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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001736-MR

STANLEY HILL

APPELLANT

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

HOSSEIN FALLAHZADEH, M.D.;
SARAH J. LONGMIRE-COOK, M.D.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: DIXON, STUMBO, AND VANMETER, JUDGES.

STUMBO, JUDGE: Stanley Hill, *pro se*, 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. This is the second time this issue has come before this Court in this case. The previous time, this Court remanded the case to the trial court for it to consider the factors of *Ward v. Housman*, 809 S.W.2d 717

(Ky. App. 1991), which set forth the standard test for involuntary dismissal with prejudice. After doing so, the trial court again dismissed the case. Hill argues that dismissal was unwarranted. We agree, reverse, and remand.

The facts as set out in our earlier opinion are as follows:

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 [Kentucky Civil Rule (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.

Hill v. Fallahzadeh, 2008 WL 3875416, 1 (Ky. App. 2008).

It is worth noting that the reason Kressner's entry did not comply with Kentucky rules is that he failed to show he had paid the *pro hac vice* fee to the Kentucky Bar Association and had not named local counsel who would try the case with him as required by the rules of the Kentucky Supreme Court. These deficiencies, however, were remedied before the court entered its December 21, 2006 order. On September 15, 2006, local counsel moved to join the case with Kressner. Then, on September 18, 2006, Kressner filed proof that he had paid the required fee to the Kentucky Bar Association.

A previous panel of this Court found the dismissal of Hill's case to be an involuntary dismissal pursuant to CR 41.02. It then vacated the order

dismissing the case and remanded it to the trial court to consider the involuntary dismissal factors listed in *Ward, supra*. The trial court dismissed the case once again and this appeal followed.

“Dismissals [. . .] pursuant to CR 41.02 [. . .] are reviewed under an abuse of discretion standard.” *Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky. App. 2006). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). This Court has held that the involuntary dismissal of a case with prejudice “should be resorted to only in the most extreme cases,” and a reviewing court must “carefully scrutinize the trial court’s exercise of discretion in doing so.” *Polk v. Wimsatt*, 689 S.W.2d 363, 364-65 (Ky. App. 1985).

Wildcat Property Management, LLC v. Reuss, 302 S.W.3d 89, 93 (Ky. App. 2009).

Hill argues that the trial court abused its discretion in dismissing his case with prejudice. He claims the *Ward* factors do not compel a dismissal with prejudice in this instance. The *Ward* factors are: (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* at 719.

The trial court examined each factor. It made the following findings:¹ (1) that Hill had around 48 days to find a new attorney; (2) that the deadline for disclosures of experts had passed, Hill failed to obtain new counsel, and Kressner filed a motion showing his compliance with the *pro hac vice* rules three days after

¹ The findings will be numbered in relation to the factor they correspond with which.

a hearing on the issue; (3) that Hill's conduct was willful and in bad faith for not obtaining new counsel in time; (4) that Hill's claim cannot truly be determined to have merit at this stage, but the failure to find new counsel and disclose experts suggests a lack of merit; (5) that the other parties have followed court orders and allowing Hill to disregard them would be unfair; and (6) no alternative sanction was appropriate because Hill was put on notice that failure to find new counsel would result in dismissal with prejudice.

THE EXTENT OF THE PARTY'S PERSONAL RESPONSIBILITY

The trial court seemed to focus on the lack of counsel and expert disclosures. While 48 days to find a new attorney may seem sufficient, a medical malpractice case generally has extensive medical and other records that must be reviewed by a new attorney prior to his or her acceptance of the case. In this case, the record on appeal consists of two boxes of record with volumes of medical records and depositions. Here, Hill did in fact find a new attorney to take his case. Kressner moved to enter an appearance as counsel of record within the deadline set by the trial court. While it was a defective motion, it was remedied three full months before the trial court dismissed the case. Also, Hill did not have notice that his previous attorney, Ms. Spurgeon, had moved to withdraw from the case. It was not until after the motion was granted that he became aware.

Further, the time for expert disclosures had not passed as the trial court believed. When Ms. Spurgeon withdrew, the trial court also generally continued the case until new counsel could be found. This means that the time for

disclosure of experts was also continued. Hill states in his brief that he has an expert ready to testify. The previous panel of this Court also stated in its opinion that Hill identified an expert from North Carolina.

THE HISTORY OF DILATORINESS

While the complaint was filed in 2003, both parties are responsible for extending it into 2006. The previous delays were due to difficulty in deposing witnesses. Other than that, the only other delays were caused by Hill needing to find another attorney.

WAS THE ATTORNEY'S CONDUCT WILLFULL AND IN BAD FAITH

Since there is no attorney in this case, we will look at the conduct of Hill. We cannot say that Hill's actions were in bad faith. He engaged a new attorney within the timeframe set by the court. While the initial appearance was defective, the defects were cured three months before the trial court ruled.

MERITORIOUSNESS OF THE CLAIM

As the trial court itself stated, it was unable to determine the merits of the case at this stage. We agree.

PREJUDICE TO THE OTHER PARTY

As for the prejudice factor, we can see little prejudice to the other party. Hill found a new attorney and perfected his appearance before the trial court ruled on the issue.

ALTERNATIVE SANCTIONS

The trial court stated that there were no alternative sanctions because Hill was put on notice that failure to find a new attorney would result in the dismissal of the case. It is true that Hill was put on notice of this, but as stated above, involuntary dismissal with prejudice is a harsh outcome and should only be used in extreme cases. The court could have considered alternative sanctions such as requiring Hill to pay the doctors' attorney fees, or other costs.

Involuntary dismissal of a case with prejudice “should be resorted to only in the most extreme cases,” and a reviewing court must “carefully scrutinize the trial court’s exercise of discretion in doing so.” *Reuss* at 93. We hold that the trial court abused its discretion in dismissing this case with prejudice. Hill found a new attorney to take his case and the new attorney entered an appearance within the deadline given by the court. While the appearance was defective, it was cured three months before the trial court dismissed the case. The case had been delayed in the past, but it was not done in bad faith and both parties contributed to the delay. Finally, any prejudice to the defending parties would have been minimal.

For the reasons set forth above, we reverse the order dismissing the case and remand to the trial court for further proceedings.

DIXON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS WITHOUT OPINION.

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