

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000219-MR

NITA BANDY,
ADMINISTRATRIX OF THE ESTATE
OF RUSSELL D. BANDY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 04-CI-04123

NORFOLK SOUTHERN RAILWAY COMPANY;
CINCINNATI, NEW ORLEANS AND
TEXAS PACIFIC RAILWAY COMPANY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: BARBER, MINTON, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Nita Bandy (Bandy), appeals the Fayette Circuit Court's grant of Appellee, Norfolk Southern Railway Company's (Norfolk Southern) motion for judgment on the pleadings and dismissal of Bandy's complaint asserting a cause of action for a violation of KRS 524.100. We affirm the dismissal of the action.

Bandy's husband, decedent Russell Bandy, was a passenger in an automobile struck by a train owned by Norfolk Southern. Bandy filed a wrongful death action against the railroad and won a jury verdict. During the course of discovery in the civil action, Bandy asserted that the railroad had wrongfully withheld or destroyed relevant evidence. This evidence included the transcripts of the train dispatcher's tape, documents showing the railroad's safety programs, safety manuals, safety procedures, improvement programs, maintenance procedures and safety improvement programs.

Norfolk Southern responded to the discovery requests claiming that the dispatcher's tape had been destroyed in accordance with company policy, and that the other documents would be provided if they could be located. The railroad also claimed that time tables, bulletins, notices, track warnings, slow orders, special orders, superintendent orders, and train orders in effect on the date of the accident were no longer available.

Bandy filed a second set of discovery requests asking for track volume records for the crossing where decedent was killed and the minutes of the grade crossing safety committee meetings. Norfolk Southern claimed that the track volume records were no longer available as company policy permitted them to be destroyed after 12 months. The railroad contended

that the minutes were "unavailable." The discovery requests were in the nature of a continuing request, and during the pendency of the action, Bandy repeatedly tried to obtain relevant documents.

At the request of her expert witness, Bandy asked for additional information in 2000. These included printouts of the event recorders located on the two locomotives that powered the train on the day of the collision. Bandy also asked for the train's "consist," a document showing the specific makeup of a train. Norfolk Southern provided one event recorder and a document they claimed was the train's consist. After review by the expert witness, it was determined that the document was not the consist. Norfolk Southern failed to provide an accurate consist.

The judgment after jury trial was not favorable to Bandy. Bandy blamed the adverse result, in part, on the refusal or failure of Norfolk Southern to provide evidence necessary to support her claims, or concealment of relevant evidence. Bandy argued that her expert was unable to provide a full report without the information requested, and claimed that the failure to provide the evidence prejudiced her case at trial.

The circuit court judge ruled that the railroad's conduct constituted spoliation of the evidence and discovery abuse. The remedy provided at trial by the circuit court was a

"missing evidence" instruction. That ruling was upheld on appeal by this Court, where we held that Bandy "was prejudiced by the discovery abuses and spoliation of evidence committed by the Appellees." This Court believed the railroad's conduct "disturbing," but found no abuse of discretion by the trial court in limiting the sanction imposed to the giving of a missing evidence instruction, rather than dismissing the case as Bandy requested.

Following a jury verdict in the wrongful death action, Bandy filed a civil action alleging damages due to the spoliation of evidence. That action was filed pursuant to KRS 446.070, and alleged a violation of KRS 524.100. KRS 524.100 provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

In the circuit court action, Bandy detailed the hiding or destruction of evidence by Norfolk Southern, and alleged:

That the aforementioned course of wrongful conduct of the Defendants, Norfolk Southern Railway Company and Cincinnati, New Orleans and Texas Pacific Railway Company, violated KRS 524.100 prohibiting tampering with evidence, for which the Plaintiff [Bandy] has a civil cause of action against these Defendants pursuant to KRS 446.070.

Norfolk Southern claimed that Bandy was attempting to assert a common law cause of action against the railroad, and that such a cause of action was not permitted by law. Bandy argues that she asserted a statutorily authorized cause of action, such as were expressly authorized in State Farm Mutual Automobile Insurance Company v. Reeder, 763 S.W.2d 116 (Ky. 1989).

