

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000414-MR

JOYCE LANE

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 05-CI-01171

HUGH MONTGOMERY RICHARDS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, MOORE AND NICKELL, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Laurel Circuit Court. The Appellant, Joyce Lane, brought a legal malpractice action against Appellee, Hugh Montgomery Richards. The trial court dismissed it for failure to prosecute and we reverse that decision and remand this action to the trial court for further findings consistent with this opinion.

BACKGROUND INFORMATION

Richards represented Lane in federal court in an action she filed against the Bell County School Board (School Board). Lane brought the action under the Americans with Disabilities Act (ADA) and the Civil Rights Act of 1964. She also asserted a claim under the tort of outrage. The federal court granted summary judgment to the School Board holding that Lane had not demonstrated that she was disabled under the ADA.

Once her federal case was dismissed, Lane hired a second attorney to appeal the dismissal to the Sixth Circuit Court of Appeals. The Sixth Circuit upheld the dismissal and Lane then hired a third attorney to appeal the decision to the United States Supreme Court. The Writ of Certiorari, however, was not filed within the appellate time period.

Lane then filed this action against Richards for legal malpractice. In her action, Lane contended that Richards was negligent in his representation of her federal court case. The trial court dismissed the action holding that the statute of limitations had run. This was appealed to a panel of our Court which reversed the holding. Richards's counsel asserted that he thereafter made several attempts over a period of months to contact Lane's counsel, Bobby G. Wombles, but was unsuccessful. On March 2, 2009, Richards's counsel filed a motion for summary judgment and a motion to dismiss for failure to prosecute. On April 8, 2009, Wombles filed a motion for summary judgment. Wombles had a medical condition on that day that caused the motion to be passed.

On July 20, 2009, Richards's counsel received a letter from Wombles setting forth that he was going to file a motion to withdraw within a week. No motion was filed and on September 2, 2009, Richards's counsel renewed its motion to dismiss for failure to prosecute. Wombles then contacted Richards's counsel and stated that Lane would agree to a mutual release and agreed order of dismissal.

On September 17, 2009, Wombles contacted Richards's attorney and stated that he had sent the documents to Lane. On October 7, 2009, Wombles informed Richards's attorney that Lane would not settle. Counsel for Richards then re-noticed their motion to dismiss for a hearing on November 13, 2009. On November 9, 2009, four days prior to the motion being heard, Wombles filed a motion to withdraw due to his health and requested that his pleading in response to Richardson's motion for summary judgment be stricken.

On November 13, 2009, the trial court passed Richards's motion to dismiss to December 11, 2009. Following a hearing at which neither Lane or Wombles appeared, the trial court entered an order December 15, 2009, granting Wombles's motion to withdraw and allowing Lane thirty days in which to obtain new counsel. On February 2, 2010, the trial court granted Richards's motion to dismiss for failure to prosecute. Lane then filed this appeal arguing that she had been unaware of the incidents which led to the dismissal.

STANDARD OF REVIEW

We review an appeal for dismissal pursuant to Kentucky Rules of Civil Procedure (CR) 41.02 for abuse of discretion. *Jaroszewski v. Flege*, 297 S.W.3d 24, 32 (Ky. 2009). A trial court has abused its discretion if it has acted in a way which was arbitrary, unreasonable or unfair or its decision is not supported by sound legal principles. *Wildcat Property Management, LLC v. Reuss*, 302 S.W.3d 89, 93 (Ky. App. 2009); *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

With this standard in mind, we examine the merits of this appeal.

DISCUSSION

Lane first asserts that the trial court erred in dismissing her case for failure to prosecute because she was not notified either by her attorney or the court clerk's office of pending motions in the case. In *Jaroszewski, supra*, the Kentucky Supreme Court held that in reviewing a dismissal under CR 41.02, "the trial court must base its decision to dismiss under CR 41.02 upon the totality of the circumstances; and it should take into account all relevant factors, whether or not those factors are listed in *Ward*." *Id.* at 36. The *Ward* factors are those set forth in *Ward v. Housman*, 809 S.W.2d 717, 719 (Ky. App. 1991):

- 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.

Jaroszewski also set forth that: “Trial courts must make explicit findings on the record so that the parties and appellate courts will be properly apprised of the basis for the trial court’s rulings[.]” *Jaroszewski*, 297 S.W.3d at 36. In the trial court’s ruling, the following is set forth:

. . . Plaintiff has completely failed to move this matter towards resolution. This Court has specifically considered the factors enumerated in *Ward v. Housman*, Ky. 809 S.W.2d 717 (1991), namely: 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; [sic] 6) alternative sanctions. The Court has considered each of these factors and finds that the balance of the test weighs in favor of the Defendant, thus Dismissal is appropriate.

Order entered February 2, 2010 at 1.

While the trial court sets forth the *Ward* factors, it did not explain with the explicitness required by *Jaroszewski* why it dismissed the case pursuant to those factors. Thus, we reverse this action and remand it to the trial court for further findings consistent with this order.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEFS FOR APPELLEE:

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