

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000869-MR

JOSEPH M. BROWN and
JAMES HENRY BROWN

APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
CIVIL ACTION NO. 93-CI-03367

STS. MARY AND ELIZABETH HOSPITAL
D/B/A SISTERS OF CHARITY HEALTH
CORPORATION

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUDGEL, Chief Judge; COMBS and HUDDLESTON, Judges.

HUDDLESTON, Judge: Joseph Brown and James "Jim" Brown¹ appeal pro se from a Jefferson Circuit Court order dismissing with prejudice an action for the wrongful death of appellants' father for lack of prosecution pursuant to Kentucky Rule of Civil Procedure (CR) 41.02.

¹ Although James Brown is designated as an appellant in the notice of appeal, the complaint has never been amended to include him as a party in the circuit court.

On July 9, 1993, Joseph Brown, as Executor and Personal Representative of the Estate of Olen P. Brown, his father, filed a complaint against Saints Mary & Elizabeth Hospital, Division of the Sisters of Charity of Nazareth Health Corporation d/b/a The Sisters of Charity Health Corporation (the Hospital), seeking monetary damages for the wrongful death of Olen Brown. In his complaint, plaintiff alleged that hospital personnel were negligent in caring for the elder Brown, which led to his death on July 20, 1992, after he fell from his hospital bed on July 10, 1992. At the time the complaint was filed, Jim Brown, the brother of Joseph Brown, was acting as the attorney for Olen Brown's estate.

On August 4, 1993, the Hospital filed its answer, interrogatories and requests for production of documents. In his answer to interrogatories, Joseph Brown stated that Jim Brown could testify that "he saw the nurse call button tied up where the deceased could not reach it . . ., [and] that the deceased stated to [him] that the nurses considered the call button a nuisance." Based on the discovery responses, the Hospital, (relying on Rule 3.7 of the Kentucky Rules of Professional Conduct), moved to disqualify Jim Brown as the plaintiff's attorney on the ground that he would be called as a necessary witness. The circuit court granted the motion on November 15, 1993, and denied motion to reconsider on December 5, 1994.

On February 15, 1995, the Hospital filed a CR 77.02 motion to dismiss the action for failure to prosecute. The trial court granted the motion on February 21, 1995, and Jim Brown filed a notice of appeal as counsel for Joseph Brown. In an unpublished opinion rendered on November 15, 1996, a panel of this Court

affirmed the circuit court's decision disqualifying James Brown as counsel for plaintiff in the action, but reversed the circuit court's dismissal of the suit. Brown v. Sts. Mary & Elizabeth Hospital, 95-CA-000757. This Court relied on Bohannon v. Rutland, Ky., 616 S.W.2d 46 (1981), in which the Kentucky Supreme Court held that CR 77.02 should be applied narrowly and only when absolutely "no action of record has been taken by either party during the year next preceding the judge's review of the docket." Id., slip op. at 3 (emphasis supplied). The Court, however, stated that the trial court acted pursuant to CR 77.02, and noted that its decision may have been different had the Hospital filed its motion to dismiss pursuant to CR 41.02(1). Id., slip op. at 3 n.2.

On October 21, 1997, Joseph Brown filed a motion in circuit court requesting an order allowing him to prosecute the action pro se as an heir of the estate. Following a hearing, the circuit court denied the motion on December 16, 1997, stating that ordinarily a person may represent himself in any action in which he is a party, but Joseph Brown was a representative of the estate rather than a party to the wrongful death action.

On January 7, 1998, the Hospital filed a motion to dismiss for failure to prosecute pursuant to CR 41.02(1). On March 2, 1998, the circuit court conducted a hearing on the motion at which Jim Brown argued against the motion on behalf of the plaintiff. The court summarily granted the motion and dismissed the action with prejudice on March 9, 1998. This appeal followed.

The Browns argue on appeal that the circuit court abused its discretion by dismissing the action with prejudice for lack of prosecution. They contend that they were hampered in their ability

to prosecute the action because Jim Brown was disqualified from acting as legal counsel and Joseph Brown was not allowed to pursue the case pro se. They contend that as heirs of the estate, they should be allowed to prosecute the action without an attorney.

