

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-000227-MR

ROBERT R. SPANN

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE RON DANIELS, JUDGE  
ACTION NO. 93-CI-634

JAMES B. BAGBY

APPELLEE

OPINION  
VACATING AND REMANDING  
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BEFORE: EMBERTON, KNOFF, AND KNOX, JUDGES.

KNOFF, JUDGE: This is an appeal from an order dismissing a personal injury action due to failure to comply with the trial court's discovery orders. Finding that the trial court failed to make sufficient findings to justify dismissal of the action, we vacate and remand for further proceedings.

On April 24, 1993, the appellant, Robert R. Spann, was a passenger in a car operated by Jeanette Wilson when they were involved in an accident with the appellee, James B. Bagby. Thereafter, Wilson and Spann brought this action against Bagby for personal injury and lost wages suffered as a result of the accident. Wilson settled her claims with Bagby prior to trial.

On September 8, 1995, the trial court entered an order setting the matter for trial on May 8 and 9, 1996. The court set a proof deadline of February 26, 1996. After the deadline passed, Spann's counsel filed a motion to extend the time to complete discovery. Spann's counsel filed several motions at that time to take depositions of witnesses. The trial court granted the motion over Bagby's objections. The proof deadline was extended to November 27, 1996, and the trial was rescheduled to January 9, 1997.

On August 27, 1996, Bagby served supplemental interrogatories and requests for production of documents on Spann. Bagby sought production of updated medical and wage loss information, copies of medical records, income tax returns from 1992 through 1995, and reports from experts expected to testify at trial. Spann filed a second motion to extend time to complete discovery on November 27, 1996. He eventually filed a response to Bagby's interrogatories and request for production of documents on December 3. However, the responses were only signed by Spann's attorney, and not by Spann himself. In addition, he did not provide copies of his 1994 and 1995 tax returns, and he did not return signed releases for his employment, social security or medical records.

Shortly thereafter, Bagby moved to dismiss due to Spann's failure to supply the requested information in a timely manner. In an order dated December 27, 1996, the trial court granted the motion and dismissed Spann's complaint against Bagby. This appeal followed.

Although Spann was represented by counsel at the outset of this appeal, his attorney withdrew prior to filing of the briefs. Consequently, Spann is now proceeding pro se. In his brief, Spann states that his trial counsel mishandled the proceedings below. Whatever complaints he has against his former attorney, they are not properly addressed to this court.

Spann also notes that one (1) of the medical reports Bagby obtained during discovery belonged to a person other than Spann. Spann believes that the trial court dismissed his case because this report described lesser injuries than he was alleging. We find no indication in the record that the trial court dismissed the action for this reason.

The trial court's order of December 27, 1996, does not state any ground for dismissing the action, other than to reference CR 37.02(2). That rule provides, in pertinent part as follows:

If a party . . . fails to obey an order to provide or permit discovery, including an order made under Rule 37.01 or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; . . .

In reviewing the imposition of sanctions for an abuse of discretion, the appellate court should consider: (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. Greathouse v. American National Bank and Trust Co., Ky. App., 796 S.W.2d 868, 870 (1990); citing, Taylor v. Medtronics, Inc., 861 F.2d 980, 986 (6th Cir.1988). The lack of express findings in the record makes any meaningful appellate review impossible. A dismissal of an action under these circumstances should be accompanied by some articulation on the record of the trial court's resolution of the factual, legal, and discretionary issues presented. When such a severe sanction is imposed, values of consistency and predictability, reviewability, and deterrence, outweigh the values of economy and efficiency that may be promoted by allowing inarticulate decisions. Greathouse, 796 S.W.2d at 870. Consequently we must remand this action either for additional factual findings supporting the dismissal or for the imposition of lesser sanctions.

Since we are remanding this matter for reconsideration after further factual findings, we will briefly set out the standards which should guide that reconsideration. The severe

sanction of dismissal of a complaint should be imposed only in the most "rare circumstances" and only as a "last resort." Bridewell v. City of Dayton, ex rel. Urban Renewal and Community Development Agency of City of Dayton, Ky. App., 763 S.W.2d 151, 152 (1988). Bridewell involved the issue of appropriate sanctions in the context of discovery violations, and this Court reiterated the mandate of our Supreme Court in Ready v. Jamison, Ky., 705 S.W.2d 479, 482 (1986), that a "sanction imposed should bear some reasonable relationship to the seriousness of the defect." Ready, and its progeny, e.g. Crossley v. Anheuser-Busch, Inc., Ky., 747 S.W.2d 600 (1988); Foxworthy v. Norstam Veneers, Inc., Ky., 816 S.W.2d 907 (1991); and Johnson v. Smith, Ky., 885 S.W.2d 944 (1994), emphatically establish both our Supreme Court's policy that a sanction bear some reasonable relationship to the prejudice created, and the Court's goal that, whenever possible, cases be decided on their merits.

Ward v. Housman, Ky. App., 809 S.W.2d 717 (1991) has given us standards which we can apply to the circumstances of each case to determine if a less severe sanction would be warranted. Ward, supra, adopted the following test from Scarborough v. Eubanks, 747 F.2d 871 (3rd Cir. 1984):

- 1) the extent of the party's personal responsibility;
- 2) the history of dilatoriness;
- 3) whether the attorney's conduct was willful and in bad faith;
- 4) meritoriousness of the claim;
- 5) prejudice to the other party; and
- 6) alternative sanctions.

Id. at 875-878.

A review of the pleadings reveals a pattern of putting off discovery as well as a failure to prepare the case for

trial. However, it also shows that Spann provided most of the requested medical records and did so prior to the discovery deadline. Bagby's primary complaints concern Spann's failure to provide signed releases for medical, employment and social security records; his failure to provide copies of his 1994 and 1995 income tax forms; and his attempt to subpoena Dr. James Hawkins after the discovery deadline.

Although these failures to comply with the trial court's orders are inexcusable, we do not agree that they necessarily merit dismissal of Spann's entire cause of action.<sup>1</sup> The trial court could have prohibited Spann from presenting his claim for lost wages, or from introducing the testimony of Dr. Hawkins. As to Spann's claim for medical expenses, Bagby failed to show how he has been prejudiced by the missing evidence. At the very least, we must conclude that the trial court abused its discretion in dismissing the action without stating why lesser sanctions were not appropriate.

Accordingly, the judgment of the McCracken Circuit Court is vacated, and this action is remanded for further findings and proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert R. Spann, Pro Se  
Ledbetter, Kentucky

BRIEF FOR APPELLEE:

Michael D. Moore  
Paducah, Kentucky

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<sup>1</sup>Upon remand, the trial court should also consider the requests for medical records and the releases in light of Geary v. Schroering, Ky. App., 979 S.W.2d 134 (1998).