

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000410-MR

LINDA SUSAN SMITH, EXECUTRIX
OF THE ESTATE OF GARY SMITH AND
LINDA SUSAN SMITH, INDIVIDUALLY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 90-CI-07050

MILTON F. MILLER, M.D.;
GALEN OF KY. D/B/A
COLUMBIA SUBURBAN HOSPITAL
FKA HUMANA OF KY., ETC;
HUMANA HEALTH PLAN, INC.;
AND HUMANA, INC.

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: GUIDUGLI, HUDDLESTON AND MCANULTY, JUDGES.

GUIDUGLI, JUDGE. Appellant, Linda Susan Smith (Smith), appeals from a Jefferson Circuit Court order which denied her motion to continue a trial date and thereafter granted appellees' oral motion to dismiss. We reverse and remand.

On August 29, 1989, Gary Smith, appellant's husband, died. In August, 1990, appellant, through her attorney, Herman Joseph Marshall (Marshall), filed a complaint against several parties, including appellees, alleging they were responsible for

his death.¹ The merits of appellant's complaint is not an issue before this Court and we will not comment on the merits of the case. However, it should be noted that the trial court had refused to grant summary judgment to appellees, and at a July 2, 1997, hearing stated, "I understand there is a basis for the claim." The only issue on appeal is whether the trial court abused its discretion in denying a continuance because of Marshall's failure to be present on the scheduled trial date. In that the record documents that Marshall was admitted to a hospital two days prior to the scheduled trial date suffering from serious medical and psychological problems, we believe the trial court abused its discretion.

A lengthy recitation of the history of this case would not be helpful, but a short summary is necessary to understand the utter frustration experienced by the trial judge in this matter. The complaint was filed in August 1990 by Marshall. The case was not advanced due most likely to Marshall's medical condition at that time. Marshall was determined to suffer from lumbar and cervical disc problems which led to him filing for total disability. On March 18, 1994, the trial court, sua sponte, set the first trial date for May 23, 1995. The record is unclear as to why this trial date was continued, but it was. At the urging of the court, Marshall filed a statement on June 23, 1995, indicating that he was physically ready and able to fully participate in bringing this case to trial.

¹Caretakers, Inc. and Galen of Virginia, Inc., d/b/a University of Louisville Hospital originally named defendants were subsequently voluntarily dismissed.

On February 6, 1996, a new trial date of November 19, 1996, was set. That trial date was continued at the request of appellee, Dr. Miller, without objection by the other parties. The trial was rescheduled for May 6, 1997.

As the new trial date approached, the parties became extremely aggressive and antagonistic, especially during discovery and final trial preparation stages. Numerous motions, objections and protective orders were filed and argued before the court as the trial date approached. Marshall moved to recuse the trial judge and strenuously argued the trial judge's rulings were unfair and hampering his ability to adequately and properly represent Smith. Marshall's conduct towards the court and opposing counsel, at times, can be characterized as confrontational, argumentative, obnoxious, and incoherent.

Despite these personal and professional confrontations, discovery was completed and the case was scheduled to proceed on May 6, 1997. However, two additional events transpired in the week immediately before the trial date. First, Marshall sought to obtain co-counsel to try the case.² Approximately two to three weeks prior to the May 6, 1997, trial date, attorneys, Tim McCall (McCall) and Brian Clare (Clare), entered appearances on behalf of Smith. Shortly after McCall's appearance, appellee, Humana Health Plan, Inc., moved to disqualify McCall based upon an alleged conflict of interest. At the May 1, 1997, hearing on

²It should be noted that Marshall had obtained the assistance of several "co-counsel" previously. All had either withdrawn or been fired by Smith or Marshall. Previous co-counsel included: Harry Gregory, Jackie Schroering, Alan Leibson and Todd Boles.

the motion, the trial court granted the motion and disqualified McCall. Subsequently on May 6, 1997, Clare was also disqualified. McCall's disqualification occurred on May 1, 1997, prior to the scheduled May 6, 1997, trial date. The video tape of this hearing shows that Marshall appeared physically fine but was visibly upset at the trial court's ruling and openly expressed concern over his ability to properly present appellant's case without assistance of co-counsel.

