

No. 32706

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

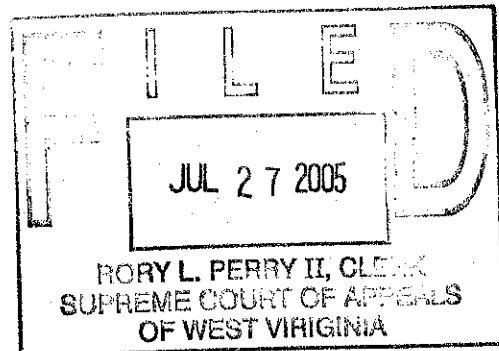
VALLIE HUFFMAN,

Appellant,

v.

ROBERT CRINER,

Appellee.



BRIEF OF APPELLEE

Submitted by:

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I.
Kind of Proceeding
and
Nature of Ruling Below

In 2000 the Appellant Vallie Huffman brought a civil suit seeking damages against Appellee Robert Criner. In her lawsuit Huffman asserted that Criner illegally burned her property. That property, more particularly identified, was a house which was located in the Clendenin area of Kanawha County. It had been rented under the federal HUD program.

Contrary to Huffman's assertions discovery disclosed that *she did not own the property*. Perhaps more significant, discovery also disclosed other reasons which establish that *Huffman was not a proper party plaintiff* in this case. Court records disclosed that 1) the subject property was actually titled in the corporate name of Vallie's, Inc. and 2) Vallie Huffman had filed a personal bankruptcy action which concluded in her discharge in bankruptcy in the United States Bankruptcy Court for the Southern District of West Virginia. In the bankruptcy action Huffman not only failed to list her holdings under the corporate name Vallie's, Inc. she did not list in any way the property which she claims Criner burned as an asset or liability.

In the face of the above information which appears to damn Huffman's claims that she has sustained damages which are compensable to her, counsel moved the Circuit Court to dismiss her cause of action and to enter judgment in favor of Criner as a matter of law. Criner's motion was denied by Judge Irene C. Berger who ordered the following in an *Order entered on March 4, 2003*:

The Court must liberally construe Rule 15 of the West Virginia Rules of Civil Procedure when motions to amend are filed. That Rule provides that the amended complaint relates back to the date of filing when: a) there is no essential change in the cause of action; b) Vallie's, Inc., bears a close relationship to the original Plaintiff; and c) the adverse party is not prejudiced by the assertion of the amendment. Rosier v. Garron, Inc., 199 S.E.2d 50 (1973).

It is therefore ORDERED that:

The Defendant's Motion to Dismiss, having been treated as a motion for summary judgment, is denied.

The Defendant's Motion to Dismiss and Supplemental Motion to Dismiss insofar as the same relies upon the statute of limitations are denied.

The Defendant's Supplemental Motion to Dismiss, which the Court has referred to as the Defendant's Alternative Motion to Dismiss, is hereby granted insofar as said motion relies upon Rule 19 of the West Virginia Rules of Civil Procedure. *Therefore, the Court ORDERS that this case be stayed until such time (not to exceed six (6) months) as documents are presented from the Bankruptcy Court for the Southern District of West Virginia which allows Vallie's, Inc., to proceed before this Court.*

More than thirteen (13) months passed before the case was heard from again. During that time Huffman did nothing to pursue the case, her counsel did nothing, Vallie's, Inc. did nothing as an entity, by or through anyone to pursue the case, and most importantly the Trustee in bankruptcy (identified as Lynden Graham, Jr.) did nothing. The office of the Circuit Clerk of Kanawha County included this case on a list of cases to be dismissed for inactivity and on April 15, 2005 the case was stricken from the docket under the terms of Rule 41(b), West Virginia Rules of Civil Procedure.¹ The Appellant's counsel then moved the Circuit Court requesting that the case be retained on the docket pending resolution of "certain issues in bankruptcy court" which issues were not otherwise identified or amplified. On August 16, 2004 Judge Berger denied the Appellant's "Motion to Not Dismiss" holding that its order of August 16, 2004 that:

¹While the Appellant asserts that sustaining the Rule 41(b) order constitutes error a more careful reading of the record discloses that the case was actually over after September 4, 2003 at which time the stay expired.

“After careful consideration of the same, the Court finds that it stayed this matter for six (6) months by virtue of its Order of March 4, 2003. Said stay was, therefore, in effect until September 4, 2003. No action was taken in this action until the Motion to Not Dismiss was filed on April 7, 2004. Specifically, no motion to extend the stay or any other action was taken.