Norfolk Southern, Defendants below, made a motion for judgment on the pleadings, contending that Kentucky law does not provide a separate cause of action for spoliation of the evidence, and arguing that Bandy's claims were barred by the statute of limitations and the doctrine of *res judicata*.

The railroad, through its counsel, attempted to foreclose Ms. Bandy's action by threatening sanctions and claiming that the underlying cause of action was "frivolous" and that the railroad would be suing both plaintiff's counsel and plaintiff herself individually, for "malicious prosecution and abuse of process." In a separate letter to co-counsel for Ms. Bandy, defense counsel wrote:

I am sorry to hear that you are "along for the ride" in the Bandy matter. I really thought that your initial reaction, that this case without merit [sic] and motivated by ill will, was truly the class way to go.

Defense counsel concluded the letter with a reiteration of the personal attack on Ms. Bandy and her lawyers, and continuing threats of individual litigation against the plaintiff and counsel. This attempt to foreclose litigation by threatening the client and her counsel is clearly inappropriate and unwarranted.

The trial court granted the motion, holding that Bandy had argued spoliation of the evidence before both the trial and appellate courts. The trial court ruled that Bandy could not file a civil action for spoliation of evidence, ruling that the Court of Appeals had held that the only remedy available to Bandy was a "missing evidence" instruction. Such an instruction was given to the jury.

In Monsanto v. Reed, 950 S.W.2d 811 (Ky. 1997) the Kentucky Supreme Court held that there was no separate tort of spoliation of evidence. 950 S.W.2d at 814. In making that ruling, the Supreme Court overruled this Court's earlier recognition of a spoliation claim. See also Clements v. Moore, 55 S.W.3d 838, 841 (fn.8) (Ky.App. 2000). Under the ruling of Monsanto, Bandy's claim is prohibited by law.

The Kentucky Supreme Court, in Monsanto v. Reed, 950 S.W.2d 811 (Ky. 1997), ruled that the circuit court can "counteract a party's deliberate destruction of evidence with jury instructions and civil penalties." Id., 950 S.W.2d at 815.

The railroad argues that the court's jury instruction in the personal injury case followed the rule laid down in Monsanto, and that the "missing evidence" instruction was all Bandy was allowed. Norfolk Southern asserts that the underlying action, claiming a statutory right to damages for the destruction of the evidence, is barred by law. We agree.

Bandy received a "missing evidence" instruction in her wrongful death action against the railroad. A "missing evidence" instruction is strictly limited. Such an instruction may not infer bad faith by the party alleged to have lost or destroyed the evidence, and cannot infer that the missing evidence would be favorable to the plaintiff. Estep v. Commonwealth, 64 S.W.3d 805, 810 (Ky. 2002). Both the circuit court and this Court reviewed the railroad's actions, and found that the actions constituted spoliation of the evidence and discovery abuse. Despite this, the only remedy available to the trial court was the missing evidence instruction. This Court found that the trial court's decision did not constitute an abuse of discretion.

Norfolk Southern asserts that Bandy's claims are barred by the applicable statute of limitations. Bandy contends that the underlying action is based on the railroad's behavior while defending the wrongful death action, and that therefore, the statute did not begin to run until the wrongful death case

was complete. Bandy also argues that the railroad's misconduct in willfully destroying records relevant to litigation and concealing such destruction should toll any applicable limitations period. As we find that the action asserted by Bandy is unsupported by law, we do not address the limitations issue.

Bandy shows this Court that the underlying action lists two reasons for recovery. The first is a civil action for Norfolk Southern's violation of KRS 524.100 which prohibits tampering with evidence. We find no basis for that action in Kentucky law. The second claim raised was that the railroad violated its own retention policy by destroying the records at issue. The second claim was not addressed by the parties or the trial court below. However, as a general rule, an order of dismissal adjudicates all rights. Commonwealth v. Sowell, 157 S.W.3d 616, 617 (Ky. 2005). Bandy has not shown that this claim constitutes its own separate action, capable of standing alone if the statutory claims are dismissed. For this reason, we find no error in the dismissal of the claim.

For the foregoing reasons, the circuit court's dismissal of Bandy's claims is affirmed.

ALL CONCUR.

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