

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

IN THE MATTER OF:) CASE NO. 04 MA 264
)
THE ESTATE OF RAYMOND) O P I N I O N
DeCARLO, DECEASED.)
)

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,
Probate Division, Case No. 2004ES469.

JUDGMENT: Reversed.

APPEARANCES:

For Appellee:

Attorney John Juhasz
7330 Market Street
Youngstown, Ohio 44512

For Appellant:

Attorney Mark Meyer
Attorney Jason Shipp
1030 Fifth Avenue
Pittsburgh, Pennsylvania 15219

JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 8, 2005

VUKOVICH, J.

{¶1} Appellant Goldberg, Persky & White, P.C. (GPW) appeals the decision of the Mahoning County Probate Court vacating its prior decision that approved of the litigation agreement between GPW and Ellen J. DeCarlo, executrix of the Estate of Raymond A. DeCarlo, for asbestos litigation. GPW also finds fault with the Probate Court ordering Ellen J. DeCarlo thirty days to supply it with a “Representation Agreement” with other asbestos litigation counsel. The issue before the court is whether the probate court abused its discretion in making either of the above two orders. For the reasons expressed below, the judgment of the probate court is reversed.

STATEMENT OF CASE

{¶2} GPW, a Pennsylvania law firm, represented Raymond A. DeCarlo five years prior to his death in an asbestos-related personal injury lawsuit in Cuyahoga County Common Pleas Court. After his death, GPW continued its representation by representing the Estate of Raymond A. DeCarlo in the asbestos-related personal injury lawsuit.

{¶3} On July 13, 2004, after Raymond’s death, the Mahoning County Probate Court approved the representation agreement between Ellen J. DeCarlo, executrix of the Estate of Raymond A. DeCarlo, and GPW for the continued representation in the asbestos-related personal injury lawsuit. Thus, it granted GPW pro hac vice status.

{¶4} On November 18, 2004, a hearing was held in the Mahoning County Probate Court. The hearing was regarding a check that was forwarded by GPW to the executrix’s estate attorney, Albert J. Ortenzio. At the hearing, GPW admitted that the check was for the incorrect amount in that it had pre-deducted its attorney fees and costs, i.e. it was for net proceeds, not gross proceeds. GPW admitted that this was a clerical error on its part and that it would be corrected.

{¶5} The probate court at this point asked whether the settlement amount had yet been approved by the court. GPW acknowledged that it made another clerical mistake when it did not follow its prior practice of forwarding the applications for approval to the executrix (through her attorney) for filing with the probate court. The probate court also became aware of three other settlements that were sent to the

executrix and deposited into an interest bearing account without receiving prior approval from the probate court. GPW stated that it may have not forwarded the approval application to the executrix by mistake and that is why there was no prior approval.

{¶16} After hearing this information, the probate court addressed Ellen J. DeCarlo. It explained that she asked to be named executrix, and that this was a “severe” responsibility. (Tr. 11). It explained that it was her “duty to make sure that everyone is complying with the law of Ohio and your instructions.” (Tr. 11). The court then adjourned and stated that it would enter its orders.

{¶17} On November 22, 2004, the court entered judgment. In this order the court stated:

{¶18} “Upon the Court’s review of the record of this case and the testimony presented, the Court finds not less than four (4) ‘settlements’ have been accepted by Goldberg, Persky, without the Court’s prior approval and contrary to Local Rule 70.5(B). As a consequence, more than \$25,000.00 is on deposit in a restricted Sky Bank account, but without the benefit of the Court knowing who the settling defendants are and whether each such settlement is fair and reasonable. The Court finds that Goldberg, Persky has, therefore, exceeded any authority to act on behalf of the Estate and has hindered, delayed and obstructed the administration of this Estate. In this regard, Goldberg, Persky has accepted ‘settlements,’ without their first obtaining the prior, written authority of the Court, and it has deducted attorneys’ fees and expenses, without the prior approval of the Court.” (11/22/04 J.E.).

{¶19} The court then vacated its order approving the representation agreement between GPW and Ellen J. DeCarlo, it ordered that GPW immediately comply with the provisions of Loc.R. 70.5 and 70.6, and it ordered Ellen J. DeCarlo to have within thirty days a representation agreement with another asbestos litigation attorney. GPW appeals from this decision raising four assignments of error.

ASSIGNMENT OF ERROR NUMBER ONE

{¶10} “THE PROBATE COURT ERRED BY FINDING THAT GPW VIOLATED MAHONING COUNTY PROBATE COURT RULE 70.5(B).”

