

[Cite as *Dodig v. Pecaitis*, 2004-Ohio-5859.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83772

JOANNA DODIG

Plaintiff-appellant

vs.

ANTHONY PECAITIS

Defendant-appellee

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

NOVEMBER 4, 2004

CHARACTER OF PROCEEDING:

Civil appeal from Common Pleas Court, Case
No. D-287205

JUDGMENT:

REVERSED AND REMANDED.

DATE OF JOURNALIZATION:

APPEARANCES:

For plaintiff-appellant:

WILLIAM D. MASON, ESQ.
CUYAHOGA COUNTY PROSECUTOR
MARK R. MARSHALL, ESQ.
Assistant County Prosecutor
P.O. Box 93923
Cleveland, Ohio 44101

For defendant-appellee:

PAMELA J. MacADAMS, ESQ.
Morganstern, MacAdams & DeVito Co.,
L.P.A.
623 West St. Clair Avenue
Cleveland, Ohio 44113-1204

KARPINSKI, J.:

{¶ 1} Petitioner, Joanna Dodig (“mother”), appeals the trial court’s dismissal with prejudice of her motion for past support¹ for her out-of-wedlock child with respondent, Anthony Pecaitis (“father”). The parties had had a brief relationship in late 1988 and early 1989. Father disputes that mother told him that she was pregnant with his child. Nonetheless, before the child was born, mother moved out of state.

{¶ 2} Twelve years after the child’s birth, the State of Tennessee filed an interstate support petition under the Uniform Interstate Family Support Act, R.C. 3115 on her behalf. After genetic testing proved father’s paternity, the court ordered the parties to submit financial documents, including W-2 forms for the years of 1996 through 2002. The court also ordered mother to “provide a written breakdown of how much is alleged to be owed for public assistance to the State of Tennessee and how much is owed to [mother] for past care claims.” Order of February 24, 2003. In a separate order of the same date, the court ordered mother to be available by phone on April 7, 2003 and ordered both parties to brief the issue of whether mother was entitled to past care retroactive to May 1996 (the date she requested on her petition).

{¶ 3} The prosecutor’s office, who represented mother on behalf of the child in this case,² sent a letter to the Child Support Services in Tennessee requesting mother’s financial information. It also requested “an affidavit from [mother] setting forth in detail exactly when and how she first made [father] aware that he might be the father of her son ***.” Letter of February 24, 2003. After several phone calls and inquiries to the Child Support Services in Tennessee, the prosecutor learned that the

¹Mother’s petition for future support was granted and that order was not appealed.

²Only mother, on behalf of the child, and not the State of Tennessee, could maintain an action under the statute. R.C. 3115.13.

agency had lost contact with mother and could not provide the discovery requested. The prosecutor did not inform the court of mother's unavailability, however, until the hearing of April 7th. Although he alleges in his appellate brief that he requested a continuance in order to obtain the wage information, nothing in the record reflects this request. The April 7th hearing was not recorded, so the only record of the hearing available is the summary contained in the magistrate's report. The prosecutor also did not file a motion concerning the past support issue.

{¶ 4} On the day of the hearing, according to the magistrate's report, father moved for dismissal because mother failed to provide the required information. The magistrate recommended that the court, rather than dismiss the entire petition, dismiss the motion for past support with prejudice and grant the motion for present and future support. The prosecutor filed objections to the report on behalf of mother and included an affidavit from mother which he had received after the hearing, stating that "[d]ue to a personal family emergency I was unable to be reached." Affidavit of May 1, 2003. Despite this objection, the trial court adopted the magistrate's recommendation, stating in part, "Petitioner's request for past support (prior to June 25, 2002) is denied with prejudice." Judgment Entry of September 30, 2003. The prosecutor, on behalf of mother, timely appealed, assigning four errors, the first of which states:

- I. THE TRIAL COURT'S [sic] ABUSED ITS DISCRETION WHEN IT DENIED WITH PREJUDICE THE CLAIM FOR PAST CARE AFTER BEING ADVISED THAT APPELLANT DID NOT HAVE NOTICE OF THE MAGISTRATE'S PRETRIAL DISCOVERY ORDER.

{¶ 5} Although the prosecutor, acting as mother's counsel, had notice that failure to comply with the court's discovery order could result in dismissal, he argues, on behalf of mother, that

because she herself did not receive this notice, the court erred in dismissing her claim for past support with prejudice.

{¶ 6} The standard of review of a dismissal is abuse of discretion.

