

RENDERED: April 1, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000541-MR

PAULA W. WALSER
AND JAMES M. WALSER

APPELLANTS

v. APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 94-CI-01279

CHARLES P. MAUZY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

KNOPF, JUDGE: Paula and James Walser appeal from an order of the Jefferson Circuit Court dismissing for lack of prosecution their legal negligence claim against Charles P. Mauzy. The Walsers argue that the trial court abused its discretion in dismissing their complaint. Based on the facts and circumstances of this case, we agree with the trial court that the Walsers failed to

show good cause for their delay in completing discovery and bringing their claim to trial. Hence, we affirm.

Mauzy had represented the Walsers regarding a personal injury which Paula had suffered in Alabama in 1989. The Walsers allege that Mauzy failed to file a complaint in Alabama. They also assert that Mauzy repeatedly misrepresented the status of the case to them.

On March 11, 1994, Paula and James Walser filed a complaint against Mauzy, alleging legal negligence. In 1997, Mauzy filed for summary judgment, arguing that, even if he had been negligent, the Walsers could not recover because their personal injury claim in Alabama would have been barred under the doctrine of official immunity. The trial court agreed and dismissed the Walsers' complaint. In the first appeal, this Court reversed, finding that the Walsers' underlying tort claim would not have been barred under Alabama law.¹

The matter was remanded to the trial court in February of 2000, when this Court's prior order became final. Discovery proceeded intermittently over the next year and a half. In August of 2001, Mauzy moved to require Paula to undergo an independent medical evaluation (IME) by Dr. James Harkess, an

¹ Paula W. Walser and James M. Walser v. Charles P. Mauzy, No. 1998-CA-001052-MR (not-to-be-published opinion rendered June 4, 1999).

orthopedic surgeon.² The trial court granted the motion over the Walsers' objection. The IME was initially scheduled for September 17, and was then rescheduled to November 5 after Paula informed Mauzy's counsel that she intended to tape-record the examination. Mauzy moved the trial court to prohibit Paula from recording the IME. In an order entered on October 17, the trial court granted the motion.

Paula failed to appear for the IME scheduled on November 5. On Mauzy's motion, the trial court issued an order directing her to appear for an IME on November 29. However, when Paula appeared on that date, she presented a letter imposing certain limitations on Dr. Harkess's examination of her. When Dr. Harkess informed her that he could not accommodate those limitations, the IME was cancelled.

Thereafter, Mauzy moved to dismiss the complaint for failure to prosecute. In an order entered on January 9, 2002, the trial court denied the motion and directed that the exam "be rescheduled without any (party imposed) conditions other than good medical practice." Dr. Harkess conducted the IME on January 29, 2002.

Between the date of the IME and December 2003, the only substantive activity occurred in July 2002, when Mauzy took Dr.

² CR 35.01. See also Sexton v. Bates, 41 S.W.3d 452 (Ky.App. 2001).

Harkess's deposition, and when he moved to compel the Walsers' payment for the cancelled IME appointments. On December 8, 2003, Mauzy again moved to dismiss the complaint for failure to prosecute. On February 20, 2004, the trial court granted the motion, finding that the Walsers have not shown good cause for the delay in completing discovery. This appeal followed.

The law demands the exercise of due diligence by the client as well as by his attorney in the prosecution or defense of litigation.³ CR 41.02 permits a court to dismiss an action for failure of a plaintiff to prosecute or to comply with the civil rules or with any order of the court. A trial court is vested with broad discretion in determining whether a case should be dismissed for want of diligent prosecution.⁴

However, "[i]n ruling on a motion for involuntary dismissal, the trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial."⁵ Each case must be considered in the light of the particular circumstances involved and length of

³ Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equip. Co., 451 S.W.2d 401, 403 (Ky. 1970).

⁴ Gill v. Gill, 455 S.W.2d 545, 546 (Ky. 1970).

⁵ Ward v. Housman, 809 S.W.2d 717, 719 (Ky.App. 1991). See also Thompson v. Kentucky Power Co., 551 S.W.2d 815, 816 (Ky.App. 1977).

time is not alone the test of diligence.⁶ Factors relevant in considering whether a case should be dismissed for lack of prosecution include: "1) the extent of the party's personal responsibility; 2) the history of dilatoriness; 3) whether the attorney's conduct was willful and in bad faith; 4) meritoriousness of the claim; 5) prejudice to the other party; [and] 6) alternative sanctions."⁷

The Walsers argue that the trial court did not consider any of these factors and only relied on the length of the delay in reaching its decision to dismiss the complaint. But while the trial court's order is not detailed, we conclude that the circumstances of this case justified dismissal of the Walsers' complaint. The trial court did not find that the Walsers caused these delays in bad faith. However, the Walsers have had a history of dilatory conduct since the remand and they were primarily responsible for all of the delays. The Walsers were late in responding to some of Mauzy's discovery requests and they failed to respond to others. The IME was rescheduled four times over a period of six months, mostly due to Paula Walser's actions.

⁶ Polk v. Wimsatt, 689 S.W.2d 363, 364-65 (Ky.App. 1985).

⁷ Ward v. Housman, *supra* at 719; (citing Scarborough v. Eubanks, 747 F.2d 871, 875-78 (3rd Cir. 1984)).

Moreover, despite numerous opportunities, the Walsers have failed to show that they took any significant steps in moving their case to trial between February 2002 and December 2003. During the interim, the Walsers' physician and expert witness died, thus requiring further delay. As a justification for further delay, the Walsers cite to new and old health problems, the death of their physician, and difficulty in finding expert witnesses. But as the trial court noted, "[w]hile the Court understands that the reasons cited by Plaintiff would cause some delay, they should not have caused a delay of this magnitude, particularly in a case that was filed almost TEN years ago. Some of the anticipated concerns of Plaintiffs (death of witnesses) are an anticipated result of such an old case."

Finally, the Walsers have never indicated when they will be ready to proceed to trial on their claims. At some point, a plaintiff must go forward with litigation to a final disposition. The Walsers have shown themselves unwilling or unable to do so in this case. Under the circumstances, we agree with the trial court that the Walsers failed to show good cause for the delays in this action. Consequently, the trial court did not abuse its discretion by dismissing their complaint with prejudice.

Accordingly, the February 20, 2004, order of the Jefferson Circuit Court dismissing the Walsers' complaint is affirmed.

ALL CONCUR.

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