{¶11} This assignment of error deals strictly with Loc.R. 70.5(B). This rule states:

{¶12} “No fiduciary, or any person purporting to act for them or the estate, shall have any authority to execute or approve of the execution of releases, or another document which may reflect the release or waiver of any rights of the estate or next of kin, in favor of any defendant under such claims without first obtaining the prior written approval and authority of the Court to do so. The fiduciary and attorney of record for the estate must, with the full cooperation of the litigation counsel, first apply for such authority by completing and filing an *Application For Authority To Execute Release Under Special Litigation Claims* [Local Form 70.5(B) M.C.]. In doing so they shall:

{¶13} “(1) Disclose the identity of the settling defendant;

{¶14} “(2) Disclose the excepted settlement sum to be paid by that defendant;

{¶15} “(3) Disclose the anticipated date upon which that defendant is to pay and satisfy such settlement; and

{¶16} “(4) Append a copy of the proposed release for the identified defendant to that *Application*, or a certification by litigation counsel as to the existence of such a release or settlement.”

{¶17} GPW argues that nothing in the record suggests that the executrix or any other person purporting to act on her behalf executed or approved the execution of releases. Therefore, according to GPW, it did not violate the local rule.

{¶18} GPW’s argument is unpersuasive. When it distributed the four checks for the settlement to Ellen J. DeCarlo to put into an interest bearing account, it was executing a release and was not acting in compliance with Loc.R. 70.5(B). It admitted at the hearing that it probably was a clerical error on its part that the Application for Approval was not sent to Ellen J. DeCarlo’s attorney, Attorney Ortenzio, for submission to the probate court. Thus, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

{¶19} “THE PROBATE COURT ERRED BY VACATING ITS ORDER APPROVING GPW AS THE FIDUCIARY’S LITIGATION COUNSEL.”

{¶20} GPW argues that a fiduciary has “unfettered discretion” to appoint counsel to represent that fiduciary during the administration of the estate. It

references Ellen J. DeCarlo's choice to have GPW continue to represent her husband's interest and her own in the asbestos action. The probate court approved this agreement pursuant to its authority under Ohio Sup.R. 71(I). GPW argues that there is no authority for the proposition that the probate court can vacate that order and make the fiduciary retain other counsel. It cites *In re Estate of Deardoff* (1984), 10 Ohio St.3d 108, 109, and *In re Estate of Ross* (1989), 65 Ohio App.3d 395, in support of this proposition.

{¶21} *Deardoff* dealt with whether “a testator may compel the executor of his or her estate to select an attorney so designating in the testator’s last will and testament.” *Deardoff*, 10 Ohio St.3d at 108. The *Deardoff* court held that such language in the will is merely advisory and not binding on the executor. It reasoned that the attorney-client relationship is personal and usually involves confidential matters. *Id.* at 109. As such, it concluded that “the relationship demands complete faith and trust between the parties,” and thrusting such a relationship upon the client against his will “would be ill-conceived and not conducive to an atmosphere of reciprocal confidence.” *Id.* Thus, for that reason it stated that forcing an attorney of the testator’s choice on the executor would interfere with the administration of the estate. *Id.*

{¶22} In *Estate of Ross*, the executrix had her own counsel to pursue the wrongful death action. The beneficiaries of the estate moved to intervene and asked the probate court to name their counsel as co-counsel in the wrongful death action. The probate court denied the motion by stating that the executrix, as the personal representative, had the right to select the counsel for that action. On appeal, the appellate court affirmed the probate court’s decision. The court explained that wrongful death actions shall be brought in the name of the deceased’s personal representative and that courts have interpreted this to mean that only the personal representative has the legal capacity to sue under this wrongful death statute. *Estate of Ross*, 65 Ohio App.3d at 400. It went on to explain that the representative is like the executor. *Id.* at 400-401. While it affirmed the probate court’s ruling on the request to have the beneficiaries counsel added as co-counsel in the wrongful death action, the appellate court cautioned that the representative’s discretion in choosing his attorney and directing the course of the litigation is not unlimited. *Id.* at 401. It added that the

representative could be removed if his conduct is not in the best interest of the beneficiaries. *Id.*

{¶23} These cases are factually distinguishable from the matter at issue. Both cases deal with someone other than the court directing the executor/representative as to who should be the attorney representing the estate/ beneficiaries. Regardless, both cases stand for the proposition that the executrix has the authority to determine who she wants to represent the estate in the wrongful death proceedings, i.e. the asbestos litigation.