Additionally, the Court finds that this matter should not have been dismissed pursuant to Rule 41 (for lack of activity for a period in excess of one (1) year) inasmuch as the matter was stayed for six (6) months. However, *the Court finds dismissal was proper as of September 4, 2003, by virtue of the language of the Court’s Order of March 4, 2003.*”

The Appellant challenges the correctness of the foregoing order in this appeal.

II. Statement of Facts of the Case

Essentially, the Appellant claims that Mr. Criner intentionally set fire to the Clendenin property because of some argument with his ex-girlfriend who was then renting the property. The claims of arson led to the filing of a criminal warrant and a later indictment by a Kanawha County grand jury in September of 1999.

The criminal case was dismissed by the Circuit Court because the evidence was lost, misplaced and in some instances improperly packaged by the investigators. That evidence was of a kind which could have been relied upon both by the defense and the State. The criminal case was thus rendered impossible to defend or to prosecute, see e.g. State v. Jones, 239 S.E.2d 763 (1977) requiring proof of incendiary origin as an element of proof.

Evidence developed in defending the civil case disclosed that the Plaintiff-Appellant Huffman did not own the property in question, that she had formed a corporation named Vallie’s, Inc. in whose name the property was titled, that she had filed and been discharged in a bankruptcy in which she made no mention of her interests in Vallie’s, Inc. or this property, and

that subsequently Vallie's, Inc. had been identified by the Secretary of State as not being in good standing due to nonpayment of license taxes. Notwithstanding all of the aforementioned infirmities and apparent bankruptcy fraud, the Circuit Court was generous in its rulings on Appellant's claims. The Appellant was allowed to amend her pleadings, but was ordered in the clearest of terms to present proof that the case was permitted to proceed by order of the Bankruptcy Court for the Southern District of West Virginia. After all, if damages were ever established, those damages would actually belong not to Huffman but to the Trustee in Huffman's bankruptcy for distribution to creditors in that Vallie's, Inc. and its holdings would properly be Huffman's assets subject to the bankruptcy plan of distribution.

In her Brief to this Court the Appellant states as a fact that "unfortunately, the order granting the request of trustee [to reopen the bankruptcy] was not entered and counsel retained until after the trial court determined that the stay had expired." This statement lacks important particulars. For example, when did the trustee or counsel actually move the Bankruptcy Court to reopen the bankruptcy case and did they specifically request the Court's permission to pursue the claim against Criner? Moreover, why did it take until April, 2004 – seven (7) months after the stay had expired to do anything at all, and then merely a reflexive reaction to the Clerk's Rule 41(b) notice? No evidence is provided by Appellant and no explanation has been given, thus an essential fact basis in the record is missing.

III. Petitioner's Assignment of Error

The Appellant urges this Court to reverse the Circuit Court because the Court did not grant summary judgment and because the Court enforced its previous order in ruling upon Appellant's "Motion to Not Dismiss."

**IV.
Points and Authorities**

- B. The Circuit Court's Order Of March 4, 2003 Was An Appealable Order Which Was Effective As A Dismissal Of Huffman's Case On September 4, 2003.**

State ex rel. Consolidation Coal Co. v. Clawges, 523 S.E.2d 282 (1999)

State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc., 461 S.E.2d 516 (1995)

- C. The Appellant's Motion Of April 6, 2004 Was Both Untimely And Expressed No Grounds To Support Altering Or Amending the Circuit Court's Judgment.**

James M. B. v. Carolyn M., 456 S.E.2d 16 (1995)

Rule 59(e) of the West Virginia Rules of Civil Procedure

- D. The Appellant Has Not Presented Special Circumstances Required To Justify Appealing The Denial Of Summary Judgment.**

Estate of Gooch v. W.Va. Dept. Of Public Safety, 465 S.E.2d 628 (1995)

Sergent v. City of Charleston, 549 S.E.2d 311 (2001)

State v. Adkins, 446 S.E.2d 702 (1994)

State v. Mullins, 383 S.E.2d 47 (1989)

Williams v. Precision Coil, Inc., 459 S.E.2d 329 (1995)

Rule 56 of the West Virginia Rules of Civil Procedure

- E. The Dismissal Of This Action Below Is Consistent With The Applicable Law And Not An Abuse Of Discretion.**

Burgess v. Porterfield, 469 S.E.2d 114 (1996)

