

RENDERED: JANUARY 23, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

CORRECTED: JANUARY 30, 2015; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001819-MR

B. DAHLENBURG BONAR, P.S.C,
AND BARBARA D. BONAR

APPELLANTS

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 06-CI-02202

STANLEY MORRIS CHESLEY;
ROBERT STEINBERG; WAITE,
SCHNEIDER, BAYLESS & CHESLEY
CO., L.P.A.

APPELLEES

OPINION AND ORDER
AFFIRMING AND DENYING MOTION TO DISMISS

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT AND MAZE, JUDGES.

J. LAMBERT, JUDGE: Barbara Bonar and B. Dahlenburg Bonar, P.S.C.

(hereinafter Bonar) appeal an order of the Boone Circuit Court denying Bonar's

motion for a new trial. The Appellees, Stanley Morris Chesley (Chesley), Robert

Steinberg (Steinberg), and Waite, Schneider, Bayless & Chesley Co. L.P.A. (WSBC), have filed a renewed motion to dismiss Bonar's appeal. The Appellees argue that the appeal is not within the jurisdiction of this Court, that two of the Appellees have already been dismissed from the underlying case prior to the notice of appeal being filed, and that this appeal has not been prosecuted in conformity with the rules. After careful review of the parties' briefs and oral arguments before this Court, we deny the motion to dismiss but affirm the trial court's order denying Bonar's motion for a new trial.

On June 21, 2002, Bonar filed suit against the Diocese of Covington in an action styled *John DiMuzio, et al. v. Roman Catholic Diocese of Covington*. In addition to a host of employment-related claims, the complaint alleged long-term concealment of sexual abuse by diocesan priests. Following the filing of the complaint, several victims of sexual abuse began to contact Bonar seeking representation. About the same time, Robert A. Steinberg, an attorney with WSBC, was also investigating child sexual abuse claims and considering a possible class action against the Diocese of Covington.

In December of 2002, Bonar and Steinberg discussed their similar claims and, thereafter, Bonar agreed to join WSBC in a class action against the Diocese. The Doe complaint was filed in Boone Circuit Court on February 4, 2003, with Bonar listed among class counsel and her clients listed as class representatives. In a letter dated February 6, 2003, Steinberg wrote Bonar to confirm her participation as co-counsel in the case and the fees she would receive. The arrangement contemplated that Bonar would receive a certain percentage of the overall fees awarded to class counsel. Bonar agreed by e-mail dated February 10, 2003. No written agreement was ever formalized.

A petition for class certification was filed in July of 2003, and a memorandum was filed a couple of months later in September. Both of these pleadings listed Bonar as co-counsel. In this memorandum, the plaintiffs alleged, for the first time, that the Diocese was continuing to place sexual predators in positions involving contact with children. WSBC drafted the memorandum and Bonar did not review it prior to its filing.

Evidently, Bonar was uncomfortable with the allegations contained in the memorandum and was unaware that the class claim would implicate existing programs in the Diocese. Immediately after it was filed, Bonar contacted Steinberg to express her concerns. She requested that her name be removed from the memorandum because it was “placing [her] in an extremely uncomfortable position with many of [her] clients and peers.” She wrote to Steinberg: “I am a supporter, volunteer, and member of many of these programs, and my law practice involves clients, witnesses, and other persons who are administrators, board members, and personnel in many of the current Diocese of Covington school programs.” In a subsequent letter, she explained that the memorandum “indicates a position which could be interpreted as contrary to some of my clients' interests.”

Bonar also filed a “Notice to Clarify the Record” with the trial court, in which she denied any participation in the drafting, review, or filing of the memorandum. Thereafter, on October 1, 2003, Doe was certified as a class action. On January 9, 2004, Bonar filed a motion to withdraw. Her accompanying affidavit stated that “recent changes in the composition of the class members have created a conflict of interest for Affiant, prohibiting Affiant from continuing as class counsel.” She contemporaneously filed a notice of attorney's lien pursuant to KRS 376.460.

In May of 2005, a tentative settlement was reached in the Doe matter. Following a fairness hearing on the proposed settlement, the Boone Circuit Court addressed the issue of attorney's fees. In subsequent pleadings regarding that issue, Bonar alleged, for the first time, that WSBC had forced her to withdraw. Over the next

several months, the Doe settlement was approved and an order setting attorney's fees was issued. Attempts to mediate the remaining dispute between Bonar and WSBC failed. Eventually, the parties agreed to remove the attorney's fees dispute from the class action and created the present case style.

