

RENDERED: JANUARY 21, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001035-MR

DELLA NOE

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 02-CI-00093

RANDALL W. WALTERS, M.D.;
AND PINEVILLE COMMUNITY
HOSPITAL ASSOCIATION, INC.

APPELLEES

OPINION
VACATING AND REMANDING
WITH DIRECTIONS

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

TAYLOR, CHIEF JUDGE: Della Noe brings this appeal from a December 18, 2007, Order dismissing appellant's action under Kentucky Rules of Civil Procedure (CR) 37.02(2). We vacate and remand with directions.

On February 26, 2001, Della Noe underwent a hysterectomy procedure at Pineville Community Hospital (Pineville Hospital). The surgical

procedure was performed by Randall W. Walters, M.D., and Satish Dholakia, M.D. On February 25, 2002, appellant filed a complaint in the Bell Circuit Court relating to the hysterectomy and named as defendants Walters, Dholakia, and Pineville Hospital.¹ Appellant specifically alleged that Walters and Dholakia negligently caused or permitted the surgical stitching of her ureter and other tissue so as to “ultimately cause . . . [her] ureter and . . . kidney to become permanently non-functional.” Appellant also alleged that Pineville Hospital’s negligence contributed to her injury.

Throughout the five-year procedural history of this case, the record discloses that appellant engaged in dilatory conduct. In June 2002, Dholakia, Walters, and Pineville Hospital filed motions to compel appellant to respond to discovery requests. In response, appellant filed a motion for additional time and objections to the motion to compel; both were untimely filed. On July 19, 2002, appellant finally provided the requested discovery by appellees, which was originally due some three months earlier on April 8, 2002.

Thereafter, on July 28, 2003, the circuit court stayed the proceedings for six months upon motion by Pineville Hospital. During this time, discovery was exchanged, and appellant’s deposition was taken. Subsequently, on March 17, 2004, Pineville Hospital filed a motion for summary judgment. CR 56. After granting appellant additional time to respond, the circuit court ultimately denied the motion. Then, on April 18, 2005, Dholakia filed a motion for summary

¹ The claims against Satish Dholakia, M.D., were dismissed by order entered August 17, 2005.

judgment. Following numerous delays by appellant, the circuit court granted summary judgment and dismissed the claims against Dholakia by order entered August 17, 2005. Appellant filed an appeal to this Court (Appeal No. 2006-CA-000487-MR), which was ultimately dismissed for failure to timely file a prehearing statement.

On December 28, 2006, Pineville Hospital requested that appellant provide possible dates for deposing her expert, Dr. William Evans. There was no response by appellant, and Pineville Hospital ultimately filed a motion to compel. By order entered March 12, 2007, the circuit court ordered appellant to provide dates for deposing Evans and to provide expert disclosures under CR 26.02 within forty-five days. The forty-five-day time limit expired on April 26, 2007, and appellant failed to comply with the March 12, 2007, order.

On May 9, 2007, Pineville Hospital filed a motion to dismiss pursuant to CR 37.02(2). Therein, Pineville Hospital asserted that appellant's counsel had engaged in a pattern of improper conduct and had specifically disobeyed the March 12, 2007, discovery order. Pineville Hospital argued that dismissal was warranted under CR 37.02(2). By order entered May 14, 2007, the circuit court granted Pineville Hospital's motion to dismiss under CR 37.02(2). Appellant timely filed a motion to vacate the order of dismissal. Therein, appellant's counsel asserted that he was out of the office "on personal and urgent business" during the week of May 7, 2007, and did not "see his mail." He also stated that a miscalculation caused him to miss the deadline for complying with the court's March 12, 2007, order. The

circuit court then set June 25, 2007, as the date to hear appellant's motion.

Appellant's counsel subsequently asserted he had a conflict on that date, and the hearing was rescheduled to August 13, 2007. Eventually, the circuit court granted appellant's motion to vacate the June 25, 2007, order of dismissal.

Because appellant had not complied with the March 12, 2007, discovery order, Pineville Hospital again filed a motion to dismiss under CR 37.02(2), and a hearing was scheduled for October 8, 2007. While the motion was pending, appellant finally complied with the March 12, 2007, order by providing the dates Evans would be available for deposition and by providing expert disclosures pursuant to CR 26. Such compliance was originally due on April 26, 2007.

By order entered December 18, 2007, the circuit court granted Pineville Hospital's motion to dismiss. Appellant again filed a motion to vacate, which was heard on February 25, 2008. Appellant filed a memorandum of law on the day of the hearing, and the circuit court ordered both parties to file briefs within 50 days. By order entered April 30, 2008, the circuit court denied appellant's motion to vacate. This appeal follows.

