

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002387-MR

CHARLES R. PIERCE AND  
ANNIE E. PIERCE

APPELLANTS

v.

APPEAL FROM TAYLOR CIRCUIT COURT  
HONORABLE DOUGHLAS M. GEORGE, JUDGE  
ACTION NO. 98-CI-00118

MINIT MART FOODS

APPELLEE

OPINION  
VACATING AND REMANDING  
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BEFORE: COMBS, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Charles and Annie Pierce appeal from the judgment of the Taylor Circuit Court entered on September 8, 1999, which dismissed their lawsuit against Minit Mart Foods due to their failure to comply with the trial court's discovery order. Because the trial court failed to make any findings justifying its dismissal, we vacate and remand for further proceedings.

The record reveals that the Pierces commenced this action by filing a complaint on March 19, 1998, in which they alleged that Charles had sustained "permanent and debilitating injuries" on March 20, 1997, when he fell at the premises known

as "Minit Mart" located in Campbellsville, Kentucky. In addition to incurring medical bills, Charles alleged that as a result of the appellee's negligence, he had "been impaired in his life activities and earning power, ha[d] been inconvenienced and ha[d] suffered and will continue in the future to suffer physical, mental and emotional pain, distress and anguish." Annie sought damages for her alleged loss of consortium.

Minit Mart Foods answered the complaint on October 16, 1998. Six months later, on May 13, 1999, Minit Mart moved the trial court pursuant to CR<sup>1</sup> 37, to order the Pierces to "fully" respond to interrogatories and requests for production of documents originally propounded to the Pierces on October 6, 1998. The motion stated that Minit Mart's counsel had not received any response to the discovery requests and that he had been unsuccessful in his efforts to contact the Pierces' attorney by mail and by telephone. The Pierces did not file a response to the motion in the record. However, prior to the hearing on the motion, their counsel provided unsigned answers to most, but not all, of the interrogatories. On June 10, 1999, the trial court entered its order compelling discovery within 10 days.

Two months later, on August 16, 1999, Minit Mart moved the trial court to dismiss the Pierces' claims. In its motion Minit Mart alleged that the Pierces had not complied with the court's previous discovery order and that the Pierces' "delay and refusal to provide initial discovery" had prejudiced Minit Mart in the defense of the action. In response, the Pierces argued

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<sup>1</sup>Kentucky Rules of Civil Procedure.

that they had made a "good faith response[ ]" to Minit Mart's discovery requests and asked that the motion be denied. On September 8, 1999, the trial court entered its order dismissing the action with prejudice for failure to comply with its order of June 10, 1999.<sup>2</sup>

In their appeal, the Pierces contend that the trial court's dismissal of their complaint was an abuse of discretion. While CR 37.02(2)(c) authorizes a trial court to dismiss an action when a party does not comply with discovery requests, the discretionary power to dismiss is not absolute. In any event, when the ultimate sanction of dismissal is utilized, the trial court must articulate findings to justify its imposition, as opposed to a lesser sanction.<sup>3</sup> As Greathouse makes clear, the trial court's judgment should contain findings that reflect its "resolution of the factual, legal, and discretionary issues

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<sup>2</sup>The order from which this appeal has been taken is very brief and states in its entirety as follows:

Motion having been made and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the claims of the Plaintiff, Charles R. Pierce, be and are hereby dismissed with prejudice pursuant to CR 37.02(2) and CR 37.04(1) for Plaintiff's failure to comply with this Court's Order of June 10, 1999, to provide written discovery within ten days of said Order.

<sup>3</sup>Greathouse v. American National Bank and Trust Co., Ky.App., 796 S.W.2d 868, 870 (1990) (the discretion to impose such sanctions "is not unbridled, but must rest upon a finding of willfulness or bad faith on behalf of the party to be sanctioned").

presented'."<sup>4</sup> Having failed to make any findings whatsoever in the case sub judice, the trial court's judgment is simply not amenable to a meaningful review by this Court.

Accordingly, the judgment of the Taylor Circuit Court is vacated and the matter is remanded for factual findings to support the dismissal, or for the imposition of a lesser sanction. On remand, the trial court is directed to utilize the standards set forth in Bridewell v. City of Dayton, ex rel. Urban Revewal and Community Development Agency of City of Dayton,<sup>5</sup> and consider the test in Ward v. Housman,<sup>6</sup> adopted from Scarborough v. Eubanks,<sup>7</sup> for determining if a lesser sanction would be warranted.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark S. Medlin  
Paducah, KY

BRIEF FOR APPELLEE:

William B. Wells  
Louisville, KY

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<sup>4</sup>Id. (quoting Quality Prefabrication, Inc. v. Daniel J. Keating Co., 675 F.2d 77, 81 (3d Cir. 1982)) (findings articulating the basis for the dismissal held to be of "special importance" when such a "severe sanction is imposed" because "values of consistency and predictability, reviewability, and deterrence, outweigh the values of economy and efficiency").

<sup>5</sup>Ky.App., 763 S.W.2d 151, 152 (1988) (sanction of dismissal of a complaint should be imposed only in the most "rare circumstances" and only as a "last resort").

<sup>6</sup>Ky.App., 809 S.W.2d 717 (1991).

<sup>7</sup>747 F.2d 871 (3d Cir. 1984).