

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001829-MR

WILLIAM L. CLEMENTS

APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 96-CI-00150

THEODORE H. LAVIT

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING
** ** * * * * *

BEFORE: GUIDUGLI, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: William L. Clements appeals from a judgment of the Casey Circuit Court dismissing his complaint against Theodore H. Lavit for legal malpractice. The trial court concluded that Clements's defective service of the summons on Lavit did not toll the one-year statute of limitations, and thus Clements's causes of action were untimely. We find that Clements's errors in obtaining the issuance of a valid summons did not amount to bad faith which would render his claims untimely. We further find that the trial court prematurely dismissed the professional negligence claim which arose from Lavit's representation of

Clements in a civil case. However, we agree with the trial court that Clements's admission of guilt in the underlying criminal case precludes his claims against Lavit arising from that case. Hence, we affirm in part, reverse in part, and remand for further proceedings.

On September 9, 1996, Clements filed a complaint against Lavit in the Casey Circuit Court. Clements alleged that Lavit had negligently provided legal representation to him in two separate proceedings: one civil and one criminal. The complaint and summons were delivered to Lavit's office in Lebanon, Marion County, Kentucky, and the return-receipt card was signed by Margaret Smith at that address. On September 30, 1996, Lavit filed an answer which, among other things, objected to personal jurisdiction and venue in the Casey Circuit Court. Lavit asserted that the service of process was defective because he was not served in the county where the action was brought, as required by KRS 452.480 and 452.485. In addition, Lavit filed a counterclaim against Clements, seeking payment for legal services rendered.

On November 8, 1996, Lavit filed a motion to quash the summons and to dismiss the complaint based upon the defective service of process. In an order entered on January 13, 1997, the trial court granted the motion to quash the summons, but denied the motion to dismiss. The court noted that venue would be proper in Casey County if Lavit were personally served there. Shortly thereafter, Clements had the Marion County Sheriff personally serve Lavit at Lavit's office in Marion County. Lavit

again moved to quash the summons, citing the defective service under KRS 452.480 and 452.485. The trial court granted the motion by order entered July 22, 1997.

Clements filed a motion to reconsider that order. At the hearing on February 23, 1998, Clements's attorney moved to transfer the case to Marion Circuit Court. The trial court granted the motion over Lavit's objection. However, the Marion Circuit Court agreed with Lavit that, under the version of KRS 452.010 which was then in effect, the Casey Circuit Court could not order a change of venue over Lavit's objection.¹ By order entered on September 11, 1998, the Marion Circuit Court dismissed the transferred action and returned the case file to the Casey Circuit Court.

On November 20, 1998, Lavit was personally served in Casey County with Clements's summons and complaint. In May of 1999, Lavit filed a motion to dismiss, alleging that the defective service did not toll the statute of limitations and as a result, Clements's causes of action were now untimely.² In addition, Lavit argued that Clements had failed to state causes of action for the professional negligence claims, noting that Clements failed to appeal from the dismissal of his civil action, and he admitted his guilt in the criminal matter. The trial

¹ Effective July 14, 2000, KRS 452.105 now permits a court which lacks venue to transfer the case to a court with proper venue, even over the objection of one of the parties.

² KRS 413.245 requires any cause of action arising from the negligent performance of professional services to be brought within one year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured.

court denied the motion to dismiss on July 2, 1999. However, two years later Lavit filed a renewed motion to dismiss based upon the same grounds, which the trial court granted on July 23, 2001. The trial court later denied Clements's CR 59.05 motion to set aside the order dismissing, and this appeal followed.

It is well-established that an action for professional negligence is transitory.³ Therefore, the action may be brought in the county in which the defendant resides or is summoned.⁴ In its order of January 13, 1997, the trial court noted that Lavit regularly practiced in Casey County, and both of the underlying actions were tried in Casey County. However, KRS 452.485 prohibits any judgment from being entered in a transitory action against a single defendant unless the defendant is summoned in the county where the action is brought, or unless he resides in the county where the action is brought, or unless he files a defense to the action before objecting to the jurisdiction of the court. Because Lavit did not reside in Casey County, the trial court could not exercise personal jurisdiction unless he was personally served there or unless he waived any objection to personal jurisdiction.

As noted by the trial court, a civil action is deemed to commence upon the filing of a complaint with the court and the issuance of the summons in good faith.⁵ The question is whether the summons was issued in good faith. The trial court agreed

³ Wood v. Downing's Administrator, 110 Ky. 656, 62 S.W. 487, 489 (1901).

⁴ KRS 452.480.

⁵ KRS 413.250; CR 3.01.

that Clements had filed his complaint within one year after his causes of action accrued. However, the court concluded neither of the first two summons had been issued in good faith because they could not have led to valid service. The court also noted that there was a delay of nearly sixteen months between the quashing of the second summons and Lavit's actual service in Casey County. Consequently, the court determined that the one-year statute of limitations had not been tolled, and Clements's action was now untimely. We disagree.

