2019 WL 1224566
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

George ELLIS; James Lyons; and Robert Relford, Appellants
v.
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; John Turner; and Robert Clark, Appellees

NO. 2016-CA-000566-MR
|
MARCH 15, 2019; 10:00 A.M.

APPEAL FROM FAYETTE CIRCUIT COURT, HON. THOMAS L. CLARK, JUDGE, ACTION NOS. 97-CI-00542, 97-CI-01882, 97-CI-01899 & 97-CI-02717

Attorneys and Law Firms

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ORAL ARGUMENT FOR APPELLANTS: James M. Morris, Lexington, Kentucky

SUPPLEMENTAL ORAL ARGUMENT FOR APPELLANTS: James M. Morris, Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT: Robert L. Roark, Lexington, Kentucky

SUPPLEMENTAL ORAL ARGUMENT FOR APPELLEE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT: Robert L. Roark, Lexington, Kentucky

BEFORE: CLAYTON, CHIEF JUDGE; TAYLOR AND L. THOMPSON, JUDGES.

OPINION

TAYLOR, JUDGE:

***1** George Ellis, James Lyons, and Robert Relford bring this appeal from April 6, 2016, opinions and orders rendering summary judgments dismissing their respective claims under the Kentucky Civil Rights Act. For the reasons stated, we vacate and remand.

This case has a complex procedural history; therefore, only those facts particularly necessary for the disposition of this appeal will be set forth. George Ellis, James Lyons, Robert Relford, John Henry Adams, John Turner, and Robert Clark were employed by the Lexington-Fayette Urban County Government (LFUCG) in the Division of Building Maintenance and Construction. Turner was a supervisor, and Clark was the director of the division.[1]

In 1997, Ellis, Lyons, Relford (collectively referred to as appellants) and Adams filed separate complaints in the Fayette Circuit Court against LFUCG, Turner, and Clark (collectively referred to as appellees) alleging unlawful race discrimination and unlawful retaliatory acts in violation of the Kentucky Civil Rights Act (Kentucky Revised Statutes (KRS) Chapter 344). Initially, the four cases were consolidated by the circuit court and trial preparation proceeded as if the cases would be tried together. However, in 2002, over the objection of the plaintiffs, the circuit court severed the cases for separate trials. Eventually, Adams' case went to trial first in February 2006. The jury returned a verdict in favor of LFUCG which was appealed to this Court. By Opinion rendered February 13, 2009, another panel of this Court affirmed the circuit court judgment in favor of LFUCG. Appeal No. 2007-CA-000066-MR. The Kentucky Supreme Court denied discretionary review on December 8, 2010.

Subsequently, in appellants' cases, in January 2012, LFUCG filed motions for summary judgment in each case arguing that appellants had not demonstrated sufficient facts to support race discrimination or retaliation claims. Appellants filed responses to the motions. The circuit court conducted an oral argument on July 24, 2012, in the

Ellis case only, and then took the pending motions for all three cases under submission. No ruling was forthcoming. Later, on April 13, 2015, appellants filed a motion for trial date, but no action was taken on the motion. The circuit court took no action on the motions for summary judgment until February 2016.

At this point in the proceedings, the record is unclear; however, at a pretrial conference upon another case in February 2016, the circuit court judge apparently engaged in a discussion with LFUCG's counsel concerning the pending motions in each case. According to LFUCG's counsel, the circuit court remarked that it may be helpful to the court if the parties tendered proposed opinions and orders.[2] LFUCG's counsel volunteered to inform appellants' counsel, which he did via facsimile.

***2** After the exchange between counsel, the record indicates that appellants filed a motion for a hearing on the pending motions on March 10, 2016,[3] and LFUCG tendered at about the same time to the court, proposed opinions and orders granting it summary judgment in each of the three cases. Appellants did not submit proposed opinions and orders to the court. The circuit court ultimately adopted LFUCG's proposed opinions and orders *in toto*, and an opinion and order granting summary judgment and dismissing each of appellants' claims were entered in each case on April 6, 2016. On the scheduled hearing day on appellants' motion (April 8, 2016), the circuit court informed appellants that summary judgments dismissing their actions were entered two days earlier. This consolidated appeal from all three judgments followed.

Appellants argue that the circuit court engaged in improper *ex parte* communications with LFUCG that resulted in prejudice to appellants. For the reasons hereinafter set forth, we agree.

