

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RICHARD C. RASHID, M.D.,

Appellant/Plaintiff,

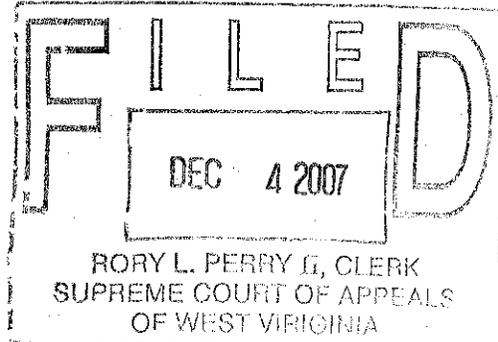
33596

Appeal No: 070444

v.

MUHIB S. TARAKJI, M.D.,

Appellee/Defendant.



REPLY BRIEF OF APPELLANT/PLAINTIFF, RICHARD C. RASHID, M.D.

Prepared on behalf of Appellant/Plaintiff
Richard C. Rashid, M.D., by:

R. Edison Hill (WV Bar # 1734)
HILL, PETERSON, CARPER, BEE & DEITZLER, PLLC
500 Tracy Way
Charleston, West Virginia 25311-1261
(304) 345-5667

I. REPLY ARGUMENT

This matter has been well and fully briefed by the parties. The Appellant and Plaintiff below, Richard C. Rashid, M.D., (hereinafter "Dr. Rashid") files this short Reply for the purpose of reiterating several critical facts, addressing the standard of review and responding to two new arguments advanced by Appellee and Defendant below, Muhib S. Tarakji, M.D., (hereinafter "Dr. Tarakji").

First, Dr. Rashid's civil action was filed on March 14, 1997. The Complaint was grounded primarily in a claim for breach of contract which had a ten year statute of limitations. It was involuntarily dismissed pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure on July 1, 2001, for failure to pay a twenty dollar (\$20) fee in accordance with West Virginia Code §59-1-11(b). This involuntary dismissal for failure to pay twenty dollars (\$20) occurred without affording Dr. Rashid notice and opportunity to be heard in contravention of the requirement of Rule 41(b). This involuntary dismissal for failure to pay a twenty dollar (\$20) fee also occurred well within the ten year statute of limitation. Further, the involuntary dismissal occurred within a factual setting wherein Dr. Tarakji had requested both open-ended extensions of time within which to respond to discovery requests and six month extensions of time to answer discovery requests.

Second, the record is abundantly clear that Dr. Rashid's counsel was not afforded prior notice and opportunity to be heard regarding the involuntary dismissal. The Circuit Clerk's docket sheet, unlike other entries on the docket sheet, has no indication as to whom the prior notice was purportedly sent. Nevertheless, the trial court inexplicably determined that two letters were sent on March 31, 2001, informing the parties that the action would be referred for dismissal unless twenty dollars (\$20) was remitted to the Clerk by May 1, 2001. Significantly, in addition to the record firmly establishing that counsel for Dr. Rashid did not receive prior notice and opportunity to be

heard, the record does not reflect that counsel for Dr. Tarakji received a copy of a notice letter from the Clerk. Dr. Tarakji proffered before the trial court that testimony from the Circuit Clerk's office would reveal that letters were sent to "counsel of record." However, the record has never been supplemented with an affidavit from any of Dr. Tarakji's counsel that they, in fact, received prior notice. The lack of such information certainly suggests that Dr. Tarakji's counsel, like counsel for Dr. Rashid, did not receive any prior notice.

Third, the standard of review with respect to this matter is also in dispute. Counsel for Dr. Tarakji submits that this appeal is to be considered under an abuse of discretion standard. However, the appeal issues require the application of two distinct standards of review. The issue of whether the involuntary dismissal under Rule 41(b) was *void ab initio* for the failure to provide prior mandatory notice and opportunity to be heard, requires the consideration of the application of the legal requirements of Rule 41(b) and the trial court's legal conclusions which discounted the prerequisites that must be met prior to involuntary dismissal.

It is the position of Dr. Rashid that the requirements of the Rule are explicit in providing that prior to dismissal, notice and an opportunity to be heard must be given to all parties. Once the matter is properly noticed, the requirements of the Rule serve to provide what functions as a rule to show cause why the matter should not be dismissed. This Honorable Court's review of the trial court's legal conclusion regarding the application of the requirement of pre-dismissal notice is one that must be reviewed *de novo*. Here, the trial court erred as a matter of law in refusing to apply the plain mandate of the Rule and the case law requiring pre-dismissal notice and opportunity to be heard. *See, e.g., Lacy v. CSX*, 205 W.Va. 630, 646, 520 S.E.2d 418, 434 (1999); *State ex rel. Orlofske v. City of Wheeling*, Syl. pt. 2, 212 W.Va. 538, 575 S.E.2d 148 (2002) (a *de novo* standard of review

is applied to a clear question of law); *Dimon v. Mansy*, Syl. pt. 2, 198 W.Va. 40, 479 S.E.2d 339 (1996) (reversing and remanding for predismissal hearing in case involving a Rule 41(b) dismissal for failure to prosecute).

