No. 21966 - Claudette Downing v. Arden Dana Ashley

Workman, Justice, dissenting:

I must dissent to the majority's decision to remand this case for further development on the issue of whether sanctions should be ordered against the Appellee, Mrs. Downing. If the majority was unable to determine the lower court's basis for denying sanctions, they must not have read the transcript.

Senior Judge Robert Abbot,[1] now deceased, made it clear on the record why he was denying sanctions. After hearing argument of counsel on the motion for sanctions, the judge said:

> Let me rule on this one first. I tell you why I am going to overrule. I think I know the considerations on a Court for such a motion, and I realize that in the passage of time that the courts have looked more favorably on a motion of this nature.
>
> Frankly, I believe in them, but in this particular case where you have the underlying fact that your client - - we are not talking about whether you get the money or not, we are talking about from whom you get the money.

[1]Although Judge MacQueen heard the earlier proceeding, he was deemed disqualified in the 1993 proceeding, not on the basis of any actual prejudice, but on the basis of avoiding an appearance of impropriety, since the Appellant was and is the Sheriff of Kanawha County, where Judge MacQueen is the Chief Judge. Then Senior Judge Abbot was appointed in this matter.

> You've got a client here who didn't pay this lady what he owed her. If he didn't think he owed it, he would not have set up any kind of artificial statutory barrier. He would have gone to the man on the merits maybe. (emphasis added)

By failing to appeal the circuit court's 1980 order refusing to give full faith and credit to the Georgia court order which held Appellant in contempt for failing to pay child support, the Appellee effectively lost her opportunity to ever collect that child support. Judge Abbot was an outstanding judge who was particularly skillful at balancing the equities in these types of cases. He made clear that, in light of the fact that the Appellant was off the hook for the child support, Mrs. Downing should not have to pay his attorney fees.

Rule 11 provides, in pertinent part:

> the court, upon motion or upon its own initiative, may 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.

W. Va. R. Civ. P. 11 (emphasis added). The rule clearly makes imposition of sanctions discretionary in nature. Judge Abbot exercised his discretion and clearly there was no abuse of

discretion. His determination to deny sanctions should be upheld so that the parties can act out no further.

The majority points out that the judge did not make a finding that the Defendant owed the Plaintiff money. Let's read the entire excerpt and see what else the court and Appellant's lawyers said:

> MR. GOODWIN: Let me make very, very, very clear and this is the truth, we did not admit on the record and have never admitted and there is no evidence in this record or in this case that he owes that money to the contrary.
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> THE COURT: Nobody has convinced me that he doesn't, but I haven't got that before me.
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> MR. GOODWIN: That is what I am saying, for the Court to make a finding that he owes this money --
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> THE COURT: No, I am not doing that.
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> MR. GOODWIN: -- it is not supported by the record.
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> THE COURT: I am doing that.
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> MS. PRICE: Your Honor, if I could just briefly address that. You asked right at the beginning if he had paid those temporary payments, and I said we didn't concede them.
>
> I am being perfectly honest. This suit was brought a couple of weeks before the

[2]Mr. Joseph R. Goodwin and Ms. Debra C. Price are counsel of record for Appellant.

> election. When the sheriff brought it in and showed it to me, reading the Complaint I was convinced it was completely time barred and I have never once asked him if he ever made those payments. That is why I really have no idea if he did or not.
>
> THE COURT: I don't either really. He hadn't told me he did. I know this lady right here signed an affidavit and swore to God he didn't. I don't think he has done that, has he?
>
> So I am going to deny attorney's fees. Now, you-all get an Order to me and have both of you sign it. (emphasis added)

A first-year law student could read that exchange and determine the judge felt that the Appellant didn't pay the child support he owed, and consequently was not making Appellee pay Appellant's attorney fees. Obviously, there was no finding of fact as to whether the child support was ever paid, because there was no necessity for such a finding in connection with the underlying issue of whether Appellee's claim was barred by her failure to appeal the 1980 order. But for purposes of Rule 11 sanctions, the circuit court obviously viewed it as a very important factor, and rightfully so. Judge Abbot figured if it walked like a duck and quacked like a duck, it was probably a duck. He used the old-fashioned concept of fairness to resolve this issue in a way that took the equities of the entire scenario into account, and he did not abuse his discretion.

On remand, it seems doubly important that the Appellant now have the opportunity to present full evidence as to whether the child support ordered by the Georgia court was ever fully paid. This evidence was not permitted in earlier proceedings, because the underlying issue was whether Appellee had a right to seek to enforce the earlier Georgia child support orders after not appealing the 1980 order. The issue on remand, however, is whether it would be proper to require Appellee to pay Appellant's attorney fees under Daily Gazette Co. v. Canady, 175 W. Va. 249, 332 S.E.2d 262 (1985). The standard set forth there to justify an award of attorney fees is of a "vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law."

With the new focus on child support and innovative strategies courts and other governmental entities across the country are using to try to collect child support, how could it be said that a good faith argument for the modification of existing law could not be made if the child support was never fully paid.

On remand, maybe we'll finally find out if the child support was paid, for Mrs. Downing should be given a full opportunity to offer evidence on this issue.