

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000994-MR

KAREN B. WARE

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 97-CI-00466

MARK E. EDISON

APPELLEE

OPINION and ORDER

AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, EMBERTON AND SCHRODER, JUDGES.

EMBERTON, JUDGE: The single issue in this appeal is whether the trial judge erred in dismissing appellant's legal malpractice claim on the basis of her failure to timely respond to requests for admissions. Citing the relatively short period of delay in answering and the lack of a showing of prejudice because of the delay, appellant argues that dismissal of the action constitutes too severe a sanction. Because our review convinces us that the trial court was acting within the scope of authority set out in Kentucky Rules of Civil Procedure (CR) 36.01(2), we affirm its decision to dismiss the complaint.

It is undisputed that on February 13, 1998, as part of discovery in defense of a legal malpractice complaint, appellee served upon appellant a set of requests for admissions, interrogatories and requests for production of documents which included the following:

Admit or deny that in April, 1996, and thereafter until December, 1996, you advised the Defendant you did not wish to file suit concerning the December, 1994, accident.

Admit or deny that you told the Defendant you did not wish to file suit involving the December, 1994, accident because the Defendant advised you that you would have to sue the driver of the vehicle you were riding in who was your friend.

It is also undisputed that responses to these requests were not served upon appellee by March 16, 1998, and were thus outside the thirty day period set out in CR 36.01(2). At a pretrial conference conducted on March 30, 1998, appellee advised the trial judge that responses to the discovery requests had not been timely received nor had any request for additional time been made and he thereafter orally moved for dismissal. Counsel for appellant responded that no motion to compel had been filed and he attempted to advise the court that the responses were ready for service. On April 1, 1998, the trial judge entered an order dismissing appellant's complaint with prejudice. The subsequent denial of appellant's petition for reconsideration precipitated this appeal in which she argues that it was an abuse of discretion to impose the extreme sanction of dismissal. We disagree.

Although appellant characterizes the dismissal of her complaint as a discovery sanction, the dismissal is in reality the natural outcome of admitting certain matters by operation of CR 36.01(2) and CR 36.02. CR 36.01(2) provides that a matter about which an admission is requested will be deemed admitted unless a written answer or objection is made. CR 36.02 states that "[a]ny matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission." The rule itself plainly sets out the conclusive nature of the matter admitted. Lewis v. Kenady, Ky., 894 S.W.2d 619,621 (1994). Thus, the sanction provided by the rule is not dismissal but, depending upon the nature of the matters established, application of the rule may be outcome determinative.

In this case, among the matters admitted were that up until December 1996, appellant had advised appellee that she did not wish to file suit because of her relationship with the driver of the automobile in which she was a passenger; that she did not advise appellee that the accident had occurred in Indiana until December 1996; that appellee then informed her that he did not practice in Indiana and was unfamiliar with Indiana law; and that, after receiving a report from her physician, he advised her that in his opinion she did not have a claim worth pursuing through legal action. As in any action for negligence, a plaintiff alleging legal malpractice must show a negligent act or omission and legally cognizable damages. Meade County Bank v. Wheatley, Ky., 910 S.W.2d 233 (1995). Considering the admissions

together with the other evidence before the trial judge, we cannot say that his decision to dismiss the appeal was erroneous since it appears it would be impossible for the appellant to have prevailed at trial. Nor do we perceive in this case any abuse of the wide latitude afforded a trial judge in deciding whether relief from the application of CR 36.01(2) should be granted. Accordingly, we find no basis for disturbing the judgment of dismissal.

Finally, we deny as moot appellee's motion to dismiss this appeal for failure to supply the court with a transcript of the proceedings at the pretrial conference. As is evident from our decision in this case, the transcript was not essential to a review of the matters pressed in this appeal.

The judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

ENTERED: December 10, 1999

/s/ Thomas Emberton
JUDGE, COURT OF APPEALS

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