The issuance of a summons does not commence an action unless accompanied by an intent that the summons be served in due course.⁶ But mere negligence in the execution and issuance of a summons will not bar a cause of action.⁷ If, when the summons was issued, the plaintiff had a bona fide, unequivocal intention of having it served presently or in due course or without abandonment, the summons was issued in good faith.⁸

In support of its conclusion that the summons had not been issued in good faith, the trial court cited Brock v. Turner Fuel Co.,⁹ as holding that a delay of six months in obtaining an issuance of a second summons was destructive of good faith in the issuing of process necessary for the commencement of an action so

⁶ Whittinghill v. Smith, Ky. App., 562 S.W.2d 649, 650 (1977).

⁷ Jones v. Baptist Healthcare System, Inc., Ky. App., 964 S.W.2d 805, 807 (1997).

⁸ Roehrig v. Merchant's & Businessmen's Mutual Insurance Co., Ky., 391 S.W.2d 369, 371 (1965).

⁹ 296 Ky. 729, 178 S.W.2d 427 (1944).

as to toll limitations statutes.¹⁰ However, in Brock, although the summons was issued prior to expiration of the limitations period, the plaintiff's attorney held it until after the limitations period had passed. There was no evidence of any attempt to serve the first summons.¹¹ In contrast, other cases have held that a party's failure to follow the precise statutory method for service of summons did not amount to bad faith.¹²

In this case, Clements and his trial counsel exercised less than perfect diligence in attempting to serve Lavit. While the procedures for service in a transitory action are unique (and one could argue outdated), they are clearly set out in the applicable statutes. Nevertheless, there was no evidence which supports a conclusion that either Clements or his trial counsel did not intend to immediately commence the action against

¹⁰ Id. at 429.

¹¹ See also Graham v. Harlin, Parker & Rudloff, Ky. App., 664 S.W.2d 945 (1983) and Whittinghill v. Smith, *supra*, both holding that causing a summons to be issued by the clerk conditionally is not causing it to be issued in good faith.

¹² See also Jones v. Baptist Healthcare System, Inc., *supra* (Secretary of State provided incorrect name for the defendant's agent for service of process); Crowe v. Miller, Ky., 467 S.W.2d 330, 333 (1971) (Plaintiff's mistake as to the proper method of service of process upon an unmarried defendant, over eighteen but less than twenty-one years of age did not amount to bad faith); Roehrig v. Merchants & Businessmen's Mut. Ins. Co., *supra*, (Plaintiff's attempt to serve process on a foreign corporation through the incorrect agent did not amount to bad faith); Commonwealth, Dept. of Highways v. Parker, Ky., 394 S.W.2d 899 (1965) (Plaintiff's mistake in seeking to obtain service upon the Workmen's Compensation Board by having summons served on the Attorney General did not amount to bad faith); and Hausman's Adm'r v. Poehlman, 314 Ky. 453, 236 S.W.2d 259 (1951) (Although plaintiff's counsel should have exercised greater diligence in discovering the defendant's correct address, the Court held that the mistake did not warrant a finding that the summons had not issued in good faith).

Lavit.¹³ Lavit received actual notice of the filing of the action. The summons was delivered to Lavit's correct office address in Marion County, and Lavit was personally (albeit improperly) served with the second summons. After the second summons was quashed, Clements filed a motion to transfer the case to Marion County -- a motion which the Casey Circuit Court granted. Finally, less than two months after the case was returned to Casey County, Clements obtained personal service of the summons on Lavit in Casey County. Neither the trial court nor Lavit refer to any evidence in the record that Clements could have obtained personal service on Lavit in Casey County prior to November 1998. Consequently, the statute of limitations was tolled when Clements filed his initial complaint, and his causes of action remain timely.

In its order dismissing, the trial court recognized that its ruling finding Clements's action untimely rendered moot the other issues raised in Lavit's motion to dismiss. Nonetheless, the trial court found that Clements was collaterally estopped from claiming professional negligence with regard to either of the underlying cases because Clements failed to appeal from the adverse judgments. While the trial court addressed the sufficiency of Clements's claims on a motion to dismiss, it considered matters outside of the pleadings. Accordingly, the

¹³ See also Louisville & Nashville Railroad Co. v. Little, 264 Ky. 579, 95 S.W.2d 253, 255 (1936).

motion should have been treated as a summary judgment motion pursuant to CR 56.02.¹⁴

The standard of review on appeal from a summary judgment is whether the trial court correctly determined that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.¹⁵ Summary judgment may be granted only if it appears impossible for the non-moving party to produce evidence at trial warranting a judgment in his favor after the record has been reviewed by the court in a light most favorable to the party opposing the motion for summary judgment--with all doubt having been resolved in his favor.¹⁶ Since factual findings are not at issue, the ruling of the trial court is given no deference.¹⁷

The trial court ruled that both of Clements causes of action were barred "by principles of collateral estoppel or res judicata." However, if these doctrines were applicable, no party alleging negligence by an attorney could ever recover. The adverse judgment would invariably preclude re-litigation of the underlying cases. Rather, to prevail in a professional negligence action against an attorney, a plaintiff is required to prove: 1) that there was an employment relationship with the defendant/attorney; 2) that the attorney neglected his duty to

¹⁴ CR 12.03.

