

RENDERED: JUNE 23, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000325-MR

CHERYL SMITH

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 04-CI-00571

JOHN CONTI COFFEE COMPANY
AND ERIC W. HALL

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Cheryl Smith brings this appeal from a January 10, 2005, Order and Judgment of the Bullitt Circuit Court dismissing her action under Ky. R. Civ. P. (CR) 41.02. We affirm.

On June 10, 2004, appellant filed a complaint for personal injuries against appellees in the Bullitt Circuit

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Court. On September 17, 2004, appellees served upon appellant interrogatories and request for production of documents (interrogatories). Appellant never answered the interrogatories. Thereupon, appellees filed a motion to compel appellant to answer the interrogatories. A hearing was held upon the motion. However, neither appellant nor her attorney appeared at the hearing. On November 29, 2004, the circuit court entered an order compelling appellant to answer the interrogatories. The order specifically stated that "[f]ailure to comply with this Order may result in the imposition of sanctions in the sole discretion of this Court, up to and including dismissal of Plaintiff's claims against Defendants." Appellant failed to comply with the order and never answered the interrogatories. Consequently, appellees filed a motion to dismiss under CR 41.02. A hearing was held upon the motion on January 10, 2005, and neither appellant nor her attorney appeared at the hearing. As a result, the court entered an order dismissing appellant's claim, with prejudice, under CR 41.02 on January 10, 2005. This appeal follows.

Appellant contends the circuit court committed reversible error by dismissing her claim under CR 41.02. Appellant contends her trial attorney failed to prosecute the action in a timely manner and she was never advised by trial counsel that her action was under threat of being dismissed.

Appellant believes the circuit court abused its discretion in ordering the dismissal and there was no showing of a lack of good faith.

CR 41.02 states, in part, as follows:

(1) For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

A circuit court's decision to dismiss under CR 41.02 is entirely discretionary and will not be disturbed on appeal absent a clear abuse of discretion. Thompson v. Kentucky Power Company, 551 S.W.2d 815 (Ky.App. 1977). In the case before us, the record reveals that appellant failed to attend hearings, failed to respond to discovery requests, and failed to abide by court orders. Appellant infers in her brief that former counsel was negligent in his duties to her and the court. However, such negligence is imputed to the client and is normally not a ground for relief from a court order of judgment. VanHook v. Stanford-Lincoln Co. Rescue Squad, Inc., 678 S.W.2d 797 (Ky.App. 1984).

Moreover, appellant did not offer any justification to the circuit court for her repeated failure to respond to its orders.² Considering the totality of the record, we are of the

² The record reflects that former counsel filed a motion on February 21, 2005, in the circuit court pursuant to Ky. R. Civ. P. 60.02 to set aside the judgment and withdraw from the case. However, this motion was filed after Cheryl Smith filed a notice of appeal on February 9, 2005, and appellant did not seek abatement of the appeal pending a ruling on the motion.

opinion that the circuit court was left with few options and that dismissal was proper. When a party repeatedly fails to respond to court orders, we believe it within the discretion of the court to dismiss the action under CR 41.02.

For the foregoing reasons, the Order and Judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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