RENDERED: OCTOBER 14, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001006-MR

LINDA F. BROWN
AND GARY F. BROWN — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
CIVIL ACTION NO. 01-CI-02451

LOWE'S HOME CENTERS, INC.;
AMERICAN WOODS, INC.;
ON-SITE ASSEMBLY, INC.;
AND UNKNOWN DEFENDANTS — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BARBER, MINTON, AND SCHRODER, JUDGES.

MINTON, JUDGE: Linda Brown and her husband, Gary Brown, bring this *pro se* appeal from an order of the Fayette Circuit Court involuntarily dismissing their products liability case with prejudice. After examining the record and the applicable law, we vacate and remand for further proceedings.

The Browns' brief is difficult to follow in that it does not follow the standard format for briefs set forth in Kentucky Rules of Civil Procedure ("CR") 76.12.[1] For that reason alone, their brief could be stricken.[2] But since the Browns are proceeding without counsel, we will afford them some leeway and exercise discretion by considering their appeal on its merits.[3]

Although the Browns' brief does not contain a recitation of the facts *per se*, the facts most pertinent to this appeal may be gleaned from Appellees' brief and the trial court record. The Browns complaint, filed in June 2001, contends that they bought a swing from Lowe's Home Centers, Inc., but that when Linda sat on the swing following its delivery to her home, it collapsed, causing her to suffer "serious personal injuries."[4] The Browns then sued Lowe's; On-Site Assembly, Inc. (who allegedly assembled the swing); and American Woods, Inc. (who allegedly manufactured the swing).

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[1] For example, there are no citations to relevant authorities and no separate facts and legal argument sections.

[2] CR 76.12(8)(a) ("A brief may be stricken for failure to comply with any substantial requirement of this Rule 76.12.").

[3] *See, e.g.,* Beecham v. Commonwealth, 657 S.W.2d 234, 236 (Ky. 1983) ("Pro se pleadings are not required to meet the standard of those applied to legal counsel."); 5 Am.Jur.2d *Appellate Review* § 578 (2005) ("Courts prefer to dispose of a case on the merits rather than to dismiss for deficiencies in a brief.").

[4] Record, p. 2.

In April 2002, Lowe's served a second set of interrogatories and requests for production of documents on the Browns.[5] Dissatisfied with what it deemed to be incomplete responses, in September 2003, Lowe's filed a motion to compel further responses to these discovery requests.[6] That motion to compel resulted in an agreed order, signed on September 18, 2003, which ordered the Browns to respond to the discovery requests by November 11, 2003.[7]

In response to the trial Court's September 18 order, the Browns filed a "Motion for Order to Clarify Requested Discovery,"[8] as well as a supplemental response to discovery, which, according to Lowe's, merely repeated the initial objections to the discovery.[9] Lowe's counsel filed a response to the Browns' motion for clarification stating that Lowe's "respectfully requests that the Court require the Plaintiffs to respond fully to all outstanding discovery responses on or before December 19, 2003[,] or be subject to the sanction of

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[5] Record, pp. 69-70, 78-80.

[6] Record, pp. 66-67.

[7] Record, p. 132. Lowe's asserts that the extension was asked for by the Browns' then-attorney because "he thought that he had been fired [by the Browns] and needed more time to clarify his representation." Appellees' Brief, p. 2.

[8] Record, p. 134.

[9] Record, p. 137; Appellees' Brief, p. 2.

dismissal."[10] In response to the parties' motions, the trial court signed an order on December 16, 2003, requiring Linda to respond to the outstanding interrogatories and requests for production of documents by January 16, 2004.[11] Later in December 2003, the trial court granted Browns' counsel's motion to withdraw[12] and further ordered Linda to "appear, either personally or through counsel, on January 30, 2004[,] at 10:30 a.m. to advise the Court of the status of this suit. Should Plaintiff be unrepresented and medically unable to attend on that date, she must provide a doctor's statement advising the Court that she will be unable to attend."[13]

Despite the clear language of the trial court's December order, Linda neither appeared on January 30 nor did she submit a report from a physician advising the Court that she could not attend.[14] Based on Linda's failure to comply with the Court's discovery orders, as well as the assertion that the Browns had taken only one affirmative action (filing discovery requests upon Lowe's in January 2003) to prosecute their case

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[10] Record, p. 144.

[11] Record, p. 154.

[12] Record, p. 159.

[13] Record, p. 157.

[14] Linda did submit a report by a Dr. Henry Tutt. Record, pp. 170-171. However, that report, dated January 15, 2004, did not contain anything that could be reasonably construed as a statement advising the Court that Linda could not attend any hearings.

since its inception in 2001, Lowe's and the remaining defendants moved to dismiss the Browns' complaint with prejudice.[15]

The trial court granted Appellees' motion to dismiss on February 9, 2004.[16] But in one final effort to prod the Browns to action, the trial court's February 9 order dismissed the action without prejudice, with the caveat that "[i]f no additional appropriate action is taken [by the Browns] within sixty (60) days, Defendants are directed to submit an order dismissing [the action] with prejudice."[17] Despite the trial court's clear warnings, the Browns failed to take any substantive steps to prosecute their action (other than faxing a letter to the trial court judge outlining all of Linda's alleged health problems).[18] So on April 20, 2004, the trial court dismissed the Browns' complaint with prejudice,[19] after which the Browns filed the appeal at hand.

CR 41.02(1) governs involuntary dismissal of actions. That subsection provides that "[f]or 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

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[15] Record, pp. 162-166, 176-179.

[16] Record, p. 181.

[17] *Id.*

[18] *See* Record, pp. 188-189.

[19] Record, p. 183.

claim against him." However, due to the "grave consequences" of a dismissal with prejudice, such an action "should be resorted to only in the most extreme cases."[20] Thus, this Court must "carefully scrutinize" the trial court's dismissal of a case with prejudice.[21]

The Kentucky Courts have set forth several factors a trial court must consider in determining whether an action should be dismissed with prejudice, including whether the action has been placed on the trial docket;[22] the reasons for the delay;[23] and whether less drastic sanctions would have been appropriate.[24] Further factors to be considered are:

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.[25]

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[20] Polk v. Wimsatt, 689 S.W.2d 363, 364-365 (Ky.App. 1985).

[21] *Id.*

[22] Gill v. Gill, 455 S.W.2d 545, 546 (Ky. 1970).

[23] *Id.*

[24] Polk, 689 S.W.2d at 365.

[25] Ward v. Housman, 809 S.W.2d 717, 719 (Ky.App. 1991).

In the case at hand, the trial court clearly considered the efficacy of alternative sanctions, as evidenced by the fact that it first dismissed the action without prejudice. But neither the audiotape of the hearings nor the written orders of dismissal reflect that the trial court considered any of the other factors outlined above before dismissing the Browns' claims with prejudice. We are not unmindful of the fact that the Appellees' brief contains an admirable discussion of the Ward factors. But the responsibility to make the necessary findings before dismissing the case lies with the trial court only, not the parties or this Court. Thus, although we understand fully the trial court's duty to require the cases on its docket to advance toward resolution in an orderly and expeditious way, we are compelled to remand this case due to the lack of findings in the trial court's orders or oral statements.[26]

For the foregoing reasons, the order of the Fayette Circuit Court is vacated and remanded for further proceedings consistent with this opinion.

BARBER, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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[26] Lest this opinion be misconstrued, we express no view as to whether the Browns' actions (or lack thereof) merit dismissal of their claims. Finally, as a cautionary note, we observe that any further motions to dismiss must be served on all parties at least ten (10) days before any hearing on it. *See* Fayette Circuit Court Rule 15(A)2.

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