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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001010-MR

GWENDOLYN MARINELLE
MOSES-BIGGERSTAFF AND
W. CHRISTOPHER MOSES — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 14-CI-004902

ROBERT BIGGERSTAFF — APPELLEE

AND NO. 2015-CA-001793-MR

GWENDOLYN MARINELLE
MOSES-BIGGERSTAFF AND
W. CHRISTOPHER MOSES — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 15-CI-003530

ROBERT BIGGERSTAFF
AND DARYL OWENS — APPELLEES

AND NO. 2016-CA-000318-MR

GWENDOLYN MARINELLE
MOSES-BIGGERSTAFF APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA J. JOHNSON, JUDGE
ACTION NO. 14-CI-500896

ROBERT BIGGERSTAFF APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: A mother and son appeal three decisions from the Jefferson Circuit Court. The first, a decision from the family division, held the appellants in contempt for violating a court order during a dissolution proceeding. The second dismissed a civil complaint for failing to allege a valid claim. The third dismissed a civil action on res judicata grounds and assessed costs against the son, a licensed attorney who was representing himself and his mother. For the following reasons, we affirm.

I. BACKGROUND

In appeal 2016-CA-000318, the underlying facts are straightforward. Gwendolyn Marinelle Moses-Biggerstaff (Gwendolyn) filed for divorce from her husband, Dr. Robert Biggerstaff. During the dissolution proceedings, the Jefferson Family Court ordered Gwendolyn and Hon. W. Christopher Moses, Gwendolyn's son and attorney, who also acted as her personal representative with respect to certain trust property, to allow Dr. Biggerstaff to retrieve some items of property. The family court found the mother and son had blocked Dr. Biggerstaff from retrieving this property and ordered them in contempt. Gwendolyn and Christopher now challenge that order.

In addition to the contempt order, Gwendolyn challenges the circuit court's dismissal of two lawsuits. The facts and procedural history surrounding those lawsuits are only slightly more complicated. To begin, Gwendolyn filed her first complaint in September 2014. In that complaint, she principally claimed that her estranged husband, acting on behalf of the company BIGG Marketing Enterprises LLC, attempted to kill her in an elaborate scheme to harvest her kidneys. Specifically, she alleged Dr. Biggerstaff, a dentist, had poisoned her with a contaminated dental specimen and intended to donate her kidneys to a gravely ill friend of his. Christopher was also a plaintiff in the action and alleged sundry torts and sought damages for loss of parental consortium.

In October 2014, Dr. Biggerstaff moved for summary judgment with respect to Gwendolyn's and Christopher's complaint. Among other things, Dr. Biggerstaff explained that BIGG Marketing Enterprises, LLC had been dissolved since 2011 and that plaintiffs had produced no proof of a conspiracy. Dr. Biggerstaff denied any wrongdoing and also pointed out that Gwendolyn was 83 years old at the time, and thus not a viable kidney donor.

After stating that he knew two of the parties to the action, although admittedly "not well," the circuit court eventually accepted Dr. Biggerstaff's position and dismissed the complaint. The circuit court ultimately concluded that no allegation supported a claim against either Dr. Biggerstaff or BIGG Marketing Enterprises, LLC. Gwendolyn and Christopher appealed that order five days after its entry. Importantly, no motion asking the circuit court to recuse was ever filed.

Notwithstanding the pending appeal, Gwendolyn and Christopher filed a second action in mid July 2015. According to Dr. Biggerstaff, the claims in that complaint mirrored those of the earlier complaint, with the only change being that Dr. Biggerstaff's attorney, Darryl Owens, was added as a party defendant. Dr. Biggerstaff accordingly filed a motion to dismiss based on the doctrine of res judicata and requested Kentucky Rule of Civil Procedure (CR) 11 sanctions be imposed against Christopher.

Another division of the circuit court reviewed the complaint in light of Dr. Biggerstaff's motion and granted both the motion to dismiss and the sanctions request in September 2015. The circuit court ordered Christopher to pay Dr.

Biggerstaff $1,500 in costs because Christopher had initiated multiple mental inquest warrants against Dr. Biggerstaff, which were all denied, and filed repetitive actions in the circuit court. The circuit court relied on *Clark Equip. Co., Inc. v. Bowman*, 762 S.W.2d 417, 420 (Ky. App. 1988), in concluding that the time and money expended to defend such actions were precisely the type of abusive conduct CR 11 was "designed to curb." *Id.* Christopher appealed that order as well.

II. DISCUSSION

On appeal, Gwendolyn and Christopher present five main arguments. First, they challenge the family court's contempt order. Second, they argue summary judgment was improper because they did not have an opportunity to complete discovery. Third, they contend the judge presiding over the initial civil action should have recused *sua sponte*. Fourth, they claim the circuit court in the second civil action erred by holding their claims barred by res judicata. Fifth, they urge this court to set aside the CR 11 sanction. For the following reasons, we reject their arguments.

1. The contempt order was proper

In Kentucky, "civil contempt is a failure to do what is ordered by the court in a civil action for the benefit of an opposing party[.]" *Lanham v. Lanham*, 336 S.W.3d 123, 128 (Ky. App. 2011). "[T]rial courts have almost unlimited discretion in exercising their contempt powers and we will not disturb a trial court's exercise of its contempt powers on appeal absent an abuse of that discretion." *Id.*

Here, the family court ordered Gwendolyn and Christopher to allow Dr. Biggerstaff access to his property and observed that such access was never provided. As Gwendolyn and Christopher failed to comply with a court order benefitting Dr. Biggerstaff, they were appropriately found in contempt.

