

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000562-MR

RACHAEL PRICE, INDIVIDUALLY;  
RACHAEL PRICE, PARENT AND  
NEXT FRIEND OF D.P., AN  
INFANT CHILD UNDER 18;  
AND WAEDELL HARRIS

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 01-CI-000233

ROSE GARCIA; AND  
YELLOW CAB CO., LLC

APPELLEES

OPINION AND ORDER  
REVERSING AND REMANDING;  
DENYING MOTION TO STRIKE;  
DENYING MOTION FOR SANCTIONS.

\*\* \*\* \* \* \*

BEFORE: BARBER AND McANULTY, JUDGES; BUCKINGHAM, SENIOR JUDGE.<sup>1</sup>

BARBER, JUDGE: Appellant, Rachael Price (Price), appeals the Jefferson Circuit Court's Order Dismissing the action for lack of prosecution. We reverse the order of dismissal and order denying Price's motion to reinstate the action, finding that

---

<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

under the particular circumstances of this case dismissal was improper.

Yellow Cab filed a motion to strike the Price's reply brief, requesting that sanctions be imposed on Price for the filing of that brief, pursuant to CR 73.02(4) and CR 11. Price's reply brief addresses, primarily, Yellow Cab's alleged concealment of the location of the driver of the cab involved in the accident with Price. During most of the time when Yellow Cab contended that it had no idea where Garcia was, she was in fact employed by a wholly owned subsidiary of Yellow Cab. The reply brief also addresses the failure of Yellow Cab to apply local rules regarding discovery and disputes between parties. Price's reply brief argues that the conduct of Yellow Cab was egregious.

Yellow Cab asserts in the Motion to Strike that the statements made by Price were "unsupported by the court record and have absolutely no basis in fact or relevance to the issue on appeal." Although this Court cannot verify, based on the minimal record thus far created in this action, that all the assertions made in the Reply brief are true, this Court can and does believe that the record supports a finding that Yellow Cab acted deceptively in its defense of this matter, and that for this reason, the dismissal was improper. Yellow Cab's claims to the contrary are unsupported in the motion or in its brief

before this Court. In the motion Yellow Cab does not provide a reference to the briefs or the record in support of its claim that Price's contentions were not true. Yellow Cab also fails to reference any conduct by Price which would support striking the brief or an imposition of sanctions. For the foregoing reasons, the motion to strike and motion for sanctions are denied.

Price and her minor child were injured in an automobile accident in January, 1999. The action was timely filed in January, 2001. The suit named Yellow Cab and Rosa Garcia, the cab driver, at the time of the accident as defendants. The complaint was served on Yellow Cab. Price was unable to effectuate service on Garcia as she had moved since the accident. Yellow Cab denied any knowledge of her whereabouts. During the pendency of the action Yellow Cab denied knowledge of Garcia's whereabouts, and even filed pleadings stating that the claim should be dismissed because Yellow Cab could not defend the action in the absence of Garcia. Price sought the appointment of a Warning Order attorney, and took other steps to locate Garcia.

Yellow Cab filed a motion to dismiss the action in September, 2004, claiming unreasonable delay in prosecution of the action by Price. In October, 2004, after the trial court had dismissed the action, Price located Rosa Garcia in Indiana.

Rosa Garcia was working for Yellow Cab of Southern Indiana at the time. Yellow Cab of Southern Indiana is a wholly owned subsidiary of Defendant/Appellee Yellow Cab. Investigation by counsel for Price revealed that Rosa Garcia had worked for Yellow Cab or its subsidiaries for all but six months of the four years between the accident and the dismissal of the action. Yellow Cab had not disclosed this fact to the parties or to the court. In fact, Yellow Cab had filed documents before the trial court indicating that it was unable to find Garcia, despite taking steps to do so. When Garcia was discovered working for Yellow Cab, Yellow Cab neither admitted nor denied that it had knowledge of Garcia's whereabouts. Yellow Cab does not address its alleged deception in the briefs before this Court.

Price contends that Garcia and Yellow Cab used improper techniques to prevent prosecution of this matter, ultimately resulting in dismissal of the case. Price argues that dismissal of the case was an unwarrantedly harsh remedy, and that the trial court abused its discretion by dismissing the action. We agree, particularly in light of the fact that Yellow Cab knew where Garcia was and withheld this knowledge from the plaintiffs and the trial court. Yellow Cab's argument that "no obligation exists on the part of the defendant to bring the case to trial. . . ." (citing Gill v. Gill, 455 S.W.2d 545, 546 (Ky. 1970)), is disingenuous at best. Yellow Cab is not charged with

prosecuting the plaintiffs' case, but Yellow Cab does have a duty to be honest and forthright with the plaintiffs and with the trial court. The ongoing failure to do so led, at least in part, to the dismissal of the action. Under such circumstances, the dismissal must be found improper.