B. Dahlenburg Bonar, P.S.C. v. Waite, Schneider, Bayless & Chesley Co., L.P.A., 373 S.W.3d 419, 421-422 (Ky. 2012).

The present appeal arises out of the opinion and judgment rendered by the Boone Circuit Court on June 1, 2007. During their appeal of that judgment, Bonar filed several motions for a new trial as well as motions to abate the appeal so that rulings could be made on the motions for a new trial. Specifically, in 2009, Bonar filed a second Civil Rules of Procedure (CR) 60.02(d) and (f) motion for a new trial and a CR 59.05 motion to alter, amend, or vacate the Boone Circuit Court's June 1, 2007, order. Bonar's 60.02 motion was denied by the trial court on September 17, 2009. The Appellees filed an initial motion to dismiss this appeal on December 28, 2009. That motion was denied on April 13, 2010.

On October 16, 2009, this Court rendered its opinion affirming the June 1, 2007, order of the Boone Circuit Court dismissing Bonar's complaint. Bonar then filed a motion for discretionary review by the Supreme Court of Kentucky. Discretionary review was granted, and the Supreme Court thereafter entered its opinion on August 23, 2012, affirming this Court and the Boone Circuit Court. The Supreme Court ultimately found that the very issues raised in Bonar's motion for a new trial—alleged perjurious/fraudulent evidence about the formation of co-

counsel relationship or alleged ethical violations by Bonar—were ultimately unnecessary to support the original ruling that Bonar was not entitled to any attorney fees due to voluntary withdrawal.

Because of the confusing nature of the case, a timeline of events is helpful:

1. June 1, 2007: Entry of Judgment by Boone Circuit Court, Hon. Robert McGinnis, Special Judge.
2. June 29, 2007: Bonar's first notice of appeal is filed in 2007-CA-1374, which arose out of Boone Circuit Court case number 06-CI-2202.
3. February 18, 2009: Court of Appeals' order setting oral argument for April 27, 2009.
4. March 16, 2009: Bonar's First Motion for Relief under CR 60.02 is filed.
5. March 18, 2009: Bonar's motion to abate her appeal, based upon the filing of her CR 60.02 motion.
6. April 2, 2009: Hearing on Bonar's motion for relief (before Hon. Robert McGinnis, Special Judge).
7. April 2, 2009: Bonar's KRS 26A.020 Affidavit regarding Judge McGinnis is filed during the hearing, and after rulings are made.
8. April 3, 2009: Judge McGinnis' order denying Bonar's motion for new trial under CR 60.02.

9. April 10, 2009: Bonar's motion to alter, amend, or vacate under CR 59.05.
10. April 21, 2009: Bonar's supplemental (2nd) motion for relief under CR 60.02.
11. April 23, 2009: Bonar's motion before Court of Appeals to reconsider the denial of abatement of appeal/second motion to abate appeal.
12. April 27, 2009: Court of Appeals' order entered continuing oral argument in light of Bonar's motion to reconsider the denial of Bonar's motion to abate appeal.
13. June 22, 2009: Court of Appeals' order granting Bonar's second motion to abate appeal, with appeal to be held in abeyance for 60 days allowing Boone Circuit Court to rule on Bonar's supplemental motion for relief under CR 60.02.
14. August 18, 2009: Hearing before Hon. Stephen Mershon, Special Judge.
15. September 17, 2009: Entry of Order denying relief pursuant to Second Motion for Relief, by Judge Mershon.
16. September 30, 2009: Bonar's second notice of appeal is filed, appealing from the September 17, 2009, and April 3, 2009, orders, and order certifying need for special judge assignment (2009-CA-1819, arising out of Boone Circuit Court case number

06-CI-2202). This was subsequently held in abeyance pending the Supreme Court's decision issued in August 2012.

17. October 16, 2009: Court of Appeals' opinion is rendered affirming the June 1, 2007, judgment.

As stated above, the Supreme Court rendered its opinion in August 2012, affirming the circuit court's 2007 order denying Bonar's claim for attorney's fees in the class action.

In October 2012, this case was returned to this Court's active docket, and subsequently Bonar has filed numerous motions for extensions of time in which to file briefs before this Court. Furthermore, the Appellees acquired new counsel, and a motion for substitution was made and granted by this Court.

On August 30, 2012, the Appellees filed a renewed motion to dismiss the present appeal pursuant to CR 76.34(6) and 73.02 on the grounds that this appeal is not within the jurisdiction of this Court, that two Appellees have already been dismissed from the underlying case prior to the notice of appeal being filed, and that this appeal has not been prosecuted in conformity with the rules. That motion has been passed to this panel for a decision on the merits. The parties also requested oral argument, which was held on June 23, 2014.

After careful review of the record and the parties' arguments at oral argument, we hereby deny the Appellees' motion to dismiss but affirm the decision of the Boone Circuit Court on the merits.

