STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED
February 11
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA, 2011

JAMIE BACHIE,
Plaintiff below, Appellant

vs.) **No. 35544** (Ohio County 05-C-466)

WHEELING ISLAND GAMING, INC., d/b/a WHEELING ISLAND RACETRACK & GAMING CENTER, and MARK WEST, individually,
Defendants below, Appellees

MEMORANDUM DECISION

Appellant Jamie Bachie (hereinafter "appellant") appeals an order from the Circuit Court of Ohio County, granting defendants' motion for summary judgment and denying plaintiff's motion to reconsider. After carefully reviewing the record provided, the briefs and oral arguments of the parties, and taking into consideration the relevant standards of review, the Court determines that the circuit court committed no error. The Court further finds that this case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The appellant was employed by defendant Wheeling Island Gaming, Inc., for six months. Her job duties included busing tables and working at banquets. After leaving Wheeling Island Gaming, Inc., she filed a sexual harassment claim alleging that a supervisor, Mark West, made inappropriate comments to her and inappropriately touched her on a few occasions. The defendants denied these allegations.

The pretrial conference was held on February 24, 2009, one month before the scheduled trial date. The purpose of this conference was to take up motions and disputed matters that could be resolved before trial. At this conference, the circuit court granted two motions in *limine* filed by the defendants, precluding the appellant from submitting evidence on her emotional distress and lost wage claims. The motions were granted as a sanction due to the appellant failing to respond to discovery requests, failing to prepare the case for trial and violating the circuit court's scheduling order by being unprepared for the pretrial conference. Specifically, the appellant failed to produce tax

returns, medical records, medical bills or identify an expert witness to support her emotional damages claim.[1] The appellant offered no substantive reason why she failed to make these disclosures. Also during the pretrial conference, counsel for the appellant confused the facts of this case with a separate case. In addition to being unable to respond to rudimentary aspects of the case at the pretrial conference, counsel for the appellant filed 31 Motions in *Limine* which had little or no relevance to the facts of this case. For instance, appellant's motion in *limine* 23 asks the circuit court, "[t]o preclude the defendant, his counsel and witnesses from . . . making any reference whatsoever, directly or indirectly, to the events or aftermath of September 11, 2001[.]" The appellant failed to offer any reasonable explanation why these superfluous motions were filed.

Because the appellant was unprepared for this pretrial conference, the circuit court scheduled a second pretrial conference one month later, on March 24, 2009, one day before the scheduled trial date. The appellant failed to supplement any of her discovery responses during the month between these two pretrial conferences, again failing to produce any tax returns, medical records, medical bills or identify an expert witness to support her emotional damages claim. The circuit court was exasperated by the appellant's failure to meaningfully participate in either of the pretrial conferences or prepare the case for trial and granted summary judgment to the defendants, stating the appellant "has just failed to be prepared. That's about as straightforward as I can make it and, as a result of that, both claims . . . have been dismissed."

Dismissal is a permissible sanction under Rule 16(f) of the *West Virginia Rules of Civil Procedure* when a party or party's attorney fails to obey a scheduling or pretrial order, or where a party's attorney is substantially unprepared to participate in a pretrial conference.[2] "We review the circuit court's imposition of sanctions under an

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[1] The appellant initially identified an expert witness named Leigh Huggins, who was to provide testimony "regarding her care and treatment of plaintiff Jamie Bachie." At the appellant's deposition, she stated that she was never treated by Leigh Huggins. Instead, she testified that she saw a therapist three years after leaving Wheeling Island Gaming, whose first name was Kathy, and whose last name she could not remember.

[2] Rule 16(f) addresses sanctions for noncompliance with a scheduling order or pretrial order issued pursuant to Rule 16 of the *West Virginia Rules of Civil Procedure*. The only sanction specifically set out in Rule 16(f) is that of imposing attorney's fees and other expenses on a noncomplying party. However, Rule 16(f) permits imposition of the sanctions provided in Rule 37(b), which includes dismissal for failure to follow a court's order. "There is no question that the circuit court has authority to impose sanctions, including dismissal of an action, if a party fails to comply with a circuit court's order

abuse of discretion standard." *Cox v. Department of Natural Resources*, 194 W.Va. 210, 218 n. 3, 460 S.E.2d 25, 33 n. 3 (1995) (Cleckley, J., concurring). "Mindful that case management is a fact-specific matter within the ken of the trial court, reviewing courts have reversed only for a clear abuse of discretion." *Bartles v. Hinkle*, 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (1996).

