IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 5, 2000 Session

SARA ETHEL WEST and JERRY KEITH WEST, v. LOWELL JUSTIN WIKRE

Direct Appeal from the Circuit Court for Bradley County
No. V-96-978 Hon. John B. Hagler, Jr., Circuit Judge

FILED JANUARY 22, 2001

No. E2000-00824-C0A-R3-CV

The plaintiffs refused to comply with the Rules of Discovery and the Trial Court as a sanction dismissed the suit. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Paul G. Whetstone, Morristown, Tennessee, for Appellants, Sara Ethel West and Jerry Keith West.

Angela M. Cirina, Chattanooga, Tennessee, and John F. Kimball, Cleveland, Tennessee, for Appellee, Lowell Justin Wikre.

OPINION

Plaintiffs' action for personal injuries arising from an automobile accident was dismissed by the Trial Judge, because plaintiffs failed to turn over copies of tax records to defendant, as ordered by the Trial Court.

After suit was filed, defendant took the deposition of plaintiff Sara West and requested copies of her 1996 tax records, which were never produced. In an attempt to acquire the tax records, Defendant's attorney wrote Plaintiffs' attorney on January 5, January 26, and February 23, 1999. When no response was forthcoming, Defendant filed a Motion to Compel On March 15, 1999. The Motion was heard by Judge Russell Simmons on April 26, 1999, and the Judge ordered the plaintiffs to supply their tax records for 1996, 1997 and 1998. The trial was set for May 10, 1999. By agreement, the trial was later continued to November 4, 1999.

When Defendant did not receive the tax records by May 10, 1999, Defendant's attorney wrote plaintiffs on May 11, 1999 requesting the documents. When no response was forthcoming, defendant filed a Motion to Enforce the Court's Order on July 6, 1999. A hearing was then set for August 16, 1999, and notice of the hearing date was sent to plaintiffs' attorney, but he did not appear. Judge John B. Hagler, Jr. presided over the hearing, and granted defendant's motion, giving plaintiffs fifteen days to produce the requested tax documents. The defendant's attorney sent plaintiffs' attorney a copy of the proposed Order granting the Motion to Enforce, which was signed and filed with the Clerk on September 29, 1999.

Defendant's attorney filed a second Motion to Enforce, and plaintiffs' attorney was noticed to appear on October 18, but did not appear or otherwise respond to the Motion. At the hearing on October 18, 1999, the Court found that defendant's motion was well-taken and awarded defendant's attorney fees and costs associated with the three discovery motions, and then dismissed the case against both plaintiffs for failure to comply with the Court's earlier Orders and lack of prosecution. A copy of the order of dismissal, was sent by certified mail by defendant's attorney to plaintiffs' attorney. Shelby Barnard in the plaintiffs' attorney's office, signed for the Order on October 22, 1999.

Plaintiffs' attorney filed a Motion to Set Aside the Order on November 18, 1999, claiming he did not know that the case had been dismissed until November 4, 1999 when he went to the courthouse ostensibly to try the case.

The hearing date for plaintiffs' Motion to Set Aside resulted in further controversy. Plaintiffs' attorney claims the Judge set the Motion for December 10, 1999, but the Judge denies that plaintiffs' attorney ever set a hearing date with the scheduling clerk or the Judge. Plaintiffs' attorney claims he went to the Courthouse on December 10 to have his motion heard, but the record is devoid of anything that occurred on that date. Then, on February 3, 2000, Attorney Whetstone wrote a letter to Judge Hagler stating that he showed up on January 17, 2000 to have his Motion heard, but upon arrival at the courthouse discovered that it was closed in observance of Martin Luther King Day. There is nothing in the record, aside from this letter, that mentions a January 17 hearing on any motion, and neither of the Defendant's attorneys were noticed of any such hearing.

