

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002060-MR

LEWIS HURD

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 01-CI-005988

CHARLES WHITE

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

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

JOHNSON, JUDGE: Lewis Hurd has appealed from the September 8, 2004, order entered by the Jefferson Circuit Court which denied his motion to reconsider the trial court's dismissal of his personal injury claim against Charles White. Having concluded that the trial court abused its discretion in dismissing the action, we vacate the ruling and remand for further proceedings.

On August 31, 2001, Hurd filed a complaint in the Jefferson Circuit Court against White seeking damages for injuries he sustained as a pedestrian in Louisville, Kentucky,

after White hit him in a pickup truck.¹ The case was submitted to mediation by order of the trial court on September 9, 2002. An order was entered on November 15, 2002, setting the case for trial on June 4, 2003. By letter dated December 26, 2002, Hurd's attorney notified White's attorney that he was withdrawing from Hurd's case. White's attorney then filed a motion on January 7, 2003, asking the trial court to give Hurd a deadline to find a new attorney, because of the deadlines in the pre-trial schedule. Hurd's attorney then filed a motion to withdraw on January 8, 2003, which the trial court granted by order entered on January 13, 2003, and gave Hurd 30 days to obtain a new attorney. Subsequently, Hurd hired a new attorney, who filed an entry of appearance on February 12, 2003.

The trial court entered an order in the case on November 14, 2003, resetting the trial for May 11, 2004.² Both parties appeared with counsel on that date, however, Hurd announced that he was not ready to proceed. On May 25, 2004, Hurd's attorney filed a motion to withdraw, which the trial

¹ White was served with summons on March 18, 2002, and filed an answer on May 16, 2002.

² Hurd claims that this continuance was granted because White failed to appear for a scheduled deposition on more than one occasion. While there is no proof of this in the record, Hurd did file a motion on May 6, 2004, to be heard on May 11, 2004, asking the trial court to strike White's answer, pursuant to Kentucky Rules of Civil Procedure (CR) 55, and to grant a default judgment in the case as to liability. In support of the motion, Hurd claimed that White failed to appear for depositions on April 27, 2004, and May 6, 2004.

court granted on June 10, 2004. The trial court stated in its order that Hurd had 30 days in which to hire a new attorney.

On July 9, 2004, White filed a motion to dismiss the claim pursuant to CR 41.02. He claimed that Hurd had violated the trial court's order of June 10, 2004, by failing to retain counsel to represent him within 30 days. White further claimed that Hurd had "not attempted to communicate with [White's attorney] in any manner." The hearing was noticed for July 12, 2004, but neither Hurd, nor an attorney, appeared on his behalf. At that time, the trial court informed White of its order entered on July 11, 2004, which stated that Hurd believed he had found an attorney to represent him and confirmed the hearing date of July 26, 2004.³ There was no communication between the parties before the hearing on July 26, 2004, and no one appeared on behalf of Hurd on that date. Subsequently, on July 30, 2004, the trial court granted White's motion to dismiss for want of prosecution under CR 41.02.

On August 6, 2004, Hurd's new attorney entered his appearance and filed a motion for reconsideration of the order dismissing the action.⁴ At a hearing on August 16, 2004, Hurd's

³ On July 6, 2004, Hurd appeared in court and stated that he had spoken to an attorney who had agreed to represent him. However, that attorney did not file an entry of appearance in the case.

⁴ White claims that Hurd's motion for reconsideration was not timely filed because the order dismissing the case was entered in court on July 26, 2004, rather than being entered on July 30, 2004, which is the date the clerk stamped on the order. However, pursuant to the clerk's certified docket

new attorney stated that Hurd did not attend the hearing on White's motion to dismiss because he had been hospitalized on July 26, 2004. However, Hurd's attorney filed a notice of proof of inability to attend the July 26, 2004, hearing indicating that Hurd was incarcerated between July 15, 2004, and July 28, 2004. As proof, he attached a letter from the Louisville Municipal Department of Corrections dated August 17, 2004. Hurd's motion to reconsider was denied by the trial court on September 8, 2004. This appeal followed.