¹⁵ Scifres v. Kraft, Ky. App., 916 S.W.2d 779 (1996) (citing CR 56.03).

¹⁶ Steelvest v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991).

¹⁷ Scifres v. Kraft, 916 S.W.2d at 781 (citing Goldsmith v. Allied Bldg. Components, Inc., Ky., 833 S.W.2d 378, 381 (1992)).

exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and 3) that the attorney's negligence was the proximate cause of damage to the client.¹⁸ Based upon this standard, we find that summary judgment was appropriate as to the claim arising from the criminal matter, but not as to the claim arising from the civil action.

In Commonwealth of Kentucky v. William L. Clements,¹⁹ Clements was charged with fourth-degree assault of his fifteen-year-old daughter.²⁰ Clements asserts that he hired Lavit to represent him in the action. Lavit denies that he agreed to represent Clements. In any event, Clements appeared for trial on September 22, 1995, without counsel. Testifying on his own behalf, Clements admitted that he struck his daughter three times with his belt, but he asserted that his actions were justified in reasonably disciplining the child. The trial court, sitting without a jury, concluded that Clements had used excessive force and found him guilty of fourth-degree assault. In a related proceeding, Clements stipulated that the child had been abused within the meaning of KRS 600.020(1).

On appeal, Clements concedes that he was guilty of the charge against him, but he contends that his innocence or guilt is irrelevant to his claims against Lavit. We disagree. If Lavit had agreed to represent Clements, his failure to appear for

¹⁸ Daugherty v. Runner, Ky. App., 581 S.W.2d 12, 16 (1978).

¹⁹ Casey District Court, Action No. 1995-D-00091-001.

²⁰ Fourth-degree assault is a class A misdemeanor. KRS 508.030.

the trial clearly would have been a breach of his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances. Nevertheless, Clements's admission that the evidence supported his conviction precludes any finding that his justification defense would have prevailed.²¹ Consequently, this trial court properly dismissed this claim.

In William L. Clements v. Shelter Insurance Company,²² Clements filed a complaint against his motor vehicle insurance carrier seeking to recover benefits allegedly due under the policy. The carrier denied coverage based upon alleged misrepresentations in Clements's original application for insurance. The Shelter case was dismissed for lack of prosecution on August 30, 1995, and the order dismissing became final on September 25, 1995. Lavit contends that Clements failed to cooperate in the discovery process, while Clements asserts that Lavit failed to diligently pursue the matter.

Clements admits he failed to appeal from the dismissal of this action despite Lavit's recommendation that he do so. Lavit argues that Clements's failure to appeal precludes any recovery for professional negligence. We disagree. Clements was

²¹ Ray v. Stone, Ky. App., 952 S.W.2d 220, 223 (1997). If Clements had alleged that he had paid a retainer to Lavit for the representation but Lavit failed to provide any services, then Clements's innocence or guilt on the underlying charge would not preclude his claim. But such a claim would be one for breach of contract rather than tort.

²² Casey Circuit Court, Action No. 89-CI-00153. This action was originally filed in Marion Circuit Court, but was later transferred to the Casey Circuit Court.

not required to appeal from the dismissal of his civil action if Lavit's negligence rendered an appeal futile.

Under CR 41.02, a trial court has the discretion to dismiss an action with prejudice for failure of the plaintiff to prosecute or to comply with the orders of the court.²³ Because of the grave consequences of a dismissal with prejudice, a trial court should grant such a dismissal only in the most extreme cases.²⁴ Yet while the court's decisions in such matters will be subject to close scrutiny on appeal, a trial court's discretion will not be disturbed except for abuse.²⁵ It is by no means clear from the record that the circumstances surrounding the dismissal of the civil case could have warranted a finding of abuse of discretion. Furthermore, Lavit's alleged negligence would not have been a factor in determining whether the trial court abused its discretion in dismissing the action.²⁶ We conclude that there were genuine issues of material fact which rendered summary judgment on this claim inappropriate.

Accordingly, the judgment of the Casey Circuit Court is affirmed in part, reversed in part, and this case is remanded for further proceedings on the merits of Clements's claim against Lavit arising from the dismissal of the civil action.

²³ See also CR 77.02.

²⁴ Polk v. Wimsatt, Ky. App., 689 S.W.2d 363, 364-65 (1985).

²⁵ Id. at 365. See also Thompson v. Kentucky Power Co., Ky. App., 551 S.W.2d 815, 816 (1977).

²⁶ See Vanhook v. Stanford-Lincoln City Rescue Squad, Ky. App., 678 S.W.2d 797, 799 (1984).

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