

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000402-MR

STEVEN CARY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARTIN F. MCDONALD, JUDGE  
ACTION NO. 02-CI-003398

MICHAEL S. COX

APPELLEE

### OPINION

### VACATING AND REMANDING

\*\* \*\* \* \* \*

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOFF, JUDGES.

DYCHE, JUDGE: The Jefferson Circuit Court dismissed Steven Cary's personal injury claim against Michael S. Cox, apparently due to Cary's failure to abide by an order of the court to appear for a physical examination by a physician of Cox's choice. Because the trial court failed to make any findings supporting its order, we vacate and remand.

Cary's complaint against Cox was filed in May of 2002. Routine discovery progressed, and trial was set for September 9, 2003. Prior to that date, the judge of the division in which

the matter was pending retired, and counsel for Cary "presumed" for some reason that the trial would be cancelled, so he advised Cary not to make the trip from his home in Texas to Louisville at that time.

On September 9, 2003, trial was rescheduled for January 27, 2004; counsel, in open court, made certain agreements concerning pretrial matters in the case, including the identity of expert witnesses. Counsel for Cary thereafter moved the court to be allowed to change the agreement; the trial court agreed, and then counsel for Cox sought permission to engage in further discovery to counter the additional witness for Cary.

On November 13, 2003, counsel for Cox wrote counsel for Cary scheduling a medical examination of Cary for December 17, 2003, in Louisville, and for a deposition of that examining doctor for January 8, 2004. Counsel for Cary made no objection and took no action until counsel for Cox moved the court to order Cary to appear at the doctor's office for the examination. On December 15, 2003, the court conducted a hearing on that motion and entered an order for Cary to appear for the examination, as previously notified, on December 17, 2003. Cary failed to appear, and Cox moved for dismissal. The court granted the motion, and this appeal followed.

Cary argues to this court that the trial court abused its discretion in dismissing his action. Cox, of course, argues that the sanction was richly deserved. Unfortunately, the trial court made no findings underpinning its order, and the videotape of the hearing on the motion to dismiss is not in the record, so we are unable to determine the question presented.

In Greathouse v. American National Bank and Trust Co., 796 S.W.2d 869 (Ky.App. 1990), this Court faced a similar circumstance. The defendant failed to answer interrogatories and produce certain documents, and the court issued an order for compliance, which went unheeded. The trial court granted the plaintiff a default judgment, making no supporting findings, and the defendant appealed.

We will first examine the propriety of the default judgment itself. It is unquestioned in these circumstances that the standard of review on appeal of same is whether it was an abuse of discretion by the trial judge. Nowicke v. Central Bank & Trust Co., Ky.App., 551 S.W.2d 809 (1977). See also Natural Resources and Environmental Protection Cabinet v. Williams, Ky., 768 S.W.2d 47 (1989).

This discretion, however, is not unbridled, but must rest upon a finding of willfulness or bad faith on behalf of the party to be sanctioned. Nowicke, supra, at 810. Such behavior has also been characterized as possessing "a consciousness and intentional failure to comply with the provisions [of the Civil Rules.]"

We are aware of the deference due the trial court's findings. CR 52.01. In this case, however, we have no such findings, and are unable to discern the precise reason for imposition of the ultimate sanction upon appellant; we must therefore vacate the judgment and remand for findings by the trial court. The preferred course of conduct would be for the trial court's dismissal under these circumstances to be "accompanied by some articulation on the record of the court's resolution of the factual, legal, and discretionary issues presented." Quality Prefabrication, Inc. v. Daniel J. Keating Company, 675 F.2d 77, 81 (3d Cir. 1982). This should not be overly burdensome to the trial court, and will assist in meaningful appellate review. See CR 52.01.

The reasons for desiring some articulation of the bases for decision have special importance in this context. When such a severe sanction is imposed, values of consistency and predictability, reviewability, and deterrence, outweigh the values of economy and efficiency that may be promoted by allowing inarticulate decisions.

Quality Prefabrication, supra, at 81 (citation omitted).

Then, if appealed, the trial court's decision may more intelligently be examined.

Among the factors to be considered in reviewing the imposition of sanctions for an abuse of discretion, the appellate court should consider: (1) whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery, (2) whether the dismissed party was

warned that failure to cooperate could lead to dismissal, and (3) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Taylor v. Medtronics, Inc., 861 F.2d 980, 986 (6th Cir. 1988) (citation omitted). It has also been stated that "if a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion." Regional Refuse Systems, Inc. v. Inland Reclamation Co., 842 F.2d 150, 154 (6th Cir. 1988).

796 S.W.2d at 869-870. We remand to the Jefferson Circuit Court for appropriate action in accordance with Greathouse.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward C. Airhart  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Marc L. Breit  
Scott E. Miller  
Louisville, Kentucky