

RENDERED: DECEMBER 16, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000413-MR

KEITHEN GAINES AND
KATHY PARKER

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 07-CI-009900

VIRGINIA J. NICHOLS AND
SAFE AUTO INSURANCE COMPANY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: KELLER, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Keithen Gaines and Kathy Parker appeal from an order of the Jefferson Circuit Court dismissing their action against Virginia J. Nichols and Safe Auto Insurance Company in which they sought damages resulting from a “hit and run” automobile accident. Gaines and Parker argue that the circuit court erred by

sustaining the defendants' motions to dismiss before the 20 day local rule response period had elapsed. They also contend that the court improperly failed to strike Nichols' motion to dismiss as it was improperly set to be heard at a motion hour in violation of a local rule. Because the record reveals that Gaines and Parker were not given 20 days to respond to Nichols' motion to dismiss, we must reverse on this issue and remand the matter for further proceedings.

On October 5, 2005, Gaines was operating a motor vehicle in Jefferson County, Kentucky, when he attempted to make a left turn. While executing the turn, another vehicle passed Gaines on the left and struck the vehicle. The passing vehicle continued on without stopping. The vehicle being driven by Gaines was owned by Kathy Parker. At the time of the accident, she was a passenger in the vehicle and it was insured by Safe Auto.

Two years later on October 5, 2007, Gaines and Parker filed the instant action against Safe Auto and the then unknown driver of the other vehicle. Approximately two years after that, on December 4, 2009, and having ascertained that Nichols was the unknown driver, Gaines and Parker served her with an amended complaint. Nichols and Safe Auto tendered interrogatories and requests for the production of documents on December 30, 2009, to which Gaines and Parker did not respond.

After the matter languished in inaction for several more months, the circuit court scheduled a pretrial conference for November 17, 2010. Counsel for

Nichols and Safe Auto appeared at the conference, but Gaines, Parker and their counsel did not attend.

As a result of Gaines and Parker's failure to participate in the litigation, Nichols and Safe Auto made oral motions at the November 17, 2010 conference to dismiss the action for failure to prosecute. Within a few days, the oral motions to dismiss were memorialized with written motions to dismiss. On November 24, 2010, Gaines and Parker filed a motion to set a trial date and a motion to strike the Nichols' motion to dismiss. Gaines and Parker sought to dismiss Nichols' motion because it was to be heard at a motion hour in apparent violation of a local rule. On November 30, 2010, the circuit court entered an order granting the defendants' motion to dismiss. Gaines and Parker's subsequent CR 59.05 motion to alter, amend or vacate the order was denied, and this appeal followed.

Gaines and Parker now argue that the circuit court erred in granting the defendants' motion to dismiss. They direct our attention to Jefferson Rules of Practice (JRP) 401, which states that,

Motions to dismiss, for judgment on the pleadings, and for summary judgment *shall not be noticed for motion hour* but shall be filed with a memorandum of authority not exceeding twenty-five (25) pages in length, in type no smaller than 12-point. *An opposing party shall have twenty (20) days from the certification date on the motion to respond.* A reply may be filed no later than ten (10) days after the filing of a response and shall not exceed five (5) pages in length, in type no smaller than 12-point. Prior to notice of submission, counsel may request oral argument. Counsel shall file Form AOC-

280, Notice of Submission of Case for Final Adjudication, when the case is ready for submission. (Emphasis added).

Gaines and Parker contend that since the Appellees' first motion to dismiss was made on November 17, 2010, the court failed to comply with JRP 401 by rendering the order of dismissal on November 30, 2010, i.e, before 20 days had elapsed. They contend that the dismissal therefore constitutes an abuse of discretion for failure to follow JRP 401. Additionally, they maintain that Nichols' motion to dismiss was improper because it was noticed to be heard at a motion hour in violation of a local rule. They seek an order reinstating the action and remanding the matter for trial.

The primary issues before us are whether JRP 401 may be enforced in the same manner as a Kentucky Rule of Civil Procedure and, if so, whether Gaines and Parker were availed of the rule's protection. First, our determination is that the Jefferson Rules of Practice are enforceable in the same manner as the Kentucky Rules of Civil Procedure. The Jefferson Rules of Practice were approved by way of an order of the Chief Justice of the Kentucky Supreme Court on July 11, 2006. Once local rules are duly approved, they have binding effect. SCR 1.040(3)(a). The purpose and scope of the rules, as set out in JRP 101, provide that the rules "shall be enforced in all divisions . . . of the Jefferson Circuit Court." Additionally, JRP 101 states that the rules shall supplement the Kentucky Rules of Civil Procedure.

The question then becomes whether Gaines and Parker were availed of the protection of JRP 401. We must conclude that they were not. The parties acknowledge that Nichols and Safe Auto made oral motions to dismiss on November 17, 2010, which were reduced to writing and filed with the clerk the following week. When using November 17, 2010, to start the running of the 20 day clock, Gaines and Parker had until approximately December 7, 2010, to file a response. One might reasonably contend that the clock should not have begun to run until the motions were reduced to writing and filed with the clerk, as JRP 401 starts the clock on the certification date. When using either the date of the oral motions or the later dates of the written motions, it is uncontested that the circuit court rendered its orders sustaining the motions to dismiss on November 30, 2010, or before the expiration of the 20 day period.

We acknowledge the trial court's inherent and important right to control its docket by dismissing actions for failure to prosecute, and this authority is set out in both the civil rules and the case law. Additionally, Gaines and Parker have done themselves no favor by ignoring the appellees' submission of interrogatories and failing to attend the November 17, 2010 pretrial conference. The issue before us, however, is not whether Nichols and Safe Auto are substantively entitled to dismissal of the claims against them, but whether Gaines and Parker were availed of the procedural due process set out in JRP 401. We conclude that they were not. We base this conclusion on both the court's entry of

its orders of dismissal before the running of the 20 days, and because Nichols' motion was improperly noticed for the motion hour in violation of JRP 401.

Nichols and Safe Auto direct our attention to Gaines and Parker's motion for a trial date and motion to strike Nichols' motion to dismiss. They contend that these filings are responsive pleadings for purposes of JRP 401, which justify the circuit court's failure to wait 20 days before dismissing the action. Irrespective of whether these motions, to strike or for a trial date, are properly characterized as responsive pleadings, the trial court was not in a position to enter its order dismissing. Again, under JRP 401, counsel was entitled to request oral argument prior to notice of submission, and the rule requires that "[c]ounsel **shall** file Form AOC-280, Notice of Submission of Case for Final Adjudication, when the case is ready for submission." (Emphasis added.) The record discloses that no such Form or notice of submission was filed for this motion.¹

While it is beyond the scope of our review to consider the underlying contention of Nichols and Safe Auto that they are entitled to a dismissal, we can conclude that JRP 401 carries the force of a Kentucky Rule of Civil Procedure, and that Gaines and Parker were not availed of the full 20 day period to respond to the motions to dismiss. For this reason, we reverse the orders of the Jefferson Circuit Court dismissing the action, and remand the matter for further proceedings.

ALL CONCUR.

¹ A Form AOC-280 had been filed earlier in May 2010, but that form related to a motion to dismiss a third-party complaint. The trial court decided that motion in July 2010.

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