

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002185-MR

WALTER ALAN PALMER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 01-CI-006709

CSX TRANSPORTATION, INC.

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

BARBER, JUDGE: This appeal stems from the dismissal by the Jefferson Circuit Court of a suit by Appellant, Walter Alan Palmer (Palmer), against Appellee, CSX Transportation, Inc. (CSX), pursuant to Ky CR 41.02(1).¹ Palmer's action was filed September 28, 2001 alleging personal injuries arising under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60. CSX filed its answer October 9, 2001. Palmer then filed a motion for a

¹ Kentucky Rule of Civil Procedure 41.02(1) states "**For the 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.**" (Emphasis added.)

pretrial conference and trial date October 26, 2001. No order was entered in relation to Palmer's motion.

Palmer filed a second motion for a pretrial conference and trial dated April 16, 2003. Pursuant to Palmer's request, the court set the matter for a pretrial conference on October 14, 2003 and a trial date of March 2, 2004.² The court also issued a separate pretrial order the same day. In its order, the trial court stated the following in relation to expert witnesses:

6. On or before October 1st, 2003, [Palmer] shall identify each person whom he expects to call as expert witnesses at trial, and comply with CR 26.02(4)(a)(i)³ regardless of whether this information has previously been requested through interrogatories. These same disclosures should be provided regarding any treating physicians. Failure to do so may result in the suppression of the expert's testimony.

Palmer filed his first expert witness list October 6, 2003, five days later than the court ordered. Palmer listed eight experts that may have testified at trial on his behalf. However, Palmer failed to state any information about the

² The court's order was entered June 4, 2003.

³ Kentucky Rule of Civil Procedure 26.02(4)(a)(i) states "Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows: (a)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

experts' opinions in accordance with the trial court's pretrial order.

Palmer filed a motion for continuance of the scheduled trial on February 25, 2004 based in part that due to settlement negotiations, no liability expert had made a site visit to Palmer's former place of employment in Ravenna, Kentucky. Palmer's motion was granted despite CSX's objection and the trial date was moved to August 31, 2004.

On July 12, 2004, CSX filed a motion to strike Palmer's experts due to Palmer's alleged failure to comply with the court's pretrial order regarding expert designations. Following a hearing July 19, 2004, the court entered an order⁴ which stated in pertinent part:

Mr. Beal⁵ conceded that his client has not disclosed experts pursuant to the Court's trial order and pursuant to CR 26.02. However, he cited problems with the Plaintiff's treating physicians and other medical experts. Counsel conceded that [Palmer] has also not performed a site inspection after which he intended to update his expert disclosures.

Having considered the arguments of counsel, the Court will not strike the Plaintiff's expert but will enter the following order:

. . .

⁴ The court's order was entered on July 20, 2004.

⁵ Charles E. Beal, II, was co-counsel for Palmer pursuant to an Entry of Appearance filed October 9, 2003.

2. [Palmer] shall perform any site inspection and update his list of experts on or before August 30th, 2004.
3. No expert shall testify for [Palmer] who has not been disclosed on or before August 30th, 2004, along with appropriate CR 26.02 disclosures.
4. **If such designations have not been provided on or before August 30th, 2004, then the Court will dismiss this action at the August 31st, 2004, pretrial conference.** (Emphasis added.)

On August 30, 2004, Palmer faxed to CSX⁶ his supplemental expert witness list.⁷ The supplement consisted of only two experts, one of whom was listed on Palmer's original expert list. Palmer again failed to comply with the trial court's pretrial order by not listing any information regarding the experts' opinions.

At the August 31, 2004 pretrial conference, Mr. Alva A. Hollon, Jr.⁸ acknowledged non-compliance with the court's July 20, 2004 order. Mr. Hollon explained that a site examination had been completed by one of their experts on August 18, 2004, but he had not received a report from the expert. Mr. Hollon requested an additional two to three weeks to comply with the court's orders. CSX noted that the case was nearly three years

⁶ CSX stated in the August 31, 2004 hearing that the supplemental expert list was faxed after 5 p.m.

⁷ [Palmer's] supplemental expert witness list was not received by the circuit clerk until September 1, 2004.

⁸ Mr. Hollon represented Palmer.

old and that Palmer had failed multiple times to comply with the court's orders. CSX requested dismissal by the court. The trial court stated it had no choice but to dismiss the claim in accordance with its July 20, 2004 order.⁹

Palmer filed a motion to vacate the order of dismissal pursuant to Ky CR 59 on September 8, 2004. The court denied Palmer's motion September 29, 2004. Whereupon, Palmer filed a notice of appeal on October 20, 2004.

Palmer makes two arguments in his appeal: (1) the trial court failed to consider the factors of Ward v. Housman, 809 S.W.2d 717 (Ky.App. 1991), before resorting to the extreme measure of dismissal and (2) the trial court abused its discretion in dismissing his case involuntarily under Ky CR 41.02(1). We will first examine the applicability of Ward to the instant case.

In Ward, the court held that in considering whether a case should be involuntarily dismissed under Ky CR 41.02(1) for dilatory conduct of counsel, it would be well for trial courts to consider six 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. Id. at 719. The court also held

⁹ An order reflecting the same was entered September 1, 2004.

that although Ky CR 41.02(1) refers to dismissal of an action or a claim therein as the sole remedy for a violation of the rule, a sanction less than dismissal is also appropriate. Id. at 719-720. The rule is subject to the sound discretion of the trial judge. Id. at 720.

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). The question then arises whether the court erred in failing to utilize the factors in Ward before dismissing Palmer's action. We believe it did not.

We believe Palmer's reliance on Ward is misplaced. There are several important dissimilarities between Ward and the instant case. First, in Ward, the scheduling order made no mention of sanctions if the plaintiff failed to furnish expert witnesses' names with a summary of their opinions. However, in the instant case, the trial court clearly stated that a repeated failure to comply with expert disclosures would result in a dismissal. Second, in Ward, the plaintiff filed his witness list nearly nine months after the deadline established by the court had passed. The plaintiff's actions in Ward caused the court to exclude the expert's testimony resulting in summary judgment for the defendant. In the instant case, the trial court dismissed the action because of Palmer's continuing

failure to adhere to pretrial orders despite a clear warning of dismissal. Third, in Ward, the late filing of the expert list was the only instance of dilatory conduct by counsel. Here, Palmer's counsel repeatedly failed to adhere to the trial court's pretrial orders in relation to his expert witnesses. Fourth, the defendant did not move for a dismissal in Ward. In the instant case, CSX clearly requested dismissal as evidenced by the August 31, 2004 hearing video. Therefore, we believe the court did not err in failing to consider the Ward factors.

We now turn to whether the trial judge abused his discretion in involuntarily dismissing Palmer's claim pursuant to Ky CR 41.02(1). According to the record, Palmer was given several opportunities to correct his expert list but failed to utilize any of them. In its July 20, 2004 order, the trial court clearly stated that another failure to comply would result in dismissal of the claim. However, Palmer again failed to comply with the trial court's mandate. The case was nearly three years old at the time of the August 31, 2004 pretrial conference.

We believe the trial court gave Palmer ample opportunity to correct prior errors to save his claim, but for his own reasons he chose not to do so. Based on the foregoing, we do not believe the trial court abused its discretion in

dismissing Palmer's suit pursuant to Ky CR 41.02(1). Therefore,
we affirm the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Alva A. Hollon, Jr.
Jacksonville, Florida

BRIEF FOR APPELLEE:

Richard W. Edwards
Louisville, Kentucky