Dismissals for lack of prosecution are provided for in CR 41.02(1), which states that a case may be dismissed "[f]or failure of the plaintiff to prosecute or comply with these rules or any order of the court[.]" "The power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process."⁵ A dismissal for lack of prosecution pursuant to CR 41.02 is reviewed under the abuse of discretion standard.⁶ "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable,

which is attached to the notice of appeal in this case, the order was not formally entered until July 30, 2004, which made the filing of Hurd's motion for reconsideration timely.

⁵ Nall v. Woolfolk, 451 S.W.2d 389, 390 (Ky. 1970).

⁶ Jenkins v. City of Lexington, 528 S.W.2d 729, 730 (Ky. 1975).

unfair, or unsupported by sound legal principles'" [citations omitted].⁷

The trial court should resort to a CR 41.02 dismissal "only in the most extreme cases."⁸ This Court shall "carefully scrutinize the trial court's exercise of discretion in doing so."⁹ A trial court should rule on CR 41.02 motions "in the light of the particular circumstances involved and length of time alone is not the test of diligence" [citation omitted].¹⁰

The trial court should also determine whether less drastic measures would remedy the situation, especially where there is no prejudice to the other party.¹¹ Factors relevant to whether the trial court should dismiss the action with prejudice are set forth in Ward v. Housman,¹² which states:

Considering whether a case should be dismissed for dilatory conduct of counsel, it would be well for our trial courts to consider [Scarborough v. Eubanks, 747 F.2d 871, 875-78 (3d Cir. 1984)]¹³ and these relevant factors:

⁷ Sexton v. Sexton, 125 S.W.3d 258, 272 (Ky. 2004).

⁸ Polk v. Wimsatt, 689 S.W.2d 363, 364-65 (Ky.App. 1985).

⁹ Id. at 365.

¹⁰ Gill v. Gill, 455 S.W.2d 545, 546 (Ky. 1970).

¹¹ Polk, 689 S.W.2d at 365.

¹² 809 S.W.2d 717 (Ky.App. 1991).

¹³ The guidelines in Scarborough were used to determine whether a case should be dismissed for dilatory conduct under Rule 41(b) of the Federal Rules of Civil Procedure, which is the counterpart of our CR 41.02(1).

- 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.

Although CR 41.02(1) refers to dismissal of an action or a claim therein as the sole remedy for a violation of the rule, . . . the rule is subject to the sound discretion of the trial judge.¹⁴

The law of this Commonwealth establishes that a sanction must bear some relationship to the prejudice created, and that cases, whenever possible, should be decided on their merits.¹⁵ In the case before us, the record does not reflect that the trial court considered any of the factors outlined above prior to entering its order dismissing Hurd's case with prejudice. It appears that the trial court based its decision solely on the fact that neither Hurd, nor counsel on his behalf, appeared for the hearing on July 26, 2004. However, Hurd provided the trial court uncontroverted proof that he was incarcerated on the date of the hearing. Further, the record reflects that, while Hurd's actions had caused some delay in the case, White's actions had also contributed to this delay. In

¹⁴ Ward, 809 S.W.2d at 719-20.

¹⁵ See Bridewell v. City of Dayton, ex rel. Urban Renewal & Community Development Agency of City of Dayton, 763 S.W.2d 151, 153 (Ky.App. 1988); Crossley v. Anheuser-Busch, Inc., 747 S.W.2d 600, 601 (Ky. 1988); and Ready v. Jamison, 705 S.W.2d 479, 482 (Ky. 1986).

accordance with Ward, “[i]t is our opinion that the trial court abused its discretion . . . [b]y dismissing the complaint for a one-time dilatory act . . . when no other alternative sanctions were considered[.] [T]he trial court inappropriately applied the ‘death sentence’ to this civil action.”¹⁶

Accordingly, the order of the Jefferson Circuit Court is vacated and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kyle A. Burden
Louisville, Kentucky

BRIEF FOR APPELLEE:

James M. Cawood, III
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¹⁶ Ward 809 S.W.2d at 720.