

RENDERED: NOVEMBER 5, 2004; 2:00 p.m.  
 NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002405-MR

RHONDA DEATON, ADMINISTRATRIX  
OF THE ESTATE OF  
VIRGINIA FINDLEY

APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT  
v. HONORABLE LEONARD L. KOPOWSKI, JUDGE  
ACTION NO. 02-CI-00823

ST. LUKE HOSPITAL EAST,  
DR. MARK SCHROER,  
DR. GARY SEWARD, AND  
PATIENT FIRST

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Rhonda Deaton, administratrix of the estate of Virginia Findley, appeals from an order of the Campbell Circuit Court dismissing her complaint against St. Luke Hospital East, Dr. Gary Seward, Dr. Mark Schroer, and Patient First Physician Group. The court dismissed Deaton's complaint

pursuant to CR<sup>1</sup> 37.02(2)(c). We find no abuse of discretion and thus affirm.

Following the death of her mother, Virginia Findley, Deaton filed a pro se civil complaint in the Campbell Circuit Court against the appellees. She filed the complaint on June 19, 2002. She alleged therein three causes of action: negligence, medical malpractice, and wrongful death.

The appellees immediately began discovery attempts, including an effort to learn the identity and opinions of any expert witnesses upon whom Deaton would rely to support her case. After being served with interrogatories and requests for production of documents, Deaton filed a motion for extension of time on August 7, 2002. The court granted her motion and entered an order on August 26, 2002, giving her an additional 30 days to respond.

Although Deaton responded to discovery requests, she did not identify any expert witnesses to support her case. In December 2002 and January 2003, the appellees moved the court to compel discovery pursuant to CR 37.01(b)(i). The court entered an order on January 13, 2003, granting the appellees' motion to compel and giving Deaton until February 10, 2003, to respond to discovery requests. The order stated that Deaton was to specifically provide the identities of experts and a summary of

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

their opinions pursuant to CR 26.02. Further, the court stated in its order that Deaton's failure to abide by the order could result in sanctions as provided in CR 37.02, including dismissal of her case.

On February 10, 2003, Deaton filed a motion for an extension of time. The court granted her motion in an order entered on February 25, 2003, and Deaton was given until March 4, 2003, to comply with the court's previous orders. Furthermore, the court cautioned Deaton in its order that her complaint could be dismissed if she failed to comply.

On March 4, 2003, Deaton served discovery responses identifying Dr. Rudick, a pulmonary care specialist, as an expert witness. Deaton also identified a nurse practitioner and a lab technician as expert witnesses. However, although her responses disclosed the opinions of her experts as to possible deviations from standard of care, no indication was given that any of the witnesses would testify that the acts of any of the appellees caused harm to Ms. Findley.

The appellees deposed Deaton on May 20, 2003. She testified that she expected to receive a written report from Dr. Rudick, but that he had not indicated to her that any of the alleged deviations from the standard of care by the appellees led to her mother's death. Likewise, her testimony regarding the opinions of the other two witnesses was that neither of them

had told her that any acts of the appellees had caused harm to Ms. Findley.

Due to the failure of the appellees to obtain discovery of the expert witnesses' opinions, and in compliance with CR 37.02(2)(c) and the court's previous orders, the appellees filed motions to dismiss Deaton's complaint. The motions were filed in late July 2003, and Deaton responded that the appellees should depose Dr. Rudick in order to get his expert opinion. The court entered an order on August 19, 2003, granting the appellees' motion to dismiss. Following the court's denial of Deaton's postjudgment motion for additional findings of fact, this appeal by Deaton followed.

CR 37.02 provides in part that if a party fails to obey an order to provide or permit discovery, then the court may sanction the party in various ways, including dismissing the action. CR 37.02(2)(c). Imposing sanctions for failing to comply with a discovery request is within the discretion of the trial court. M.P.S. v. Cabinet for Human Resources, Ky. App., 979 S.W.2d 114, 118 (1998). As Kentucky's highest court stated in Naive v. Jones, Ky., 353 S.W.2d 365 (1961):

The Civil Rules prescribe a practical pattern for the conduct of litigation and the effective administration of justice. To this end reasonable compliance is necessary. The proper application and utilization of those Rules should be left largely to the supervision of the trial judge, and we must

respect his exercise of sound judicial discretion in their enforcement.

Id. at 367. However, dismissal of the action as a sanction against the offending party "is a drastic measure, and should be utilized cautiously and judiciously." Natural Resources and Environmental Protection Cabinet v. Williams, Ky., 768 S.W.2d 47, 50 (1989). Nevertheless, this court noted in Greathouse v. American Nat. Bank and Trust Co., Ky. App., 796 S.W.2d 868 (1990), that "[i]t has also been stated that 'if a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion.'" Id. at 870, quoting Regional Refuse Systems, Inc. v. Inland Reclamation Co., 842 F.2d 150, 154 (6<sup>th</sup> Cir. 1988), overruled on other grounds as superseded by rule change, Vance, by and through Hammons v. U.S., 182 F.3d 920 (6<sup>th</sup> Cir. 1999).

In light of the facts stated above, we conclude that the trial court did not abuse its discretion in ordering Deaton's complaint dismissed. Deaton was given over a year to identify expert witnesses that would support the causes of action in her complaint. Although she identified expert witnesses, she did not disclose their opinions, and there is no indication that their opinions would support the causation element of her claims. Furthermore, contrary to Deaton's argument, the appellees were entitled to obtain Dr. Rudick's

expert opinion pursuant to CR 26.02(4)(a)(i) through interrogatories and were not required to depose him in order to learn the discoverable matter.

The judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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SEWARD AND DR. SCHROER:

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