

[Cite as *Hughley v. Cintron*, 2009-Ohio-5839.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93145**

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**KEVIN HUGHLEY**

PLAINTIFF-APPELLANT

vs.

**JOSE CINTRON**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Common Pleas Court  
Case No. CV-676870

**BEFORE:** Sweeney, J., Rocco, P.J., and Jones, J.

**RELEASED:** November 5, 2009

**JOURNALIZED:**

**FOR APPELLANT**

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**FOR APPELLEE**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

{¶ 2} Plaintiff-appellant, Kevin Hughley (“Hughley”), appeals the trial court’s decision that dismissed his claims in this refiled action for failure to prosecute. For the reasons that follow, we affirm.

{¶ 3} Hughley first commenced this action on April 14, 2008 alleging he sustained personal injuries as a result of defendant’s negligence. The matter proceeded as Cuyahoga County Court of Common Pleas Case Number CV-656705 (the “Original Action”). Hughley filed the action pro se and was incarcerated. The trial court set a case management conference in the original action and repeatedly instructed Hughley to appear or retain counsel to appear on his behalf. When Hughley failed to appear at the case management conference, the trial court issued an order instructing him that failure to appear at future court dates would result in dismissal for failure to prosecute and reset the case management conference for a later date. After Hughley notified the court of his incarceration, the trial court issued a detailed order informing Hughley, among other things, that it was the court’s preference under Loc.R. 21 that parties attend court hearings unless they are represented by counsel. Hughley was also informed that if he could not prosecute his claims he could dismiss the case and refile it at a later time. When Hughley again failed to appear or secure

counsel to represent him at the second case management conference, the trial court dismissed the original action without prejudice on September 4, 2008.

{¶ 4} Two months later, in November 2008, Hughley refiled his claims pro se in this action alleging injuries as a result of defendant's alleged negligence on June 29, 2007. The court scheduled the case management conference for February 10, 2009. Among other filings, defendant submitted a motion for extension/time enlargement for scheduled case management conference on the grounds of perfecting service and "other reasoning due to detainment." The trial court denied this request, reasoning: "This is a refiled case and plaintiff was notified by the court in his initial filing that he is required to be present and prosecute his case. Failure to appear at dates in this matter will result in dismissal for failure to prosecute." R. 8.

{¶ 5} Hughley failed to appear and did not secure counsel to attend the case management conference on his behalf. The trial court issued an order providing: "Plaintiff failed to appear. Failure to appear at future dates will result in dismissal of this matter with prejudice. CMC is reset for March 31, 2009 \* \* \*."

R. 9. In response, Hughley "objected" to the trial court's order requiring his attendance at court hearings and the notification of the consequences, which he considered to be in contradiction to Loc.R. 21. The trial court construed the objection as a motion to proceed with the case management conference in plaintiff's absence, which the court denied. In its order, the trial court again advised Hughley as follows: "As Plaintiff was previously warned by this court in

the prior filing of this matter, and in the current filing, that plaintiff must be present and prepared to prosecute his case or it will be dismissed. \* \* \* Loc.R. 21(A) states that ‘The case management conference may be conducted in person or telephonically, according to the court’s preference. All counsel attending must have full authority to enter into a binding case management order. Parties are not required to be present.’ It is this Court’s preference that this CMC be held in person. Further, Hughley is required to appear in person for the CMC as he is pro se and is his own counsel in this matter. Parties are not required to appear at the CMC only if they have their counsel there representing them. Thus, Hughley must be present at CMC or have counsel there to represent him. Plaintiff was aware of this Court’s order that he must be present when he chose to refile this matter just two months after [sic] this Court first dismissed the matter for failure to prosecute, knowing that he would not be able to be present and prosecute his case.\* \* \*

R. 12. Hughley then filed various documents seeking a continuance of the case management conference due to his incarceration. The trial court proceeded with the case management conference on March 31, 2009 and issued an order as follows:

{¶ 6} “CMC held on 3/31/2009. Defendant failed to appear or have legal counsel appear on his behalf. Pursuant to the court’s orders of 2/17/2009 and 3/18/2009 this case is dismissed with prejudice for failure to prosecute. Plaintiff

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<sup>1</sup>The omitted portions of the referenced orders concern Hughley’s failure to obtain service on defendant.

was notified by the court multiple times in his previous filing of this matter and in the present case that he must be present or have legal counsel present to prosecute this case. Further, plaintiff's multiple motions to continue after the court has already ruled the CMC shall go forward based on erroneous grounds of Local Rule 21 and claims of clerical errors are denied. The docket clearly shows that there is no clerical error regarding service \* \* \* and plaintiff has failed to serve defendant in this matter. Plaintiff has failed to show any good cause of continuance in this matter and the case is hereby dismissed." R. 16.

