

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

WILLIAM MILLER,

Appellant

v.

DWANE SHORR AND PETER HUCHKO,

Appellees

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 296 WDA 2012

Appeal from the Order entered January 24, 2012,  
in the Court of Common Pleas of Allegheny County,  
Civil Division, at No(s): GD 10-004057

BEFORE: ALLEN, WECHT and STRASSBURGER\*, JJ.

MEMORANDUM BY ALLEN, J.:

Filed: February 15, 2013

William Miller ("Appellant") appeals from the trial court's January 24, 2012 order granting summary judgment in favor of appellees Dwane Shorr and Peter Huchko. Appellant's sole issue is:

Did the trial court erroneously fail to grant [Appellant's] motion to continue the case due to the appearance of new counsel, inadequate time to prepare, obtain medical reports and depositions of medical expert witnesses (treating doctors)?

Appellant's Brief at vi.

The record is relatively scant, and there are no notes of testimony relative to Appellant's continuance issue, which was argued in motions court. The parties were involved in an automobile accident on March 4, 2008. On March 3, 2010, Appellant filed a complaint in which he claimed that he sustained injuries as a result of Appellees' negligence.

\*Retired Senior Judge assigned to the Superior Court.

On November 1, 2011, Judge Folino granted Appellant's counsel's request to withdraw from the case. The order directed that replacement counsel enter an appearance within thirty (30) days, and the case was continued to January 23, 2012. Appellant's current counsel entered his appearance beyond the prescribed thirty (30) days, on January 18, 2012. On January 20, 2012, Appellant's counsel appeared in motions court where he requested a 90 day continuance. Appellant's motion lists three reasons for the requested continuance:

1. Counsel is new to the case after the court permitted [prior counsel] to withdraw...Counsel is not yet prepared to try this matter.
2. Medical reports need to be obtained from certain medical experts.
3. Depositions of certain medical experts need to be set up and taken prior to trial.

On January 19, 2012, Appellees filed a motion in opposition to the continuance in which they averred, *inter alia*, the following:

--Appellant's prior counsel advised Appellees' counsel on August 16, 2011, that he would no longer be representing Appellant, and that current counsel would be entering his appearance for Appellant.

--The case was originally listed for jury trial on November 29, 2011, with the following discovery and pre-trial dates:

-Discovery to end September 2, 2011

-Appellant's Pre-Trial Statement due September 16, 2011

-Appellees' Pre-Trial Statement due September 30, 2011

--Appellees filed their Pre-Trial Statement on September 30, 2011, consistent with the trial court directive.

--Appellant never filed a Pre-Trial Statement.

--Prior counsel was permitted to withdraw by order entered October 31, 2011, and the case was continued until January 23, 2012, with replacement counsel to enter an appearance "within 30 days."

--A pre-trial conference convened on January 5, 2012, at which neither Appellant nor counsel for Appellant appeared.

--On January 18, 2012, "previously identified" counsel for Appellant entered his appearance on Appellant's behalf, 79 days after the trial court's October 31, 2011 directive.

--Appellant, through his new/current counsel, seeks a continuance to allegedly obtain medical reports and depositions; said experts are not identified and no fact or expert witnesses have ever been identified by Appellant or his counsel.

Motion in Opposition to Continuance at 1-2.

Appellees further asserted that Appellant's continuance motion should be denied because:

--Appellant failed to comply with every pre-trial rule "for the orderly administration of civil cases."

--Appellant never identified any expert witness in the two (2) years of the case's pendency.

--If the case were continued, the case will be given an additional 6 to 8 months of discovery, depending on whether it would be continued to the March or May, 2012 term.

--Appellees would be "extremely prejudiced" if the case were continued, discovery reopened and witnesses produced that have not been identified in the two (2) years that the case was pending.

--Appellees were already prejudiced by having the case remain unresolved despite their complying with all rules and deadlines established by the trial court.

*Id.* at 2.

By order dated January 20, 2012, Judge Folino<sup>1</sup> denied Appellant's motion for a continuance. On January 24, 2012, the parties appeared before Judge O'Brien and argued pre-trial motions, including Appellees' motion for summary judgment. Judge O'Brien granted summary judgment and Appellant filed an appeal, to which he attached a Pa.R.A.P. 1925(b) statement. Judge O'Brien filed a "Statement Under Pa.R.A.P. 1925(a)" in which he opined that Appellant's Pa.R.A.P. 1925(b) statement was overly vague and "the functional equivalent of no statement at all." In his Pa.R.A.P. 1925(b) statement, Appellant, *inter alia*, simply averred:

The trial court erroneously failed to grant [Appellant's] motion to continue the matter.

