

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000547-MR

LINDA COLLIER, INDIVIDUALLY,
AND AS ADMINISTRATRIX OF THE
ESTATE OF ROBERT F. COLLIER,
DECEASED, AND ANGIE THOMAS;
MARCIE THOMAS; AND
ROBERT COLLIER

APPELLANTS

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 99-CI-00040

RODNEY L. MCKIBBEN;
AND THE CITY OF MAYSVILLE, KENTUCKY

APPELLEES

OPINION
REVERSING

** ** * * *

BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: Appellants, Linda Collier, Individually and as Administratrix of the Estate of Robert F. Collier, deceased, and Angie Thomas, Marcie Thomas and Robert Collier, ("Appellants") seek review of an order of the Mason Circuit Court dismissing for want of prosecution under CR 77.02(2). We reverse.

On February 4, 1999, Appellants, the spouse and children of Robert F. Collier, filed a complaint in the Mason Circuit Court against the Appellees, Rodney L. McKibben and the City of Maysville ("Appellees"). According to the complaint, on or about February 5, 1998, Robert F. Collier, a pedestrian, was struck by an ambulance operated by Mr. McKibben, and owned by the City of Maysville. Mr. Collier died on February 6, 1998, as a result of the injuries sustained in the accident.

Appellees filed their answer on February 26, 1999. Interrogatories were subsequently filed. Depositions were taken in late October 1999. On December 8, 2000, the defendants' counsel filed a Notice of Substitution of Counsel.

On January 3, 2002, the trial court served a Notice to Dismiss for Lack of Prosecution. On February 15, 2002, a show cause hearing was held. Appellants' then counsel requested that the matter remain on the docket. He explained that he had tendered notices to take depositions that day. He also explained that Appellees had scheduled certain depositions that had been cancelled. "After that point in time," [Appellants' counsel] . . . was in an automobile accident. . . . [and had not] done anything since then, really."

On February 19, 2002, the circuit court entered an order dismissing without prejudice for want of prosecution under CR 77.02(2).

On appeal, Appellants maintain that they will be substantially prejudiced by the court's order, because they cannot re-file their claim, the statute of limitations having run. Appellants assert that due to the "type of action and the extremity of the injury" it was clearly an abuse of discretion to dismiss the action and deny . . . [them] the right to have their case fully adjudicated by a jury."

Much of Appellees' response is devoted to an argument on the merits. Appellees assert that Appellants "are not substantially prejudiced. . . . [because] there is no evidence showing negligence on the part of the Appellees." Moreover, "Appellants still have a cause of action against their former attorney for legal malpractice, and consequently can recover the same or greater damages . . . that potentially could have been recovered in the underlying case." Appellees do not claim that they have suffered any prejudice.

CR 77.02(2) provides: At least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year; that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made.

"The purpose of CR 77.02(2) is to afford trial judges a means by which they may periodically review their dockets and purge them of cases which have lapsed into inactivity."¹

In *Gill v. Gill*,² cited by Appellants, the trial court had dismissed for want of prosecution upon defendant's motion to dismiss under CR 41.02³. Plaintiffs' counsel had argued that the delay was caused, in part, by his own political activities, and by intense investigation of witnesses and public records. The trial court explained that:

Each case must be considered in the light of the particular circumstances involved and length of time is not alone the test of diligence. 24 Am.Jur.2d, Dismissal, Discontinuance and Nonsuit, § 59 (page 50). . . .

While we are extremely loath to find an abuse of discretion on the part of the trial court, in this case it seems to us that the dismissal was a rather harsh penalty to impose on the plaintiffs for the delay.

We must decide whether the trial court abused its discretion in light of the particular circumstances involved in this case. Although dismissed *without prejudice*, the effect of the trial court's ruling could not be more harsh, because

¹ *Bohannon v. Rutland*, Ky. 616 S.W.2d 46, 47 (1981).

² Ky. 455 S.W.2d 545 (1970).

³ Subsection (1) of the Rule provides: "For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

Appellants cannot re-file their claim. In that context, we believe that this Court's reasoning in *Polk v. Wimsatt*⁴ is applicable:

Because of the grave consequences of a dismissal with prejudice, we have no doubt that such a dismissal pursuant to either CR 41.02 for failure to prosecute or CR 77.02 should be resorted to only in the most extreme cases, see 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2369 (1971), and that this Court should carefully scrutinize the trial court's exercise of discretion in doing so. This kind of dismissal may even raise questions of constitutional import. [citation omitted]. Less drastic remedies . . . would normally suffice to punish a dilatory, but not recalcitrant, party where the rights of other parties have not been prejudiced by the delay.

Here, Appellees do not complain that they were prejudiced in any way. There is no evidence of any recalcitrant conduct on Appellants' part. Under the circumstances, we must conclude that the trial court abused its discretion.

We reverse the Order dismissing for lack of prosecution, entered February 19, 2002, and remand this case to the circuit court for reinstatement on the docket.

TACKETT, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

⁴ Ky. App., 689 S.W.2d 363, 364-65 (1985).

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