The circuit court's scheduling order provided a clear warning to both parties that sanctions pursuant to Rule 16(f) would be imposed for failure to comply with the court's scheduling order. It states

> [I]n accordance with WVRCP 16(f), the Court will impose the full spectrum of sanctions authorized by the WVRCP if a party or party's counsel fails to obey this order or other Orders of the Court.

Upon review, we hold that the circuit court did not abuse its discretion in dismissing the appellant's case. The egregious conduct by counsel for the appellant is extensive: (1) appellant's counsel failed to respond to numerous discovery requests; (2) appellant's counsel was wholly unprepared for the pretrial conference and could not answer rudimentary questions about the case; (3) appellant's counsel filed 31 mostly frivolous motions in *limine*, causing the circuit judge and opposing counsel to spend time preparing for motions that had no relevance to the facts of this case; and (4) appellant's counsel failed to supplement her discovery requests during the month between the first and second pretrial conferences. Based on the record before us, we agree with the circuit judge's conclusion that the appellant "has just failed to be prepared. That's about as straightforward as I can make it[.]" The numerous violations in this case justify the sanction the circuit court imposed. This Court has previously warned that repeated violations will be met with harsh sanctions. In *Bartles, supra*, Justice Cleckley stated:

> A succession of violations, however, indicating a general unwillingness to comply with a court-imposed scheduling order, is enough for us even to justify a default. Calenders are simply too crowded for parties to treat scheduling and discovery orders as optional and to conduct preparations at their own convenience.

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regarding discovery." *Cox v. Department of Natural Resources*, 194 W.Va. 210, 217, 460 S.E.2d 25, 32 (1995) (Cleckley, J., concurring).

Bartles, 196 W.Va. at 392, 472 S.E.2d at 838.

We next address appellant's motion to withdraw her appeal, filed with this Court four days before oral argument in this matter. By way of background, the appellant filed a motion to reconsider on July 30, 2009, requesting the circuit court to set aside its ruling granting the defendant's summary judgment motion. The circuit court denied the appellant's July 30, 2009, motion to reconsider by order entered on November 20, 2009. On November 25, 2009, another motion to reconsider, alter or amend (hereinafter "motion to alter") was inadvertently filed by someone in the office of appellant's counsel. This inadvertent motion to alter was not noticed for hearing before the circuit court and a copy was not delivered to the circuit court, as required by Rule 22.01 of the *West Virginia Trial Court Rules*.[3]

On January 19, 2010, approximately two months after the inadvertent filing of the motion to alter, counsel for the appellant filed the present appeal with this Court. The appellant did not mention the inadvertently filed motion to alter in her petition, and neither party addressed the motion in their briefs. On January 21, 2011, four days before this case was set for oral argument, counsel for the appellant filed a motion to withdraw her appeal, stating that the inadvertently filed motion to alter has not been ruled on and that this Court therefore lacks jurisdiction over this matter.

During oral argument, counsel for the appellant stated that the motion to alter was "inadvertently" filed by his office. Counsel stated that he was not even aware this motion was filed until he reviewed the file on January 20, 2011, in preparation for argument before this Court. Also during oral argument, defense counsel acknowledged that shortly after the motion to alter was filed, appellant's counsel told him he was not going to pursue the motion to alter and would be filing an appeal with this Court. Consequently, both parties have abandoned this inadvertently filed motion to alter.

In *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995), this Court addressed motions to alter or amend pursuant to Rule 59(e) of the *West Virginia Rules of Civil Procedure*, stating at Syllabus Point 4:

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[3] Rule 22.01 of the *West Virginia Trial Court Rules* states, in relevant part:

> In addition to filing and serving on opposing counsel and unrepresented parties, counsel shall deliver to the assigned judge copies of each motion, response, supporting memorandum, and supporting documents or materials.

> Rule 59(e) of the West Virginia Rules of Civil Procedure provides the procedure for a party who seeks to change or revise a judgment entered as a result of a motion to dismiss or a motion for summary judgment.

Syllabus Point 3 of *James M.B. , supra*, addresses when a case is "final" and ripe for appeal:

> Under W.Va. Code, 58-5-1 (1925), appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

In the case *sub judice*, the circuit court's November 20, 2009, order addressed the merits of the case and resolved all outstanding issues. Following this ruling, and unbeknownst to counsel for the appellant, his office inadvertently filed another motion to alter. This inadvertent motion was virtually identical to the motion to reconsider the circuit court addressed in its November 20, 2009, order. Because counsel for the appellant never intended to file or pursue this motion to alter, we find no reason to dismiss this appeal based on the inadvertent filing of a motion that was not set for hearing before the circuit court or pursued by either party.

For the foregoing reasons, the circuit court's November 20, 2009, order dismissing the appellant's case is affirmed.

Affirmed.

ISSUED: February 11, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh