

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Herring v. City of Whitehall

804 F.2d 464 (8th Cir. 1986) · Decided October 31, 1986

SUMMARY

The Eighth Circuit held that the district court abused its discretion by conditioning refiling on payment of costs and fees by plaintiffs who alleged that their attorney, rather than they, caused the litigation delay. The court vacated the dismissal with prejudice and remanded for consideration of sanctions directed at the attorney, the plaintiffs’ ability to pay, and alternative sanctions under Federal Rule of Civil Procedure 41.

CASE DETAILS

COURT	United States Court of Appeals for the Eighth Circuit
JURISDICTION	Federal
DECIDED	October 31, 1986
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiffs appealed the district court's dismissal with prejudice of their civil rights action after they failed to pay costs and fees imposed as a condition of refiling under an earlier dismissal without prejudice.
STANDARD OF REVIEW	A district court's conditions on a Rule 41(a)(2) dismissal without prejudice are reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published federal appellate opinion
PARTIES	Stanley D. Herring, Carla Herring v. City of Whitehall

TOPICS

- sanctions
- attorney fees
- civil procedure
- appellate procedure
- standard of review

PRACTICE AREAS

- civil procedure
- civil rights
- appellate procedure
- attorney sanctions

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by conditioning a Rule 41(a)(2) dismissal without prejudice on payment of costs and fees by plaintiffs if their original attorney was no longer counsel of record.

2. Whether the district court was required to inquire into plaintiffs' ability to pay the imposed costs and fees before dismissing the refiled action with prejudice.
3. Whether dismissal with prejudice was permissible where the attorney, rather than the clients, was principally responsible for the failure to proceed to trial.

HOLDINGS

1. A district court may impose costs and fees as conditions of a voluntary dismissal without prejudice, including costs attributable to the attorney's conduct, and the district court did not abuse its discretion by initially assessing the duplicative costs against the attorney.
2. The district court abused its discretion by requiring plaintiffs to pay the costs and fees if their original attorney was no longer counsel of record, because that condition penalized plaintiffs for seeking adequate legal representation after their attorney's neglect.
3. When a party alleges that it cannot satisfy financial conditions imposed under Rule 41, the district court must inquire into the party's ability to perform the conditions and consider alternative sanctions before imposing dismissal with prejudice.

KEY QUOTATIONS

“Trial court dismissal of a lawsuit never heard on its merits is a drastic step, normally to be taken only after unfruitful resort to lesser sanctions.” (at 467)

“Such a choice is repugnant to our system of justice.” (at 468)

“If the fault lies with the attorneys, that is where the impact of sanction should be lodged. If the fault lies with the clients, that is where the impact of the sanction should be lodged.” (at 468)

“In the imposition of costs and fees against an attorney, however, regard should be given to the due process requirements of notice and hearing.” (at 468)

FACTUAL BACKGROUND

Plaintiffs alleged that Mr. Herring's constitutional rights were violated by the use of excessive and unreasonable force during his July 17, 1980 arrest. Their attorney sought a continuance shortly before trial because he was unprepared, and after the continuance was denied he moved for a nonsuit. The district court dismissed without prejudice on the condition that duplicative costs, witness expenses, and reasonable attorney fees be paid if the action was refiled. Plaintiffs obtained new counsel, refiled, and asserted that they were financially unable to pay the \$1,600 condition.

PROCEDURAL HISTORY

The district court dismissed the action without prejudice after plaintiffs' attorney stated that he could not proceed to trial, conditioning refile on payment of duplicative costs and fees. Plaintiffs later obtained new counsel and refiled, but were ordered to pay \$1,600 by a specified deadline or face dismissal with prejudice. After plaintiffs asserted that they could not pay, the district court dismissed the complaint with prejudice. The Eighth Circuit

vacated the judgment and remanded for reinstatement of the case and reconsideration of appropriate sanctions and conditions.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Vacate the judgment and reinstate the case to its status as of the entry of the final decree. The district court may exercise its discretion to impose costs, fees, or other conditions available under Rule 41, but must proceed consistently with the opinion, including by determining responsibility for the misconduct, considering plaintiffs' ability to pay, and considering alternative sanctions if plaintiffs cannot make advance payment.

CASES CITED

- *Flaksa v. Little River Marine Construction Co.*, 389 F.2d 885, 888-89 (5th Cir. 1968), cert. denied, 392 U.S. 928 (1968)
- *Kern v. TXO Production Corp.*, 738 F.2d 968, 970-72 (8th Cir. 1984)
- *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-34 & n.10 (1962)
- *Butler v. Pearson*, 636 F.2d 526, 529 (D.C. Cir. 1980)
- *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123-24 (D.C. Cir. 1977)
- *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191, 1194 (8th Cir. 1976)
- *In re Baker*, 744 F.2d 1438, 1442 (10th Cir. 1984) (en banc), cert. denied, 471 U.S. 1014 (1985)
- *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980)
- *Hombuckle v. Arco Oil & Gas Co.*, 732 F.2d 1233, 1237 (5th Cir. 1984), aff'd after remand, 770 F.2d 1321 (5th Cir. 1985), cert. denied, 106 S. Ct. 1198 (1986)
- *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976)
- *Yoffe v. Keller Industries, Inc.*, 582 F.2d 982, 983 (5th Cir. 1978), cert. denied, 440 U.S. 915 (1979)

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