{¶ 7} Hughley appeals the dismissal of his claims and presents one assignment of error for our review:

{¶ 8} "1. Trial court erred and abused discretion [sic] while ignoring Local Rule 21 in [dismissing] the complaint for failure to appear at case management hearing."

{¶ 9} "The decision to dismiss a complaint for failure to prosecute is within the sound discretion of the trial court, and an appellate court's review of such a dismissal is confined solely to the question of whether the trial court abused its discretion. *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 91, 1 OBR 125, 126-127, 437 N.E.2d 1199, 1201. The term 'abuse of discretion' as it applies to a dismissal with prejudice for lack of prosecution 'implies an unreasonable, arbitrary or unconscionable attitude on the part of the court in granting such motion.' *Id.*" *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 371, 678 N.E.2d 530, 534.

{¶ 10} “Proper factors for consideration in a Civ.R. 41(B)(1) dismissal with prejudice include the drawn-out history of the litigation, including a plaintiff’s failure to respond to interrogatories until threatened with dismissal, and other evidence that a plaintiff is deliberately proceeding in dilatory fashion or has done so in a previously filed, and voluntarily dismissed, action.” *Id.* at 372.

{¶ 11} “[W]here a plaintiff fails to appear on the date set for a hearing, the court may either order a Civ.R. 41(B)(1) dismissal or grant a continuance.” *Allstate Ins. Co. v. Rule* (1980), 64 Ohio St.2d 67, 69, 413 N.E.2d 796, 798.

{¶ 12} “Where a plaintiff who is incarcerated and unrepresented by counsel fails to appear at the pretrial conference to which he requested but was not granted transportation, a trial court abuses its discretion in dismissing the action with prejudice for failure to prosecute without first considering other alternatives which would lead to a resolution on the merits.” *Laguta v. Serieko* (1988), 48 Ohio App.3d 266, 549 N.E.2d 216, syllabus. In *Laguta*, the court advised of various alternatives to dismissal, including among them “or dismissal without prejudice leaving open the possibility of the plaintiff’s refiling his case at a later date.” *Id.* at 267.

{¶ 13} The record in this case reflects that the trial court made numerous efforts to preserve Hughley’s claims despite his incarceration, including rescheduling the case management conference several times, advising Hughley of his option to retain counsel and his ability to voluntarily dismiss the action and refile it. Although the trial court dismissed the original action for failure to

prosecute, this was expressly done “without prejudice,” which allowed Hughley to refile his claims at a later date. Although the statute of limitations had yet to expire on his claim, Hughley decided to almost immediately refile and pursue his negligence claim. He did this knowing that the trial court required his attendance at court hearings and knowing he would be unable to attend them due to incarceration. Hughley also had the option to secure counsel to attend the hearings on his behalf but he did not do so. In addition to all of the foregoing, the record reflects that Hughley never obtained or perfected service on the defendant in either case.

{¶ 14} Hughley’s claim that the trial court’s dismissal was in contradiction to Loc.R. 21 is mistaken. Loc.R. 21(A) provides in part: “The case management conference may be conducted in person or telephonically, ***at the court’s discretion.***” (Emphasis added.) The trial court had specifically advised Hughley that either he must appear or have counsel appear on his behalf. This is consistent with Loc.R. 21.

{¶ 15} There is no indication in the record when Hughley expected to be released from incarceration nor when he would be available to prosecute his claim. Service was not perfected on the defendant, and the record is devoid of any request from Hughley for permission to appear in person at civil proceedings.

{¶ 16} Finally, the record amply reflects copious warnings to Hughley that his case would be dismissed if he did not attend the court hearings. This record demonstrates that the trial court proceeded with great caution before it ultimately



dismissed Hughley's claim with prejudice for failure to prosecute. The trial court gave Hughley sufficient notice to allow him to make alternative arrangements for prosecuting his case. The trial court considered other alternatives to dismissal, including its previous dismissal in the original action without prejudice. Because we find no abuse of discretion, Hughley's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and  
LARRY A. JONES, J., CONCUR