With respect to Dr. Rashid's alternative arguments, the parties agree that the abuse of discretion standard applies to the questions of whether reinstatement of the civil action should have been granted notwithstanding the expiration of three terms of court due to good cause based upon accident, mistake and/or fraud, and to the issue of whether a hearing for the development of evidence should have been held with respect to Dr. Rashid's Motion for Reinstatement.

Fourth, with respect to Dr. Rashid's alternative argument regarding the failure to provide a hearing on the Motion for Reinstatement, Dr. Tarakji now argues that everything was, in fact, on the record. Dr. Tarakji asserts that if there was a denial of an opportunity to be heard, it was Dr. Tarakji who suffered such denial when he did not have an opportunity to cross-examine any of the affiants. Dr. Tarakji further states that there is nothing that Dr. Rashid did not have a full opportunity to develop. This is simply not the case in that a full hearing would have necessarily involved complete development of the issues of health, impairment and absence from the practice of law of the counsel responsible for the development and prosecution of Dr. Rashid's civil action. These matters necessarily involve questions of fact that are critical with respect to the issues of good cause for reinstatement based in part on mistake in the form of negligence or impairment, affirmative fraud, or positive misconduct of a level such that the attorney's apparent authority to bind a client does not permit the attorney to destroy the client's cause of action. Dr. Rashid emphasizes that this is an alternative argument that need not be considered if the Court applies a *de novo* standard of review

and finds the Dismissal Order *void ab initio* for lack of prior notice and opportunity to be heard as required by the Rule and the case law.

Finally, Dr. Tarakji raises one additional new argument to the effect that Dr. Rashid is estopped from challenging the Dismissal Order because Dr. Tarakji relied on the Dismissal Order and Dr. Rashid's inaction to reinstate. Dr. Tarakji argues that he moved on with his practice and his life in reliance on the dismissal inasmuch as Dr. Rashid did not make any move to reinstate. The record belies that argument. Importantly, it must be remembered that it was Dr. Tarakji who sought to draw the civil action out with open-ended extensions of discovery. Further, the record reflects that subsequent to the dismissal, Dr. Rashid's counsel requested the same discovery information that had been previously requested. Indeed, Dr. Tarakji's counsel was explicitly informed that Mr. Sorrells was considering reasserting the claims in another civil action. Again, this is a cause of action that had a ten year statute of limitations governing the primary breach of contract claim.

Given the facts as fully set forth in Dr. Rashid's previously filed brief, there have been no acts, misrepresentations or concealment of material facts that would have induced Dr. Tarakji to act or refrain from acting in any way to his detriment. Rather, the logic that is inequitable is that which would instruct that Dr. Rashid is to be stripped of his rights as a civil litigant for failure to pay twenty dollars (\$20) in the absence of having prior notice and opportunity to be heard with respect to an imminent dismissal in violation of the requirement of Rule 41(b) and in a setting of a case with a ten year statute of limitations.

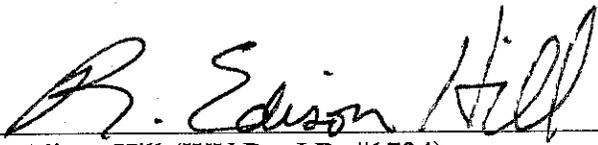
WHEREUPON, based upon the foregoing, the Appellant/Plaintiff, Richard C. Rashid, M.D., respectfully requests that this Honorable Court reverse the July 5, 2001, Order of the Circuit Court of Kanawha County, West Virginia, involuntarily dismissing Civil Action No. 97-C-725, for failure

to pay a twenty-dollar fee, and requests that this matter be remanded to the lower court for reinstatement and adjudication of the claim upon its merit.

Respectfully submitted,

RICHARD C. RASHID, M.D.,

By counsel:

A handwritten signature in cursive script that reads "R. Edison Hill". The signature is written in black ink and is positioned above a horizontal line.

R. Edison Hill (WV Bar I.D. #1734)

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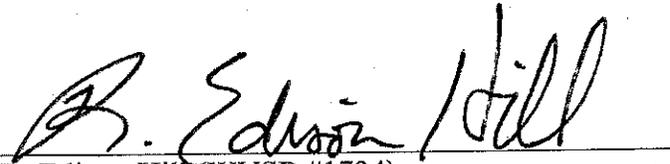
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CERTIFICATE OF SERVICE

I, R. Edison Hill, counsel for Petitioner, hereby certify that I have served the foregoing
“**REPLY BRIEF OF APPELLANT/PLAINTIFF, RICHARD C. RASHID, M.D.,**” upon counsel
of record for Appellee/Defendant via U.S. Mail this 4th day of December 2007 as follows:

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