreed to a follow-up status conference, which the district court scheduled for April 18, 2017.

On April 18, 2017, Ms. Harrison appeared in person for the status conference. Rodney & Etter did not make a physical appearance. After some time lapsed and telephone calls were made, the district court contacted Rodney & Etter and learned the firm was involved in a trial in Texas. Mr. Rodney advised the

⁵ The handwritten notation references a "2/16/17" status conference. However, the undisputed record shows the status conference was fixed for February 6, 2017. As such, this Court shall treat the notation to the 2/16/17 status conference date as a typographical error.

⁶ The parties acknowledge a conflict regarding the time the March 31, 2017 hearing was to take place. The district court's calendar fixed the hearing for 9:00 a.m., whereas, the district court's order listed the hearing time as 1:30 p.m. Plaintiff's counsel represented that she arrived at 9:00 a.m. and then left after no representative from Rodney & Etter appeared. Thereafter, the parties agreed to the telephone status conference.

district court that pleadings would be filed relative to Mr. Willard's status on April 19, 2017.⁷ Ms. Harrison verbally requested sanctions for Rodney & Etter's failure to appear. The district court indicated that it would consider a written motion for sanctions.

Plaintiff filed a motion for sanctions, attorney's fees, and costs ("the Motion") against Mr. Willard and Rodney & Etter on April 27, 2017, alleging they had purposefully failed to comply with scheduling dates and had failed to appear at court-ordered status conferences. Plaintiff prayed for sanctions, including "all of the reasonable expenses incurred by the Plaintiff and her counsel and reasonable attorney's fees including the costs of filing this said Motion."

The district court heard argument on the Motion on June 23, 2017. The district court denied the Motion as it pertained to Mr. Willard. It granted the Motion against Rodney & Etter. The judgment rendered included the following:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Motion for Sanctions, Attorney's Fees, and Costs filed by Plaintiff, GERALYN BREAU-FACIANCE be and is hereby Granted against the Rodney & Etter law firm.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Rodney & Etter, LLC law firm shall pay \$500.00 to the Civil District Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Rodney & Etter law firm shall pay the costs incurred by Plaintiff for the foregoing Motion for Sanctions, Attorney's Fees and Costs to Plaintiff, GERALYN BREAU-FACIANCE, in the amount of \$67.00.

⁷ The record verifies that the pleadings were filed in Civil District Court on April 19, 2017.

In its oral reasons for judgment, the district court cited Rodney & Etter's nonappearances at two agreed-upon status conferences, February 6, 2017 and April 18, 2017.⁸

Rodney & Etter filed a motion for new trial, which was denied by the district court. This appeal followed.

DISCUSSION

Rodney & Etter alleges that the district court's imposition of sanctions resulted from a finding of constructive contempt. As a result, Rodney & Etter argues the district court erred in not providing Rodney & Etter with an evidentiary hearing; failing to refer the Motion for a hearing before an impartial judge; and failing to grant its motion for a new trial. Rodney & Etter contends no evidence was introduced to show Rodney & Etter intentionally disobeyed a direct order of the court to appear at the February 6, 2017 and the April 18, 2017 status conferences.

“A contempt of court is any act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority.” *See* La. C.C.P. art. 221. “A direct contempt of court is committed in the immediate view and presence of the court. . . .” *See* La. C.C.P. art. 222. “A constructive contempt of court is any contempt other than a direct one.” *See* La. C.C.P. art. 224. Constructive contempt encompasses “[w]ilful disobedience of any lawful judgment, order, mandate, writ or process of the court.” *See* La. C.C.P. art. 224(2).

⁸ In the transcript, the district court specifically referenced Rodney & Etter's failure to appear at status conferences scheduled in January and April 2017. The parties admit that Rodney & Etter attended the January 24, 2017 status conference and did not attend the February 6, 2017 status conference—the status conference the firm had requested on January 25, 2017. Accordingly, for purposes of this appeal, the record makes clear that Rodney & Etter was sanctioned for the firm's nonappearances at the February 6, 2017 and April 18, 2017 status conferences.

Well-settled jurisprudence provides that “[a] contempt proceeding is designed for the vindication of the dignity of the court rather than for the benefit of a litigant. Thus, any fine assessed must be payable to the court, since the assessment itself is to vindicate the dignity of the court.” *Joseph v. Entergy*, 2008-0855, p. 6 (La. App. 4 Cir. 12/17/08), 1 So.3d 748, 752 (citations omitted).