The second event which transpired immediately prior to the trial is essentially the issue of this appeal. According to Marshall and his hospital records, Marshall struck his head on a car door frame and this act aggravated his prior back and neck problem to such an extent that he had to be hospitalized. Additionally, on the Saturday night prior to the trial, Marshall's wife became concerned over his erratic behavior and arranged a visit with a psychiatrist, Dr. Kishore Gutpa (Dr. Gutpa). Dr. Gutpa determined Marshall was suffering from severe depression and anxiety and proscribed Luvox. Dr. Gutpa's diagnosis was "major depression, single episode." Dr. Gutpa opined that Marshall could not try the Smith case on May 6, 1997, because he was "confused and disoriented." The next day Marshall was admitted to Jewish Hospital in Louisville. The admitting records indicate the following medical history:

HISTORY: The patient is a 53 year old Caucasian male, well known to our service, with history of previous anterior discectomy and fusion in 1994 at C5-6 level, left side arm pain. The patient also underwent a bilateral L4-5 discectomy approximately two years ago. He has history of chronic intermittent low ack pain which has been, at

times, quite debilitating which has limited his overall law practice. The patient has had a recent history of striking his head on a car door frame with acute onset of severe neck pain which progressively radiated down the right arm to involve the dorsal aspect of the right hand with paresthesia of the finger. The patient went through a course of steroidal anti-inflammatories under the care of Dr. Seligson as well as Dr. Paul Wolfe. The patient has failed to improve with conservative measures and because of significant degree of intractable pain the patient has been brought into the hospital for pain control, management and workup. The patient denies any bowel or bladder problems, difficulty ambulating.

On May 5, 1997, attorneys, Peter Ostermiller (Ostermiller) and William McMurry (McMurry), appeared before Judge Wine seeking a continuance of the trial date due to Marshall's health problems. McMurry, who indicated that he was now lead counsel for appellant Smith, argued that Marshall was suffering from serious health problems and it would be impossible for Marshall to try the case or assist McMurry in preparing for trial. McMurry requested a minimum four weeks continuance. Ostermiller stated he represented Marshall and also sought a continuance due to Marshall's serious health problems which included being in traction for his disc problem and a morphine pump for his pain.

Appellees' counsel argued in opposition of the continuance because Marshall knew or should have known of his health problems and had committed a fraud on this court or at least was acting in bad faith. These arguments were based upon letters provided by Marshall that indicated he had been seeking total disability payments from his disability insurance provider and letters from his treating physicians that Marshall was in

fact disabled and should not be practicing law. Specifically, in January 1997, Dr. Gaar wrote a letter stating that Marshall was disabled and in October 1996, Dr. Seligson listed Marshall's disability at 40% and then in April 1997, wrote that Marshall was totally disabled from practicing law.

After a lengthy hearing in which the judge voiced his frustration with the fact that this case was one of the oldest cases, if not the oldest, on the Jefferson Circuit Court docket, and after voicing his concerns over Marshall's failure to notify the court of his prior medical limitations, the court denied the motion to continue and dismissed the case. The court specifically found "that the hospitalization [of Marshall] was for the purpose of delaying these proceedings and that this is a dilatory practice on the part of Marshall." Additionally, the court indicated it had considered other sanctions but determining that because of the high costs of preparing for trial, the potential for loss of witnesses and the cloud of accusation hanging over Dr. Miller's head, the court believed dismissal was the only appropriate remedy.

Subsequent to this dismissal, appellant filed motions to alter, amend and vacate and CR 59 and CR 60 motions. The trial court permitted extensive discovery relating to Marshall's medical condition, but after considering all the evidence denied appellant's motion by order entered January 6, 1998. This appeal followed.

To say that this case which includes fifteen (15) volumes of records, numerous medical reports and depositions

concerning Marshall's physical and mental condition and several video tapes of motion hearings, is an unusual case is an understatement. This case was on the trial court's docket for over seven years without reaching trial. This appeal deals mainly with the competency, both medically and professionally, of the trial attorney and not the underlying issues of the complaint. These factors are of great concern to this Court.

A thorough review of the case convinces this Court that the trial judge was extremely conscientious, patient, and professional throughout. However, in the final paragraph of its January 6, 1998, order, the court admitted the seriousness of Marshall's medical condition immediately prior to the trial date. After finding that the initial purpose for Marshall's hospitalization was a "dilatatory practice on the part of Mr. Marshall", the court then states, "this tactic may well have benefitted his [Marshall] own life as treating physicians did find a life threatening condition... ." Additionally, the trial court admitted that the medical evidence presented did clearly show that Marshall "suffered from a long term, progressive back problem as well as chronic depression, which affected his ability to perform as an attorney." Despite Marshall's refusal to admit to himself and to ethically inform the court of his condition, the medical proof presented to the trial court showed that on the day of the scheduled trial, Marshall suffered from debilitating depression, pneumonia and a serious back ailment which resulted in a "life threatening condition" which required surgery on May 12, 1997, to remedy the condition. It should also be noted the

back surgery could not be performed immediately upon admission to the hospital (May 5, 1997) due to the fact that Marshall was suffering from pneumonia.

The trial court relied upon the cases of Miller v. Commonwealth, Ky., 432 S.W.2d 638 (1968), and Gorin v. Gorin, Ky., 167 S.W.2d 52 (1942), in denying the continuance. We do not believe either case to be factually similar to or dispositive of the case sub judice. In Miller, the appellant contended that the trial court abused its discretion in not granting a continuance on a claim that the attorney was ill. Although trial counsel produced a statement of a physician dated about three weeks earlier that the attorney was "not well," nothing else was submitted to the court in support of his claim. In this case, there is an abundance of hospital and medical records and doctors' dispositions to support the fact that Marshall did suffer serious medical and psychological problems on the scheduled trial date. Although he had suffered from on-going back and neck problems previously, the record indicates that Marshall had completed lengthy discovery depositions during the week proceeding the trial and had met on Saturday, May 3, 1997, with his client to prepare for the trial. Despite the trial court's assertions that Marshall's admission to the hospital was a "dilatatory practice" the medical evidence revealed, as the trial court concedes, "a life threatening condition."

The court also relied upon the Gorin case in issuing its sanction of dismissal. The trial court determined that appellant Smith had been "given every opportunity to denounce the

practices of her lead counsel" and that "she condoned and acquiesced in these practices." As such, pursuant to Gorin the trial court found that Smith "cannot allow counsel to engage in questionable activities, hope to keep the benefits of his practices and then seek to distance herself only when the Court sanctions the activity of counsel." The court determined that other sanctions were not appropriate because he believed Smith had "condoned and acquiesced" in Marshall's "questionable activities" and therefore she should not avoid the sanction of dismissal. However, as noted earlier, there was sufficient medical evidence to support the granting of the continuance. Despite the trial court's numerous warnings and admonitions to Smith regarding Marshall's questionable activities, Smith failed to heed the court's advice. Were it not for the serious life-threatening medical condition of Marshall, the trial court would have had every right to impose the "death penalty" sanction and dismiss this case. We need not address other issues as to how Marshall practiced this case, his on-going medical ailments, his failure to notify the court, or his attempts to receive total disability yet still practice law, as they are not specifically before this Court.

While we agree with appellees' argument and prior case law that a trial court must be able to control its docket and must have broad discretion in granting or denying continuances, we are of the opinion, based upon the medical records and doctors' depositions submitted to the trial court, that Marshall did in fact suffer from serious medical and psychological

problems on the date the trial was scheduled. As such, the trial court abused its discretion by not granting a continuance in this case. While we are mindful of the myriad of additional issues the trial court will have to face as a result of this reversal, we are confident that the trial court will continue control of its docket and properly manage this case, using appropriate sanctions as needed, until the case is concluded.

For the foregoing reasons, we reluctantly reverse the order of the Jefferson Circuit Court and remand this matter for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Peter L. Ostermiller
Louisville, KY

H. Joseph Marshall
Ferncreek, KY

J. Fox DeMoisey
Louisville, KY

Charles E. Theiler, II
Louisville, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, HUMANA HEALTH PLAN,
INC.:

Michael M. Hirn
Frank P. Doheny, Jr.
Louisville, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, MILTON F. MILLER,
M.D.:

W. Kennedy Simpson
Louisville, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, GALEN OF KY:

William T. Robinson, III
Thomas H. Stewart
Covington, KY