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OCTOBER 15, 2008
(FILE NO. 2008-SC-0077-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001370-MR

TINA B. CONNER — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-01428

PAUL PATTON, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

[1] Senior Judge Daniel T. Guidugli, 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.

VANMETER, JUDGE: Tina Conner appeals from the Franklin Circuit Court's order denying her motion to amend her complaint, and granting Paul Patton's motion to dismiss her action. For the following reasons, we affirm.

As set forth in this court's previous opinion in *Conner v. Patton*, 133 S.W.3d 491, 492 (Ky.App. 2004), this matter arose

> out of the sexual relationship which the parties admit existed between Conner and Patton during a portion of the latter's tenure as governor. During that time, Conner was a Democratic "political contact person" in Hickman County. She also was the owner/operator of a nursing home which was licensed and regulated by the state, and she was a partner in a construction company. According to Conner's brief on appeal, she terminated her relationship with Patton and then found that her construction business "no longer had access to public construction projects and her nursing home suffered from a pattern of harassment from agencies" under Patton's control, eventually leading to the closing of the nursing home.
>
> Conner filed this action against Patton and the Commonwealth, raising various claims including sexual harassment, intentional infliction of emotional distress, outrage, defamation and waste. The trial court eventually dismissed all claims against the Commonwealth. The court also dismissed the sexual harassment and waste claims against Patton, both individually and in his official capacity.

Conner appealed but this court affirmed the circuit court's dismissal of those claims. During the pendency of that appeal, the circuit court also entered a final and appealable order dismissing Conner's defamation claim against Patton, from which Conner did not appeal. Thus, Conner's only remaining claim was one for intentional infliction of emotional distress (IIED) against Patton.

However, Conner then moved the circuit court for leave to file a second amended complaint.[2] In his response to Conner's motion to amend her complaint, Patton

[2] After Conner filed her initial complaint, she filed a first amended complaint before any responsive pleading was served pursuant to Kentucky Rules of Civil Procedure (CR) 15.01.

moved to dismiss her claim for want of prosecution or, in the alternative, for judgment on the pleadings. The circuit court granted Patton's motion to dismiss pursuant to CR 41.02(1) for failure to prosecute, dismissed Conner's IIED claim, and denied her motion to amend her complaint. The circuit court also denied Conner's motion to alter, amend, or vacate its order. This appeal followed.

I. Motion to Amend Complaint

Conner argues that the circuit court erred by failing to allow her to amend her complaint to include claims based on the following: violation of KRS 522.020 and KRS 522.030; violation of her right to freedom of speech under the First Amendment and §§ 1 and 8 of the Kentucky Constitution; violation of her rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment; violation of the Ninth Amendment; and slander *per se*. We will address each claim in turn, keeping in mind the appropriate standard of review.

Pursuant to CR 15.01, a party may amend her complaint after a responsive pleading is served "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." In determining whether to permit a party to amend his complaint, a circuit court "may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself." *First Nat'l Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky.App. 1988).[3] Whether an amendment would prejudice the opposing party or would work an injustice may also be considered. *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 493 (Ky. 1983). Ultimately, whether a party may amend his complaint is discretionary with the circuit

[3] Conner argues that this court cannot consider the futility of amendment because the circuit court did not base its conclusions on that factor. However, we may affirm for any reason sustainable by the record. *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky.App. 1991).

court, and we will not disturb its ruling unless it has abused its discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky.App. 2000) (quoting *Graves v. Winer*, 351 S.W.2d 193, 197 (Ky. 1961)).

A. Violation of KRS 522.020 and KRS 522.030

KRS 522.020 and KRS 522.030 prohibit public servants from committing official misconduct. Conner alleges that if she can prove Patton violated one of these statutes, she is entitled to damages pursuant to KRS 446.070, which provides:

> A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

KRS 446.070 does not create a new theory of liability. *Toche v. American Watercraft*, 176 S.W.3d 694, 698 (Ky.App. 2005). Rather, the statute "merely codifies the common law concept of negligence *per se*." *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 99 (Ky. 2000). Such negligence is "a negligen[ce] claim with a statutory standard of care substituted for the common law standard of care." *Pile v. City of Brandenburg*, 215 S.W.3d 36, 41 (Ky. 2006).

Under Section 81 of the Kentucky Constitution, the governor is charged with the responsibility to "take care that the laws be faithfully executed." In *Baker v. Fletcher*, 204 S.W.3d 589, 595 n.16 (Ky. 2006), the Kentucky Supreme Court noted favorably "the proposition that a chief executive enjoys absolute immunity for official acts taken while in office." In the same vein,

> the discretion vested in the chief executive by the constitution and laws of the state respecting his official duties is not subject to control or review by the courts, and that his proclamations, warrants, and orders made in the discharge of his official duties are as much due process of law as the

> judgment of a court. It is therefore held that **a court cannot interfere with the executive actions of a governor, so long as they fall within the sphere of his lawful authority**[.]