The standard of review for the issues raised in this appeal is abuse of discretion. Review of a denial of a motion to recuse is abuse of discretion if someone might reasonably question the impartiality of the court. *Somers v. Commonwealth*, 843 S.W.2d 879, 882 (Ky. 1992). Review of the denial of a CR 60.02 motion is also for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

Bonar's first argument on appeal is that it was error to deny her a new trial under CR 60.02 (d) or (f) because there exists substantive evidence of Appellees' fraud on the trial court and evidence of an extraordinary nature justifying relief.

CR 60.02(d) states that a judgment, order, or proceeding may be vacated when there is fraud affecting the proceedings. The Kentucky Supreme Court has stated that fraud on a party is in fact "fraud affecting the proceedings." *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 818 (Ky. 2002). There, the Court defined such fraud upon the court when it found that one of the parties, the husband, had used the court proceedings as a tool to defraud his wife. The Court, refusing to allow the miscarriage of justice to stand, held that while the fraud was perpetrated against a party, the ultimate result was a fraud against the court. *Id.*

Bonar argues that the fraud in the instant case is in fact much worse than the fraud perpetrated in *Terwilliger*. Here, Bonar contends that the fraud was perpetrated by Appellees on the proceedings and on the court from the very moment that she filed her fee lien. Bonar contends that the Appellees intensified such fraud as the fee trial approached, directly deceiving their own clients

wrongfully to influence the trial court. Because this case's procedural history is so complicated, we will explain the conduct Bonar presents as evidence to this Court as fraud on the proceedings.

Bonar contends that she first became aware of this fraud in 2008 or 2009, after the trial court's initial judgment at issue in this case was rendered. She contends that several former members of the underlying class action (victims) realized they had been unjustly misled and used by their own counsel, Appellees herein. The victims, none of whom had known Bonar, began making public statements they had been duped into perpetrating a fraud on the trial court in the class action case when they were coached by Appellees to have *ex parte* contact with the court to state that Bonar was actively delaying the payment of their class settlement monies. Bonar claims that in 2008 and 2009, these victims began realizing that the Appellees had lied to them and that it could not possibly be true that Bonar was blocking or derailing the class settlement.

In particular, Bonar alleges that the Appellees gathered at least some of their 400 class action members in a rented room at the Holiday Inn in Hebron, Kentucky, and directed them to write false letters and provide false testimony to the court to deprive Bonar of any fee. At this Holiday Inn meeting, Appellees gave very specific instructions to these victims as to what they should tell the court about Bonar, whom these victims had never met. Under a specific threat of losing their own settlement monies, they demanded that the clients help them convince the court that Bonar had not done any work on the class action; that Bonar was not

credible; that Bonar's fee request should be denied because it would directly reduce their own settlement amount; that the court should stop Bonar from receiving her fee since she was blocking the class action and intruding on their own settlement monies; that Bonar had multiple violations of Kentucky law; and that the court should issue an order of disbarment for Bonar to prohibit her from practicing law.

To the contrary, the Appellees argue that Bonar's claims in this appeal are blocked by the doctrine of *res judicata* and the law of the case doctrine as a result of the decision rendered by the Supreme Court. The Appellees contend that the central issue in this case is whether there was substantial evidence to support the trial court's finding that Bonar voluntarily withdrew from the class action and therefore was not entitled to a portion of the fee. They contend that the Supreme Court already decided that Bonar's own statements provided substantial evidence to support the conclusion that she withdrew voluntarily, and because Bonar does not allege that the statements she made were somehow the product of the Appellees' allegedly fraudulent efforts at the Holiday Inn, her statements alleging fraud, even if true, do not entitle her to relief under CR 60.02.

We agree with the Appellees that the opinion rendered by the Supreme Court in 2012 directly dealt with the factual issues which Bonar cites as grounds for this appeal. Specifically, the Supreme Court found that Bonar's own handwritten letters and communications with counsel for the Diocese constituted substantial evidence to support its finding that Bonar voluntarily withdrew from

the representation. Thus, while the conduct alleged, if true, might constitute a fraud on the court, it cannot change the fact that Bonar voluntarily withdrew from the case because of conflicts with clients, business associates, friends, and acquaintances. The alleged fraud does not supersede the fact that Bonar voluntarily withdrew as class counsel and made no mention whatsoever of any mistreatment by the other class counsel.

We agree that the law of the case doctrine prohibits Bonar from attempting to re-litigate this issue. In *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky. 1989) (quoting *Martin v. Frasure*, 352 S.W.2d 817, 818 (Ky. 1961)), the Supreme Court held that:

A final decision of this [Supreme] Court, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved. It is binding upon the parties, the trial court, and the Court of Appeals. It may not be reconsidered by prosecuting an appeal from a judgment entered in conformity therewith.

In *Union Light, Heat, & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956), the Court also stated:

The law of the case rule is a salutary rule, grounded on convenience, experience and reason. It has been often said that it would be intolerable if matters once litigated and determined finally could be re-litigated between the same parties, for otherwise litigation would be interminable and a judgment supposed to finally settle the rights of the parties would be only a starting point for new litigation.