Rules 17 of the West Virginia Rules of Civil Procedure

Rules 18 of the West Virginia Rules of Civil Procedure

Rules 19 of the West Virginia Rules of Civil Procedure

Rules 20 of the West Virginia Rules of Civil Procedure

Rules 21 of the West Virginia Rules of Civil Procedure

Rule 56 of the West Virginia Rules of Civil Procedure

**V.
Discussion of Law**

- A. The Appeal is Not Timely**

Appellant Huffman has chosen to appeal two (2) alleged errors. Each of the operative orders which she challenges was entered substantially before this appeal was filed. The

Appellant's Motion for Summary Judgment was denied by Judge Paul Zakaib by ordered entered May 24, 2001 and was restated by Judge Berger in an order entered on January 16, 2003.² In that this appeal was filed many, many months later it can hardly be interpreted as having been timely filed as to the denial of summary judgment.

The undersigned submits that the second error in reality addresses the Circuit Court's order of March 4, 2003. That order granted this Appellant a six (6) month stay before any dismissal became effective, a stay which Appellant, her counsel and the real party in interest neglected or ignored for a total period of some thirteen (13) months. In any event, this appeal was certainly filed more than four (4) months beyond either the March 4, 2003 order or its effective date of dismissal of September 4, 2003.

B. The Circuit Court's Order Of March 4, 2003 Was An Appealable Order Which Was Effective As A Dismissal Of Huffman's Case On September 4, 2003.

This Court has held consistently that:

“The key to determining if an order is final . . . is whether the order approximates a final order in its nature and effect.” State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc., 461 S.E.2d 516 (1995); State ex rel. Consolidation Coal Co. v. Clawges, 523 S.E.2d 282 (1999).”

The final effect of Circuit Court's order must be considered applying the foregoing standard. That order, which ruled upon one of Mr. Criner's Motion(s) to Dismiss entitled Defendant's Supplemental Motion to Dismiss, *granted that motion, but stayed its execution* for a period of six (6) months. In effect, this Appellant and her attorney acting through her successor

²For these purposes counsel assumes for argument's sake only that the denial of summary judgment in these circumstances actually results in an appealable order.

in interest who was the Trustee in her bankruptcy had a six (6) month window in which to present documents from the Bankruptcy Court allowing the case to proceed in the Circuit Court. Such documents not only were not presented within six (6) months, but they never had been presented. Nothing could appear more final in nature and effect than a specific and clear directive to a party represented by counsel that the party has six (6) months in which to establish the party's right to proceed. There is a known date – September 4, 2003, a known result – the effective dismissal of the case, and a known method to avoid the adverse result – permission from the Bankruptcy Court allowing the successor in interest and/or the Plaintiff to continue with claims in Circuit Court. This deadline is at least as clear and certainly as definitive as the garden variety statute of limitations. It is a known deadline with a readily understandable preclusive effect. Therefore, if the Appellant Huffman objected to the dismissal prescribed in the March 4, 2003 order, her appeal must be filed no later than four (4) months after the dismissal became effective.

C. The Appellant's Motion Of April 6, 2004 Was Both Untimely And Expressed No Grounds To Support Altering Or Amending the Circuit Court's Judgment.

Although the Appellant Huffman complains to this Court that the Circuit Court should not have dismissed the case the Appellant failed to present a supporting basis to the Court for granting her motion to reinstate the case even if the motion were deemed timely. Huffman's motion stated:

MOTION TO NOT DISMISS

Comes now the Petitioner, Vallie Huffman, by counsel, Clinton W. Smith, moves this Court to not dismiss this matter for lack of activity within the last year on the grounds that this action has been

stayed pending resolution of certain issues in the bankruptcy court for the Southern District of West Virginia. Therefore the Plaintiff was not permitted to prosecute her claim.

Nothing more was presented to Judge Berger. There was no explanation about why relief in the matter was not sought before September 4, 2003, and no request for an extension of the stay was requested. In fact, the only document ever presented is a December 3, 2003 order signed by the Bankruptcy Judge which states that the trustee H. Lynden Graham "is authorized to employ Clinton W. Smith" as the trustee's attorney. Even that order, signed as it was two (2) months after the dismissal was effective, was not presented to Court or opposing counsel until after the Circuit Clerk's Rule 41(b) notice was mailed to counsel.

The substance of the "Motion To Not Dismiss" is a motion to alter or amend judgment. Rule 59 provides the correct procedure, James M. B. v. Carolyn M., 456 S.E.2d 16 (1995). Under Rule 59(e) of the West Virginia Rules of Civil Procedure such a motion must be filed within ten (10) days of the order which it addresses. Since the dismissal was ordered in 2003 the April, 2004 motion is untimely on its face.

