

RENDERED: OCTOBER 20, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000913-MR

GEORGE KONSTANTINIDIS

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 03-CI-00516

RONALD RELIFORD;
TTC ILLINOIS, LLC;
AND MID-STAR CONSTRUCTION, INC.

APPELLEES

OPINION AND ORDER

1. AFFIRMING;
2. GRANTING MOTION TO STRIKE

** ** * * * * *

BEFORE: BARBER AND VANMETER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

BARBER, JUDGE: Appellant, George Konstantinidis, appeals the Boone Circuit Court's summary judgment order dismissing his action against Appellee, Ronald Reliford. Konstantinidis'

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

action was a tort claim for alleged injuries sustained in an automobile accident. Following a review of the record, we affirm.

Reliford filed a motion to strike Konstantinidis' appellate brief for failure to adhere to CR 76.12(4).² After the motion to strike was filed, Konstantinidis did file a motion for additional time to correct his brief. However, this motion was denied by our court on March 20, 2006. As such, we are left only with his original appellate brief to review.

Konstantinidis' brief is essentially a two-page letter written by a friend on his behalf discussing, in large part, the discovery procedure at the trial level. His brief is insufficient in many ways: (1) he failed to follow the basic format of appellate briefs (CR 76.12(4)(a)); (2) he did not have any of the specific content requirements (CR 76.12(4)(c)); (3) he made no references to the record (CR 76.12(4)(c)(iv) and (v)); and (4) he failed to cite any legal authority for his position (CR 76.12(4)(c)(iii) and (v)).

While we are sympathetic to Konstantinidis' plight in trying to appeal pro se, it would be improper for us to allow a brief with such severe deficiencies to remain. For the foregoing reasons, the motion to strike is granted.

² Reliford also requests that the appendix to Konstantinidis' brief be stricken arguing that our court denied Konstantinidis' request to supplement the record with the documents per order entered December 1, 2005.

Even though we have stricken Konstantinidis' brief, we will still review the circuit court's summary judgment order to determine if it was proper.

Background

On May 17, 2001, Konstantinidis was operating construction equipment on a bridge on I-275 in Boone County Kentucky. Specifically, he was working in a "cherry-picker" bucket. Reliford was driving his automobile on the same stretch of interstate. Konstantinidis lowered his bucket into a driving lane and was struck by Reliford. Konstantinidis later filed suit on April 14, 2003, alleging that Reliford was negligent and that he sustained permanent injuries as well as an inability to work.

Konstantinidis' first attorney, Joseph M. Schulte, withdrew November 4, 2004. He was replaced by Curtis H. Hatfield. During the time Mr. Hatfield represented Konstantinidis, the trial court entered a pre-trial order December 3, 2004. The order required the parties to file trial briefs, proposed jury instructions, and witness lists by March 15, 2005 as well as to exchange copies of all exhibits to be used at trial no later than the morning of trial. The order also set a trial date of April 13, 2005.

Mr. Hatfield then withdrew on January 4, 2005. The following month, Kenneth E. Rylee, Jr., entered his entry of

appearance on behalf of Konstantinidis. A second pre-trial order was entered on March 18, 2005.³ This order allowed the parties until March 25, 2005, to file their trial brief, proposed jury instructions, and witness list. In addition, the order again restated that the parties were to exchange copies of all exhibits to be used at trial no later than the morning of trial.

Mr. Rylee was then permitted to withdraw as counsel on March 25, 2005.⁴ Reliford subsequently filed his motion for summary judgment April 6, 2005. Konstantinidis filed no response. A hearing was held on the motion April 13, 2005.⁵ Konstantinidis was unrepresented at this hearing and still had not complied with the court's pre-trial orders.

The trial court sanctioned Konstantinidis for his non-compliance with its orders by not allowing him to call "any witnesses other than himself" and restricted him in introducing "proof of medical expenses or special damages." This hindered Konstantinidis' ability to prove his case.

³ A pre-trial conference was held March 15, 2005, pursuant to first pre-trial order. Konstantinidis had filed nothing to comply with the first pre-trial order at the time of the pre-trial conference while Reliford had complied with all applicable deadlines.

⁴ Mr. Rylee had filed a motion to continue the jury trial, but it was not granted.

⁵ The trial court moved the jury trial to April 14, 2005 to accommodate the motion.

In light of this ruling, the court then concluded it would be impossible for him to introduce any proof that would remove him from the abrogation of tort liability pursuant to the Kentucky Motor Vehicle Reparation Act (Act), KRS 304.39-060(2)(b). Therefore, it granted summary judgment and dismissed his case. Konstantinidis now appeals to our court.