38 Am.Jur.2d, *Governor* § 10 (1999) (emphasis added) (footnotes omitted).

As we read the record, the gravamen of Conner's complaint is that following her termination of their relationship, Patton no longer gave her favored treatment, but hurled the wrath of state government upon her nursing home business. The problem, however, is that Conner makes no allegation that the enforcement of laws and regulations regarding nursing homes was not within the purview of Patton's duties as governor. And, in fact, no such allegation could reasonably be made. *See* KY CONST. § 81. Unique among all officers of the executive branch, the governor alone is charged with constitutional responsibility to see that the laws are faithfully executed. Once a court determines that a governor's actions fall within his lawful authority, his motives are irrelevant; thus, for purposes of our review, it makes little or no difference whether Patton's motives in enforcing nursing home regulations were pure, *i.e.*, protection of the most vulnerable among our society, or impure, *i.e.*, the retribution of a spurned lover. The circuit court did not err by failing to permit Conner to amend her complaint to include a claim under KRS 446.070 for violation of KRS 522.020 and 522.030.

B. Freedom of Speech

Conner alleges in her proposed second amended complaint that she "exercised her constitutional right of free speech on matters of public concern relating to Patton's conduct," and that Patton's conduct infringed upon her constitutionally-protected interest in freedom of speech under the United States and Kentucky constitutions.

Further, Conner alleges that Patton's conduct led to the demise of a corporation in which she had an interest.

Conner's initial complaint alleged that shortly after she terminated any personal contact with Patton in October 2001, and before she filed her September 2002 complaint, he used his position as governor to make her the "target of harassment, retaliation and intimidate [sic] by the regulatory agencies of the executive branch of state government[.]" The conduct of which she complains therefore occurred prior to Conner's exercise of "her constitutional right of free speech on matters of public concern relating to Patton's conduct," *i.e.*, her speaking to the media around the time she filed her September 2002 complaint alleging Patton's misconduct. As such, Conner clearly cannot prove her claim that Patton's conduct was in retaliation for her exercise of free speech, and the circuit court did not err by denying Conner's motion to amend her complaint to include such a claim.

C. Fourteenth Amendment

In her proposed second amended complaint, Conner alleges that Patton's conduct unlawfully deprived her of her "liberty interests protected by the Due Process Clause of the 14th Amendment[.]" While Conner quotes a portion of the Fourteenth Amendment's text, her proposed amended complaint does not elaborate further upon this claim. We recognize that CR 8.01(1) simply requires a claimant to plead "a short and plain statement of the claim showing that the pleader is entitled to relief[;]" however, Conner's statement is wholly inadequate in that regard. The Fourteenth Amendment's Due Process Clause guarantees fair process, *i.e.*, procedural due process, as well as a "heightened protection against government interference with certain fundamental rights

and liberty interests[,]" *i.e.*, substantive due process. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2059-60, 147 L.Ed.2d 49 (2000). From reading Conner's proposed amended complaint, one cannot even discern, at the very least, which of these two avenues Conner intended to pursue. As such, the circuit court did not err by failing to permit Conner to amend her complaint to include this claim. *See Lee v. Stamper*, 300 S.W.2d 251, 253 (Ky. 1957) ("principal objective of a pleading is to give the opposing party fair notice of the essential nature of the claim presented").

Conner also alleges in her proposed second amended complaint that Patton's conduct unlawfully deprived her of her "rights protected by the Equal Protection Clause of the 14th Amendment[.]" Again, Conner quotes a portion of the Fourteenth Amendment's text but does not elaborate further upon this claim. The Fourteenth Amendment's Equal Protection Clause essentially directs "that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). To establish a claim for relief under the Equal Protection Clause, a plaintiff must show that "the government treated [her] disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Club Italia Soccer & Sports Org., Inc. v. Charter Township of Shelby, Mich.*, 470 F.3d 286, 298 (6th Cir. 2006). Here, Conner has not made any of the necessary allegations to succeed on such a claim. As such, the circuit court did not err by failing to permit her to amend her complaint to include this claim.

D. Ninth Amendment

Conner's proposed second amended complaint alleges vaguely in one count that "Patton's conduct unlawfully deprived Conner of her rights protected by the 9th Amendment to the U.S. Constitution."[4] While the proposed second amended complaint does not elaborate further, at oral argument Conner cited *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), in support of this claim. She argued that under *Roe*, her body is sovereign and that any interference or retaliation by Patton for her choice not to continue their sexual relationship is actionable. Our reading of that case, however, is that it instead recognizes that women's rights to personal privacy include the right to make certain decisions regarding the termination of pregnancies. 410 U.S. at 154, 93 S.Ct. at 727.

The Sixth Circuit has held that the Ninth Amendment "does not confer substantive rights in addition to those conferred by other portions of our governing law." *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991). Rather, it "was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius*[5] would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution." *Id.* Accordingly, Conner's Ninth Amendment claim holds no merit, and the circuit court did not err by failing to permit her to amend her complaint to include the claim.

