

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000442-MR

PATRICIA THOMPSON,
INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE FOR RONALD
THOMPSON

APPELLANT

v. APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 05-CI-00143

CITY OF CALHOUN, KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

CLAYTON, JUDGE: This is an appeal from the McLean Circuit Court after the trial judge granted summary judgment finding that the City of Calhoun (the City) and, therefore, the Deputy Coroner, had sovereign immunity. For the reasons that follow, we affirm the decision of the trial court.

BACKGROUND AND PROCEDURAL INFORMATION

Patricia Thompson is the wife of the deceased, Ronald Thompson. Ronald died while he was at work at the City of Calhoun's Water Plant (Water Plant). Patricia requested an autopsy be performed, however, the Deputy County Coroner, Lee M. Muster, did not. Ronald's body was later cremated before any autopsy could be performed.

Patricia filed suit against the City of Calhoun as well as McLean County, Lee M. Muster and Muster Funeral Homes. In her complaint, Patricia contended through averments:

1. That she was induced by the Defendant Muster to have the body of her husband cremated and the funeral held by the Muster Funeral Home (sic). That she relied upon the inducement of the said Lee Muster at and on behalf of Muster Funeral Home (sic) to her detriment; and that the said Lee Muster and Muster Funeral Home (sic) benefited from said inducement, by concealing the breach of a statutory duty and the cause of death of her husband and by Muster [sic] financial gain from the proceeds of the funeral expense.

All the defendants except the City moved for dismissal, and the trial court dismissed the action against them. The City filed a motion for judgment on the

pleadings which was converted to a motion for summary judgment due to an affidavit by Thompson filed in support of her claims.

On March 30, 2006, the trial court granted partial summary judgment to the City. On April 10, 2006, the City filed a motion to alter or amend the partial summary judgment, to which Thompson filed a response. On May 1, 2006, the trial court conducted a hearing on the motion. Thompson was not present at the hearing, and the trial court granted summary judgment in the City's favor.

On March 21, 2008, a panel of this Court issued an opinion on Thompson's appeal of the other three defendants, McLean County, Lee Muster and Muster Funeral Homes. Our Court upheld the trial court's dismissal of McLean County but reversed the dismissal of the action as to Muster and Muster Funeral Homes. The Court remanded the case in order to allow Thompson to amend her complaint against these defendants.

On December 4, 2008, Thompson filed an amended complaint and included the City as a defendant. The City asked to be removed as a defendant due to the granting of summary judgment in its favor. Thompson then filed a motion to vacate, alter and set aside judgment on December 15, 2008. Thompson's counsel contended that she had not received notice of the entry of the summary judgment. The City filed a motion to dismiss and a response to Thompson's motion.

On January 12, 2009, the trial court granted the City's motion to dismiss, and it is from this order that Thompson brings this appeal.

DISCUSSION

First, Thompson contends that the trial court did not have jurisdiction to rule that her complaint was “insufficient as a matter of law” while that issue was being appealed to this Court. While the issue may have been the same, the party was not.

The issue of whether Thompson’s complaint stated a claim or that she should have been able to amend her complaint, came before this Court on an appeal from three other defendants, Muster, McLean County, and Muster Funeral Homes. A panel of this court held that:

A trial court, when determining whether a complaint states a claim upon which relief can be granted, “should not grant the motion [to dismiss] unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” (Citations omitted). The allegations in the pleadings are taken as true and are liberally construed in a light most favorable to the plaintiff. . . . Kentucky Rule of Civil Procedure (CR) 15.01 provides that amendments to pleadings “shall be freely given when justice so requires.”. . . Salient factors for a trial court’s consideration include prejudice to the adverse party, failure to cure deficiencies by amendment, or futility of the amendment. (Citation omitted).

Here, the trial court stated in its dismissal order that “the allegations of the complaint make it clear that [Muster] is being sued for his alleged unlawful refusal to perform an autopsy in his capacity as deputy coroner.” Thompson’s affidavit appended to her motion to amend avers that Muster, on behalf of Muster Funeral Home [sic], induced her to have the body of her deceased husband cremated, to the financial benefit of Muster Funeral Home (sic).

Muster Funeral Homes and Muster assert that Thompson could not amend her complaint after the trial

court dismissed them from the action. They overlook, however, that Thompson's motion pursuant to CR 59 suspended the finality of the dismissal orders. (Citation omitted). Significantly, Muster Funeral Homes or Muster does not allege how either would be prejudiced by Thompson's amending her complaint. Further, while fraud was not alleged in the initial complaint, a change in the theory of the case is not a bar to amendment. (Citation omitted).

