

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001854-MR

REBECCA ANN NICHOLS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN CONLIFFE, JUDGE
ACTION NO. 97-CI-06688

FITZHUGH MULLINS

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Rebecca Nichols (Nichols) appeals an order of the Jefferson Circuit Court entered June 25, 1998, dismissing her cause of action against Fitzhugh Mullins, M.D. (Dr. Mullins) with prejudice for failure to comply with the court's order of May 28, 1998, requiring her to disclose her expert witnesses. We affirm.

The facts of this case are not in question. On November 19, 1997, Nichols filed a complaint against Dr. Mullins in the Jefferson Circuit Court alleging lack of informed consent to a medical procedure and medical negligence in her care and treatment. On December 3, 1997, Dr. Mullins served interrogatories and requests for production of documents on

Nichols pursuant to CR 33.01, requesting, among other things, that she identify her expert witnesses and state the grounds for their opinions.

Nichols did not provide answers to the interrogatories within the allotted time. After the interrogatories were more than four weeks late, Nichols's counsel contacted Dr. Mullins's counsel and indicated that he would produce the interrogatory answers shortly. On February 26, 1998, Dr. Mullins's counsel again contacted Nichols's counsel to inquire about the overdue interrogatory answers. Nichols's counsel informed Dr. Mullins's counsel that he would produce the interrogatory answers within the week. Dr. Mullins's counsel specifically requested that the interrogatory answers be provided before March 12, 1998, the date of Nichols's scheduled deposition.¹

When Nichols's counsel did not produce the interrogatory answers within the week, Dr. Mullins filed a motion to compel on March 3, 1998. On March 9, 1998, the trial court ordered Nichols to provide the interrogatory answers to Dr. Mullins by March 11, 1998. However, Nichols's counsel failed to comply with the trial court's order and, in fact, canceled the deposition on March 12, 1998, some two hours before it was to begin, claiming that he was in trial that day. On March 18, 1998, Dr. Mullins filed a second motion to compel Nichols to answer the interrogatories.

¹Nichols deposition was originally scheduled for February 4, 1998, but was rescheduled due to the late interrogatory answers.

At the April 27, 1998, hearing on the motion, the trial court ordered Nichols to fully answer the interrogatories by May 11, 1998, or face dismissal of her complaint. On May 11, 1998, Nichols finally provided her answers to the interrogatories. However, Nichols failed to answer interrogatory No. 7, which required her to disclose the identity of any expert witness who would testify as to Dr. Mullins's deviation from the standard of care.

On May 14, 1998, Dr. Mullins filed a motion to dismiss for failure to comply with the trial court's orders of March 9, 1998, and April 30, 1998. The motion was heard on May 18, 1998, and the trial court gave Nichols until June 17, 1998, to either disclose her experts or face dismissal. Nichols's counsel did not attend this hearing and further denies ever receiving a copy of this order. Nichols did not comply with the trial court's May 18, 1998, order. On June 23, 1998, Dr. Mullins filed a motion to dismiss, which the trial court granted on June 25, 1998. This appeal followed.

At the outset we note for the record that the decision to dismiss an action for failure to answer interrogatories falls within the discretion of the trial court. Spradling v. Boone County Planning Commission, Ky., 461 S.W.2d 548 (1970). In fact, the Supreme Court of Kentucky has held that "[a] trial court has wide discretion in applying the penalties provided by CR 37.04 and unless there is a clear abuse of this discretion this court will not disturb the order of the trial court." Benjamin v. Near East Rug Company, Inc., Ky., 535 S.W.2d 848 (1976) (emphasis

added). Pursuant to CR 37.04, the trial court may apply the following sanctions for failure to answer interrogatories:

(2) Sanctions by court in which action is pending.

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; ...

CR 37.02 2(a)-(c) (emphasis added).

Nichols argues that the trial court abused its discretion in dismissing her complaint for failure to abide by the May 18, 1998, order. We disagree. Nichols ignored not one but two orders of the trial court with regard to these interrogatories. The interrogatories were not answered until almost two months after the time period set by the trial court.

The answers to interrogatories were already four months late when the trial court ordered Nichols to either provide the answers by May 11, 1998 or face dismissal. Nichols partially complied with this order by providing Dr. Mullins with a set of incomplete answers. On May 18, 1998, the trial court gave Nichols one last chance to provide complete answers. When Nichols ignored this order, the trial court dismissed the action. We see no abuse of discretion in the trial court's decision. Court orders are not to be taken lightly and should be adhered to quickly and diligently.

We note that Nichols claims that she did not receive the trial court's May 18, 1998, order. However, we are also aware that Nichols did not attend the May 18, 1998, hearing although she was aware of same. We further note that Nichols did not inquire into the outcome of the May 18, 1998, hearing. We do not believe Nichols's conduct justifies reversal of the decision of the trial court in this matter.

For the foregoing reasons, the decision of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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