{¶ 7} One of the considerations militating against dismissal with prejudice is the tenet that disposition of cases on their merits is favored in the law. *** That precept has spawned decisions that curtail a trial court's discretion to dismiss. See *Toney v. Berkemer* (1983), 6 Ohio St.3d 455, 6 Ohio B. Rep. 496, 453 N.E.2d 700, syllabus (court should grant default judgment for failing to respond to discovery requests only where there is evidence of willfulness or bad faith on the part of responding party); *Schreiner v. Karson* (1977), 52 Ohio App.2d 219, 6 Ohio Op.3d 237, 369 N.E.2d 800, paragraph two of syllabus (court should consider lesser sanctions before dismissing a case unless negligent, irresponsible, contumacious, or dilatory conduct supports dismissal with prejudice); *Willis v. RCA Corp.* (1983), 12 Ohio App.3d 1, 2, 12 Ohio B. Rep. 57, 59, 465 N.E.2d 924, 926 (dismissal with prejudice for nonappearance at a pretrial conference should be used sparingly and only in extreme situations). Thus, although reviewing courts espouse an ordinary "abuse of discretion" standard of review for dismissals with prejudice, that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits.

{¶ 8} *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 371-372. The *Jones* court then delineated some factors the court should consider when assessing a Civ.R. 41(B) dismissal. Those factors include a drawn-out history of litigation, which includes a failure of plaintiff to respond to discovery until threatened with dismissal and evidence that plaintiff is or has deliberately proceeded in a dilatory fashion.

{¶ 9} The magistrate gave her reasons in her decision:

{¶ 10} The Magistrate finds that dismissing the U.I.F.S.A. Petition is too drastic an action for failure to provide the requested discovery. However, the Magistrate finds that this matter was continued 40 days from the last hearing for Petitioner to provide this information in connection with her request for past support and that this matter has been pending since June 25, 2002. The Magistrate has no more information available about Petitioner than when Petitioner first filed ten months earlier. Petitioner did not file this Petition until the child was twelve years old. The Magistrate finds that the Petitioner has had ample time to provide the information necessary for the Court to consider her request and her failure to comply with this Court's orders must result in a denial of her request for past support.

{¶ 11} Magistrate's decision of April 21, 2003 at 2-3.

{¶ 12} Although the magistrate indicates in her decision that she had "no more information available about Petitioner than when Petitioner first filed ten months earlier," eight months of that ten-month delay resulted from the time it took to establish paternity. Mother was not ordered, moreover, to produce the discovery until less than six weeks before the hearing at which mother's past support claims were dismissed.

{¶ 13} In dismissing the claim, the court relied on a clause contained in a warning attached to the discovery order. Dated February 26, 2003, the three-page order requiring mother to provide information contained a notice stating:

{¶ 14} If you do not do what the order requires, you can be held in contempt of court. Some things which may happen if you do not comply with this order are:

1. The court may rule against you about the issues raised in the pending motions which caused this court action in the first place. Among other things, the court can order any or all of the following:

*Strike your pleadings, *** dismiss the action ***.

The things which you have been ordered to provide to the other party and to bring to court for your next hearing are not complicated. You should begin gathering this information immediately so that you can comply with the deadline. Unless there is a very serious reason, the court is not likely to grant you more time to provide this information.

{¶ 15} This language tracks Civ.R. 37, which states in pertinent part:

(2) If any party *** fails to obey an order to provide or permit discovery, *** the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, **or dismissing the action or proceeding or any part thereof**, or rendering a judgment by default against the disobedient party ***. (Emphasis added.)

{¶ 16} The rule lists a series of alternative actions the court may take. If the court chooses to dismiss an action, however, Civ.R. 41 which governs dismissals, adds the requirement of notice to the plaintiff or his counsel of the intent to dismiss.³

³Civ.R. 41(B) states:

(1) Failure to prosecute. Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

{¶ 17} As the Ohio Supreme Court stated:

1. We hold that the notice requirement of Civ. R. 41(B)(1) applies to all dismissals with prejudice, including those entered pursuant to Civ. R. 37(B)(2)(c) for failure to comply with discovery orders. A dismissal on the merits is a harsh remedy that calls for the due process guarantee of prior notice.
2. Accordingly, the two rules should be read in pari materia with regard to dismissals with prejudice.
3. This holding stems from and reflects "a basic tenet of Ohio jurisprudence that cases should be decided on their merits." *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3. Notice of intention to dismiss with

(2) Dismissal; non-jury action. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ. R. 52 if requested to do so by any party.

