Cite as 2013 Ark. App. 372

ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-12-772

JONATHAN MURPHY d/b/a MURPHY TRUCKING; BRANDON BANKS; VINCENT BANISTER; GARY ALEXANDER; ALEXANDER TRANSPORTATION, LLC; MICHAEL GREEN; KENDRICK NELSON; ROBBIE CLINE and SYLVESTER CLINE d/b/a CLINE BROTHERS TRUCKING; C.J. KING; and C.J. KING TRUCKING

APPELLANTS

V.

BUNGE NORTH AMERICA, INC., and KRIS TILLIE

APPELLEES

Opinion Delivered June 5, 2013

APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT
[NOS. CV2009-768-5, CV2011-286-5]

HONORABLE JODI RAINES DENNIS, JUDGE

AFFIRMED

ROBIN F. WYNNE, Judge

This is an attorney-disqualification case. Luther Sutter, plaintiffs' counsel in two race-discrimination cases that were consolidated in the Jefferson County Circuit Court, was disqualified from representation, and we are asked to review that decision on appeal. We hold that the circuit court did not abuse its discretion in granting the motion for disqualification; accordingly, we affirm.

In July 2009, Sutter filed a complaint on behalf of Jonathan Murphy d/b/a Murphy Trucking against Bunge North America, Inc., and Kris Tillie, a Bunge employee, alleging race discrimination under the Arkansas Civil Rights Act. By the fall of 2009, several other

plaintiffs (collectively, Murphy), also African-Americans engaged in the trucking business, had joined the lawsuit. In May 2011, Sutter filed a separate lawsuit on behalf of C.J. King and C.J. King Trucking (collectively, King) against the Bunge defendants, alleging essentially identical claims of race discrimination.

Pursuant to Arkansas Rule of Civil Procedure 42, Bunge filed a motion to consolidate the Murphy and King cases on June 9, 2011. At the hearing on the motion to consolidate, Sutter argued against the motion on the ground that he had a conflict and plaintiff King did not wish to execute a written waiver. He asserted that the conflict required written consent under Rule 1.7(b) of the Arkansas Rules of Professional Conduct. Sutter further asserted that if the lawsuits were tried separately, once one trial had concluded, "the conflict will essentially disappear because we will have a separate jury." Defense counsel countered that if there was a conflict, it existed whether the cases were consolidated or not. At the conclusion of the hearing, the court stated,

> It will not be the Court depriving your client of a right to have an attorney of his choice. He can have you, and you could be violating the Rules of Professional Conduct. I am not going to take you off the case. You have just got to decide whether you're going to stay on ethically or not.

On September 6, 2011, the court entered orders consolidating the two cases for pretrial matters and for trial.

On January 11, 2012, appellees filed a motion to disqualify plaintiffs' counsel and a supporting brief. On February 15, 2012, attorney Alex Guynn filed an entry of appearance on behalf of the King plaintiffs.

A hearing was held on the motion to disqualify on March 29, 2012. Appellees argued that Sutter had admitted to a conflict of interest under Rule 1.7, that it was too late to obtain

informed consent, and that they were concerned with the integrity of the proceedings. Sutter responded by emphasizing that disqualification is an extreme sanction, that this was a waivable conflict, and that it was proper to move forward now that Guynn had been brought in as co-counsel. Guynn stated that King was willing to sign a waiver "if needed."

The conflict was revealed to the court at an in camera hearing immediately following. Sutter believed that a conflict did exist, but he seemed to believe that it was cured by Guynn jointly representing King; he stated that he would get a written waiver within two weeks.

On May 30, 2012, the circuit court entered an order granting the motion for Sutter's disqualification. The court made few findings, but it did note that Sutter had failed to provide a waiver. On June 12, 2012, plaintiffs filed a motion to alter or amend pursuant to Rule 59. On June 29, 2012, appellants filed a notice of appeal from the order disqualifying Sutter from representation. On July 5, 2012, appellants filed a waiver executed by plaintiff C.J. King on July 4, 2012. Appellees filed an objection to the filing of the alleged waiver. The circuit court entered no further orders.

An appeal may be taken from a circuit court order that disqualifies an attorney from further participation in the case. Ark. R. App. P.–Civ. 2(a)(8) (2012). Regarding attorney disqualification, our supreme court has written:

> Disqualification of an attorney is an absolutely necessary measure to protect and preserve the integrity of the attorney-client relationship; yet, it is a drastic measure to be imposed only where clearly required by the circumstances. *Weigel v. Farmers Ins. Co., Inc.*, 356 Ark. 617, 158 S.W.3d 147 (2004); *Craig v. Carrigo*, 340 Ark. 624, 12 S.W.3d 229 (2000). We review a circuit court's decision on whether to disqualify an attorney under an abuse-of-discretion standard. *Id.* An abuse of discretion may be manifested by an erroneous interpretation of the law. *Id.* The Arkansas Rules of Professional Conduct are applicable to disqualification proceedings. *Id.* However, a violation of these rules does not automatically compel disqualification; rather, such matters involve the exercise of judicial discretion. *Id.*

Whitmer v. Sullivent, 373 Ark. 327, 331, 284 S.W.3d 6, 9 (2008). "We must never forget that a disqualification, though aimed at protecting the soundness of the attorney-client relationship, also interferes with, or perhaps destroys, a voluntary relationship by depriving a litigant of counsel of his own choosing—oftentimes affecting associations of long standing." *Burnette v. Morgan*, 303 Ark. 150, 155, 794 S.W.2d 145, 148 (1990).

With those principles in mind, we turn to Rule 1.7 of the Arkansas Rules of Professional Conduct (2012), which provides as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another clients [sic]; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer,
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law:
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Here, we note that Sutter himself asserted to the circuit court that he had a conflict of interest, and he maintains on appeal that a conflict existed. He argues, nonetheless, that he should be allowed to continue representation because he fulfilled the requirements of Rule

1.7(b) for representing clients despite the existence of a concurrent conflict of interest. He is incorrect because he failed to obtain written informed consent until after the court had issued its ruling, and the consent that he filed was from King only—not from *each* affected client, as the Rule requires.

Under the particular facts of this case, we cannot say that the circuit court abused its discretion in granting the motion to disqualify appellants' counsel.

Affirmed.

HARRISON and WHITEAKER, JJ., agree.

Sutter & Gillham, P.L.L.C., by: *Luther Oneal Sutter*, for appellants.

Littler Mendelson, P.C., by: *Eva C. Madison*, for appellees Bunge North America, Inc., and Kris Tillie.