Standard of Review

Summary judgment should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. Jefferson County Fiscal Court v. Peerce, 132 S.W.3d 824, 832 (Ky. 2004), (citing Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 483 (Ky. 1991)). Summary judgment is to be cautiously applied and should not be used as a substitute for trial. Id.

Legal Authority and Analysis

We first note that Konstantinidis did not receive ten days notice of the hearing on Reliford's summary judgment motion as required by CR 56.03. The ten-day requirement may be waived absent a showing of prejudice. Equitable Coal Sales, Inc. v. Duncan Machinery Movers, 649 S.W.2d 415, 416 (Ky.App. 1983). In the instant case, Konstantinidis did not file a response to the summary judgment motion, did not object to the hearing date, did

not request a continuance, and argued against the motion on the day of the hearing. The hearing date of April 13, 2005 was well past the date the parties were to comply with the second pre-trial order, i.e. March 25, 2005. Thus, we do not believe Konstantinidis was prejudiced by the trial court's waiving of the ten-day notice requirement. We turn to the court's sanctions.

Parties are bound by a pre-trial order and its terms may not be contradicted. Sapp v. Massey, 358 S.W.2d 490, 491-492 (Ky. 1962). A court has a right to sanction a party for failure to comply with its order. We shall not review whether the trial court's sanctions were appropriate because that issue is not properly before us.⁶ What we shall focus on is whether Konstantinidis' action should have survived summary judgment in light of the court imposed sanctions.⁷

The Act⁸ has threshold requirements pursuant to KRS 304.39-060(2)(b), which state, in part:

⁶ Even though Konstantinidis' brief was stricken, we note that this issue was not addressed in Reliford's brief. An issue not discussed in the briefs will not be reviewed by the appellate courts. White v. Rainbo Baking Co., 765 S.W.2d 26, 30 (Ky.App. 1988), (citing Milby v. Mears, 580 S.W.2d 724 (Ky.App. 1979)).

⁷ Konstantinidis appealed the summary judgment order and his appellate brief was stricken. As such, we are extremely limited in our review.

⁸ The statute of limitation for a claim under the Act is two years. KRS 304.39-230. The statute of limitation for a personal injury claim is one year. KRS 413.140(1)(a). Konstantinidis' suit was filed nearly twenty-three months after the accident. Hence, it was filed pursuant to the Act or it would have been time-barred.

In any action of tort brought against the owner . . . of a motor vehicle with respect to which security has been provided as required in this subtitle, . . . , a plaintiff may recover damages in tort for pain, suffering, mental anguish and inconvenience because of bodily injury, sickness or disease arising out of the . . . operation or use of such motor vehicle only in the event that the benefits which are payable for such injury as "medical expense" or which would be payable but for any exclusion or deductible authorized by this subtitle exceed one thousand dollars (\$1,000), **or** the injury . . . consists in whole or in part of permanent disfigurement, a fracture to a bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of bodily function or death. (Emphasis added.)

In other words, given the threshold requirements of KRS 304.39-060(2)(b), an individual must introduce evidence of a permanent disfigurement, permanent injury, bone fracture, loss of a body member, permanent loss of bodily function, or death **or** evidence that his medical expenses exceeded \$1,000.00 in order to pursue a tort action. See Southard v. Hancock, 689 S.W.2d 616, 617 (Ky.App. 1985).

Konstantinidis did allege a permanent injury to his right wrist. However, the trial court's sanctions prevented him from having any person testify other than himself.

Konstantinidis was not qualified to testify on issues requiring a medical opinion. There also was no proof contained in the record related to the other conditions listed in KRS 304.39-

060(2)(b), such as permanent disfigurement or a broken bone.

We now examine the \$1,000.00 threshold.

The trial court also sanctioned Konstantinidis by not allowing him to introduce any of his medical expenses to support his case. As such, it would be impossible for him to provide proof of medical expenses related to the accident in excess of \$1,000.00.

Effectively, the trial court's sanctions made it impossible for Konstantinidis to satisfy either of the threshold requirements of KRS 304.39-060(2)(b). Failure to meet the threshold requirements of the Act means that Konstantinidis was not able to pursue his tort action against Reliford. It became impossible for Konstantinidis to produce evidence at trial warranting a judgment in his favor. Hence, summary judgment was appropriate.

Conclusion

The trial court's sanctions rendered it impossible for Konstantinidis to satisfy the threshold requirements of KRS 304.39-060(2)(b). The threshold requirement had to be satisfied before he could proceed with his claim against Reliford for alleged injuries sustained in the automobile accident. As such, Konstantinidis no longer had a viable claim. Therefore, we affirm the Boone Circuit Court's order granting summary judgment to Reliford.

ENTERED: October 20, 2006—

/s/ David A. Barber
JUDGE, COURT OF APPEALS

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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