The Kentucky Code of Judicial Conduct, Canon 3B,[4] generally forbids *ex parte* communications between the court and a party or a party's counsel:

> (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. With regard to a pending or impending proceeding, a judge shall not initiate, permit, or consider ex parte communications with attorneys and shall not initiate, encourage or consider ex parte communications with parties, except that:
>
> (a) Where circumstances require, ex parte communications for scheduling, initial fixing of bail, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
>
> (b) As a part of the legal research, a judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.
>
> (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
>
> (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
>
> (e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Rules of Supreme Court (SCR) 4.300, Kentucky Code of Judicial Conduct, Canon 3B(7) (2016).

Under the plain terms of Canon 3B(7), a judge "shall not initiate, permit, or consider *ex parte* communications" with a party or attorney. There are narrow exceptions; relevant herein is the exception found in Canon 3B(7)(a) relating to administrative or other nonsubstantive matters. If an *ex parte* communication potentially falls under the exception found in Canon 3B(7)(a), the court is duty bound to promptly notify the other parties of such communication.

***3** In the case sub judice, it is clear that the circuit court judge engaged in an *ex parte* communication by instructing LFUCG's counsel to file proposed opinions and orders in the cases below. At the time of this communication, appellants' counsel was not present, and LFUCG's counsel was before the court in an unrelated

action. Hence, the communication by its very essence constitutes an *ex parte* communication. LFUCG argues the exception set forth in Canon 3B(7)(a) is applicable. To be properly utilized, Canon 3B(7)(a) clearly requires the judge to promptly notify the other party concerning the *ex parte* communication:

> In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7)(a) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) regarding a proceeding pending or impending before the judge.

SCR 4.300, Canon 3B(7)(a) cmt. Additionally, the judge's duty to disclose the *ex parte* communication cannot be delegated to a party who was involved in the *ex parte* communication. To do so not only runs afoul of Canon 3B(7)(a) but also may lead to a reasonable query concerning the appearance of impropriety under Canon 2.[5]

Here, it is undisputed that the judge did not inform appellants' counsel of the *ex parte* communication with LFUCG's counsel. The record is also undisputed that at the time of the *ex parte* contact, it had been over four years since the motions for summary judgments were filed and almost a year since appellants filed a motion for trial date. Upon receiving the communication concerning the circuit court's directive to file proposed orders from LFUCG's counsel, appellants' counsel filed a motion for hearing. According to appellants' counsel, he sought clarification from the circuit court concerning its directive to LFUCG's counsel and scheduled a hearing. The hearing was ultimately scheduled to take place on April 8, 2016. At the hearing, the circuit court informed appellants that it had entered orders granting summary judgments to appellees and had dismissed appellants' actions two days earlier. Of particular concern to this Court is that no written order was entered directing counsel to tender proposed orders and of course, no deadline for submission was set by the court or communicated to counsel. Courts in Kentucky speak only through written orders entered on the court's official record. *Midland Guardian Acceptance Corp. of Cincinnati, Ohio v. Britt*, 439 S.W.2d 313 (Ky. 1968). Courts do not speak through *ex parte* contacts. Considering the totality of the circumstances, we conclude that improper *ex parte* communications occurred to the prejudice of appellants. For this reason alone, we must vacate the opinions and orders granting summary judgment in each of the three cases below and remand to the circuit court.

Additionally, we further conclude that by signing the tendered opinion and orders in these cases, the judge in this case abdicated his decision-making responsibility which is prohibited under Kentucky law. *Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982).[6]

***4** In Kentucky, the circuit court is vested with decision-making responsibility in every case within its jurisdiction. *Id.* In *Bingham*, the Kentucky Supreme Court upheld the delegation to attorneys of the clerical task of drafting proposed findings of fact and conclusions of law. *Id.* at 629. However, the Supreme Court did not condone the delegation of a court's actual power or duty to make findings of fact and to draw conclusions therefrom. *Id.* at 629-30. The Supreme Court noted that the distinguishing factor in determining whether an improper delegation of the court's powers had occurred was whether there was a "showing that the decision-making process was not under the control of the trial judge" or whether "these findings and conclusions were not the product of the deliberations of the trial judge's mind." *Id.* at 629-30.

