

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000377-MR

DELETHIA PITTS NUCKOLS,  
D/B/A STRAIGHT-LINE EXPRESS

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT  
HONORABLE EDDIE C. LOVELACE, JUDGE  
ACTION NO. 07-CI-00074

GARY TUGGLE, D/B/A  
L & D SERVICES

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND STUMBO, JUDGES.

STUMBO, JUDGE: Delethia Pitts Nuckols (Mrs. Pitts), D/B/A Straight-line Express,<sup>1</sup> appeals from an Order of the Clinton Circuit Court dismissing her action against Gary Tuggle, D/B/A L&D Services, wherein she sought to recover \$185,000 in damages arising from an alleged breach of contract. She argues that

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<sup>1</sup> Mrs. Pitts refers to this entity variously as “Straightline,” “Straight Line” and “Straight-line.” We will reference the name “Straight-line” as this is the name used by Mrs. Pitts in her Notice of Appeal.

the circuit court improperly dismissed the action when she failed to participate in discovery. We find no error in the Order of Dismissal, and accordingly affirm.

In January, 2006, Delethia Pitts and her now ex-husband, Pete Pitts, formed a business entity in Tennessee called Straight-line Express. Straight-line Express apparently engaged in commercial trucking. According to Mrs. Pitts, Straight-line Express leased five trucks from Capacity Solutions of Murfreesboro, Tennessee, which Straight-line Express then leased to Tuggle. Mrs. Pitts would later claim that Tuggle was supposed to dispatch the trucks in exchange for receiving 10% of the profit generated from the operation.

On April 10, 2007, Mrs. Pitts filed the instant *pro se* action in Clinton Circuit Court against Tuggle alleging that Tuggle received \$185,000 in revenue which he improperly failed to remit to Straight-line Express. The matter proceeded in Clinton Circuit Court, where discovery was conducted. During the course of discovery, Tuggle stated by way of Affidavit filed on November 6, 2008, that Mr. Pitts was the sole owner of Straight-line Express, that Tuggle paid all monies to Mr. Pitts, that Mrs. Pitts was not “d/b/a Straight-line Express,” and that Tuggle had never entered into any agreement whatsoever with Mrs. Pitts. Additionally, Mr. Pitts tendered an Affidavit on December 17, 2008, wherein he stated that he was the sole owner of Straight-line Express, that Mrs. Pitts did not consult with him

before filing the action and that she did not have the authority to prosecute the action using the name Straight-line Express.

The record demonstrates that at some point during the proceedings, Mr. Pitts was incarcerated and accordingly was unable to operate the business. On December 22, 2008, Capacity Solutions informed Mrs. Pitts by way of letter that it was repossessing the five trucks leased from it by Straight-line Express.

On December 29, 2008, the circuit court rendered a hand-written Order granting Mrs. Pitts 10 days to take the deposition of Mr. Pitts for the purpose of rebutting his claim that she did not have the legal standing to prosecute the instant action using the name Straight-line Express. The deposition was not conducted, and Tuggle, through counsel, moved on January 15, 2009, to dismiss the action based on Mrs. Pitts' failure to produce the discovery ordered by the circuit court on December 29, 2008. The following day, the court rendered another Order requiring Mrs. Pitts to produce a deposition of Mr. Pitts within 10 days. The Order stated that Mrs. Pitts' failure to produce the deposition would result in the dismissal of the action. Mrs. Pitts again failed to produce the deposition of Mr. Pitts, and the court rendered its Order of Dismissal on February 2, 2009. This appeal followed.

Mrs. Pitts (now Nuckols) argues *pro se* that the circuit court erred in dismissing her action against Tuggle. She maintains that the circuit court “dismissed this case . . . with no reason;” that all of the responsibility for operating Straight-line Express fell upon her when Mr. Pitts was incarcerated; and, that the

court improperly failed to take into account that her house and car were repossessed, her credit was ruined and she has “a ton of bills to pay.” She seeks an Order reversing the circuit court’s Order of Dismissal and remanding the matter for further proceedings. Tuggle has not filed a responsive brief.

We have closely examined Mrs. Pitts’ *pro se* argument, the record and the law, and find no basis for reversing the Order on appeal. We must first note that while we empathize with the difficulties encountered by a party who prosecutes an action and appeals an adverse decision without the benefit of counsel, the burden nevertheless rests with Mrs. Pitts to demonstrate the existence of error arising from the Order on appeal. *Johnson’s Executor v. Wilkerson*, 294 Ky. 208, 171 S.W.2d 249 (Ky. App. 1943). She has fallen woefully short of meeting that burden.

The record contains no evidence that Mrs. Pitts is entitled to prosecute an action on behalf of Straight-line Express, nor that either she nor Straight-line entered into a contract with Tuggle and/or L&D Services. Additionally, Mrs. Pitts’ written argument fails to comport with several Rules of Civil Procedure including the requirements that she demonstrate that the argument is preserved for review and provide citation to the record in support of her argument. Mrs. Pitts’ written argument consists solely of a few typewritten lines of argument headings with no supportive written arguments, reference to the record, citation to statutory authority or case law, or any other basis for reversing the Order on appeal.

Kentucky Rule of Civil Procedure (CR) 37.02 provides that a party who refuses to participate in discovery after having been so ordered may be found to be in contempt of court, with the range of sanctions including dismissal of the action. The factors a trial court are to consider in ruling on the involuntary dismissal of a case for failure to comply with discovery rules include: (1) the extent of the party's personal responsibility; (2) the history of dilatoriness; (3) whether the party's conduct was willful and in bad faith; (4) the meritoriousness of the claim; (5) prejudice to the other party; and (6) the availability of alternative sanctions. *Stapleton v. Shower*, 251 S.W.3d 341 (Ky. App. 2008). A trial court ruling under CR 37.02 is reviewed under the abuse of discretion standard. *Beil v. Lakewood Engineering and Mfg. Co.*, 15 F.3d 546 (6<sup>th</sup> Cir., 1994).

In the matter at bar, Mrs. Pitts repeatedly failed to depose her ex-husband as properly ordered by the circuit court. This failure occurred in the context of both Tuggle and Mr. Pitts stating by way of sworn deposition that Mrs. Pitts had no authority to prosecute an action on behalf of Straight-line, and that Tuggle never entered into a contract with Mrs. Pitts. It is also worth noting that Mrs. Pitts had not demonstrated her nexus, if any, with Straight-line nor had she shown a contract to exist between either herself and Tuggle or between Straight-line and Tuggle. When applied to the *Stapleton* factors, we find no basis for concluding that the circuit court's Order of Dismissal was anything but proper, and cannot conclude that the court abused its discretion in dismissing the action. *Beil, supra*. Accordingly, we find no error.

For the foregoing reasons, we affirm the Order of Dismissal of the  
Clinton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Delethia Pitts Nuckols, *pro se*  
Cross Plains, Tennessee