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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-13-753

KEN DAVID SWINDLE APPELLANT V. SOUTHERN FARM BUREAU CASUALTY INSURANCE CO. APPELLEE	**Opinion Delivered** March 12, 2014 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. CV-2012-1854-5] HONORABLE XOLLIE DUNCAN, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from an order granting summary judgment against and imposing Rule 11 sanctions on appellant, an Arkansas attorney. On appeal, appellant argues that the trial court erred in granting summary judgment to the appellee insurance company and in denying his motion for judgment on the pleadings. He also argues that the trial court erred in *sua sponte* imposing sanctions against appellant, awarding appellee attorney's fees and expenses in the amount of $6,785.65. We affirm.

We first address the summary-judgment issue. Our standard of review is well established:

> Summary judgment may be granted only when there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof. On appeal from the grant of summary judgment, we determine if there are genuine issues of material fact in dispute by viewing the evidence in the light most favorable to the party resisting the

> motion and resolving any doubts and inferences against the moving party. As to the issues of law presented, our review is de novo.

Hoosier v. Interinsurance Exchange, 2014 Ark. App. 120, at 4, 433 S.W.3d 259, 262 (internal citations omitted).

Viewing the evidence in light of this standard, the record shows that appellant negotiated a settlement with appellee, Southern Farm Bureau Casualty Insurance Co., on behalf of two of appellant's clients. The checks were payable to the clients individually, to the appellant as attorney, and to a chiropractic practice. Appellant submitted the checks first to appellee's bank (First Security) and then to his own bank (Arvest) on September 6 and 11, 2012, respectively. Both banks rejected the checks on those occasions because the endorsement of the chiropractic practice was missing. Appellant again presented the checks to appellee's bank on September 18. They were on that occasion rejected for an illegible endorsement.

We do not agree with appellant's argument that a genuine issue of material fact was presented regarding the reason that the checks were dishonored. Appellant presented affidavits from two of his employees to the effect that Mr. Jason Lyles, an employee at First Security Bank, told them that appellee did not have sufficient funds in its account to cover the checks. However, an affidavit in support of a motion for summary judgment must be based on personal knowledge of the affiant, setting forth facts that would be admissible in evidence. Ark. R. Civ. P. 56(e); *see, e.g., City of Fort Smith v. Driggers*, 294 Ark. 311, 742 S.W.2d 921 (1988). The affidavits of appellant's employees were based on inadmissible hearsay, not personal knowledge, and therefore cannot be considered in the summary-

judgment analysis. *Holt Bonding Co. v. First Federal Bank*, 82 Ark. App. 8, 110 S.W.3d 298 (2003). In response to appellant's hearsay affidavits, appellee presented the affidavit of the vice president of First Security to the effect that appellee did in fact at all times have sufficient funds to cover the checks and that the the checks were dishonored on September 18 was only because of improper endorsement. Therefore, even assuming *arguendo* that a contract existed between appellant and appellee, appellant has failed to show any breach by appellee because the undisputed admissible evidence shows that the checks were dishonored due to insufficient or defective endorsements, something that was entirely out of the control of appellee. On this record, we hold that the trial court did not err in denying appellant's motion for judgment on the pleadings and granting appellee's motion for summary judgment.

Nor do we agree that the trial court erred in imposing sanctions against appellant in the form of expenses and attorney's fees. Arkansas Rule of Civil Procedure 11 requires that an attorney may file a pleading only after conducting a reasonable inquiry showing that it is well grounded in fact.[1] 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. Ark. R. Civ. P. 11(a).

[1]To do less would, incidentally, be inconsistent with the duty of *uberrima fides* that an attorney owes to his client. *See Howard v. Rayner*, 192 Ark. 721, 94 S.W.2d 110 (1936).

Whether a violation of Rule 11 occurs is a matter for the trial court to determine and, because this determination involves matters of judgment and degree, we will reverse a Rule 11 determination only if the trial court has abused its discretion. *Crockett & Brown, P.A. v. Wilson*, 321 Ark. 150, 901 S.W.2d 826 (1995). There was evidence that appellee offered to reissue the checks after they had been rejected for improper endorsement, but appellant telephoned on Friday, September 28, 2012, and issued an ultimatum: unless he had the money in his hands by the close of the business day, he would sue. Appellant sued appellee on Monday, October 1, 2012. Soon thereafter, appellee reissued the checks, as it had offered to do prior to suit. We conclude that, given that the purpose of the rule is to deter litigation abuse, and the undisputed evidence that appellee did everything required of it, that immediate payment was not procured solely because of repeated mistakes by appellant, and that appellant appears to have filed suit out of anger rather than any need to do so, the trial court was within its discretion in awarding sanctions on its own motion.

Affirmed.

WYNNE and BROWN, JJ., agree.

Law Offices of Steven H. Kay, P.A., by: *Joseph Paul Smith*, for appellant.

Davis, Clark, Butt, Carithers & Taylor, PLC, by: *Constance G. Clark* and *Sidney P. Davis*, for appellee.