

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000716-MR

WILMA EVELYN BARBOUR, Individually,
and as Administratrix of the ESTATE
OF JACK N. BARBOUR

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT GALLENSTEIN, JUDGE
ACTION NO. 97-CI-00304

HOSPITAL CORPORATION OF KENTUCKY d/b/a
COLUMBIA HOSPITAL MAYSVILLE and
PHILLIP H. YUNKER, M.D.

APPELLEES

OPINION
VACATING AND REMANDING
** **

BEFORE: GUDGEL, Chief Judge; COMBS and DYCHE, Judges.

COMBS, JUDGE: Wilma Evelyn Barbour, individually and as the administrator of the estate of Jack N. Barbour, appeals from an order of the Mason Circuit Court entered on February 2, 1998, which dismissed her action against Phillip H. Yunker, M.D., and Hospital Corporation of Kentucky, d/b/a Columbia Hospital Maysville. We vacate and remand.

On January 10, 1997, Jack N. Barbour died while under the care and treatment of the appellees. On December 29, 1997, the appellant, Wilma Evelyn Barbour filed this medical

malpractice action. In her complaint, Ms. Barbour sought "[j]udgment against [the appellees], jointly and severally, as compensatory damages, in an amount to be fixed by a jury based upon the evidence at trial, in excess of the minimum jurisdictional limits of this Court" and punitive damages "in an amount to be fixed by the jury, not to exceed ten million dollars (\$10,000,000.00)." Thereafter, the appellees filed separate motions to dismiss the complaint pursuant to CR 41.02. The appellees maintained that the complaint was too verbose and that it stated damages in a specific dollar amount in violation of the rules of civil procedure.

On February 20, 1998, a hearing on the motions was held before the trial court. Subsequently, on February 26, 1998, the trial court entered its order dismissing Ms. Barbour's complaint with prejudice. This appeal followed.

The appellees sought the dismissal of the complaint pursuant to CR 41.02(1), which provides as follows:

For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or any claim against him.

They argued that Ms. Barbour's complaint failed to comply with the rules of civil procedure because it was eleven pages in length and because it contained a request for punitive damages "in an amount to be fixed by the jury, not to exceed ten million dollars (10,000,000.00)." The trial court agreed, concluding that CR 8.01(2) specifically prohibited the recital of any sum as

alleged damages other than an allegation that damages are in excess of the amount necessary to establish jurisdiction. Additionally, the court determined that the complaint failed to provide a "short and plain statement of the claim" as required by CR 8.01(1) and that it violated CR 8.05(1) by failing to contain "simple, concise, and direct" averments.

Determining an appropriate sanction for violation of the civil rules is left to the sound discretion of the trial court. Thompson v. Kentucky Power Co., Ky. App., 551 S.W.2d 815 (1977). However, "[i]n ruling on a motion for involuntary dismissal, the trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial." Ward v. Housman, Ky. App., 809 S.W.2d 717, 719 (1991). When considering whether an action should be dismissed based upon the conduct of counsel, the trial court must consider: the extent of the party's personal responsibility; whether the attorney's conduct was willful and in bad faith; the meritoriousness of the claim; prejudice to the other party; and, finally, the appropriateness of alternative sanctions. Id. Because of the "grave consequences" attendant to dismissal, this sanction should be used only in the "most extreme cases." Polk v. Wimsatt, Ky. App., 689 S.W.2d 363, 364-365 (1985).

In view of the facts and circumstances presented here, we conclude that dismissal of the Ms. Barbour's action was inappropriate. Contrary to the appellees' assertions, our review

of the complaint simply does not indicate that it was drafted in "blatant violation" of CR 8.01 and CR 8.05; nor does our review suggest that the complaint's contents are unduly inflammatory, "dramatic," or "sensationalistic."

This case appears to be a complicated medical malpractice action involving two separate defendants. It contains allegations of fraud and misrepresentation; allegations of inappropriate medical care; and allegations of negligent "credentialling." It asserts claims for economic loss and medical, funeral, and burial expenses; claims for the loss of affection, companionship, and support; and claims for severe emotional and psychological injuries. The complaint appears to detail facts and conclusions sufficient merely to advise the appellees of the specific and numerous claims that Ms. Barbour was making against them.

With respect to the provisions of CR 8.01(2), we conclude that the complaint could be construed as a technical violation of the prohibition against the recital of any sum as alleged damages. Nevertheless, in light of the facts and circumstances of this case (and mindful of our prior decisions discussing the harshness of a sanction that deprives a litigant of her day in court), we believe that the trial court abused its discretion by imposing the most drastic sanction possible upon Ms. Barbour – the jurisdictional equivalent of a death sentence for what did not amount to a capital offense procedurally.

The order of the Mason Circuit Court is vacated and this matter remanded for further proceedings.

GUDGEL, CHIEF JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT AND FILES A SEPARATE OPINION.

DYCHE, JUDGE, CONCURRING IN RESULT: I concur with the majority that the dismissal of the complaint was inappropriate in this case, despite the egregious violation of CR 8.01(2). A sanction against offending counsel would have been more appropriate. The only conceivable reasons to put the ten million dollar figure in the complaint are for shock value, or to generate publicity and discredit the defendants.

I am concerned, however, with the excruciatingly detailed nature of the complaint. The averments are not "simple, concise, and direct." CR 8.05(1). Most of the paragraphs of the complaint contain multiple sentences and multiple allegations of facts as well as argument relating to the defendants' state of mind.

The defendants should not be required to try the entire case in their answers; the minute details of the allegations against the defendants should be fleshed out by discovery and proof. I would authorize the trial court to order simplification of the complaint.

BRIEFS FOR APPELLANT:

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Raymond S. Bogucki
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ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR
APPELLEE HOSPITAL CORPORATION
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BRIEF AND ORAL ARGUMENT FOR
APPELLEE PHILLIP H. YUNKER,
M.D.:

Kenneth Williams
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