(3) Adjudication on the merits; exception. A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

(4) Failure other than on the merits. A dismissal for either of the following reasons shall operate as a failure otherwise than on the merits:

(a) lack of jurisdiction over the person or the subject matter;

(b) failure to join a party under Civ. R. 19 or Civ. R. 19.1.

prejudice gives the non-complying party **one last chance** to obey the court order in full. The moving party should not be allowed to circumvent this protection by simply framing his motion in terms of a Civ. R. 37 sanction. Nor should a trial court on its own motion dismiss on the merits without prior notice. (Emphasis added.)

{¶ 18} *Ohio Furniture Co. v. Mindala* (1986), 22 Ohio St.3d 99, 101. This court reiterated that concept in *Bonner v. AT&T* (Feb. 17, 1994), Cuyahoga App. No. 65699, 1994 Ohio App. LEXIS 593, stating, “it is clear that a trial court abuses its discretion where it dismisses a complaint without providing prior notice to plaintiff’s counsel.” *Id.* at *3. A long list of alternatives the court may choose does not suffice as notice of its actual intent to dismiss.

{¶ 19} There can be no last chance if notice of the court’s intent was never received. In the case at bar, mother’s counsel was present when father’s counsel moved for the case to be dismissed for failure to prosecute. The purpose of providing notice to the petitioner or her counsel, however, is to clarify the court’s intent, which is more than a party’s request.

{¶ 20} In this case, a prosecutor in Ohio was asked to prosecute a claim technically on behalf of mother, but, in effect, partially for the benefit of the State of Tennessee. Ultimately, he must depend upon a claimant with whom he has very little contact. He has, moreover, few resources to locate this claimant if she is not available.

{¶ 21} The *Jones* court clarified that “a trial court does not abuse its discretion in dismissing a claim with prejudice under Civ.R. 41(B)(1) when a plaintiff, who has had an objectively reasonable amount of time for discovery, fails to proceed upon a scheduled trial date for want of evidence of defendant's liability.”

{¶ 22} Those conditions, however, do not exist here. Only 40 days had elapsed from the discovery order. The State of Tennessee’s information was already in the record in an affidavit

attached to the initial petition. The petition was a preprinted form with blanks for the amounts owed. The entire petition was sworn to by the mother as accurate, in a way similar to the way a complaint is signed and sworn to by the complainant. The petition stated that the total owed to the State of Tennessee for support was \$2,057.00. The petition only requested back support from September 1996 to September 1998, and the State of Tennessee provided the figures for this period.

{¶ 23} At the April 7th hearing, the only outstanding discovery the State of Tennessee needed from mother was proof that she had informed father of his paternity within three years of the child's birth. Moreover, in his objections the prosecutor provided a reasonable explanation for mother's noncompliance. More importantly, the case had been proceeding with petitioner's co-operation. What delayed this case was waiting for the genetic testing. In fact, the discovery order, titled "Magistrate's Order for Petitioner to Produce Documents," was not signed until paternity was established (February of 2003).

{¶ 24} Mother should have been allowed the opportunity to present her defenses to dismissal. The trial court erred, therefore, in dismissing the claim for past payments for failure to comply with discovery.⁴ Accordingly, this assignment of error is sustained.

{¶ 25} This case is reversed and remanded for further proceedings consistent with this opinion.⁵

⁴We note that the trial court did not dismiss the mother's motion for future child support. It ordered father to pay \$656.56 per month until further order of the court.

⁵Because this case is reversed and remanded for further proceedings, the remaining assignments of error are moot. They state:

II. THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THE CLAIM FOR PAST CARE WITH PREJUDICE WITHOUT MAKING A FINDING THAT APPELLANT'S FAILURE TO COMPLY WITH THE MAGISTRATE'S DISCOVERY ORDER WAS WILLFUL AND IN BAD FAITH.

{¶ 26} This cause is reversed.

It is, therefore, ordered that appellant recover of appellee her costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, P.J., AND

KENNETH A. ROCCO, J., CONCUR.

DIANE KARPINSKI
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

III. THE TRIAL COURT'S DENIAL WITH PREJUDICE OF THE CLAIM FOR PAST CARE IS CONTRARY TO THE BEST INTEREST OF THE MINOR CHILD.

IV. THE TRIAL COURT'S DISMISSAL OF THE CLAIM FOR PAST SUPPORT IS CONTRARY TO THE PUBLIC POLICY AND UNFAIRLY PREJUDICES THE STATE OF TENNESSEE IN REIMBURSEMENT OF ITS PUBLIC ASSISTANCE CLAIM.