

RENDERED: May 9, 2003; 2:00 p.m.

NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000356-MR

BRENDA K. MARGHERIO  
AND RICHARD A. MARGHERIO

APPELLANTS

v. APPEAL FROM McCracken Circuit Court  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 98-CI-01194

CHARLES L. SHIELDS, M.D.

APPELLEE

### OPINION

### REVERSING AND REMANDING

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BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Brenda K. Margherio and Richard A. Margherio appeal from an order of the McCracken Circuit Court which dismissed their medical malpractice complaint against Charles L. Shields, M.D. (Dr. Shields). We agree with the Margherios that, given the facts of this particular case, the trial court abused its discretion in dismissing their complaint with prejudice. Hence, we reverse the order of dismissal and remand for further proceedings.

The relevant facts of this action are not in dispute. On December 15, 1998, the Margherios filed a complaint alleging medical malpractice against Dr. Shields. Discovery proceeded during the next two years, albeit somewhat sporadically. However, the case was scheduled for trial on July 2, 2001. Prior to that date, the Margherios requested a continuance due to their counsel's medical problems. The trial court granted the continuance over Dr. Shield's objection.

Shortly thereafter, the Margherios' counsel cancelled several scheduled depositions of expert witnesses. No further actions were taken during the following six months. Then, on November 19, 2001, the trial court entered an order permitting the Margherios' attorney to withdraw as counsel based upon medical considerations. That order further provided:

It is further ordered that Plaintiffs shall have until December 14, 2001 at 9:45 a.m., to obtain substitute counsel if they intend to prosecute this claim further. A Status Conference shall be held at motion hour on December 14, 2001 at 9:45 a.m., to address pending issues, and to determine the future course of this matter.

Neither the Margherios nor their counsel appeared at the status conference on December 14. Consequently, the trial court, on its own motion, ordered that the action be dismissed with prejudice. Upon receiving notice of the order, the Margherios filed a pro se motion to vacate the dismissal of

their action. The Margherios' previous counsel also filed a notice of appearance and a motion to set aside the dismissal. Nevertheless, on February 11, 2002, the trial court entered an order denying the motion to reinstate the action. This appeal followed.

The Margherios argue that the trial court essentially dismissed their action because they had failed to obtain substitute counsel within the time limit set by the trial court. We agree that there is no requirement for individuals to be represented by counsel in a civil case.<sup>1</sup> Thus, the mere fact that the Margherios failed to obtain substitute counsel by the date set by the trial court was not a proper ground to dismiss their action.

In response, Dr. Shields contends that the trial court did not dismiss the action due to the Margherios' failure to obtain substitute counsel, but because of their failure to move the case forward in a timely manner. CR 41.02 allows a trial court, upon motion of the defendant, to dismiss an action for failure of the plaintiff to "prosecute or to comply with these rules or any order of the court. . . ." Involuntary dismissal of an action is within the discretion of the trial court.<sup>2</sup> Dr.

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<sup>1</sup>Parsley v. Knuckles, Ky., 346 S.W.2d 1, 3 (1961).

<sup>2</sup>Thompson v. Kentucky Power Co., Ky. App., 551 S.W.2d 815 (1977).

Shields asserts that the Margherios' delays in complying with discovery, the indefinite continuance granted due to their counsel's illness, and the Margherios' failure to appear at the December 14, 2001, status conference justify the trial court's decision to dismiss the action with prejudice.

We agree with Dr. Shields that the Margherios' failure to appear at the December 14, 2001, status conference was inexcusable. The trial court's order permitting their counsel to withdraw clearly put them on notice of the hearing. Furthermore, the Margherios had a duty to proceed with due diligence in the prosecution of their case, regardless of whether they were represented by counsel.<sup>3</sup>

Nevertheless, because of the grave consequences of a dismissal with prejudice, a trial court should resort to a dismissal pursuant to CR 41.02 only in extreme cases, when less drastic remedies would not be appropriate.<sup>4</sup> We conclude that the Margherios' lapse did not merit so severe a sanction as dismissal of their case. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable,

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<sup>3</sup> See Commonwealth, Dept. of Highways v. Hatcher, Ky., 386 S.W.2d 262, 263 (1965).