D. The Appellant Has Not Presented Special Circumstances Required To Justify Appealing The Denial Of Summary Judgment.

Under ordinary circumstances denial of a Rule 56 motion for summary judgment is not appealable. This Appellant has never addressed this tenet of our law and appears frankly not to recognize the same. Special circumstances are required, Sergent v. City of Charleston, 549 S.E.2d 311 (2001); Estate of Gooch v. W.Va. Dept. Of Public Safety, 465 S.E.2d 628 (1995). Because the appeal does not address the point, the undersigned will not elaborate further.

On a more substantive level the Appellant was clearly not entitled to summary judgment.

Summary judgment is proper only when a rational trier of fact could not find for the non-moving party based upon the totality of the evidence presented, Williams v. Precision Coil, Inc., 459 S.E.2d 329 (1995). The Appellant argues to this Court that because Criner involved his privilege upon counsel's advice adverse inferences follow, therefore summary judgment must also follow. Inferences are certainly not conclusive presumptions. The Appellant appears to confuse the two evidentiary concepts.

Moreover, unless the moving party produces evidence to establish as a matter of law each of the elements required to prove the movant's case summary judgment is inappropriate. In the instant case there is not now, and will not in the future, be sufficient evidence of an incendiary origin which is absolutely necessary to prove arson, State v. Adkins, 446 S.E.2d 702 (1994); State v. Mullins, 383 S.E.2d 47 (1989). In the instant case, both Circuit Court judges who entertained and denied Huffman's motion for summary judgment were correct.

E. The Dismissal Of This Action Below Is Consistent With The Applicable Law And Not An Abuse Of Discretion.

The pertinent standard for reviewing this appeal is that which is set forth in Burgess v. Porterfield, 469 S.E.2d 114 (1996). The circuit court's final order and disposition is reviewed for an abuse of discretion and legal conclusions are reviewed *de novo*.

The Appellant Huffman does not address the standard of review in her brief to this Court. If she did, she would be hard-pressed to demonstrate an abuse of discretion on Judge Berger's part. The Judge gave every break to Huffman. She was permitted to amend when it was found that she didn't even own the property and had never mentioned it in her bankruptcy case. The case remained pending for over three (3) years with no evidence of an incendiary origin. Finally,

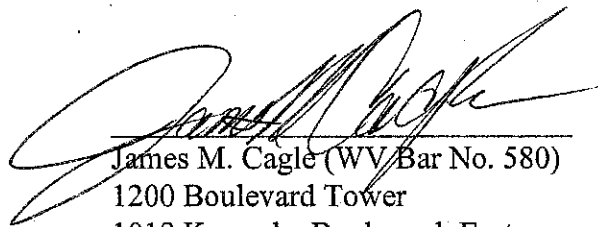
Huffman and her counsel had six (6) months to seek permission to get the case properly before the Court during which time they did nothing. In summary, Judge Berger did not abuse her discretion, she merely upheld her earlier order which Huffman had defied.

The Judge's ruling below is entirely consistent with Rules 17-21 of the Rules of Civil Procedure requiring suits by the real parties in interest. It is also in conformity with federal bankruptcy law which of course is deemed to be controlling under the Supremacy Clause of the Constitution. And, finally the ruling below is consistent with Rule 56 and the ample body of precedent which addresses that subject.

Conclusion

For the foregoing reasons the order(s) below should be affirmed.

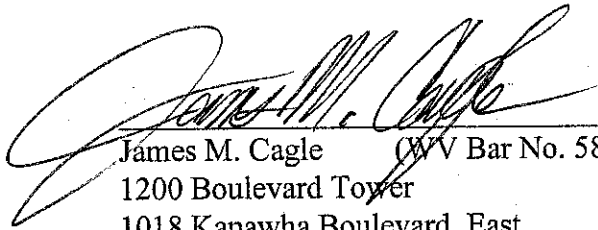
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James M. Cagle, hereby certify that I have served a true and exact copy of the foregoing Brief of Appellee, on the Appellant by forwarding said copy to Clinton W. Smith, counsel of record for said Petitioner, by regular United States mail to his last-known address at Suite 309, 405 Capitol Street, Charleston, West Virginia 25301, on this the 27th day of July, 2005 in a properly stamped and addressed envelope.



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