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Opinions of the United  
States Court of Appeals  
for the Third Circuit

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3-1-2002

## Ciaverelli v. Stryker Med

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

- - -

THERESA CIAVERELLI, : NO. 00-2873  
Appellant :  
 :  
v. : Philadelphia,  
 :  
 : February 4, 2002  
STRYKER MEDICAL, a division : Civ. No.99-cv-04745  
of STRYKER CORPORATION, :  
CONSTA CARE, JOHN DOE BED :  
MANUFACTURER, JOHN DOE BED :  
DISTRIBUTOR :  
. . . . .

Pennsylvania

BENCH OPINION  
BEFORE: HONORABLE EDWARD R. BECKER, CHIEF

JUDGE

UNITED STATES COURT OF APPEALS  
HONORABLE THEODORE A. McKEE  
UNITED STATES COURT OF APPEALS JUDGE  
THE HONORABLE MARYANNE TRUMP BARRY  
UNITED STATES COURT OF APPEALS JUDGE

- - -

APPEARANCES:

DEBBIE A. CARLITZ, ESQUIRE (ARGUED)  
Carlitz & Eisenberg  
826 Bustleton Pike, Suite 104  
Feasterville, PA 19053  
-- Counsel for Appellant

JOSEPH M. PROFY, ESQUIRE (ARGUED)  
ROBERT A. NICHOLAS, ESQUIRE  
Reed Smith Shaw & McClay  
2500 One Liberty Place  
1650 Market Street  
Philadelphia, PA 19103  
-- Counsel for Appellee

- - -

Transcribed by: Geraldine C. Laws, CET

(Proceedings recorded by electronic sound recording;  
transcript provided by AAERT-certified transcriber.)

1 (The following occurred in open court:)

conferred

2 THE HONORABLE JUDGE BECKER: The panel has

settled

3 and concluded that we are in as good a position to decide  
4 this case now as we will ever be. There is nothing here  
5 which requires a precedential opinion; the case simply  
6 involves the application of the facts of record to

the

7 principles, so there would be no point to our writing an  
8 opinion for publication. Accordingly I will now deliver

under

9 opinion and judgment of the Court from the bench. And

be

10 our practice this will be sent to a reporter and it will

form.

11 transcribed and ultimately filed of record in written

"Upon

12 This is an appeal from an order of the District

failure to

13 Court dated August 29th, 2000 which states only that

following

14 consideration of defendant's motion to dismiss for

2000,

15 comply with court orders compelling discovery, and

16 telephone conference call in this matter on July 18th,

17 and the expiration of a 30-day extension of time given to

18 plaintiff at that time, it is hereby ordered that the

19 defendant's motion to dismiss is granted and plaintiff's

See

20 Complaint is dismissed in its entirety with prejudice.

21 Federal Rule of Civil Procedure 37(b)(2)(C)."

this

22 It is the considered judgment of the panel that

23 articulation does not satisfy the rigorous standards

have

24 established by this Court for sanctions dismissals. We

25 made it clear that dismissal with prejudice is an extreme

3

1 sanction for only the most egregious cases. See, e.g.,

866

2 Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863,

drastic

3 (3rd Cir. 1984). We have said that "dismissal is a

there

4 sanction and should be reserved for those cases where

5 is a clear record of delay or contumacious conduct by the

F.2d

6 plaintiff. Donnelly v. Johns-Manville Sales Corp., 677

7 339, 342 (3rd Cir. 1982)."

the

8 Now, we understand that we review the order of

our

9 District Court for abuse of discretion which means that

10 review is deferential. But in deciding whether or not a

by

11 District Court has abused its discretion, we are guided

and  
six  
burden  
are

12 the manner in which the Court balanced the Poulis factor,  
13 whether the record supports its finding. Poulis laid out  
14 factors to be considered by District Court in determining  
15 whether to dismiss pursuant to Rule 37. I need not  
16 the record by listing the six factors, because all of us  
17 familiar with them.

