

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001748-MR

R. V. PERKINS;
ROBERTA PERKINS

APPELLANTS

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 99-CI-00146

ABEX CORPORATION

APPELLEE

AND

NO. 2005-CA-002141-MR

R. V. PERKINS;
ROBERTA PERKINS

APPELLANTS

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 99-CI-00146

DAIMLERCHRYSLER CORPORATION;
LEAR SIEGLER, INC.; OWENS
CORNING FIBERGLAS CORP.;
WAGNER ELECTRIC COMPANY; DANA CORPORATION;
BORG-WARNER CORPORATION; GARLOCK, INC.;
THE LINCOLN ELECTRIC COMPANY; ROSS
BROTHERS CONSTRUCTION COMPANY; RAPID-
AMERICAN CORPORATION; ARMSTRONG WORLD
INDUSTRIES; UNITED STATES GYPSUM CO.;
FLEXITALLIC, INC.; GAF CORPORATION;

APPELLEES

GENERAL ELECTRIC COMPANY; ANCHOR
PACKING COMPANY

OPINION
VACATING AND REMANDING

** ** *

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: R. V. Perkins and Roberta Perkins appeal from orders of the Pulaski Circuit Court dismissing their complaint against the appellees alleging injuries due to R.V.'s occupational exposure to asbestos. Because the circuit court failed to make adequate findings in support of dismissal pursuant to *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991), and *Toler v. Rapid American*, 190 S.W.3d 348 (Ky. App. 2006), we vacate and remand.

On February 18, 1999, the Perkinses filed a complaint against numerous defendants, including the appellees herein, alleging that R. V. had sustained injuries due to his occupational exposure to asbestos. The complaint contended that the defendants had caused R.V.'s exposure to asbestos.

One of the few substantive steps taken in the case occurred shortly thereafter when, on May 4, 1999, the Perkinses filed their response to a discovery request served by one of the defendants. A substantial period of time followed in which no substantive steps were taken.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

At various times during the pendency of this action, several of the defendants filed for bankruptcy.² Further, in December 2001, DaimlerChrysler Corporation sought removal to federal court. On November 20, 2002, DaimlerChrysler filed a status report stating that the Perkinses' claim against it had been remanded back to the Pulaski Circuit Court.

It appears that it was not until 2004 that another substantive step was taken in the case when, on June 25, 2004, the Perkinses filed a response to General Electric Corporation's request for admissions. Another period of inactivity then ensued.

On June 1, 2005, a little less than a year subsequent to the last substantive step, Abex Corporation filed a motion to have the lawsuit, as against itself, dismissed for lack of prosecution pursuant to Kentucky Rules of Civil Procedure (CR) 41.02. The same day, the Perkinses filed a motion for a pretrial conference and trial date. A hearing on Abex's motion to dismiss was held on July 1, 2005. On July 27, 2005, the circuit court entered an order dismissing the Perkinses' claim against Abex with prejudice. The Perkinses subsequently filed their notice of appeal from that order. (Appeal No. 2005-CA-001748-MR).

On August 19, 2005, DaimlerChrysler filed a similar motion to dismiss pursuant to CR 41.02. On September 16, 2005, the circuit court entered an order granting not only DaimlerChrysler's motion to dismiss but also dismissing all defendants to the

² In their notice of appeal, the Perkinses state "it is understood by the Perkins that some of the above defendants are currently in bankruptcy, including Owens Corning Fiberglas Corp.; Armstrong World Industries; United States Gypsum Co.; Flexitallic, Inc., and GAF Corporation."

litigation. The Perkinses subsequently filed their notice of appeal from that order.
(Appeal No. 2005-CA-002141-MR).

Because Appeal No. 2005-CA-001748-MR and Appeal No. 2005-CA-002141-MR concern the same underlying circuit court lawsuit and share a common factual and procedural background, we address both appeals herein.

The Perkinses contend that the circuit court erred in dismissing each of the defendants to the case without proper consideration of the factors contained in *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991). We agree.

The circuit court's July 27, 2005, order states, in its entirety, as follows:

This matter being before the Court on Defendant Abex Corporation's ('Abex') Motion to Dismiss for Lack of Prosecution, the Court having heard arguments of counsel and being otherwise sufficiently advised,

This Court has analyzed the factors in Ward v. Housman, 809 S.W.2d 717 (Ky.App 1991) and determined that they favor dismissal. Therefore, IT IS ORDERED AND ADJUDGED that Abex's Motion be and hereby is GRANTED. Plaintiff's claims against Abex are DISMISSED with PREJUDICE. This is a final and appealable order and there is no just cause for delay.

Similarly, the circuit court's order of September 16, 2005, dismissing the remaining defendants stated, in its entirety, as follows:

This matter being before the Court on Defendant DaimlerChrysler Corporation's f/k/a Chrysler Corporation ("DaimlerChrysler") Motion to Dismiss for Lack of Prosecution, the Court having heard arguments of counsel and being otherwise sufficiently advised,

IT IS ORDERED AND ADJUDGED that DaimlerChrysler's Motion to Dismiss for Lack of Prosecution is GRANTED.

