

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000270-MR

SUSAN RIDDLE, INDIVIDUALLY; AND
SUSAN RIDDLE, AS MOTHER AND NEXT
FRIEND OF JAMES ROBERT LOGAN
McKNIGHT

APPELLANTS

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 97-CI-01200

OWENSBORO MERCY HEALTH SYSTEM;
EMERGENCY PHYSICIANS GROUP;
VICTOR DUNN, P.A.; AND
RANDALL E. KING, M.D.

APPELLEES

OPINION

VACATING AND REMANDING

** ** * * * * *

BEFORE: BAKER; GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order dismissing a medical malpractice claim pursuant to CR 41.02(1) for failure to timely prosecute the action. Because the trial court failed to consider the factors set out in Ward v. Housman, Ky. App., 809 S.W.2d 717 (1991), in ruling on the motion to dismiss under CR

41.02(1), we vacate the order and remand for the court to reconsider the motion in light of the factors in Ward.

On October 28, 1997, appellant, Susan Riddle, filed the action herein on behalf of herself and her son alleging medical malpractice as a result of the defendants' failure to properly treat her for chicken pox while she was pregnant. The action was filed against: Owensboro Mercy Health System ("OMHS"), the hospital where she sought treatment; Emergency Physicians Group; Dr. Randall E. King; Dr. Victor Dunn; Green River District Health Department ("Green River"), a local health department from which Riddle also sought treatment; Dr. Laura Hazeltine, a physician at Green River; and Dr. Ronald Johnson, her family physician. In her complaint, Susan alleges that on October 31, 1996, when she was 25 weeks pregnant, she went to the emergency room at OMHS, operated by Emergency Physicians Health Group, and was diagnosed by Dr. Dunn as having chicken pox. According to Riddle, Dr. Dunn conferred with Dr. Randall King and they decided to send her home without any testing or medication. On November 2, 1996, Riddle again sought treatment at the emergency room at OMHS for her chicken pox which had worsened to the point where she had difficulty breathing and a high fever. At this time, Riddle was diagnosed as having varicella pneumonitis, a type of pneumonia associated with the chicken pox. Riddle was then transported to Norton Hospital in

Louisville, where she received intense treatment for the pneumonia and where her son, Logan, was born prematurely at 29 weeks' gestation. Riddle maintains that the doctors at OMHS negligently failed to treat her on October 31, 1996, for chicken pox, and, as a result, she suffers from permanent respiratory problems as well as severe depression, and Logan suffers from various physical and developmental problems related to his mother's condition when he was in utero and his premature birth. Her claim against Dr. Hazeltine stemmed from her alleged failure to treat Riddle for the chicken pox. Likewise, Riddle claimed that Dr. Ronald Johnson negligently failed to treat her for chicken pox when she called seeking treatment therefor.

Without giving a detailed procedural chronology of the case, suffice to say that in the course of litigating the case, Riddle violated various discovery orders, resulting in the entry of six orders compelling discovery. Examples of such conduct were Riddle's failure to answer interrogatories, supplement discovery responses, produce documents, list expert witnesses, and make witnesses available for deposition. Moreover, from October of 1999 until October of 2001, Riddle filed nothing in the record in the case. It was not until after the defendants filed their motion to dismiss pursuant to CR 41.02(1) that Riddle filed her motion to vacate hearing on October 26, 2001, contending that they needed more time to have Logan evaluated to

determine the extent of his injuries. Thereafter on November 29, 2001, Riddle filed a response to the motion to dismiss, citing Riddle's mental state and the inability to presently assess the extent of Logan's injury as reasons for the delay in the case. The response claimed that Logan was currently being evaluated to assess his developmental problems and cognitive limitations. Also attached to the motion was Susan Riddle's affidavit in which she claimed that "any delay in this case was due to the fact that I was just 'out of it' for a while" after her lengthy hospitalization and the premature birth of Logan. On November 29, 2001, the court granted the motion to dismiss, stating:

The Complaint in this action was filed by Plaintiff on October 28, 1997. Since that time, Plaintiffs have failed to timely answer discovery and have failed to timely prosecute the action pursuant to CR 41.02. A trial court has broad discretion regarding the granting of such a motion in these circumstances. See CR 41.02. See also Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equip. Co., Ky., 451 S.W.2d 401 (1970), where the Court was found not to have abused its discretion when it dismissed a case for lack of prosecution after three and one-half years from filing.

Riddle then filed a motion to vacate the judgment, citing the merit of the claim, the legitimate reasons for the delay, and the fact that the factors in Ward v. Housman, Ky. App., 809 S.W.2d 717 (1991), were not first considered by the

court before resorting to the extreme measure of dismissal. From the court's order denying the motion to vacate, Riddle now appeals.

In Ward, 809 S.W.2d at 719, this Court adopted the guidelines set out in Scarborough v. Eubanks, 747 F.2d 871 (3rd Cir. 1984) for determining whether a case should be dismissed for dilatory conduct under Rule 41(b) of the Federal Rules of Civil Procedure (the counterpart to our CR 41.02(1)). Our Court stated:

Considering 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.

Ward, 809 S.W.2d at 719. While acknowledging that CR 41.02(1) was subject to the sound discretion of the trial court and that dismissal was the sole remedy provided in the rule, this Court specifically noted that a sanction less than dismissal was also appropriate under the rule. Id. at 719-720.

In the present case, the court failed to consider any of the factors in Ward. The court merely recognized its broad discretion and found that dismissal was warranted because of the

plaintiff's failure to timely answer discovery and prosecute the action. Accordingly, we vacate the order and remand the action to the trial court to consider the factors set out in Ward in determining the motion to dismiss pursuant to CR 41.02(1).

For the reasons stated above, the order of the Daviess Circuit Court is vacated and the cause remanded for further proceedings consistent with this opinion.

GUIDUGLI, JUDGE, CONCURS.

BAKER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BAKER, JUDGE, DISSENTING. I respectfully dissent. I must disagree with the majority's interpretation of Ward v. Housman, Ky. App., 809 S.W.2d 717 (1991), in that I do not interpret Ward as requiring the circuit court to specifically enumerate each factor in its order of dismissal. Considering the broad discretion of the circuit court under Ky. R. Civ. P. 41.01, I think it sufficient if the record supports the circuit court's dismissal in light of the factors set out in Ward. Here, the record clearly supports dismissal under the factors. Accordingly, I see no abuse of discretion in the circuit court's determination to dismiss Riddle's action.

BRIEF FOR APPELLANT:

Joseph A. Yocum
Evansville, Kentucky

John P. Kirkham
Hopkinsville, Kentucky

JOINT BRIEF FOR APPELLEES:

John A. Sheffer
Howard E. Frasier, Jr.
Louisville, Kentucky

David F. Broderick
Kevin P. Hackworth
Bowling Green, Kentucky