in

18 The problem with the order of the District Court  
19 this case is that there has been no articulation by the  
20 District Court of the Poulis factors. And in similar  
21 situations where there has been no articulation, we have  
22 required a remand to the District Court. See, e.g.,  
Titus v.  
authored,

23 Mercedes Benz of North America, an opinion that I  
24 695 F.2d 746, 749 and 50 (3rd Cir. 1982).

District

25 Judge Joyner is a very able member of the

4

it  
case

1 Bench, a man whom we all admire and respect. But just as  
2 was said of the great Homer, that Homer nods, in this

note

3 Judge Joyner nodded and acted a little precipitously. I

4 that the panel is not certain that he had all the facts  
5 before him in terms of what plaintiff's counsel had done.

of

6 And indeed we have serious doubt that a clear balancing

7 the Poulis factors would have justified a dismissal,  
8 especially in light of the concession that counsel for  
9 appellee was constrained to make at oral argument this

the

10 morning that there really is no information other than

I

11 matter of the correct serial number of the bed, to which

have.

12 will turn in a moment, that the defendant does not now

the

13 Now, we will surely not pin any medals on  
14 plaintiff's counsel for celerity or diligence in getting

what

15 material to the defense. She acted here more like the  
16 tortoise than the hare, but ultimately she did get them

17 they needed.

notwithstanding

18 With respect to the serial number of the bed, it  
19 appears from our colloquy this morning that

with

20 the defense remonstrated that it has been five years and  
21 that she had all of this time, plaintiff's counsel  
22 represented that they fairly believed to have the correct  
23 serial number and were pursuing the location of the bed

24 the officials at St. Mary's Hospital, that they had made

not 25 requests for information, but were stonewalled and did

5

1 have an opportunity to pursue it by discovery because the  
2 sanctions dismissal intervened.

to 3 We have some doubts under the circumstances as  
4 whether the history of dilatoriness would justify  
sanctions.

faith 5 There does not appear to us to be willfulness and bad  
responsibility 6 on the part of the plaintiff's counsel or real

7 on the plaintiff. While we're not sure the Complaint is  
8 meritorious because we don't know what will happen with  
the 9 bed, we certainly cannot resolve this issue at this  
point.

bed 10 At all events, if plaintiff fails to locate the  
11 after discovery, this will be an appropriate matter for  
the 12 Court to take up on summary judgment.

constrain us 13 Accordingly, we conclude that our cases  
14 to conclude that the District Court abused its discretion  
in 15 ordering the case dismissed as a sanction. It made no

not  
16 findings, it did not do the balancing, and it indeed did  
17 conclude that lesser sanctions would better serve the  
18 interests of justice which is another of our  
requirements.  
19 Whether or not lesser sanctions are in order in this case  
is  
20 a matter that we leave to the District Court on remand.  
21 Appellee's counsel has pointed out that some of the cases  
22 that plaintiff has cited and that I have adverted to in  
this  
23 bench opinion were cases where the dismissal was sua  
sponte,  
24 but those opinions nonetheless clearly set forth Circuit  
law  
25 and have been adopted in cases where the dismissal was  
not

6

1 sua sponte.  
2 Accordingly, the order of the District Court  
will be  
3 reversed and the case remanded to the District Court for  
4 further proceedings. Costs will be taxed against the  
5 appellee. This constitutes the opinion and judgment of  
the  
6 Court, but the formal opinion and judgment will follow.  
7 Judge McKee, do you have anything to add or do  
you



8 concur in the opinion as delivered?

add. 9 HONORABLE JUDGE McKEE: I concur; nothing to

10 HONORABLE JUDGE BECKER: Judge Barry?

add. 11 HONORABLE JUDGE BARRY: I concur; nothing to

12 HONORABLE JUDGE BECKER: Very well.

in 13 Thank you, and the crier will notify whoever is

much. 14 charge of processing bench opinions. Thank you very

15 (Conclusion of bench opinion)

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TO THE CLERK:

Please file the foregoing Opinion.

BY THE COURT:

/s/ Edward R. Becker  
Chief Judge