Plaintiff's claims against DaimlerChrysler and Plaintiff's claims against all remaining Defendants, Lear Siegler, Inc., Owens Corning Fiberglas Corp., Owens-Illinois, Inc., Wagner Electric Company, Dana Corporation., Borg-Warner Corporation, Garlock, Inc., the Lincoln Electric Company, Ross Brothers Construction Company, Rapid-American Corporation, Armstrong World Industries, Inc., United States Gypsum Co., General Electric Company, Anchor Packing Co., Flexitallic, Inc., and GAF Corporation are hereby DISMISSED in their entirety WITH PREJUDICE. This Order is entered Nunc Pro Tunc, retroactive to July 27, 2005. This is a final and appealable order and there is no just cause for delay.

Dismissals for lack of prosecution pursuant to CR 41.02 and CR 77.02 are reviewed under an abuse of discretion standard. *See Midwest Mutual Insurance Co. v. Wireman*, 54 S.W.3d 177, 179 (Ky.App. 2001); *Wright v. Transportation Cabinet*, 891 S.W.2d 412, 413 (Ky.App. 1995). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky.2004) (citations omitted); *see also Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). "The power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process." *Nall v. Woolfolk*, 451 S.W.2d 389, 390 (Ky. 1970).

However, dismissal of a case pursuant to CR 41.02 "should be resorted to only in the most extreme cases" and we must "carefully scrutinize the trial court's exercise of discretion in doing so." *Polk v. Wimsatt*, 689 S.W.2d 363, 364-65 (Ky.App. 1985). The rule permitting a court to involuntarily dismiss an action "envisions a consciousness and intentional failure to comply with the provisions thereof." *Baltimore & Ohio Railroad Co. v. Carrier*, 426 S.W.2d 938, 940 (Ky. 1968). Since the result is

harsh, “the propriety of the invocation of the Rule must be examined in regard to the conduct of the party against whom it is invoked.” *Id.* at 941.

Moreover, it is incumbent on the trial court to consider each case “in light of the particular circumstances involved; length of time alone is not the test of diligence.” *Gill v. Gill*, 455 S.W.2d 545, 546 (Ky. 1970). In addition, the court should determine whether less drastic measures would remedy the situation, especially where there is no prejudice to the party requesting dismissal. *See Polk*, 689 S.W.2d at 364-65; *Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky.App. 2006).

In the *Toler* case, a panel of this court stated:

Further factors relevant to whether the court should dismiss an action with prejudice can be found in *Ward v. Houseman*, 809 S.W.2d 717 (Ky.App. 1991). In *Ward*, this Court adopted the guidelines set forth in *Scarborough v. Eubanks*, 747 F.2d 871 (3d Cir.1984) for determining whether a case should be dismissed for dilatory conduct under Rule 41(b) of the Federal Rules of Civil Procedure-the counterpart to our CR 41.02(1). We specifically held that the following factors should be considered: (1) the extent of the party's personal responsibility; (2) the history of dilatoriness; (3) whether the attorney's conduct was willful and in bad faith; (4) the meritoriousness of the claim; (5) prejudice to the other party; and (6) the availability of alternative sanctions. *Ward*, 809 S.W.2d at 719.

Id. at 351.

While the circuit court's July 27, 2005, order refers to the court having considered the factors set forth in *Ward*, the conclusory nature of this statement precludes us from undertaking any meaningful review of the circuit court's decision. Further, the September 16, 2005, order omits any reference to *Ward*. Accordingly, we find ourselves

hesitant to affirm or reverse the trial court because the record is unclear as to whether the *Ward* factors were properly considered.³ *See Toler, supra.*

While the parties discussed the *Ward* factors in their briefs and urge that the factors compel a decision in their respective favor, the responsibility to make findings concerning the *Ward* factors before dismissing a case with prejudice falls solely upon the circuit court. *Id.* Accordingly, even though we understand and sympathize with the court's desire to move the cases on its docket along in a timely and expeditious manner, we find ourselves compelled to vacate its orders as to dismissal here and to remand this action for further consideration in light of *Ward*.⁴ In doing so, we express no view as to whether dismissal with prejudice will ultimately be merited.

For the foregoing reasons, we vacate the orders of the Pulaski Circuit Court dismissing the Perkinses claims and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

³ The July 27, 2005, order contains a notation that the order was “submitted by” counsel for Abex, which we construe as prepared and tendered by counsel.

⁴ Upon remand the circuit court should also make findings identifying any parties who may be in bankruptcy, if any, and factor their bankruptcy status into its consideration concerning the appropriateness of dismissal.

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LINCOLN ELECTRIC COMPANY;
GARLOCK, INC.; ANCHOR PACKING
COMPANY; BURNS INTERNATIONAL
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