2. Summary judgment was appropriate

Although the circuit court's order appears to have treated Dr. Biggerstaff's motion for summary judgment as a motion to dismiss under CR 12.02, the procedural effect is the same when information is taken from the record as a whole. *Pearce v. Courier-Journal*, 683 S.W.2d 633, 635 (Ky. App. 1985). We must accept all of the allegations as true in order to see if there is any issue of material fact. *See* CR 56.03. Moreover, when one alleges medical malpractice, expert testimony must be provided except in limited situations when courts may infer negligence. *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky. App. 2006).

At the trial level, the circuit court found the alleged conspiracy between Dr. Biggerstaff and his colleagues to kill Gwendolyn and harvest her kidneys was baseless. And other than a string of conclusory statements claiming that summary judgment was premature, we see no additional support for appellants' allegations on appeal. Appellants give no concrete reason why Dr. Biggerstaff was not entitled to judgment as a matter of law, nor have they produced any medical evidence connecting Gwendolyn's hospitalization for pneumonia to a dental procedure. Although the injection of a contaminated dental specimen may have given rise to a colorable res ipsa loquitur claim for medical negligence, the

complaint does not address whether Gwendolyn was within Dr. Biggerstaff's exclusive control during the purported event or whether Gwendolyn contributed to her injury. *See Sadr v. Hager Beauty School, Inc.*, 723 S.W.2d 886, 887 (Ky. App. 1987)(listing the requirements under the res ipsa loquitur doctrine). We also cannot hold an exception to the medical-expert requirement exists in this case because no layman would be able to conclude from common experience what type of dental "specimen" is capable of causing a life-threatening medical condition while also preserving human kidneys for transplant. *See Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky.1992)(explaining the exceptions to the medical expert requirement). Accordingly, Dr. Biggerstaff was entitled to judgment as a matter of law.

3. The circuit court did not err in failing to recuse

As appellants did not object to the circuit court's deciding the case at the lower level, we must decide whether the circuit court erred by not recusing *sua sponte*. KRS 26A.015 clearly sets forth the grounds upon which a court must *sua sponte* recuse. Under that provision, a judge must disqualify himself if his impartiality might reasonably be questioned. *See* KRS 26A.015(e).

Here, Judge Stevens acknowledged that he had some concerns about this case at first because he knew two of the parties, including Christopher. However, he noted in his June 2015 order that he did not know them "well" and further indicated that those concerns were resolved. Evidently, he did not feel his impartiality could be reasonably questioned and without a preserved argument on

appeal, we must accept that assessment based on the limited degree of familiarity with the parties. *See Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 876 (Ky. App. 2007).

4. **The civil action filed in July 2015 was correctly dismissed**

Res judicata bars repetitious suits involving the same cause of action. It consists of two subparts: claim preclusion and issue preclusion. *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 464–65 (Ky. 1998). "Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action." *Id.* at 65 (citing *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)). Issue preclusion, on the other hand, "bars the parties from relitigating any issue actually litigated and finally decided in an earlier action." *Id.* Three elements must be present for claim preclusion to apply: (1) identity of the parties, (2) identity of the causes of action, and (3) resolution on the merits. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 371 (Ky. 2010). The key question regarding the second element is whether both lawsuits arise from the same transactional nucleus of fact; if they do, "then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action." *Yeoman*, 983 S.W.2d at 465.

Here, the circuit court wrote "that the only substantive difference between this case and [the previous case] is that the plaintiff counsel . . . added defense counsel in the earlier case as defendant. Moreover, all claims brought against the defense counsel

relate to comments or actions taken during the [previous litigation]." Although we review this legal determination de novo, we cannot disagree that the claims raised by Gwendolyn and Christopher in the previous lawsuit, which was summarily dismissed for failure to state a cognizable claim in June 2015, involved the same transactional nucleus of fact as the subsequent lawsuit. The circuit court had already decided that there was no reasonable allegation of a conspiracy and that any statements made by Dr. Biggerstaff's attorney during the earlier proceedings were entitled to immunity. Accordingly, the lawsuit was properly dismissed.

5. Christopher was properly sanctioned under CR 11

Regarding the sanctions issue, CR 11 provides, in relevant part:

> The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rather than provide substantive rights to litigants, CR 11 is merely designed to procedurally curb abusive conduct during the litigation process. *Clark Equip. Co., Inc.*, 762 S.W.2d at 420. The test for the trial court to administer when considering

a motion for sanctions "is whether the attorney's conduct, at the time he or she signed the allegedly offending pleading or motion, was reasonable under the circumstances." *Lexington Inv. Co. v. Willeroy*, 396 S.W.3d 309, 312–13 (Ky. App. 2013).

Here, the circuit court sanctioned Christopher for the costs expended by Dr. Biggerstaff to defend a repetitious, groundless lawsuit. The circuit court also noted that Christopher motioned for Dr. Biggerstaff, who was 89 years old at the time of the action, to be taken into custody and face multiple mental inquest warrants, which were all denied. Based on these findings, we cannot conclude the circuit court acted unreasonably in assessing costs. The judgments of the Jefferson Circuit Court are hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Christopher Moses
Louisville, Kentucky

BRIEF FOR APPELLEE:

Darryl T. Owens
Louisville, Kentucky