

RENDERED: AUGUST 21, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001103-MR

EVELYN CHILTON

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 02-CI-00816

DAVIESS COUNTY PUBLIC
SCHOOL BOARD

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Evelyn Chilton appeals from an order of the Daviess Circuit Court dismissing her action for lack of prosecution. As the court failed to make the findings required by *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991), we vacate the court's order and remand this matter for further proceedings.

In June 2002, Chilton filed the underlying complaint alleging the Daviess Public School Board (Board) had engaged in a pattern of racially discriminatory action against her. Although the parties pursued discovery including the taking of depositions, no pretrial conferences or trial dates were set prior to September 2007, when Chilton filed a motion seeking partial summary judgment. Four months later, the Board responded to Chilton's motion and moved to dismiss for lack of prosecution. In March 2008 the trial court granted the Board's motion to dismiss, stating only:

This matter having come on before the Court upon Motion of the [Board] to dismiss this action pursuant to CR 41.02(1), the Court having considered any response, having heard arguments of counsel, and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED that the [Board's] Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED AND ADJUDGED that [Chilton's] complaint, and all claims thereunder, or which could have been brought thereunder, be, and the same hereby are, dismissed with prejudice and ordered stricken from the docket.

The trial court denied Chilton's motion to alter or amend the order of dismissal.

This appeal followed.

Chilton contends that the trial court abused its discretion by dismissing this action without making any references to the factors set forth in *Ward*. We agree.

CR¹ 41.02(1) permits a defendant to move for the dismissal of an action based upon the plaintiff's failure to prosecute. As described in *Ward*, 809 S.W.2d at 720, such a dismissal amounts to a "death sentence" in a civil action. *Ward* therefore addressed the trial court's need to "take care in analyzing the circumstances and . . . justify the extreme action of depriving the parties of their trial" when "ruling on a motion for involuntary dismissal." *Id.* at 719. In furtherance of this goal, *Ward* examined the guidelines set out in *Scarborough v. Eubanks*, 747 F.2d 871 (3rd Cir.1984), for analysis when examining comparable federal cases. *Ward* concluded that when

[c]onsidering whether a case should be dismissed for dilatory conduct of counsel, it would be well for our trial courts to consider the *Scarborough* case and these relevant factors:

- 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.

809 S.W.2d at 719. Subsequently, several opinions of this court have vacated, and remanded for further proceedings, trial court orders which dismissed actions pursuant to CR 41.02 without making any reference to the factors set out in *Ward*. See, e.g., *Stapleton v. Shower*, 251 S.W.3d 341 (Ky.App. 2008); *Toler v. Rapid Am.*, 190 S.W.3d 348 (Ky.App. 2006).

¹ Kentucky Rules of Civil Procedure.

Here, as the trial court's order makes no reference to any of the factors set out in *Ward*, we are unable to determine the reasons for that court's actions. Thus, the order of dismissal must be vacated, and this matter must be remanded to the trial court for entry of an order setting forth the reasons for the trial court's decision.

Given this conclusion, we need not address the remaining issues raised on appeal. First, Chilton's assertion that application of the *Ward* factors plainly precludes dismissal of her complaint is premature since the trial court has not yet entered an opinion referring to those factors. Chilton's other assertions, relating to the complaint's dismissal while her partial summary judgment motion was pending, and relating to the court's failure to grant her motion seeking partial summary judgment, are not ripe for review since this matter is being vacated and remanded for further proceedings. In so stating, we express no view as to whether the facts ultimately will justify this action's dismissal with prejudice. *See Toler*, 190 S.W.3d at 352.

The Daviess Circuit Court's order of dismissal is vacated, and this matter is remanded for further proceedings in light of the factors set forth in *Ward* and its progeny.

ALL CONCUR.

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