{¶24} Yet, the above analysis does not necessarily mean that the executrix's choice could not be removed. The Ohio Supreme Court in *Royal Indemn. Co. v. J.C. Penney Co., Inc.* (1986), 27 Ohio St.3d 31, held that, "[a] trial court may revoke pro hac vice admission of an attorney who has engaged in egregious misconduct which could taint or diminish the integrity of future proceedings." *Id.* at paragraph one of the syllabus.

{¶25} In *Royal Indemn.* an out of state attorney's pro hac vice admission was revoked because that attorney told the trial court that certain subpoenaed documents did not exist when in fact they did exist and were in his file at the time that the representations were made. In upholding the trial court's revocation of the pro hac vice admission, the Court explained that a trial court's "power to protect its pending proceedings includes the authority to dismiss an attorney who cannot, or will not, take part in them with a reasonable degree of propriety. *Laughlin v. Eicher* (D.D.C. 1994), 145 F.2d 700." *Id.* at 34. It then added that the trial court's conclusion that, "[t]he records here clearly establish that the law firm of Cozen, Beiger, & O'Connor and its members have engaged in conduct involving deceit, with respect to their control after possession of discoverable matter * * *," was supported by the record. *Id.* at 35-36. Thus, it found that the trial court did not abuse its discretion.

{¶26} This case establishes that a trial court may control pro hac vice admission attorneys by removing them from cases when counsel has "engaged in conduct involving deceit" or "truly egregious conduct which is likely to infect future proceedings." *Id.* at 36. Furthermore, it implicitly indicates that there must be some correlation between the attorney's conduct and the sanction imposed by the court.

{¶27} In the matter at hand, nothing in the record supports the position that GPW intentionally made any misrepresentations to the probate court. GPW stated that it was a clerical error that it sent net proceeds instead of gross proceeds and it was also a clerical error that it had forwarded the three other checks without forwarding the Application for Approval to Ellen J. DeCarlo for filing in the probate court. This type of clerical error does not amount to “truly egregious conduct which is likely to infect future proceedings.” Accordingly, the probate court’s sanction of removing GPW as counsel was not proportionate to the inadvertent and clerical mistakes that were made. Or, in other words, there was no correlation between the sanction and GPW’s conduct. As such, the probate court abused its discretion in vacating its prior approval of the litigation agreement and ordering Ellen J. DeCarlo to retain other asbestos litigation counsel. This assignment of error has merit.

ASSIGNMENT OF ERROR NUMBER THREE

{¶28} “THE PROBATE COURT ERRED BY DECLARING THAT GPW HAD NO RIGHT, EFFECTIVE IMMEDIATELY, TO HOLD ITSELF OUT AS A REPRESENTATIVE OF THE ESTATE.”

{¶29} Under this assignment of error, GPW states that the probate court’s order conflicts with an order from Cuyahoga County Common Pleas Court. As explained above, the asbestos litigation is occurring in Cuyahoga County Common Pleas Court. That common pleas court has a general rule that allows the withdrawal of counsel to occur only upon the approval of the court. Cuyahoga Cty. Gen. Div. Loc.R. 10(B). According to GPW, the Cuyahoga County Common Pleas Court, in an order, stated that GPW is to remain as litigation counsel to the asbestos case “pending further Order of this Court or the Court of Appeals, as applicable.”

{¶30} Our disposition of the previous assignment of error renders this assignment of error moot. Thus, this court does not need to address it.

{¶31} However, even if this court did address the assignment of error, the arguments made under it are not reviewable. The alleged order from Cuyahoga County Common Pleas Court that is attached to GPW’s brief is neither time-stamped or certified. Furthermore, and more importantly, it was never made part of the record

before this court. Accordingly, this court cannot review the effect of this alleged order on the case.

ASSIGNMENT OF ERROR NUMBER FOUR

{¶32} “THE PROBATE COURT ERRED BY DIRECTING THE EXECUTRIX TO SUPPLY THE LOWER COURT WITH A REPRESENTATION AGREEMENT WITH ANOTHER ASBESTOS LITIGATION COUNSEL WITHIN THIRTY DAYS.”

{¶33} This assignment of error is a reiteration of the above arguments made under the other assignments of error – the probate court acted beyond its power in requiring Ellen J. DeCarlo to choose another asbestos litigation attorney. As we have already found merit with the second assignment of error, the additional and repetitive arguments made under this assignment of error do not need to be addressed.

{¶34} For the foregoing reasons, the judgment of the probate court is hereby reversed. The litigation agreement between the executrix Ellen J. DeCarlo and GPW is hereby reinstated. Accordingly, GPW has the right to hold itself out as a representative of the Estate upon any of its wrongful death claims.

Waite, J., concurs.

DeGenaro, J., concurs.