As a result of Judge Folino denying the continuance, and Judge O'Brien determining that Appellant's Pa.R.A.P. 1925(b) statement was overly vague, there is no trial court opinion on the continuance issue.

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<sup>1</sup> Throughout his brief, Appellant states that his continuance motion was denied by Judge **Farino**. Appellant's Brief at 1-4, 12, 16. The record, including the docket entries, the January 20, 2012 order denying the continuance, and the trial court's "Statement Under Pa.R.A.P. 1925(a)" indicate that the continuance was denied by Judge **Folino**.

At this juncture we note that there are currently pending before this Court two outstanding pleadings filed by Appellees. On July 23, 2012, Appellees filed an application to quash appeal on the basis that Appellant's Pa.R.A.P. 1925(b) statement was overly vague. On August 6, 2012, Appellees filed an application to dismiss the appeal on the basis that Appellant failed to timely file his brief and reproduced record. This Court granted the application to dismiss the appeal on August 9, 2012. On August 17, 2012, we denied the application to quash as "moot...[and] denied [the application] without prejudice to be re-filed should Appellant's appeal be reinstated." On September 6, 2012, Appellant filed an application to reinstate his appeal. On September 11, 2012, we reinstated Appellant's appeal. The per curiam order specified:

Upon consideration of appellant Miller's September 6, 2012 "motion to reconsider and reinstate appellant's appeal and first motion for an extension of time within which to file appellant's brief and reproduced record," the following is ORDERED: (1) appellant's request to reinstate this appeal is GRANTED such that the appeal is REINSTATED; (2) ***appellant's request for an extension of time to file his brief and reproduced record is GRANTED, BUT ONLY TO THE EXTENT THAT appellant's brief and reproduced record are now due thirty (30) days from the date of this order and NO FURTHER EXTENSIONS OF TIME TO FILE APPELLANT'S BRIEF AND REPRODUCED RECORD SHALL BE GRANTED***; (3) appellant's request that this court order the lower court "to file a Rule 1925 ruling" is DENIED WITHOUT PREJUDICE to the assigned panel's right to take whatever action, if any, the panel deems appropriate regarding the lower court's Pa.R.A.P. 1925(a) opinion.

(capitalization in original, emphasis added).

According to our order, Appellant had until October 11, 2012 to file his brief and reproduced record. On October 10, 2012, Appellant filed an application for extension of time to file his brief. We denied the application on October 16, 2012. On October 29, 2012, Appellant filed an application for relief seeking to file his brief "out of time", and filed his brief and reproduced record contemporaneously. On October 30, 2012, we ordered:

Appellant Miller's October 29, 2012 "motion to file out of time" is GRANTED ONLY TO THE EXTENT THAT the prothonotary shall docket the brief and reproduced record tendered to this court as untimely filed on October 29, 2012. Appellee Shorr and Huchko's brief is due thirty (30) days from the date of this order.

Appellees filed their application to strike Appellant's brief on November 1, 2012. The application was deferred to the merits panel. Appellees timely filed their brief on November 28, 2012.

The foregoing procedural history of this case in both the trial court and the Superior Court is unwieldy. Appellant's lateness in filing his brief and reproduced record is an example of Appellant's ongoing recalcitrance. Appellees have been prejudiced by Appellant's continued delay. If an appellant fails to timely file his brief and reproduced record, an appellee may move for dismissal. Pa.R.A.P. 2188; *see also Moore v. Moore*, 568 A.2d 250 (Pa. Super. 1990) (where an appellant fails to file his brief in a timely manner, the Superior Court may grant a party's application to dismiss). We further note that the rules of appellate procedure are "mandatory, not directory" and it is within our discretion to dismiss an appeal where the rules

of appellate procedure are violated. ***Rappaport v. Stein***, 506 A.2d 393, 395 n.1 (Pa. Super. 1985). ***See also*** Pa.R.A.P. 2185 and 2186 (service and filing of briefs and reproduced record).

Based on the record before us, we grant Appellees' application to strike Appellant's brief and reproduced record, and dismiss the appeal. We deny Appellees' motion to quash appeal as moot.

Appeal dismissed.