

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000191-MR

STANLEY HILL

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY BURDETTE, JUDGE
ACTION NO. 03-CI-01291

HOSSEIN FALLAHZADEH, M.D.;
SARA J. LONGMIRE-COOK, M.D.;
CUMBERLAND SURGICAL ASSOCIATES;
AND LAKE CUMBERLAND REGIONAL
HOSPITAL, LLC

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Stanley Hill appeals from an order of the Pulaski Circuit Court dismissing his complaint with prejudice for failure to secure counsel in compliance with the court's order. After careful review of the record, we vacate and remand.

On December 19, 2002, Stanley Hill underwent a laparoscopic cholecystectomy, performed by Dr. Hossein Fallahzadeh at Lake Cumberland Regional Hospital in Somerset, Kentucky. A subsequent surgery was performed by Dr. Sara J. Longmire-Cook on December 20, 2002. Complications arose from both surgeries, and a medical malpractice complaint was filed in Pulaski Circuit Court against both doctors and the hospital on December 29, 2003.

Hill's complaint alleged a deviation from the applicable standards of medical care, but no indication or evidence of these standards was initially provided. On January 3, 2006, Dr. Longmire-Cook filed a motion for summary judgment. Dr. Fallahzadeh joined the motion on January 9, 2006. Both motions argued that Hill was required to identify an expert who would identify the standard of care, note a violation of such standard, and testify that such violation caused injury to plaintiff Hill. Hill responded on January 19, 2006, and named a North Carolina doctor as the expert intended to be called at trial.

The Pulaski Circuit Court denied the defendants' motion for summary judgment on February 3, 2006, and entered a scheduling order on March 14, 2006. Under the order, Hill was required to furnish full CR 26 expert witness disclosures to the defendants by July 1, 2006.

On June 19, 2006, Hill's attorney, Sandra Spurgeon, filed a motion to withdraw as counsel. The Pulaski Circuit Court reviewed and sustained the motion on July 7, 2006, and entered an order indicating that Hill had thirty days to obtain new counsel.

On August 4, 2006, Hill filed a motion for additional time in which to find counsel. The motion was heard on August 18, 2006, at which time Hill was granted an additional ten days to secure new counsel. The order stated that if new counsel did not appear for Hill by August 28, 2006, the case would be dismissed with prejudice.

Entry was attempted by New York attorney Mark Kressner, who filed a motion to practice *pro hac vice* on August 28, 2006. However, Kressner's entry did not comply with Kentucky rules, and defendants Fallahzadeh and Longmire-Cook objected to Kressner's motion and moved the court to dismiss the action in accordance with its August 18, 2006, order. Kressner's motion was heard on September 15, 2006, and an order was issued on December 21, 2006, ruling Kressner's motion defective. For failure to obtain counsel by August 28, 2006, Judge Burdette dismissed Hill's action with prejudice. This appeal followed.

The circuit court dismissed the action on the basis that the plaintiff had failed to comply with the circuit court's August 18, 2006, order to secure new counsel. Based upon this reasoning, we construe the dismissal of the complaint as an involuntary dismissal pursuant to Kentucky CR 41.02. The rule reads in part:

(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.

Application of CR 41.02 is a matter within the discretion of the trial court. *Thompson v. Kentucky Power Co.*, 551 S.W.2d 815, 816 (Ky.App. 1977).

Accordingly, we will reverse the circuit court's decision only if the dismissal of

Hill's claims constitutes an abuse of discretion under CR 41.02. For a circuit court to have abused its discretion, the circuit judge's decision must have been "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Because an involuntary dismissal with prejudice constitutes a failure to adjudicate on the merits, it "should be resorted to only in the most extreme cases." *Polk v. Wimsatt*, 689 S.W.2d 363, 364-65 (Ky.App. 1985). Consequently, "(i)n ruling on a motion for involuntary dismissal, the trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial." *Ward v. Housman*, 809 S.W.2d 717, 719 (Ky.App. 1991).

In *Ward*, a medical malpractice case, this Court adopted the guidelines set forth in *Scarborough v. Eubanks*, 747 F.2d 871 (3rd Cir. 1984), to determine whether a case should be dismissed under CR 41.02 for dilatory conduct of counsel. The *Ward* guidelines are as follows: "1) the extent of the party's personal responsibility; 2) the history of dilatoriness; 3) whether the attorney's conduct was willful and in bad faith; 4) meritoriousness of the claim; 5) prejudice to the other party; and 6) alternative sanctions." *Ward*, 809 S.W.2d at 719. Kentucky law is clear, however, that any involuntary dismissal under CR 41.02 requires the trial court to consider the *Ward* factors.

Specifically, in *Tolar v. Rapid American*, 190 S.W.3d 348, 351 (Ky.App. 2006), this Court reversed the circuit court's dismissal and remanded the case for the trial court to consider the *Ward* factors stating: "[t]he responsibility to

make such findings as are set forth in *Ward* before dismissing a case with prejudice falls solely upon the trial court.” There is no indication in the record that the trial court in the instant case properly considered the *Ward* factors. Accordingly, in light of our holding in *Tolar*, we vacate and remand the judgment of the court below and instruct the court to consider the *Ward* factors and to articulate such consideration in its order.

ALL CONCUR.

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