

## COURT WATCH

FROM THE LAW OFFICES OF FLAHERTY, SENSABAUGH & BONASSO

*Rashid v. Tarakji*

Appeal No. 070444

Appeal from the Circuit Court of Kanawha County to the West Virginia Supreme Court of Appeals

**ISSUE:** Whether an action, dismissed by the Circuit Court for failure to pay court costs, should be reinstated after the passage of thirteen terms of court?

On April 1, 2008, the West Virginia Supreme Court of Appeals heard arguments in the *Rashid v. Tarakji* matter. In *Rashid*, the plaintiff physician brought suit against his former physician partner alleging breach of employment contract, fraud, violation of the Uniform Trade Secrets Act, tortious interference and unjust enrichment. Four years after the action was filed, the Circuit Court of Kanawha County entered an order dismissing the action for the plaintiff's failure to pay a court fee, in accordance with West Virginia Rule of Civil Procedure 41(b).<sup>1</sup> An additional four years after the dismissal of the action, plaintiff attempted to reinstate the action in Circuit Court. The Circuit Court of Kanawha County denied plaintiff's motion to reinstate the action, finding that the plaintiff failed to reinstate the action within three terms of court, as required under Rule 41(b). Plaintiff subsequently appealed the Circuit Court's decision to the West Virginia Supreme Court of Appeals.

During arguments to the Supreme Court of Appeals, plaintiff argued that the action should be reinstated because the "good cause" exception to Rule 41(b) allows the Court to reinstate the action after three terms of court for good cause shown. Plaintiff alleges that he failed to receive a notice from the Circuit Clerk that he was delinquent in paying his court costs and would face dismissal of his case if the fees were not paid. Plaintiff asserts that he did not receive notice and was not afforded a hearing before dismissal of the action, and therefore, did not have an opportunity to be heard before the Circuit Court. Plaintiff alleges that his case was improperly dismissed and should be reinstated.

Defendant asserts that plaintiff has failed to prove that good cause exists, since West Virginia law requires he show that fraud, accident or mistake prevented him from attempting to reinstate the action within three terms of court. Defendant further argues that the plaintiff waited until after thirteen terms of court before attempting to reinstate the action. Because plaintiff did not comply with the requirements of Rule 41(b) to reinstate his action, Defendant asserts that the Circuit Court properly denied plaintiff's motion to reinstate. Finally, Defendant claims that

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<sup>1</sup> West Virginia Rule of Civil Procedure 41(b) states:

Any court in which is pending an action . . . wherein the plaintiff is delinquent in the payment of accrued court costs, may, in its discretion, order such action to be struck from its docket; and it shall thereby be discontinued. . . . The court may, on motion, reinstate on its trial docket any action dismissed under this rule, and set aside any nonsuit that may [be] entered by reason of the nonappearance of the plaintiff, within three terms after entry of the order of dismissal or nonsuit; but an order of reinstatement shall not be entered until the accrued costs are paid.

plaintiff knew of his rights under Rule 41(b) for reinstatement, and by ignoring those rights, he effectively waived his right to reinstate his claim.

The West Virginia Supreme Court of Appeals has not rendered a decision in this matter. Additional Court Watch updates will be provided as this case develops.

## **COURT WATCH**

FROM THE LAW OFFICES OF FLAHERTY, SENSABAUGH & BONASSO

*Stanley v. Chevathanarat*

Appeal No. 33666

Appeal from the Circuit Court of Logan County to the West Virginia Supreme Court of Appeals

**ISSUE:** Whether the Circuit Court properly denied plaintiff's motion for judgment as a matter of law after a jury verdict in favor of the defendant?

Currently pending before the West Virginia Supreme Court of Appeals is *Stanley v. Chevathanarat*. The West Virginia Supreme Court of Appeals heard the parties' arguments regarding this case on April 1, 2008.

In *Stanely*, the plaintiff filed a medical malpractice suit against the defendant physician, alleging that the physician failed to meet the standard of care in obtaining the plaintiff's informed consent before her total abdominal hysterectomy. The case proceeded to trial. At the close of evidence, plaintiff moved for judgment as a matter of law.<sup>2</sup> The Circuit Court of Logan County found that the defendant had presented evidence that would allow a jury to find in his favor and denied the plaintiff's motion. Subsequently, the jury returned a verdict in favor of the defendant, finding that the defendant did not fail to obtain informed consent from the plaintiff.

After the jury's verdict, plaintiff filed another motion for judgment as a matter of law. The Circuit Court again denied the plaintiff's motion. Plaintiff appealed the Circuit Court's decision to the West Virginia Supreme Court of Appeals.

During its argument to the Supreme Court of Appeals, plaintiff argued that the defendant did not present any evidence that would allow a jury to find that the defendant obtained informed consent from the plaintiff. In her brief to the West Virginia Supreme Court of Appeals, plaintiff submitted testimony from both parties, asserting that the testimony indicates that defendant failed to verbally advise the plaintiff of all of the risks and alternative treatments to having a total hysterectomy.

Defendant asserted that he testified before the jury that it is his normal practice to advise his patients of all the risks associated with a total hysterectomy. Defendant further asserted that his expert witness testified that defendant did not violate the standard of care in obtaining informed consent of the plaintiff.

In addition to considering the parties' arguments and briefs, the West Virginia Supreme Court of Appeals will review the trial transcript when determining this case. Additional Court Watch summaries will be provided as this case develops.

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<sup>1</sup> A motion for "judgment as a matter of law" is "a party's request that the court enter a judgment in its favor before the case is submitted to the jury, or after a contrary jury verdict, because there is no legally sufficient evidentiary basis on which a jury could find for the other party." *Black's Law Dictionary* (8th ed. 2004).