The trial court entered a show cause order threatening dismissal of the action in January, 2004. No response was filed by Price. The court dismissed the action in February, 2004. Notice of the show cause order and the dismissal was not served upon counsel for Price due to counsel's change in address. Counsel discovered this error, and objected to the dismissal. For that reason, the court reinstated the action. Yellow Cab then filed a motion to dismiss on June 2, 2004, claiming that it was being prejudiced by the delay in prosecution. Discovery requests were filed by Yellow Cab in February, 2001, but Price did not provide responses thereto until June 2004. Price did not propound discovery upon Yellow Cab or Garcia until June, 2004. The case was set for trial on September 1, 2004. Yellow Cab argued at the hearing on the motion to dismiss, in August, 2004, that prosecution of the action would prejudice Yellow Cab. Yellow Cab claimed that the trial could not take place in September because Garcia had neither been located, nor served.

Yellow Cab filed a motion for protective order barring it from being forced to respond to Price's discovery requests

while the motion to dismiss was pending. The court overruled the motion for protective order and stated that Yellow Cab must respond to the discovery requests so that court could "then review the status of defendants' ability to defend against the claim of plaintiffs to determine if there is any prejudice from the delay in prosecution." No discovery response of Yellow Cab is found in the record. In the order dismissing the action, the trial court stated: "A review of the discovery indicates there is a substantial likelihood that Defendants do not have any liability in this case." Price asserts that this statement was in error, and created a question as to the court's impartiality. While we do not believe that this statement shows any bias on the part of the court, we do note that where matters outside the pleadings are reviewed, the motion may properly be treated as one for summary judgment. Kreate v. Disabled American Veterans, 33 S.W.3d 176, 179 (Ky.App. 2000). A motion to dismiss may be reversed where an abuse of discretion is shown. Ward v. Housman, 809 S.W.2d 717, 718 (Ky.App. 1991). Dismissal of the action where there is a claim that a party improperly concealed relevant evidence preventing prosecution of the action is improper. For this reason, we reverse the dismissal of the action.

An additional ground for Yellow Cab's motion to dismiss was that the police officer who investigated the

accident had retired, and could not be located. That officer's report is made part of the record. The officer was not a witness to the accident, but only arrived after it was over. Yellow Cab contends that the report shows that the accident was the fault of Appellants. In fact, the report shows that the roadway was "a solid sheet of ice" and notes that both cars began sliding on the hill and that the car in which Price was a passenger struck the Yellow Cab vehicle when the Yellow Cab vehicle turned sideways, blocking the roadway. The report does not contend or suggest that the accident was the fault of the plaintiffs. The report does assert that the accident was unavoidable.

The question of whether the delay prejudiced the defendants because of the difficulty locating the witnesses was one properly addressed by the trial court. We do not find the claims of Yellow Cab convincing. With regard to the absence of Garcia, we find that Yellow Cab has failed to refute the argument that it knew where she was as its subsidiary was her employer. With regard to the retirement of the police officer, we find no convincing evidence that Yellow Cab used all available means to locate that officer, yet was unable to do so. We further note that the law provides means of appropriately refreshing a witness' memory, should the police officer fail to recall the accident once he is located. See, e.g., Robert G.

Lawson, The Kentucky Civil Law Handbook, Section 3.20(2), 238 (4<sup>th</sup> ed. 2003). Further, the record shows that Yellow Cab undertook its own investigation of the accident, and had an investigator who should be able to testify.

Yellow Cab also demanded dismissal because Price had failed to respond to discovery requests propounded by Yellow Cab. With regard to this assertion we note that the record is devoid of any evidence tending to show that Yellow Cab availed itself of the local rules or civil rules providing remedies to discovery abuses or mandate provision of responses. The trial court has broad discretion to regulate discovery. Bratcher v. Commonwealth, 151 S.W.3d 332, 336 (Ky. 2004). Failure of Yellow Cab to request such regulation or the remedies available to it forecloses any claim of prejudice at this late date.

Dismissal of an action is a drastic step, and should only be used as a last resort. Polk v. Wimsatt, 689 S.W.2d 363 (Ky.App. 1985). Under the particular circumstances present in this case, we find that dismissal was improper, and that the case should have been reinstated upon Price's motion and presentation of evidence of the continuing employment of Garcia with Yellow Cab. For the foregoing reasons, the case is reversed and remanded.

BUCKINGHAM, SENIOR JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT.



ENTERED: MAY 19, 2006

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

BRIEFS FOR APPELLANT:

Mark Joseph Smith  
Louisville, Kentucky

BRIEF FOR APPELLEES:

Bradley D. Harville  
Louisville, Kentucky