RENDERED: APRIL 20, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000586-MR

RALPH W. SULLIVAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 05-CI-003500

ANTOINETTE ANDERSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: Ralph W. Sullivan appeals *pro se* from the Jefferson Circuit Court's judgment awarding him $0 in damages, pursuant to a jury's verdict. Sullivan argues that the trial court erred by ordering him to pay for a mediator's expenses incurred as a result of a canceled mediation and by failing to grant his motion for a new trial. For the following reasons, we affirm.

On April 20, 2005, Sullivan filed a complaint seeking damages he sustained arising out of a September 22, 2004, automobile accident which occurred when

Antoinette Anderson ran into Sullivan while attempting to switch lanes. Sullivan also named as defendants passengers Johnny Barnswell and Evelyn Williams; however, they were subsequently dismissed from the action and are not named as parties to this appeal. At the pretrial conference in the matter, the trial court recommended that the parties mediate. To that end, Anderson attempted to arrange a mediation; Sullivan agreed that he would mediate only under certain conditions, including that the mediator be Tom Knopf. Anderson's attorney thereafter wrote Sullivan, indicating that Knopf was not available to mediate until after the parties' scheduled trial date but that he had scheduled mediation with another mediator on January 5. As Sullivan neither attended the mediation nor informed Anderson that he objected to mediation or would not attend, Anderson moved the court to award her the costs she incurred as a result of the canceled mediation, as well as the mediator's costs.

Anderson stipulated to liability, and the matter proceeded to trial. The jury awarded Sullivan $0 in damages, and the trial court entered judgment accordingly. The court also ordered Sullivan to pay the mediator's costs, finding that although Sullivan was not obligated to attend the mediation, he was obligated to notify Anderson he would not attend so as to not waste the mediator's time. The court denied Sullivan's motion for a new trial and also denied his motion to set aside the order requiring him to pay the mediator's costs. Finally, the trial court denied Sullivan's motion to reconsider his motion to set aside the judgment and order a new trial. This appeal followed.

Sullivan's first argument is that the trial court erred by ordering him to pay the mediator's costs which resulted from the canceled mediation. He relies on Jefferson Rules of Practice (JRP) 1305,[1] which provides as follows:

> Within fifteen (15) days of referral, the parties shall agree upon a mediator or mediators or a mediation service. If the parties cannot agree, they shall notify the Court which will select a mediator or a mediation service.

We agree with Sullivan and the trial court that Sullivan was not obligated to attend the mediation since it was not ordered by the court. However, Anderson did not have any reason to know that the parties had not agreed on mediation since Sullivan did not inform her that he did not agree to the arranged mediator and mediation date. A Kentucky court "may invoke its *inherent* power to impose attorney's fees and related expenses on a party as a sanction for bad faith conduct, regardless of the existence of statutory authority or remedial rules." *Lake Village Water Ass'n, Inc. v. Sorrell*, 815 S.W.2d 418, 421 (Ky.App. 1991) (citing *Chambers v. Nasco*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). Here, the record contains evidence of Sullivan's bad faith conduct in a letter he wrote to Anderson's counsel, stating:

> It is my hardened intention to do all that I can to cause you to earn a Twenty Thousand ($20,000.00) Dollar fee in this matter. Any amount over and above that you will have to earn on your own.

Under these circumstances, we believe that it was within the trial court's purview to order Sullivan to pay the mediator's expenses.

[1] We note that JRP 1305 has been renumbered without change as JRP 1405, effective July 11, 2006.

Further, there is no merit to Sullivan's argument that the trial court's order is void because the court lacked jurisdiction over the mediator, given the fact that the court did not order the mediator to do anything. Rather, the court ordered Sullivan, over whom it had jurisdiction, to pay the mediator's expenses.

Next, Sullivan argues that the trial court erred by failing to grant his motion for a new trial, claiming that Anderson provided perjured testimony during the trial. We disagree.

According to Sullivan, Anderson perjured herself by providing the following testimony at trial:

> Anderson's attorney: Did you see Mr. Sullivan's car after the accident?
>
> Anderson: Yes.
>
> Anderson's attorney: Was it damaged?
>
> Anderson: No.

Sullivan does not cite to the videotape record as evidence that this testimony occurred. Rather, he admits in his reply brief that he has recalled the testimony from his memory, and he charges that "[t]apes can be doctored; portions erased; tapes spliced, new material inserted replacing the deletions. The new version can then be copied. Or the copies can be doctored." However, Sullivan has taken no steps before the trial court to correct any alleged errors in the record. Having reviewed the videotape of Anderson's testimony, we agree with Anderson that there is no evidence that the exchange occurred as alleged by Sullivan. Instead, Anderson testified that she did not recall Sullivan's vehicle being as

severely damaged at the scene of the accident as it appeared to be in the pictures she was shown while testifying. Accordingly, Sullivan's motion is without merit.

Finally, Sullivan argues that since his motion for a new trial was supported by an affidavit and Anderson did not file any counter-affidavits, she in effect admitted the statements in his affidavit as true. In support of this position, Sullivan cites *Duncil v. Greene*, 424 S.W.2d 587 (Ky. 1968). *Duncil* does not compel us to reverse the trial court's judgment, however. In that case, the jury awarded the plaintiff damages resulting from an automobile accident. Some three months after the judgment was entered, the defendants moved to vacate the judgment, submitting affidavits alleging that an eyewitness who testified at trial in fact had not witnessed the accident. The court reversed the trial court's denial of the motion, finding that the affidavits were uncontradicted and "[t]he false testimony was such as might reasonably be expected to influence the jury." *Id.* at 588. Here, by contrast, Anderson clearly contested Sullivan's affidavit in her response to his motion for a new trial, regardless of the fact that she did not file a contrary affidavit. In any event, the grounds upon which Sullivan based his new trial motion did not require the support of any affidavits at all, as this was not a case where Sullivan formed his suspicion of Anderson's untruthfulness after the trial. Instead, as Sullivan became aware of any grounds at the moment of Anderson's allegedly perjured testimony, any basis for his motion was already part of the record.

The Jefferson Circuit Court's judgment is affirmed.

ALL CONCUR.

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