While *Bingham* involved the application of Kentucky Rules of Civil Procedure (CR) 52.01 to the facts of that case, we believe the underlying rule prohibiting the abdication of a judge's decision-making responsibility is also applicable to cases involving CR 56. In this case, the motions for summary judgment were filed in January 2012 and arguments by counsel in the Ellis case only were heard in July 2012. Subsequently, the record in this case fell silent until appellants filed a motion to set for trial in April 2015. The record remained silent again until the *ex parte* contacts with LFUCG's counsel in February 2016, precipitated the filing of LFUCG's proposed opinions and orders that were then entered in their entirety in each case by the circuit court on April 6, 2016.

There is nothing in the record of this case that would support the opinions and orders on appeal being the "product of the deliberations of the trial judge's mind." In other words, the decision-making process supporting the opinions and orders was that of LFUCG, not the circuit judge. Our decision is buttressed even more by the fact

that the opinions and orders entered by the circuit court were exactly identical to those tendered by LFUCG, that included several typographical and clerical errors. And, the court entered the opinions and orders notwithstanding that a hearing had been scheduled by appellants, presumably in response to the court's *ex parte* contacts, before the opinions and orders were entered. Given the circuit court took no action in this case from July 2012 until April 2016, when the court granted LFUCG summary judgment in each case, we hold the decision-making responsibility of the circuit judge had been abdicated in contravention of applicable Kentucky law.

Any remaining arguments raised on appeal by appellants are moot and may be considered by the circuit court on remand.

For the foregoing reasons, the opinions and orders of the Fayette Circuit Court are vacated and remanded for proceedings consistent with this opinion.

ALL CONCUR.

All Citations

Not Reported in S.W. Rptr., 2019 WL 1224566

Footnotes

[1] In 1994, a Lexington-Fayette Urban County Government (LFUCG) report, referred to as the "Berry Report," alleged that Robert Clark had engaged in racism in his duties as director of the division. Charges were filed against Clark in the Civil Service Commission in December 1995 and he resigned his employment in January 1996.

[2] The information concerning the *ex parte* communications has been derived from statements of counsel at oral arguments before this Court and from the parties' briefs.

[3] The record on appeal does not reflect the original motion requesting a hearing on the pending motions for summary judgment. However, the circuit clerk's docket contains an electronically filed motion on March 10, 2016, which LFUCG has acknowledged was filed. Additionally, the record does reflect that on March 11, 2016, George Ellis, James Lyons, and Robert Relford's counsel filed a "Re-Notice" of motion for hearing scheduling said hearing for April 8, 2016, in the circuit court.

[4] Effective January 31, 2018, the Kentucky Code of Judicial Conduct was amended by Supreme Court Order and the provisions of Canon 3B are now set forth in Canon 2, Rule 2.9. Rules of the Supreme Court 4.300. Canon 3B as discussed in this Opinion was in effect in 2016.

[5] We are cited to the following comment under Canon 3B(7)(a) which states that "[a] judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond ...." Preceding this comment is the directive that "a judge must disclose to all parties all *ex parte* communications." So, a judge may, of course, request a party to tender findings of fact and conclusions of law so long as the judge promptly informs all other parties of the request. Canon 3B(7)(a) cmt.

[6] The decision-making responsibility of a circuit judge emanates from Section 109 and Section 112 of the Kentucky Constitution.

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000566-MR

GEORGE ELLIS; JAMES LYONS;
AND ROBERT RELFORD — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. THOMAS L. CLARK, JUDGE
ACTION NOS. 97-CI-00542, 97-CI-01882,
97-CI-01899 & 97-CI-02717

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT; JOHN
TURNER; AND ROBERT CLARK — APPELLEES

ORDER

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; TAYLOR AND L. THOMPSON, JUDGES.

An oral argument was conducted in this case on August 22, 2018. On September 19, 2018, appellants filed a motion for Kentucky Rules of Civil

Procedure (CR) 11 sanctions against appellees' counsel Robert L. Roark. In December of 2018, due to the presiding judge being elected to the Kentucky Supreme Court, this case was assigned to a different three-judge panel of the Court of Appeals. Thereafter, this Court conducted a supplemental oral argument on February 26, 2019, whereupon James M. Morris appeared for appellants and Robert L. Roark appeared for appellee. That argument was expressly limited to the following:

(i) Appellants' Motion for CR 11 Sanctions and Appellee's Response thereto;

(ii) The events, circumstances, communications and other related matters pertaining to the tendering of proposed orders to the circuit court during the period of February through April 2016; and

(iii) Relevance or application of Adams v. LFUCG, Appeal No. 2007-CA-000066-MR (Ky. App. 2009), to this appeal.