CR 41.02(1) provides that:

For 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 claim against him.

Generally, dismissal of an action upon a motion of the defendant pursuant to CR 41.02(1) rests within the sound discretion of the trial court, and an appellate court cannot interfere with the trial court's exercise of its discretion absent clear abuse. Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equip. Co., Ky., 451 S.W.2d 401 (1970); Thompson v. Kentucky Power Co., Ky. App., 551 S.W.2d 815 (1977). Each case must be considered in light of the particular circumstances involved and although the length of time during which a party fails to move is a factor, it is not the sole factor in deciding to dismiss for lack of prosecution. Gill v. Gill, Ky., 455 S.W.2d 545, 546 (1970). This court has recognized several factors relevant to the trial court's exercise of discretion in applying CR 41.02(1) including: "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) meritoriness of the claim; 5) prejudice to the other party; [and] 6) alternative sanctions." Ward v. Houseman,

Ky. App., 809 S.W.2d 717, 719 (1991) (citing Scarborough v. Eubanks, 747 F.2d 871 (3rd Cir. 1984)).

In the present case, the Browns failed to make reasonable efforts to prosecute the action. The complaint was filed initially in July 1993 and was dismissed in March 1998. During the over four and one-half year period the case was pending, the Browns conducted no discovery, failed to even inquire about obtaining an expert witness, and failed to secure an authorized attorney to prosecute the action. While the Browns complain that the Hospital hindered their ability to pursue the case by moving to disqualify Jim Brown from acting as legal counsel and Joseph Brown from pursuing the suit pro se, the Hospital was merely acting within the legal rules.

In a previous appeal, this Court affirmed the circuit court's disqualification of Jim Brown under SCR 3.130 Rule 3.7, yet he continues to file documents and attempts to represent the plaintiff in this action. The circuit court properly held that Joseph and Jim Brown do not have standing to prosecute the action for the wrongful death of their father in their capacity as heirs. See KRS 411.130 (1); Louisville & N.R. Co. v. Turner, 290 Ky. 602, 162 S.W.2d 219 (1942) (right to sue for wrongful death exclusive to personal representative and beneficiaries are not proper parties to bring action); Everly v. Wright, Ky. App., 872 S.W.2d 95 (1993); Flanary's Adm'x v. Griffin, 239 S.W.2d 248 (1951) (surviving children have no standing to intervene in wrongful death action in individual capacity as heirs). The court initially disqualified Jim Brown in November 1993, but he waited approximately eleven months before asking the court to reconsider its decision. Joseph Brown also waited eleven months after this Court affirmed the

disqualification of Jim Brown before he filed a motion with the circuit court seeking to act pro se.

The facts relevant to the complaint occurred during Olen Brown's hospitalization in July 1992. The Hospital maintains that it has been prejudiced by the delay because some witnesses are no longer available and the memories of the available witnesses have faded. The Browns have conducted no depositions or pretrial discovery. The only independent medical evaluation of Brown's death consists of an autopsy report indicating he died of congestive heart failure unrelated to any negligence by the Hospital. Jim Brown has stated that none of the over twenty-five attorneys he has solicited was willing to handle the case. The record suggests that the claim is of questionable merit.

Based on a totality of the circumstances, we believe that the circuit court did not abuse its discretion in granting the motion to dismiss for lack of prosecution. "The law demands the exercise of due diligence by the client as well as his attorney in the prosecution or defense of litigation." Modern Heating & Supply Co., 451 S.W.2d at 403 (quoting Gorin v. Gorin, Ky., 167 S.W.2d 52, 55 (1942)). The record reflects a consistent pattern of dilatory conduct by the Browns resulting in probable prejudice to the Hospital. Although a drastic remedy, we cannot say that the circuit court abused its discretion in deciding to dismiss the action with prejudice, rather than to impose sanctions. See Nall v. Woolfolk, Ky., 451 S.W.2d 389 (1970) ("power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process") (involving five-year-old negligence action).

For the foregoing reasons, we affirm the order dismissing the Browns' complaint.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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