

RENDERED: January 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001870-MR

GERRY ANN TRAVILLIAN

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 99-CI-00327

DR. ZEEV ZUSSMAN;
DR. DENNIS ULRICH and
EAST BERNSTADT MEDICAL CLINIC

APPELLEES

AND
NO. 2003-CA-000135-MR

GERRY ANN TRAVILLIAN

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 99-CI-00327

DR. ZEEV ZUSSMAN; and
EAST BERNSTADT MEDICAL CLINIC

APPELLEES

OPINION

AFFIRMING

** ** * * * **

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND BUCKINGHAM, JUDGES.
EMBERTON, CHIEF JUDGE. On May 5, 1999, Gerry Ann Travillian filed a pro se medical malpractice action against Dr. Zeev Zusman and the East Bernstadt Medical Clinic alleging negligence over a period of time from November 19, 1997, through May 14, 1998. After Travillian failed to prosecute the matter for a period of two years, on August 26, 2002, the circuit court dismissed the action without prejudice for want of prosecution. Travillian appealed the order on September 5, 2002, but on December 6, 2002, requested the circuit court to reinstate the original action. The motion was denied on December 17, 2002, and she filed a second appeal from that order. We consider both appeals together.

Once Travillian filed a notice of appeal from the August 2002 order, the circuit court no longer had jurisdiction to modify or change its judgment, which forms the basis of the appeal.¹ The trial court properly denied the motion to reinstate the original action.

As to the merits of Travillian's claim that the trial court erred when it dismissed her claim for lack of prosecution, our review is limited by the abuse of discretion standard. "The trial court was vested with broad discretion in determining the question of whether the action should be dismissed for want of

¹ City of Devondale v. Stallings, Ky., 795 S.W.2d 954, 957 (1990).

diligent prosecution. Unless that discretion is abused this court will not intervene."² CR³ 77.02(2) provides that:

At least once each year trial court 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.

On June 17, 1999, Annette Morgan entered her appearance as counsel for Travillian. Following initial discovery requests, Travillian's deposition was taken on March 27, 2000. On December 12, 2000, Morgan moved to withdraw from the case, and on March 9, 2001, she withdrew as counsel. Tod D. Megibow filed an entry of appearance on April 20, 2001. After the case was inactive for the next fourteen months, on June 13, 2002, the trial court issued a "Notice to Dismiss for Lack of Prosecution" pursuant to CR 77.02(2).

A hearing was held on August 9, 2002, at which Travillian alleged that the delay in prosecuting the case was due to lack of cooperation by the defendants in the attempt to schedule depositions. However, the affidavit filed in support

² Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equip. Co., Ky., 451 S.W.2d 401, 403-404 (1970).

³ Kentucky Rules of Civil Procedure.

of her contention states that these attempts were made only after receipt of the court's notice to dismiss.

For two years prior to the court's notice to dismiss for lack of prosecution, there was no attempt by Travillian to prosecute the action and for well over one year the case was completely inactive. The last act of alleged negligence occurred in May 1998. The delay in prosecuting the action is unreasonable and unfair to the defendants attempting to defend her allegations. We find no abuse of discretion.

The order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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