No. 35440 State of West Virginia Ex. Rel. Richmond American Homes of West Virginia, Inc. and M.D.C. Holdings, Inc. v. Honorable David H. Sanders, Judge of the Circuit Court of Jefferson County

FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Chief Justice, concurring:

The majority opinion has remanded this case to give the trial judge an opportunity to reconsider its sanction ruling under the factors outlined in the opinion. The test adopted by the majority opinion sets out an appropriate standard for trial judges to use when considering the imposition of sanctions on a party under the trial court's inherent authority. Therefore, I concur in the judgment of the majority opinion. I write separately, however, to underscore that the egregious conduct in this case warranted the sanction imposed by the trial judge and thus, no remand is necessitated.

I. A Defendant Cannot Unilaterally Initiate Contact with a Plaintiff to Settle Part or All of a Claim

In this proceeding, Richmond American attempted to justify its unilateral contact with the plaintiffs by pointing to a comment under Rule 4.2 of the Rules of Professional Conduct.[1] The commentary to Rule 4.2 states that "parties to a matter may

[1]Rule 4.2 states the following:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(continued...)

communicate directly with each other[.]" This statement does not authorize a party to unilaterally contact an opposing party without first consulting with counsel for the party. In fact, the Indiana Supreme Court has stated Rule 4.2 "is not intended to insulate from scrutiny situations where a party communicates with another . . . while the adverse party's counsel is . . . unaware of the contact." *In re Anonymous*, 819 N.E.2d 376, 379 n.1 (Ind. 2004). Indeed, this precise issue was addressed by this Court in *Kocher v. Oxford Life Insurance Co.*, 216 W. Va. 56, 602 S.E.2d 499 (2004). In *Kocher*, the defendant unilaterally contacted the plaintiff in an attempt to negotiate a settlement of the case. As a result of such contact, the trial court used its inherent authority to sanction the defendant by imposing a default judgment. After the issue of damages was tried, the defendant appealed. One of the issues raised by the defendant in the petition for appeal was that the trial court committed error in sanctioning the defendant with default judgment for contacting the plaintiff directly and without consulting plaintiff's counsel. This Court reviewed the assignment of error and determined that it had no merit and that the trial court was correct in imposing the sanction. Consequently, this Court accepted the petition for appeal on only one issue: whether the trial court erred in giving a jury instruction on the issue of punitive damages.

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[1](...continued)
It has been correctly stated that "[t]he dual purposes behind Rule 4.2 are to prevent disclosure of attorney/client communications, and to protect a party from 'liability-creating statements' elicited by a skilled interrogator." *State v. Gilliam*, 748 So. 2d 622, 638 (La. Ct. App. 1999).

In a footnote in the *Kocher* opinion, this Court expressed its disapproval of the defendant's action in unilaterally contacting the plaintiff. We said in *Kocher*:

> We observe that the compelling facts of the instant case and applicable law fully support the trial court's ruling imposing sanctions. It should be emphasized that this is not a case of one private litigant innocently seeking to talk directly with another litigant without either party's counsel being present. Rather, this is a case where a sophisticated corporation deliberately lied to a litigant for the purpose of contacting the litigant without his counsel's knowledge, and improperly sought to influence the litigant to settle the case. . . . [The defendant] acknowledged to the trial judge and the jury at trial that [the defendant's] conduct . . . was "wrong." [The defendant] is a sophisticated business entity with substantial experience in the world of litigation. The fact that [plaintiff's] lawyer had specifically advised [the defendant] at a deposition not to discuss settlement with [the plaintiff] is merely cumulative; [defendant's] conduct would have been "wrong" even if [plaintiff's] lawyer had not had the occasion to make such a statement to [the defendant]. [The defendant's] misconduct was a deliberate effort to subvert and circumvent both the attorney-client relationship and the ordinary rules and procedures of litigation. This relationship and these rules and procedures are central to the fair working of our legal system and to the public's confidence in the courts.

Kocher, 216 W. Va. at 60 n.3, 602 S.E.2d at 503 n.3.

It is clear from the observations made in *Kocher* and the principles set out in the instant case that this Court does not approve of a party unilaterally contacting another party. This position recognizes the highly aggressive nature of civil litigation today, which makes unsophisticated plaintiffs extremely vulnerable to unscrupulously high pressure tactics by corporate defendants.

