

APR 15 2004

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

**In Case No. 2003-0558, Bessie Cuming & a. v. Governor & a.,
the court on April 14, 2004, issued the following order:**

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is not necessary for the disposition of this appeal. The plaintiffs appeal the order of the Superior Court (Barry, J.) denying their motion for voluntary nonsuit without prejudice and entering a nonsuit with prejudice. We reverse.

The record supports the following facts. The plaintiffs are individuals with developmental disabilities that prevent them from living independently. They sought to litigate their rights, and those of others similarly situated, to certain services that the defendants were allegedly not providing. The plaintiffs, however, were denied class certification. Therefore, they moved for voluntary nonsuit without prejudice. On August 5, 2003, the superior court denied the motion and entered a nonsuit with prejudice.

The court found that it "would be manifestly unjust to the defendants to allow the plaintiffs to return to the court to relitigate the class certification issue." It found that "a lengthy period of litigation has endured and the plaintiffs have had a fair opportunity to present their arguments to the court." It also found that the "defendants have had to participate in significant pre-tr[ia]l activity . . . and would be exposed to additional litigation if the nonsuit were to be granted without prejudice." It concluded that this was "sufficient general harm to warrant a finding of prejudice to the defendants."

The decision to grant a motion for voluntary nonsuit without prejudice is subject to the discretion of the trial court. See Total Service, Inc. v. Promotional Printers, Inc., 129 N.H. 266, 268 (1987). Accordingly, we will overturn the decision of the trial court only if it has committed an unsustainable exercise of discretion. See Cadle Co. v. Proulx, 143 N.H. 413, 414 (1999); State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard). To establish that the trial court erred under this standard, the plaintiffs must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of their case. See Knapp v. Tenn. Gas Pipeline, 149 N.H. 740, 742 (2003).

We have held that a trial court should grant a motion for voluntary nonsuit without prejudice unless granting the motion would result in manifest injustice or prejudice to the opposing party. See Total Service, 129 N.H. at 268-69. We have also held that the "mere prospect of duplicative and possibly inconvenient litigation [is insufficient] to warrant denial" of a motion for nonsuit without prejudice. Cadle,

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143 N.H. at 416. Accordingly, in Cadle, twenty-four months of litigation and discovery coupled with the threat of additional litigation was insufficient to deny the plaintiff's motion for nonsuit without prejudice. Id.

In Total Service, the trial court correctly denied the plaintiff's motion for nonsuit without prejudice because it prejudiced the defendants. Total Service, 129 N.H. at 269. The motion came only three days before the final trial date and the plaintiff was attempting to avoid the consequences of its failure to disclose the report of its expert witness in a timely fashion. Id. at 267, 269. Additionally, the defendants "had been preparing for trial for approximately four years, filing pre-tr[ia]l and discovery motions, taking depositions and compiling evidence." Id. at 269.

Similarly, in Keshishian v. CMC Radiologists, 142 N.H. 168 (1997), the trial court appropriately denied a motion for nonsuit without prejudice because the plaintiff was attempting to avoid the consequences "that the trial court's disposition of his equitable claims would have on a retrial of his claim for money damages." Keshishian, 142 N.H. at 181. If it had granted the motion, the defendants would have been forced to "bear the burden of the plaintiff's failed strategic gamble." Id.

In this case the trial court found that the defendants were required to participate in significant pre-trial activity and would be exposed to additional litigation if the plaintiffs' motion was granted without prejudice. The eighteen months of litigation and discovery and the potential for additional litigation, however, are insufficient to warrant the denial of the plaintiffs' motion for nonsuit without prejudice. See Cadle, 143 N.H. at 416. Moreover, unlike the motion in Total Service, the plaintiffs' motion was filed four months in advance of trial. The plaintiffs do not seek any advantage at the defendants' expense, but merely wish to preserve their individual rights to litigate the important issues involved in this case at a later time. Therefore, the trial court erred by not granting the plaintiffs' motion for voluntary nonsuit without prejudice.

Reversed.

BRODERICK, C.J., and NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Distribution:

Clerk, Northern District of Hillsborough County 02-E-0043

Honorable James J. Barry

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