

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001338-MR

TIFFANY AMELIA CODY

APPELLANT

v. APPEAL FROM KNOTT CIRCUIT COURT  
HONORABLE EDDY COLEMAN, SPECIAL JUDGE  
ACTION NO. 02-CI-00034

DR. KAREN KIMSEY; REGIONAL  
HEALTHCARE, INC. D/B/A JUNE  
BUCHANAN PRIMARY CARE CENTER; AND  
OTHER UNKNOWN DEFENDANTS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.<sup>1</sup>

TAYLOR, JUDGE: Tiffany Amelia Cody brings this appeal from a June 1, 2004, order of the Knott Circuit Court dismissing her medical malpractice action pursuant to Ky. R. Civ. P. (CR) 41.02 for failure to prosecute. We affirm.

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<sup>1</sup> Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On February 8, 2002, Cody filed a complaint against Dr. Karen Kimsey, the Appalachian Regional Healthcare, Inc. d/b/a June Buchanan Primary Care Center (Regional Healthcare), and Other Unknown Defendants. Therein, Cody alleged defendants were negligent in their care of her and that as a result she suffered a ruptured appendix. Both Regional Healthcare and Dr. Kimsey filed answers on March 4, 2002. On March 18, 2003, Dr. Kimsey filed a motion to dismiss under CR 41.02 for failure to prosecute. Therein, Dr. Kimsey specifically stated:

Since the date of filing the Complaint, the Plaintiff has failed to respond to the Interrogatories and Request for Documents of this Defendant, which were filed on March 4, 2002. . . . At this time the Plaintiff has not attempted to take any depositions or serve discovery on the Defendants. In effect, the Plaintiff has not taken a single affirmative step in this case since the filing of the Complaint.

On March 20, 2003, Regional Healthcare filed a motion to dismiss for failure to prosecute. It appears the parties agreed to give Cody the opportunity to respond to the interrogatories and as a consequence appellees withdrew their motions.

On July 18, 2003, the circuit court entered an order staying the action for six months from the date of June 20, 2003, because of a bankruptcy proceeding filed by Regional

Healthcare's insurance company. The case was returned to the active docket in December 2003.

On February 27, 2004, Dr. Kimsey again filed a motion to dismiss under CR 41.02(1) for failure to prosecute. Again, Dr. Kimsey alleged:

In the case at bar, almost two years have passed since the complaint was filed. Plaintiff has not taken a single deposition of any of the defendants to this action, nor has she propounded any discovery requests to defendants. Plaintiff has not taken any other affirmative steps to move the case along. She has not offered any affidavits or exhibits to support her serious allegations of misconduct against Dr. Kimsey or any of the other defendants in this matter. The record is as devoid of proof today as it was two years ago when this case was filed. Plaintiff has never offered any sort of excuse or justification of her conduct in neglecting the case. All Plaintiff has done is (a) belatedly respond to Dr. Kimsey's discovery requests almost a year after they were due and (b) file one response to a motion to dismiss propounded by Dr. Kimsey.

Thereafter, Regional Healthcare also filed another motion to dismiss for failure to prosecute. A hearing upon the motions to dismiss was originally scheduled for March 25, 2004; however, Dr. Kimsey and Regional Healthcare renoticed the hearing for April 8, 2004. As a consequence, Cody filed a motion to continue the hearing. The circuit court ultimately denied the motion to continue and granted the motion to dismiss the action against both Dr. Kimsey and Regional Healthcare. Thereafter,

Cody filed a motion to alter, amend, or vacate, and the court held a hearing upon the motion. On June 1, 2004, the circuit court entered an order denying Cody's motion and dismissing with prejudice any claims Cody asserted against Dr. Kimsey and Regional Healthcare. This appeal follows.

Cody contends the circuit court committed reversible error by dismissing her action under CR 41.01(1) against Dr. Kimsey and Regional Healthcare. We disagree.

CR 41.02(1) reads as follows:

For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

It is well-established that a dismissal for failure to prosecute is within the sound discretion of the circuit court. Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equip. Co., 451 S.W.2d 401 (Ky. 1970).

In this case, the record discloses that Cody has failed to prosecute the action in a timely manner. The complaint was filed February 8, 2002. Over a year passed before motions to dismiss were filed for failure to prosecute. Subsequently, an agreement was recorded; whereby, Cody would respond to pending discovery requests. Dr. Kimsey's and Regional Healthcare's second motions to dismiss were filed in February 2004. Although the action was stayed for a period of

six months, it remained on the active docket for some eighteen months before the second motions to dismiss were filed. During that eighteen month period, Cody failed to take any depositions and failed to identify an expert witness. Cody had adequate notice that dismissal was possible considering these were the second motions to dismiss for failure to prosecute. Considering the circumstances as a whole, we cannot say the circuit court abused its discretion by dismissing Cody's actions against Dr. Kimsey and Regional Healthcare for failure to prosecute under CR 41.02. See Trumbo v. Parsley, 461 S.W.2d 67 (Ky. 1970).

Cody also contends the circuit court committed reversible error by denying her motion to continue the hearing on the CR 41.02 motions to dismiss. The record reveals that Cody filed a motion to continue the hearing citing an engagement at her child's school. Even if the circuit court erred by denying the motion, we are of the opinion that any error was merely harmless. CR 61.01. Cody received a full hearing upon her motion to vacate the order of dismissal. In that hearing, Cody was given the opportunity to fully argue the merits of dismissal. Moreover, given the particular circumstances of this case, we simply cannot say that the denial of Cody's motion to continue affected her substantial rights.

For the foregoing reasons, the order of the Knott  
Circuit Court is affirmed.

VANMETER, JUDGE CONCURS.

POTTER, SENIOR JUDGE, DISSENTS WITHOUT SEPARATE  
OPINION.

BRIEF FOR APPELLANT:

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