After receiving a copy of plaintiffs' attorney's letter of February 3, defendant's attorneys informed the Court that they wanted to be present for any hearing on the Motion to Set Aside. The attorneys sent copies of their letters to plaintiffs' attorney. However, plaintiffs' attorney, or someone from his office, then represented to the Court, via a phone call to the clerk's office, that

all parties had agreed to set aside the dismissal and requested the case be set for trial.

Upon learning of this development, Defendant's attorneys noticed plaintiffs' attorney to a hearing on plaintiffs' motion. The hearing was scheduled for March 6, 2000, but at the hearing, plaintiffs' attorney did not appear. A phone call was placed to his office, but the woman answering the phone did not know where he was but said that she would try to get in touch with him. There was never any response from plaintiffs' attorney, and the Court denied Plaintiffs' Motion to Set Aside Dismissal by Order entered on March 15, 2000, affirming the prior dismissal of the action.

Plaintiffs sole issue on appeal is whether the Trial Judge abused his discretion in dismissing plaintiffs' suit for failure to adequately comply with discovery. Plaintiffs' attorney suggests that some lesser level of sanction would have been appropriate, but that the Court abused its discretion in imposing the sanction of dismissal.

The record before us offers no plausible justification for plaintiffs' failure to produce the income tax records as requested by several court orders to compel and multiples requests by the Defendant. Compounding this egregious conduct, is the fact that when plaintiffs were seeking to have the judgment set aside, they at that late date did not attempt to comply with the discovery request. Tenn. R. Civ. P. Rule 37 expressly authorizes the Trial Court to dismiss a plaintiff's action, either upon motion or *sua sponte*, as a sanction for the plaintiff's violation of the court's discovery order. Accordingly, courts have repeatedly upheld the dismissal of an action where the plaintiff has failed to comply with the Trial Court's order compelling discovery. *Holt v. Webster*, 638 S.W.2d 391 (Tenn. Ct. App. 1982); *Johnson v. Wade*, 2000 WL 1285331 (Tenn. Ct. App. Sept. 6, 2000); *Gordon v. Wilson*, 1998 WL 315940 (Tenn. Ct. App. June 15, 1998); *Nokes v. Hooper*, 1989 WL 115186 (Tenn. Ct. App. Oct. 4, 1989); *Ratliff Development Corp. v. Brooks*, 1988 WL 116455 (Tenn. Ct. App. Nov. 2, 1988). When a trial court imposes the sanction of dismissal, the decision will not be disturbed on appeal in absence of an affirmative showing that the trial judge abused his discretion. *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230, 236 (Tenn. Ct. App. 1998). As we noted in *Holt*, dismissal is a harsh sanction, but as the *Holt* Court explains, if a party flouts the discovery order of the Trial Court without showing any reason for their failure to timely comply with the Order of Discovery, then dismissal may be an appropriate remedy.

Plaintiffs' cite to two cases for the fact that a trial judge should only dismiss a case *sua sponte* "sparingly" and only "in the most urgent circumstances," i.e., *Harris v. Baptist Memorial Hospital*, 574 S.W.2d 730 (Tenn. 1978) (setting aside a *sua sponte* dismissal that was based solely on the opening arguments of counsel) and *Barish v. Metropolitan Government of Nashville and Davidson County*, 627 S.W.2d 953 (Tenn. Ct. App. 1981) (remanded the case for trial where dismissal based on plaintiff's appearance at trial *pro se* with no proof after the lower court had allowed her formal lawyer to withdraw four days before trial). However, these cases do not deal with dismissals imposed as sanctions under Rule 37.02 of the Rules of Civil Procedure, which have a stricter standard.

Taking into account the number of Court Orders that plaintiffs' counsel ignored and

the fact that someone from the attorney's office misrepresented to the Court that the Defendant had agreed to set aside the dismissal, we are of the opinion that the Trial Judge was well within his discretion in dismissing this action. Accordingly, we affirm the Judgment of the Trial Court, and remand, with the cost of the appeal assessed to plaintiffs, Sara Ethel West and Jerry Keith West.

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HERSCHEL PICKENS FRANKS, J.