Appellant contends that the circuit court committed reversible error by dismissing the medical negligence action under CR 37.02(2).² Under CR 37.02(2),

² We note that the December 18, 2007, order of the Bell Circuit Court dismissed Della Noe's action upon the basis of Kentucky Rule of Civil Procedure (CR) 37.02 and not pursuant to CR 41.02(1). In *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991) this Court identified six factors that the trial court should consider before dismissing a case under CR 41.02(1) due to the dilatory conduct of counsel. Recently, another panel of this Court in *Stapleton v. Shower*, 251 S.W.3d 341 (Ky. App. 2008) determined that dismissal under CR 37.02 and CR 41.02 are

an action may be dismissed or a default judgment entered where a party fails to obey a court order to provide or to permit discovery. CR 37.02(2) reads:

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30.02(6) or 31.01(2) to testify on behalf of 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;

(e) Where a party has failed to comply with an order under Rule 35.01 requiring him to produce another for examination, such orders as are listed in subparagraphs (a), (b) and (c) of this paragraph (2), unless the party

functionally the same. Because this Court relies on *Greathouse v. American National Bank and Trust Co.*, 796 S.W.2d 868 (Ky. App. 1990) as cited herein, we do not reach the merits nor give an opinion as to whether any or all of the factors set forth in *Ward v. Housman* are applicable to this case.

failing to comply shows that he is unable to produce such person for examination.

While dismissal is provided for under CR 37.02(2), it should only be utilized in exceptional cases. *R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654 (Ky. App. 2009). Additionally, in *Greathouse v. American National Bank and Trust Co.*, 796 S.W.2d 868 (Ky. App. 1990), our Court has recognized the duty of the circuit court to provide written findings of fact and conclusions of law when dismissing an action under CR 37.02(2):³

We are aware of the deference due the trial court's findings. [CR 52.01](#). In this case, however, we have no such findings, and are unable to discern the precise reason for imposition of the ultimate sanction upon appellant; we must therefore vacate the judgment and remand for findings by the trial court. The preferred course of conduct would be for the trial court's dismissal under these circumstances to be “accompanied by some articulation on the record of the court's resolution of the factual, legal, and discretionary issues presented.” [Quality Prefabrication, Inc. v. Daniel J. Keating Company](#), 675 F.2d 77, 81 (3d Cir.1982). This should not be overly burdensome to the trial court, and will assist in meaningful appellate review. See [CR 52.01](#).

The reasons for desiring some articulation of the bases for decision have special importance in this context. When such a severe sanction is imposed, values of consistency and predictability, reviewability, and deterrence, outweigh the values of economy and

³ The holding in *Greathouse v. American National Bank and Trust Co.*, 796 S.W.2d 868 (Ky. App. 1990) is consistent with the recent Court of Appeals' decision in *Brown v. Shelton*, 156 S.W.3d 319 (Ky. App. 2004). Therein, our Court held that Kentucky Rules of Civil Procedure (CR) 52.01 required the circuit court to make written findings of fact and conclusions of law and the circuit court's complete failure to do so constituted reversible error. This is, of course, distinguished from a case where the circuit court made findings of fact and conclusions of law, but such are simply inadequate. In such a case, the circuit court's failure to make adequate findings of fact and conclusions of law must be brought to the court's attention by motion under CR 52.04, or the error is waived. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

efficiency that may be promoted by allowing inarticulate decisions.

Greathouse, 796 S.W.2d at 870. Hence, it is settled that a circuit court's failure to make any findings of fact or conclusions of law in an order dismissing under CR 37.02(2) constitutes reversible error.

In the case *sub judice*, the circuit court failed to provide any written findings of fact or conclusions of law. The December 17, 2007, order merely consisted of three sentences and read:

On motion of the Defendant, Pineville Community Hospital, Associates, Inc., by counsel, and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is hereby GRANTED with prejudice. This is a final and appealable Order.

We, thus, conclude that the circuit court erred by dismissing appellant's action under CR 37.02(2) without including findings of fact and conclusions of law. *See Greathouse*, 796 S.W.2d 868. Accordingly, we vacate the circuit court's December 18, 2007, order and remand with directions to make specific findings of fact and conclusions of law articulating the reasons for dismissal under CR 37.02(2). In so doing, the circuit court should be guided by *Greathouse*, 796 S.W.2d 868.

For the foregoing reasons, the Order of the circuit court is vacated and remanded with directions that the circuit court supplement its order dismissing under CR 37.02(2) with specific findings of fact and conclusions of law.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

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BRIEF FOR APPELLEE PINEVILLE
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ORAL ARGUMENT FOR
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NO BRIEF FILED FOR
APPELLANT RANDALL W.
WALTERS, M.D.