In the case *sub judice*, the record reflects that Plaintiff’s Motion requested sanctions in the form of reasonable attorney’s fees and costs, which is permitted by La. C.C.P. art. 1551(C). The district court, however, did not award Plaintiff attorney’s fees; rather, the \$500.00 assessed against Rodney & Etter was to be made payable directly to the Civil District Court. Thus, commensurate with the proceedings, the district court’s oral reasons for judgment and the written judgment in this matter demonstrate that the district court imposed the \$500.00 sanction⁹ to vindicate the court’s dignity for Rodney & Etter’s failure to attend two court-ordered status conferences.

Having determined that the district court cited Rodney & Etter for constructive contempt, we must now consider the firm’s procedural assignment of error—whether the district court erred in failing to provide Rodney & Etter with an evidentiary hearing.

The procedure to punish a party for constructive contempt of court is outlined in La. C.C.P. art. 225(A) as follows:

- A. Except as otherwise provided by law, a person charged with committing a constructive contempt of court may be found guilty thereof and punished therefor *only after the trial* by the judge of a rule against him to show cause why he should not be adjudged guilty of contempt and punished accordingly. The rule to show cause may issue on the court's own motion or on motion of a party

⁹ La. R.S. 13:4611(1)(d)(i) provides, for this type of contempt of court, punishment may include “a fine of not more than five hundred dollars”

to the action or proceeding and shall state the facts alleged to constitute the contempt. A person charged with committing a constructive contempt of a court of appeal may be found guilty thereof and punished therefor after receiving a notice to show cause, by brief, to be filed not less than forty-eight hours from the date the person receives such notice why he should not be found guilty of contempt and punished accordingly. The person so charged shall be granted an oral hearing on the charge if he submits a written request to the clerk of the appellate court within forty-eight hours after receiving notice of the charge. Such notice from the court of appeal may be sent by registered or certified mail or may be served by the sheriff. In all other cases, a certified copy of the motion, and of the rule to show cause, shall be served upon the person charged with contempt in the same manner as a subpoena at least forty-eight hours before the time assigned for the trial of the rule. (Emphasis added).

A district court has discretion to find a person in contempt of court; however, that finding must be based on whether the person willfully, intentionally, knowingly, purposefully, and without justifiable excuse disobeyed a court order, in violation of La. C.C.P. art 224(2). *See Lang v. Asten, Inc.*, 2005-1119, p. 1 (La. 1/13/06), 918 So.2d 453, 454. Proceedings for constructive contempt should be strictly construed. *See Crosby v. Ogden*, 2003-1934, p. 4 (La. App. 4 Cir. 11/10/04), 888 So.2d 1071, 1073. The burden of proof for civil contempt is by a preponderance of the evidence. *Joseph v. Entergy*, 2005-0263, p. 5 (La. App. 4 Cir. 8/3/05), 918 So.2d 47, 51.

At the Motion hearing, Mr. Etter argued that the firm did not purposely and without cause disobey any court orders. Particularly, he contended that the firm only received notice of the February 6, 2017 status conference later on the same day of the status conference. As for the April 18, 2018 status conference, Mr. Etter

reiterated that the firm's nonappearance was not intentional, but rather was caused by the unexpected duration of a Texas trial.¹⁰

Upon review, we find that the Motion hearing did not meet the procedural formalities to impose punishment for constructive contempt of court as contemplated by La. C.C.P. art. 225(A). The district court did not conduct an evidentiary hearing. It did not receive sworn testimony or documentary evidence from Rodney & Etter before rendering its judgment granting Plaintiff's Motion and ordering Rodney & Etter to pay \$500.00; it merely heard argument of counsel. Accordingly, pursuant to La. C.C.P. art. 225(A), we vacate the judgment of the district court and remand the matter for an evidentiary hearing.

Because we find a procedural basis to vacate the judgment, we pretermitt discussion of Rodney & Etter's other assignments of error that address the merits of the judgment. For similar reasons, we need not consider Plaintiff's request for attorney's fees based on a frivolous appeal.

CONCLUSION

For the foregoing reasons, the district court's judgment is vacated and the matter is remanded for an evidentiary hearing on the Motion in compliance with La. C.C.P. art. 225.

**JUDGMENT VACATED;
REMANDED**

¹⁰ In Rodney & Etter's motion for new trial, the firm also argued that it did not purposefully violate a direct court order because the district court did not enter a written order for the April 18, 2018 status conference. Rodney & Etter asserted it complied with the "purpose" for the April 18, 2018 status conference when Mr. Rodney conferred with the district court by telephone phone and confirmed that pleadings relative to Mr. Willard's status would be filed on April 19, 2018.