<sup>4</sup> Polk v. Wimsatt, Ky. App., 689 S.W.2d 363, 364-65 (1985).

unfair, or unsupported by sound legal principles.<sup>5</sup> We first note that the trial court failed to set forth any findings setting out the reasons for the dismissal. A dismissal of an action under these circumstances should be accompanied by some articulation on the record of the trial court's resolution of the factual, legal, and discretionary issues presented. When such a severe sanction is imposed, values of consistency, predictability, reviewability, and deterrence, outweigh the values of economy and efficiency that may be promoted by allowing unexplained decisions.<sup>6</sup>

We also note that the trial court dismissed the action on its own motion and without prior notice to the Margherios. The trial court's order of November 19, 2001, gave no indication that the court would be considering dismissal of the action at the scheduled status conference. While the trial court may dismiss an action for want of prosecution on its own initiative,<sup>7</sup> the Margherios were entitled to notice that their action was to be dismissed and an opportunity to respond.

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<sup>5</sup> Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000).

<sup>6</sup> Greathouse v. American National Bank and Trust Co., Ky. App., 796 S.W.2d 868, 870 (1990); *citing* Taylor v. Medtronics, Inc., 861 F.2d 980, 986 (6th Cir.1988).

<sup>7</sup> Nall v. Woolfolk, Ky., 451 S.W.2d 389 (1970).

Furthermore, the propriety of a dismissal under CR 41.02 is dependent upon the circumstances of the particular case.<sup>8</sup> Before dismissing an action for want of prosecution, a trial court should consider: (1) the extent of the party's personal responsibility; (2) the history of dilatoriness; (3) whether the party's conduct was willful and in bad faith; (4) the meritoriousness of the claim; (5) the prejudice to the other party, and (6) the availability of alternative sanctions.<sup>9</sup>

The circumstances of this case do not unequivocally support the trial court's decision. Clearly, the Margherios had not been particularly diligent in bringing their action to trial. There was some history of delays in discovery. As previously noted, the Margherios had cancelled several of their discovery depositions, and they had not yet submitted a witness list for trial. However, for the most part, discovery had been completed at the time the action was dismissed.

Although the length of the delay is not alone determinative of a party's diligence in bringing the case to trial,<sup>10</sup> it is an important factor in determining whether a party has been dilatory in bringing his or her case to trial. In Nall

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<sup>8</sup> Jenkins v. City of Lexington, Ky., 528 S.W.2d 729, 730 (1975).

<sup>9</sup> Ward v. Housman, Ky. App., 809 S.W.2d 717, 719 (1991).

<sup>10</sup> Gill v. Gill, Ky., 455 S.W.2d 545, 546 (1970).

v. Woolfork,<sup>11</sup> the trial court dismissed a case after two and one-half years of inaction. In Jenkins v. City of Lexington, supra, the plaintiff's case had been inactive for two years. In Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equipment Co.,<sup>12</sup> the trial court dismissed an action when more than three and one-half years had passed without significant activity. In each of these cases, the former Court of Appeals upheld the dismissal, concluding that the lower courts did not abuse their discretion. But in Gill v. Gill,<sup>13</sup> the former Court of Appeals reversed the trial court's decision to dismiss an action after only nine months of inactivity. Similarly, in Ward v. Housman,<sup>14</sup> this Court reversed a trial court's dismissal of an action following a six-month delay in furnishing the name of an expert witness.

In this case, while the Margherios' failure to attend the status conference was unjustified, there was no evidence that it was willful or in bad faith. Moreover, the most recent delay in this case had been of comparatively short duration. Six months had elapsed between the time the court had continued the trial date and when it granted counsel's motion to withdraw.

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<sup>11</sup> Supra at 390.

<sup>12</sup> Ky., 451 S.W.2d 401 (1970).

<sup>13</sup> Supra at 546.

<sup>14</sup> Supra.

The trial court dismissed the action only a month later. This period of inactivity, while troubling, was not so great as to warrant an inference that the Margherios no longer wished to pursue their claims against Dr. Shields.

Given the history of this case, we are hesitant to reverse the trial court's exercise of discretion on this matter. The Margherios' failure to attend the scheduled status conference was unjustified, and the Margherios' compliance with discovery had been, at best, spotty. Furthermore, Dr. Shields is entitled to have this claim against him resolved without unreasonable delay. However, in the absence of specific findings justifying the dismissal and viewing the record as a whole, we must conclude that the trial court abused its discretion by dismissing this action at this point in time. But nothing in this opinion should be taken as approval of the Margherio's lack of diligence in pursuing their action.

Consequently, on remand of this action, the trial court should immediately schedule this case for a pre-trial conference. At that conference, the trial court should set dates certain for the completion of discovery (if necessary) and for trial. Further delay by the Margherios should not be tolerated without a compelling justification. In short, it is time for this action to proceed to trial by the soonest possible date.



Accordingly, the order dismissing the Margherios' complaint is reversed, and this matter is remanded to the McCracken Circuit Court for further proceedings as set forth in this opinion.

HUDDLESTON, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

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