Support for the position taken in *Kocher* and the principles in the instant case may be found from the fact that a defendant may be sued for initiating direct contact with a plaintiff and settling a claim. There is no question that "[a] [plaintiff] has an absolute right to cancel a retainer agreement, discharge an attorney at any time, and independently settle a case without being liable for breach of contract." *Marks v. Struble*, 347 F. Supp. 2d 136, 144 (D.N.J. 2004). However, "those who encourage or cause a rupture in the attorney-client relationship by means of fraud, coercion, or other wrongdoing are not justified in doing so." *Ferris v. South Florida Stadium Corp*., 926 So. 2d 399, 402 (Fla. Dist. Ct. App. 2006). Stated differently, "while the law does not bind a client to an attorney merely because she has entered into a contingent fee contract, the Court will vigorously protect this contractual relationship when a third party willfully interferes with this relationship by inducing the plaintiff-client to discharge her attorney and settle with the third party." *Jackson v. Travelers Ins. Co. of Hartford, Conn*., 403 F. Supp. 986, 998-99 (M.D. Tenn. 1975). Consequently,

> When a third person intentionally interferes with [the attorney-client] relationship for his own benefit, either by unlawful means or by lawful means where there is a lack of sufficient justification, by inducing a client to terminate the relationship with his attorney or otherwise act with the intent to deprive the attorney of his remuneration, a cause of action arises in tort for the damages resulting from that act."

State Farm Mut. Ins. Co. v. St. Joseph's Hosp., 489 P.2d 837, 841 (Ariz. 1971). Furthermore, "To be actionable the conduct of the [defendant] need not necessarily be

egregious in nature but only intentional for the improper purpose of inducing the client to repudiate his contract and settle directly with the [defendant]." *Ronald M. Sharrow, Chartered v. State Farm Mut. Auto. Ins. Co.*, 511 A.2d 492, 499 (Md. 1986). *See also Edwards v. Travelers Ins. of Hartford, Conn.*, 563 F.2d 105 (6th Cir. 1977) (affirming judgment for attorney in action against defendant that induced attorney's client to settle case); *State Farm Fire Ins. Co. v. Gregory*, 184 F. 2d 447, 448 (4th Cir. 1950) (affirming judgment for attorney after finding evidence was sufficient "to support the conclusion that the adjuster obtained the settlement by inducing the insured to abandon his lawyer and save the fee which he had contracted to pay"); *Marks v. Struble*, 347 F. Supp. 2d 136, 144 (D. N.J. 2004) ("New York courts, even though retainer agreements are terminable at will, recognize an attorney's cause of action against a third party who interferes with the attorney's contingency fee agreement."); *Ellis Rubin, P.A. v. Alarcon*, 892 So. 2d 501 (Fla. Dist. Ct. App. 2004) (holding that attorneys stated a cause of action for tortious interference with a business relationship as a result of defendant's direct contact with their client and subsequent settlement of case with their client); *Knell v. State Farm Mut. Auto. Ins. Co.*, 336 N.E.2d 568, 572 (Ill. App. Ct. 1975) (holding that an attorney has a cause of action against a defendant in an underlying action, when "it was either alleged or shown that the [attorney's] client was induced by or conspired with the defendant to breach or terminate his contract with an attorney."). Moreover, plaintiff's counsel may obtain punitive damages against a defendant

for wrongfully contacting his/her client to settle the underlying claim. *See Cross v. American Country Ins. Co.*, 875 F.2d 625, 632 (7th Cir. 1989) ("On the facts of this case, we believe that punitive damages were properly awarded. From the evidence that defendant told Patterson to come to its office to settle without his lawyer, told him that he did not need a lawyer and that litigation takes a long time, the jury was entitled to conclude that the company intentionally induced Patterson to breach his contract and that its conduct was of a willful, wanton, and malicious nature.").

To the extent that a defendant seeks to have direct contact with a plaintiff, I suggest the following procedure be utilized so one does not violate Rule 4.2. Prior to a defendant having direct contact with a plaintiff, the plaintiff's counsel must be informed by defense counsel that such contact is desired. It is the duty of plaintiff's counsel to inform his/her client that the defendant wishes to have direct contact with the plaintiff, either in person or through written or other form of communication. If the plaintiff consents to such direct contact, plaintiff's counsel has a duty to inform the defendant's counsel that defendant can have direct contact with the plaintiff only under the circumstances approved of by the plaintiff.[2] *See Bowens v. Atlantic Maint. Corp*., 546 F. Supp. 2d 55, 90 (E.D.N.Y. 2008) (granting a protective order to prevent defendant from directly contacting plaintiffs); *Murton*

[2]This procedure would be the same for a plaintiff who seeks to initiate direct contact with the defendant.

v. Measurecomp, LLC, No. 1:07CV3127, 2008 WL 5725628, at*6 (N.D. Ohio, Dec. 2, 2008) (requiring defendant to submit any offer of judgment to plaintiffs' counsel and not to plaintiffs).