We agree that the evidence Bonar cites as alleged fraud upon the proceedings does not supersede the fact that she voluntarily withdrew as class counsel. There is

absolutely no evidence before this Court, nor was there any evidence before the trial court or the Supreme Court, that Bonar was in any way forced or coerced to resign as class counsel. Instead, the communications written by her establish that she recognized conflicts of interest and withdrew. Because the alleged fraud cited by Bonar does not negate the fact that Bonar voluntarily withdrew and cannot establish that it was because of the alleged fraud, we affirm the trial court's order denying Bonar relief under CR 60.02(d).

Similarly, Bonar was not entitled to relief under CR 60.02(f), which justifies relief when evidence of an extraordinary nature warrants it. In the instant case, the evidence Bonar presents is the alleged conduct by Appellees. However, any such evidence simply cannot undo the clear and direct communications from Bonar to Diocese counsel, co-class counsel, and the court that she was voluntarily withdrawing due to conflicts of interests between friends of hers in the Diocese and the victims of the abuse. Absent proof that her withdrawal was due to Appellees' conduct, Bonar cannot establish that the trial court abused its discretion in denying her motion for relief under CR 60.02(f).

Bonar next argues that Appellees' egregious fraud on the court and against her violates the rule of law. In support of this argument, Bonar contends that the sheer trepidation expressed by former victims in their affidavits, as a result of alleged threats made by Appellees, shows the egregiousness of Appellees' fraudulent acts. She argues that the alleged fraud Appellees conducted in this case is a stark violation of our basic principles of justice, the judicial process, and our

rule of law. Bonar argues that minimal due process norms require this Court to remand this case.

Again we disagree with Bonar. Bonar assisted several clients with their claims against the Diocese before determining that she had a conflict of interest. She was compensated for her work with those clients. Significantly, Bonar has presented her claims to two judges, this Court, and the highest court in the Commonwealth. She is again before this Court with the same claims, arguing that new evidence renders her withdrawal involuntary. We are not persuaded. We find no due process violation requiring us to remand this case for further review by the trial court.

Bonar also argues that Judge McGinnis erred by continuing to preside at the April 2, 2009, hearing after acknowledging his own bias. In support of this, Bonar contends that when faced with her request to recuse at the April 2, 2009, hearing, Judge McGinnis, although initially stating he believed he could be impartial, admitted outright that an objective person would question his impartiality.

The Appellees argue that Judge McGinnis had proper jurisdiction over the case at the April 2, 2009, hearing. At the start of that hearing, the only pending recusal/disqualification motion was a motion for Judge McGinnis to recuse pursuant to KRS 26A.015. After he announced he would not recuse himself, one of Bonar's attorneys left the hearing to file the disqualification affidavit pursuant to KRS 26A.020. Judge Mershon later ruled that this motion was untimely, and Bonar has failed to address the timeliness of the disqualification affidavit in her

brief to this Court. Appellees argue that the entry of the April 3, 2009, order did nothing more than reduce the April 2, 2009, order to writing, which amounts to a formal or ministerial act, which even a recused or disqualified judge may undertake. *See Appalachian Reg'l Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 54 (Ky. 2007).

The Appellees further argue that even if Judge McGinnis lacked jurisdiction over the case, Judge Mershon addressed the merits of Bonar's CR 60.02 supplemental motion and determined that Bonar was not entitled to CR 60.02 relief. We agree with the Appellees. Judge McGinnis had jurisdiction over the case when he determined that Bonar was not entitled to CR 60.02 relief. Even if Judge McGinnis did not have jurisdiction over the case, Judge Mershon addressed the merits of Bonar's motion and made the same determination. Accordingly, we find no error in this regard.

Quite simply, this case has been litigated up to the highest court of this Commonwealth. We perceive of no miscarriage of justice to Bonar, who received a large fee for her work on the underlying class action until she voluntarily withdrew as class counsel. Any conduct on behalf of the Appellees, if true, does not supersede the evidence that Bonar's withdrawal was completely voluntary. Accordingly, the trial court did not abuse its discretion in denying her motions for relief under CR 60.02(d) and (f). Judge McGinnis had jurisdiction to rule at the April 2, 2009, hearing. Thereafter, Judge Mershon properly denied Bonar's motion and that ruling stands.

ALL CONCUR.

ENTERED: January 23, 2015

/s/ James Lambert
JUDGE, COURT OF APPEALS

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Thomas E. Clay
Louisville, Kentucky

BRIEF FOR APPELLEES:

James M. Gary
Lexington, Kentucky

ORAL ARGUMENT FOR
APPELLEE, ROBERT STEINBERG:

James M. Gary
Lexington, Kentucky