In consideration of appellants' motion and the arguments presented by counsel regarding the proposed orders tendered to the circuit court by appellees which were entered *in toto* by the circuit court on April 6, 2016, this Court is particularly concerned with the following statements in appellee's brief filed by attorney Roark:

> The circuit court entered summary judgment for appellees LFUCG, adopting modified language from

> appellee's tendered proposed Orders in its Opinion and Order.
>
> . . . .
>
> Appellee LFUCG submits that the only shortfall in this system is attributable to Appellants' refusal to submit Proposed Orders to the Circuit Court. In point of fact, a far cry from Appellants' characterization of a "rubber-stamping" of Appellee's tendered Proposed Order, the language of the Circuit Court's judgment differed significantly from Appellee's Proposed Order.

Appellee's Brief at 6, 22.

This Court has conducted an exhaustive review and comparison of the proposed Opinions and Orders tendered by attorney Roark to the circuit court and those Opinions and Orders entered by the circuit court in each of the three cases below. Those Opinions and Orders now on appeal entered by the circuit court were exactly identical to those tendered by attorney Roark, that included several typographical and clerical errors. The only difference in the opinions and orders was that the judge signed the orders tendered and included the date each was signed. This in no way constituted a modification of the tendered Opinions and Orders.

Kentucky Rules of Civil Procedure (CR) 11 provides that an attorney must sign every pleading, motion, or other paper filed with a court in Kentucky. The rule specifically states:

> 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, 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.

In this case, counsel for appellee tendered a signed brief which is subject to CR 11. Counsel has misrepresented in appellee's brief in at least two separate statements, that the trial court modified his tendered opinions and orders in the three cases below. These written statements are simply not true and constitute misrepresentations to this Court, for an improper purpose under CR 11.

Under CR 11, the test for determining whether an attorney has filed a pleading for an improper purpose or otherwise has affirmatively misrepresented material facts is not one of whether he acted in good faith, but rather whether counsel has made a reasonable inquiry into the underlying facts and circumstances. *Louisville-Rent-A-Space v. Akai*, 746 S.W.2d 85 (Ky. App. 1988). The standard for determining the adequacy of counsel's inquiry is "reasonableness under the

circumstances." *Id.* at 87 (quoting *Albright v. Upjohn Company*, 788 F 2d. 1217, 1221 (6th Cir. 1986). This standard is more strict than merely acting in good faith.

Under the circumstances of this case, we find counsel's conduct in making misrepresentations to this Court in his brief to be unreasonable and designed to mislead the Court. A mere cursory review of the Opinions and Orders entered below reflects that they are identical to those tendered to the court. One of the primary focuses of this appeal looks to the *ex parte* contacts between the circuit court and counsel for appellee that resulted in the tendering of the proposed opinions and orders, which were then adopted *in toto* by the circuit court. As discussed in the Court's opinion rendered this date, the issue on appeal also looks to the circuit court's abdication of its decision making authority in the cases below. The tendering of proposed opinions and orders is not a violation of CR 11. However, the misrepresentation in appellee's brief that the opinions and orders tendered were modified or significantly different from those rendered by the circuit court is clearly a violation of CR 11.

Additionally, we note that counsel for appellee continued this misrepresentation to this Court at oral argument on August 22, 2018, that being to argue orally that the circuit court did not adopt appellee's proposed opinions and orders, *in toto*. While we decline to conduct a show cause hearing for contempt at this time, we must conclude that counsel for appellee has violated CR 11 as set

forth in this Order. Once a violation has been determined, an appropriate sanction is mandatory. CR 11.

Therefore, it is hereby ORDERED that attorney Robert L. Roark, has violated CR 11 of the Kentucky Rules of Civil Procedure, and is hereby fined the sum of $300, which shall be paid to the clerk of this Court not later than the close of business on March 29, 2019. This fine shall be paid by attorney Robert L. Roark, not his client, LFUCG. A copy of this Order shall be served upon LFUCG by the Clerk of this Court.

ALL CONCUR.

ENTERED: MAR 15 2019

JUDGE, COURT OF APPEALS