

Cite as 2009 Ark. App. 677

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA09-241

CHARLES WILSON

APPELLANT

V.

CECIL SMITH AND W&S
EXCAVATING

APPELLEES

Opinion Delivered October 21, 2009APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CV-05-81/1]HONORABLE MARION A.
HUMPHREY, JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

Charles W. Wilson appeals from the denial of his motion to reconsider an earlier order of dismissal and to reinstate his lawsuit against appellees Cecil Smith and W&S Trucking. He contends that the trial court's action was an abuse of discretion and deprived him of due process of law.

Appellant was injured in January 2002 when the vehicle in which he was a passenger collided with a vehicle owned by W&S and driven by Smith. Appellant filed a complaint in Pulaski County Circuit Court in January 2005 seeking damages from appellees. The complaint was signed on appellant's behalf by Arkansas attorney J. David Wall for the Bassett Law Firm of Fayetteville. Below the signature line, the complaint also listed the names and address of Tulsa, Oklahoma, attorneys Donald Smolen and Bryan Smith. Appellees filed their answer to the complaint later that same month. The record reflects no further action in the

Cite as 2009 Ark. App. 677

court for more than a year. On March 29, 2006, the circuit judge sent a notice addressed to Mr. Wall advising that some action needed to be taken in the case within fifteen days or it would be subject to dismissal. *See* Ark. R. Civ. P. 41(b).¹ Arkansas attorney James Graves, also of the Bassett Law Firm, responded to the court with a letter stating that Mr. Wall had recently passed away and that he (Mr. Graves) had sent a letter to the Oklahoma attorneys in January 2006 notifying them of that fact and requesting that they obtain other Arkansas counsel. Mr. Graves also stated to the circuit court that he had since written a second letter to the Oklahoma attorneys and provided them with a copy of the court's Rule 41(b) notice. After no further contact from anyone purporting to represent appellant, the circuit court entered an order on April 19, 2006, dismissing the case without prejudice pursuant to Ark. R. Civ. P. 41.

Because the statute of limitations had by then run on appellant's cause of action, he had one year, or until April 19, 2007, in which to refile the action. Ark. Code Ann. § 16-56-126(a) (Repl. 2005); *see Carton v. Missouri Pacific Railroad Co.*, 295 Ark. 126, 747 S.W.2d 93 (1988) (an involuntary dismissal works as a nonsuit for purposes of the savings statute).

¹“In any case in which there has been a failure of the plaintiff to comply with these rules or any order of court or in which there has been no action shown on the record for the past 12 months, the court shall cause notice to be mailed to the attorneys of record, and to any party not represented by an attorney, that the case will be dismissed for want of prosecution unless on a stated day application is made, upon a showing of good cause, to continue the case on the court's docket. A dismissal under this subdivision is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits.”

Cite as 2009 Ark. App. 677

However, appellant took no action within one year. Instead, the record reflects no action until January 2008, when newly associated Arkansas counsel, Eric Wewers, filed an “entry of appearance” as an additional attorney for appellant. Appellees responded by noting that the lawsuit had been dismissed in April 2006 and that there was no action pending in which an appearance could be filed.

More than three months later, in April 2008, the new Arkansas attorney filed the instant motion to reinstate appellant’s original complaint. Attached to the motion was an affidavit from Oklahoma attorney Smolen in which he admitted knowledge of Mr. Wall’s death as early as January 2006, when he admittedly received Mr. Graves’s letter of that month. However, Mr. Smolen denied any knowledge of the court’s Rule 41(b) notice of inaction or the subsequent order of dismissal until being notified of the same by new Arkansas counsel in January 2008. Appellant argued in his motion that his injuries from the accident were substantial and that the dismissal of his lawsuit “works a severe prejudice” on him. He further argued, in a conclusory fashion, that the dismissal deprived him of his constitutional rights to due process because the court failed to first send the Rule 41(b) notice to his Oklahoma attorneys. Appellees responded that the court appropriately and timely notified the Arkansas attorneys of record of the potential dismissal pursuant to Ark. R. Civ. P. 41; that the Oklahoma lawyers were notified by Mr. Graves of Mr. Walls’s death, the need to associate another Arkansas attorney, and the court’s Rule 41 notice; that, despite these facts, appellant did nothing to keep up with the posture of his case or take any action in the court to refile or reinstate the action until almost two years after the order of dismissal; and that, because

Cite as 2009 Ark. App. 677

more than ninety days had passed since the dismissal, the trial court lacked jurisdiction under Ark. R. Civ. P. 60 to set aside the dismissal and reinstate appellant's action.² After a hearing in November 2008, the circuit court denied appellant's motion, ruling that it lacked jurisdiction.

On appeal, appellant's primary argument hinges on the assertion that the Oklahoma lawyers were "attorneys of record" because their names were listed in the signature block at the end of appellant's original complaint; that the trial court was therefore obliged to send the Rule 41(b) notice to the Oklahoma attorneys before dismissing the case for lack of activity; and that application of Rule 60's jurisdictional time limitation in light of the court's failure to comply with that notice obligation violates appellant's due process rights. Appellant concedes, however, that "there is no constitutional violation when the proper procedure of notice is provided under . . . [Rule] 41(b)."

We find no merit in appellant's argument because we do not agree with his assertion that the Oklahoma lawyers were "attorneys of record" for purposes of Rule 41(b). Smolen and Smith are not licensed to practice law in Arkansas. Also, they admit that they were not admitted *pro hac vice* in this case. There is nothing in the record to show that they ever attempted to become authorized to practice here by showing good standing in Oklahoma, that Oklahoma would allow an Arkansas attorney to practice there under similar

²Rule 60(a) permits a court to modify or vacate a judgment within ninety days after its entry. Sections (b) and (c) of Rule 60 provide certain exceptions to the time limit set by Rule 60(a). None of those exceptions are argued by appellant.

Cite as 2009 Ark. App. 677

circumstances, or that they filed a written statement with the court that they submitted to Arkansas disciplinary procedures. See Ark. Bar Adm. R. XIV; *Preston v. University of Arkansas for Medical Sciences*, 354 Ark. 666, 128 S.W.3d 430 (2003) (complaint filed by out-of-state attorneys before *pro hac vice* motions are filed was a nullity). Only “attorneys of record” are required to be mailed notice under Ark. R. Civ. P. 41(b). We think that, if one is not an attorney licensed to practice in Arkansas, even for the purposes of the one case before the court, then that person cannot be an “attorney of record” entitled to notice under Rule 41. Appellant’s only attorney licensed to practice in Arkansas had appropriate and timely notice mailed to him, and it was admittedly received.

Appellant makes no other argument for avoiding Rule 60’s time limitation other than the bare assertion, unsupported by any citation to authority, that the trial court should also have sent the Oklahoma lawyers a copy of the dismissal order. We do not address this issue. It is well established that Arkansas appellate courts do not consider assignments of error that are unsupported by convincing argument or sufficient legal authority. See *City of Benton v. Arkansas Soil & Water Conservation Commission*, 345 Ark. 249, 45 S.W.3d 805 (2001).

Appellant’s final argument is that the dismissal under these circumstances constituted a miscarriage of justice for which relief should be granted. However, Ark. R. Civ. P. 60(a) speaks to this directly and only permits a court to vacate or modify a judgment or order on this basis within ninety days of the entry of that judgment or order. Consequently, we hold that the limitation applies, and that the trial court correctly held that it lacked jurisdiction to

Cite as 2009 Ark. App. 677

set aside the judgment of dismissal some two and one-half years after the dismissal was first entered.

Affirmed.

KINARD and BROWN, JJ., agree.