

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001428-MR

JOHN T. EBERT, M.D.

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN WHITE, JUDGE
ACTION NO. 95-CI-00870

JENNIE STUART MEDICAL CENTER

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, GARDNER, AND MILLER, JUDGES.

MILLER, JUDGE: John T. Ebert, M.D. (Ebert), appeals from a June 2, 1998, order of the Christian Circuit Court. We affirm.

The facts are these: Ebert filed this civil action in 1995. In June 1997, the defendant, Jennie Stuart Medical Center (the medical center), took Ebert's deposition. At that time, Ebert refused to answer certain questions relevant to the issue of damages. The medical center moved the circuit court to compel Ebert to answer the questions. On August 1, 1997, the court ordered Ebert to comply. Further, the court admonished Ebert that it would "grant judgment on the pleadings or grant a

directed verdict on those issues at trial" if he failed to comply. Trial was scheduled for the end of March 1998. In September 1997, the medical center sent interrogatories to Ebert. When Ebert failed to respond within the prescribed time period, the medical center contacted Ebert's counsel, by letter and by phone, requesting same. Soon thereafter, Ebert's counsel withdrew, and Ebert proceeded *pro se*. Several months passed, and Ebert never responded. Consequently, the medical center moved the circuit court to dismiss the case pursuant to Ky. R. Civ. Proc. (CR) 37.02. On March 4, 1998, the court overruled said motion but verbally warned Ebert that the sanction of dismissal would be granted if he failed to comply with discovery within 30 days. Said admonition was reflected in the court's written order entered the same day. Ebert then filed a motion for an additional 30 days to respond, but failed therein to set a date for a hearing before the court. Consequently, the court never heard the motion. After Ebert had not responded for more than 60 days to the March 4 discovery order, the medical center renewed its motion for dismissal. A hearing was held on May 6, 1998. Shortly before the hearing, however, Ebert filed another motion for extension of time to respond to discovery. A hearing date was set therein. The court overruled Ebert's motion and dismissed his claim with prejudice pursuant to CR 37.02. In its order, the court set forth the following bases for its decision: 1) Ebert willfully disregarded discovery procedures, 2) Ebert intentionally failed to comply with discovery, 3) the medical center was prejudiced by Ebert's refusal to comply with

discovery, 4) Ebert was adequately warned that noncompliance would result in dismissal, and 5) the court had considered less drastic sanctions, but found that they would be ineffective. This appeal followed.

The sole issue on appeal is whether the circuit court erred by dismissing Ebert's claim. CR 37.02 provides for the sanction of dismissal when a party refuses to comply with discovery. A circuit court's dismissal under these circumstances should be "accompanied by some articulation on the record of the court's resolution of the factual, legal, and discretionary issues presented.'" Greathouse v. American National Bank and Trust Company, Ky. App., 796 S.W.2d 868, 870 (1990) (quoting Quality Prefabrication, Inc. v. Daniel J. Keating Company, 675 F.2d 77, 81 (3d Cir. 1982)). In the case *sub judice*, we believe the circuit court sufficiently articulated its reasons for dismissing Ebert's claim.

When a sanction of dismissal is imposed, the standard of review on appeal is whether the lower court abused its discretion in exacting same. Id. Upon such a review, the following factors should be considered:

"(1) whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery, (2) whether the dismissed party was warned that failure to cooperate could lead to dismissal, and (3) whether less drastic sanctions were imposed or considered before dismissal was ordered." [Citation omitted.]

Id. Having reviewed the record under the precepts of Greathouse, we perceive no abuse of discretion on the part of the circuit court.

For the foregoing reasons, the order of the Christian
Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jason R. Segeleon
Louisville, KY

BRIEF FOR APPELLEE:

Lee T. White
Scott P. Kasierski
Hopkinsville, KY