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Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001672-MR

CARRIE POPIELSKI AND
RICHARD POPIELSKI

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 03-CI-00311

CITY OF BELLEVUE AND
TRU-WALL CONCRETE, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Carrie Popielski appeals from an order of the Campbell Circuit Court dismissing her action against the City of Bellevue for injuries sustained in a slip and fall accident.

The court dismissed the action for failure to comply with discovery requests. Popielski argues on appeal that the court abused its discretion in dismissing the action because the interrogatories propounded were void, since the interrogatories

themselves violated the discovery rules. We disagree and affirm.

Popielski filed this action after sustaining injuries in a slip and fall accident on the defendant City's property. During the discovery phase, interrogatories propounded by the City went unanswered by the plaintiff, and the defendant moved to dismiss the action under the rules of the Economical Litigation Docket, which applies in Campbell County. The court granted the motion, and plaintiff retained new counsel and requested relief from the court's order in a motion brought under Civil Rule (CR) 60.02. The plaintiff's prior attorney, new counsel argued, had been experiencing "work-related stress" and was unable to comply with the discovery request. The court denied the motion, and this appeal followed.

On appeal, Popielski argues that the court abused its discretion by dismissing the action for failure to comply with the discovery requests, contending that the interrogatories were void when served because they did not comply with the applicable rules, containing more questions than allowed under the Economical Litigation rules. The City responds by saying that the plaintiff is incorrect in her assertion that the interrogatories were not proper within the rules, and even if they were not proper, the issue has been waived because no appeal was taken from the order of dismissal, only from the

denial of the CR 60.02 motion. We agree with the City that Popielski was not entitled to extraordinary relief.

The case before us presents a series of problems compounded by errors of counsel. The first attorney in this matter obviously neglected the case, in that he failed to take action to advance the case through discovery toward settlement or trial. By failing to answer the interrogatories in a timely fashion, or indeed at all, he did a disservice to his client. Our civil rules recognize, however, that sometimes problems both within and outside of a lawyer's practice prevent an attorney from doing his job in a timely fashion. Our rules allow relief from even a dismissal where excusable neglect can be demonstrated. But when subsequent counsel requested relief, rather than demonstrate excusable neglect, he instead cited a vague, non-specific "stress" as the reason for prior counsel's failure. If the reason was truly unknown, counsel should have requested that the court issue a subpoena to take testimony of prior counsel to explain his failure, or taken some other step to make clear to the court that there was a legitimate reason for counsel's neglect of the case, in order to demonstrate excusable neglect. As it stands, the court was given little reason to grant relief from the dismissal of the action. Now, a third attorney has been retained to file this appeal, and has inherited few grounds on which an appeal may be based.

Though creative, we must reject the argument that the interrogatories were void when served. There is no authority which supports the argument that a discovery request, if flawed, is void, thus relieving counsel of the obligation to answer. To the contrary, our rules clearly state that a party is obligated to object in a timely fashion to an improper discovery request. We realize that an attorney who has in effect abandoned a case is unlikely to file a timely objection, and the probable result is exactly what happened in this case. Even so, our rules provide an avenue for extraordinary relief through CR 60.02, but such relief is not freely given unless a showing of excusable neglect or another compelling reason to grant relief is made. Here, however, the court was not given such a reason, and we hold that no abuse of discretion was committed by the court in denying the motion.

For the foregoing reasons, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

David R. Marshall
Lexington, Kentucky

BRIEF FOR APPELLEE, CITY OF
BELLEVUE:

Amanda V. Bryant
Crescent Springs, Kentucky

BRIEF FOR APPELLEE, TRU-WALL
CONCRETE, INC.:

Michael E. Lively
Cincinnati, Ohio