Thompson's pleadings in this case leave abundant room for improvement. Nevertheless, Thompson's affidavit with her motion to amend sufficiently puts Muster and Muster Funeral Homes on notice that she was alleging fraud. (Citation omitted). Under the circumstances at bar, the trial court abused its discretion in not allowing amendment as to Muster Funeral Homes and Muster. "Cases should be tried on their merits rather than the technicalities of pleadings." *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982). We express no opinion on the merits of Thompson's claim against Muster Funeral Homes and Muster, only that she should have the opportunity to present her case to the trial court.

This issue was specifically in relation to Muster and Muster Funeral Homes and the causes of action against them, not against the City. This Court did not reverse the trial court's decision to dismiss the action against McLean County. Because Thompson's claim against the City was still pending in the trial court and was not on appeal, the trial court continued to have jurisdiction over the action. *See Garnett v. Oliver*, 242 Ky. 25, 45 S.W.2d 815, 816 (Ky. App. 1931). Thus, we find the trial court did not abuse its discretion regarding maintaining jurisdiction on appeal.

Next, Thompson contends that CR 60.02(e) requires reversal of the trial court's order granting summary judgment. It provides:

the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]

“The purpose of CR 60.02 is to bring before a court errors which (1) had not been put into issue or passed on, and (2) were unknown and could not have been known to the moving party by the exercise of reasonable diligence and in time to have been otherwise presented to the court.” *Young v. Edward Technology Group, Inc.*, 918 S.W.2d 229, 231 (Ky. App. 1995). The granting of a CR 60.02 motion is rare, and matters that could have been appealed or discovered with reasonable diligence do not merit such extraordinary relief. *Board of Trustees of Policemen’s & Firemen’s Retirement Fund of the City of Lexington v. Nuckolls*, 507 S.W.2d 183, 186 (Ky. 1974).

Adjudication of a CR 60.02 motion is generally left to the discretion of the trial court, only to be disturbed upon a finding of abuse of discretion. *Schott v. Citizens Fidelity Bank & Trust Co.*, 692 S.W.2d 810, 814 (Ky. App. 1985).

“The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Thompson asserts that this Court’s decision of March 2008 reversed all the prior holdings of the McLean Circuit Court. Clearly, however, as set forth above, this Court reversed only the dismissal of the causes of action against Muster

and Muster Funeral Homes. The Court affirmed the decision against McLean County.

Thompson's final argument is that the decision of the trial court granting summary judgment should be reversed based on CR 60.02(d), which provides that a judgment may be overturned for "fraud affecting the proceedings, other than perjury or falsified evidence."

Thompson contends that her counsel was unaware of the order of May 8, 2006, having never received a copy. This, however, is not the type of extraordinary relief allowed under CR 60.02. With a pending motion for summary judgment, Thompson should have been aware of any judgments or other pleadings placed in the court file. Her lack of diligence does not warrant the extreme measures of CR 60.02. Thus, we affirm the decision of the trial court.

CAPERSON, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS WITH RESULT AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, CONCURRING IN RESULT: I concur with the majority opinion but desire to write separately to explain my views on Thompson's argument that the trial court erred in not granting her CR 60.02 motion to vacate the judgment in favor of the City as said motion relates to her allegation that she did not receive a copy of the judgment from the clerk after it was entered. CR 77.04(4) precluded Thompson from attacking the validity of the judgment or from appealing the judgment despite the fact that she may have failed

to receive timely notice of it. Pursuant to *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002), however, CR 60.02 afforded Thompson an avenue to pursue relief from the judgment on that ground. *Id.* at 456. Nevertheless, in its order of February 4, 2009, the trial court denied such relief.

Thompson's motion was not made within one year of the entry of the judgment; therefore, grounds for relief under CR 60.02(a), (b), and (c) were unavailable to her. Thompson contends that she was entitled to relief on this ground under CR 60.02(e) or (f). In order to obtain relief under those sections of CR 60.02, Thompson was required to make her motion "within a reasonable time." CR 60.02.

"CR 60.02 addresses itself to the broad discretion of the trial court and for that reason, decisions rendered thereon are not disturbed unless the trial judge abused his/her discretion." *Kurtsinger, supra*. The record reveals that Thompson was aware of the judgment several months before filing her motion. Thus, the court did not abuse its discretion in denying the motion.

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