II. Richmond American's Conduct Undermines the Integrity of the Judicial Process

The record in this case clearly establishes that Richmond American implemented two tactical decisions to undermine the plaintiffs' attorney-client relationship. This Court has definitively stated that "[a]n attorney's nondelegable duty of loyalty to his client and the level of trust a client places in his attorney are . . . essential elements of the attorney-client relationship." *Delaware CWC Liquidation Corp. v. Martin*, 213 W. Va. 617, 622, 584 S.E.2d 473, 478 (2003). In addition, '[t]he attorney/client relationship is one that is highly valued by society and protected in the law. The relationship between lawyer and client is as sensitive a relationship as can exist and demands absolute confidence on the part of the client in order to thrive.' *Nesselrotte v. Allegheny Energy, Inc*., 615 F. Supp. 2d 397, 405 n.14 (W.D. Pa. 2009) (quoting *Klages v. Sperry Corp*., No. 83-3295, 1984 WL 49135 (E.D. Pa. Nov. 9, 1984)). Further, "'[a]s long as our society recognizes that advice as to matters relating to the law should be given by persons trained in the law – that is, by lawyers – anything that materially interferes with that relationship must be restricted or eliminated[.]'" *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W. 2d 604, 607 (Mo. 1993) (quoting *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo. 1978)).

Finally, it has been said that

> [t]he client-lawyer relationship is structured to function within an adversarial legal system. In order to operate within this system, the relationship must do more than bind together a client and a lawyer. It must also work to repel attacks from legal adversaries. Those who are not privy to the relationship are often purposefully excluded because they are pursuing interests adverse to the client's interests.

MNC Credit Corp. v. Sickels, 497 S.E.2d 331, 334 (Va. 1998) (internal quotations and citation omitted).

In the instant case, Richmond American attempted to thwart the plaintiffs' attorney-client relationship by offering their counsel a job. This egregious conduct by Richmond American was a blatant attempt to undermine "the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Learning Curve Int'l., Inc. v. Seyfarth Shaw, LLP*, 911 N.E.2d 1073, 1080 (Ill. App. Ct. 2009). In my judgment, this conduct alone was invidious enough to warrant imposition of default judgment against Richmond American. The integrity of the attorney-client relationship cannot tolerate attempts by defendants to "buy-off" opposing counsel to facilitate an unfair settlement of claims against them.

When Richmond American failed in its attempt to "buy-off" plaintiffs' counsel, it made a tactical decision to drive a wedge between the plaintiffs and their counsel. It did

this initially by having defense counsel ask plaintiffs' counsel to allow defense counsel to have direct contact with the plaintiffs. When this effort failed, Richmond American took the deliberate and calculated step of going directly to the plaintiffs with a malicious letter that was designed to interfere with, and sabotage, the attorney-client relationship between the plaintiffs and their counsel.[3] The trial court's order specifically found that the intent of the letter sent by Richmond American was "to sow discord and distrust between counsel for the Plaintiffs and the Plaintiffs themselves[.]" The letter stated in part: "It is my understanding that your attorney chose not to send this letter to you; therefore I am making the offer directly to you." This statement accuses plaintiffs' counsel of deliberately failing to inform the plaintiffs of a purported partial settlement offer. This accusation implicitly suggests to the plaintiffs that they cannot trust their attorney, and that their attorney has elevated his interests above their interests.

In addition to attacking the integrity of plaintiffs' counsel, the letter also sought to intimidate the plaintiffs into accepting Richmond American's offer of partial settlement. The letter did this by stating the following: "This offer is intended to be admissible in court should this lawsuit progress." It is quite obvious that this statement was designed to place pressure on the plaintiffs to accept the partial settlement, or run the risk of having a jury be

[3]As pointed out in the majority opinion, the letter purportedly offered to install a radon reduction system in the plaintiffs' homes.

informed that they refused the offer. In making this groundless threat, Richmond American knew, but the plaintiffs did not, that "[t]he well established and widely recognized general rule is that an unaccepted offer to compromise a disputed claim is not admissible as evidence[.]" *Shaeffer v. Burton*, 151 W. Va. 761, 770, 155 S.E.2d 884, 891 (1967). *Accord Lively v. Rufus*, 207 W. Va. 436, 449, 533 S.E.2d 662, 675 (2000) ("[W]e find that the circuit court did not err by excluding the 'Settlement and Indemnification Agreement.'"); *Schartiger v. Land Use Corp.*, 187 W. Va. 612, 617, 420 S.E.2d 883, 888 (1991) ("The trial court properly excluded the evidence of an offer of settlement under Rule 408, W. Va. R. Evidence."). *See also Brynwood Co. v. Schweisberger*, 913 N.E.2d 150, 160 (Ill. App. Ct. 2009) ("It is well settled that offers of settlement and compromise are not admissible into evidence."); *McMullen v. Kutz*, 985 A.2d 769, 774 (Pa. 2009) ("[A]n offer to compromise a claim, not accepted, cannot be introduced into evidence[.]"). In the final analysis, to condone the conduct of Richmond American "would deprecate and lessen the sanctity of the attorney-client [relationship]." *United States v. Edwards*, 39 F. Supp. 2d 716, 746 (M. D. La. 1999). Consequently, I believe the trial court was correct by imposing the sanction of default judgment. I also believe the record will support such a sanction on remand under the test outlined in the majority opinion.