E. Slander *Per Se*

Conner also alleges slander in her proposed second amended complaint, based on the fact that Patton told the media that her allegations were a "fabrication."

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[4] The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[5] This canon of construction holds "that to express or include one thing implies the exclusion of the other, or of the alternative." *Black's Law Dictionary* 602 (7th ed. 1999).

Conner contends further that Patton's comments are slanderous *per se* since they impute that she committed a crime, *i.e.*, she violated KRS 523.040, which makes one "guilty of false swearing when he makes a false statement which he does not believe under oath required or authorized by law."

Conner alleged defamation in her first amended complaint. The basis for her defamation claim was, in part, Patton's public denial of Conner's allegations in her initial complaint that a sexual affair occurred between the two. As set forth above, while Conner's first appeal was pending, the circuit court entered a final and appealable order dismissing her defamation claim. Conner did not appeal from that order.

In her proposed second amended complaint, Conner alleges slander, which is defamation communicated orally. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004). More specifically, Conner alleges that Patton accused her of violating the false swearing statute, KRS 523.040, and thus his actions are slanderous *per se*. *See id.* at 794-95 (words which impute crime are slanderous per se, carrying the presumption of damages). However, as Conner again bases her claim on Patton's comments to the media that her allegations were a "fabrication," the character of her claim has not changed.[6] Since the circuit court dismissed the claim once, and Conner did not appeal from that order, the circuit court did not err by failing to permit Conner to amend her complaint to again include the claim.

II. Intentional Infliction of Emotional Distress

[6] Conner's attempt at oral argument to distinguish her claims based on the fact that her initial defamation claim was based on Patton's accusation that she committed perjury, while her subsequent slander *per se* claim was based on his accusation that she committed false swearing, is erroneous. The claims are based on the same underlying facts.

Next, the circuit court did not err by dismissing Conner's cause of action for IIED.

A. Law of the Case Doctrine

As an initial matter, Conner argues that since Patton did not raise the sufficiency of Conner's IIED claim in the first appeal, the circuit court erred by subsequently dismissing her claim for IIED. Essentially, she argues that the law of the case precluded the circuit court from revisiting the issue. We disagree.

Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case." *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). Here, it is undisputed that Conner's IIED claim was not part of her first appeal, as the circuit court denied Patton's initial motions to dismiss insofar as they requested dismissal of the IIED claim. As such, the issue was not eligible for review by this court on appeal, and the law of the case doctrine did not preclude the circuit court from entertaining subsequent motions to dismiss Conner's IIED claim in the matter.

B. *Sua Sponte* Dismissal

We also disagree with Conner's argument that the circuit court erred by dismissing her IIED claim *sua sponte*. In Patton's response to Conner's motion to file her second amended complaint, he also moved the court to dismiss Conner's claims for lack of prosecution or, in the alternative, for judgment in his favor on the pleadings. In support of the latter argument, Patton argued:

> A) Defendant's alleged telephone calls do not support an intentional infliction of emotional distress claim because

> Plaintiff admits those calls were not intended solely to cause her emotional distress;
>
> B) Defendant's alleged phone calls were not so outrageous in character to constitute "outrage"; and
>
> C) The Plaintiff's allegations of regulatory retaliation are barred by the absolute immunity of the Governor from suits for money damages alleging official misconduct.

As such, it is apparent that Patton renewed his previous motion and prompted the court to dismiss Conner's IIED claim. Hence, the court did not act *sua sponte*.[7]

C. Dismissal of IIED Claim

As to the merits of the claim, Conner argues that the circuit court erred by dismissing her IIED claim. We disagree.

The elements necessary to prove IIED are: 1) the wrongdoer's conduct must be intentional or reckless; 2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; 3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and 4) the emotional distress must be severe. *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 65 (Ky. 1996) (citing *Craft v. Rice*, 671 S.W.2d 247, 249 (Ky. 1984)). As set forth in the *Restatement (Second) of Torts* § 46(1) cmt. d (1965), an actor is liable for IIED only when his

> conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the

[7] Part of Conner's *sua sponte* argument involves whether the circuit court erred by dismissing her IIED claim "[w]ithout the benefit of any proof or supporting affidavit[.]" This aspect of Conner's argument more aptly relates to the merits of the dismissal of Conner's IIED claim, as discussed in the following section.

> community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

In one Kentucky case, proof was sufficient to support an IIED claim where the defendant engaged in "a plan of attempted fraud, deceit, slander, and interference with contractual rights, all carefully orchestrated in an attempt to bring [plaintiff] to his knees[.]" *Stringer*, 151 S.W.3d at 789-90 (quoting *Willgruber*, 920 S.W.2d at 64-67, and detailing several instances where conduct was sufficient to support an IIED claim). On the other hand, outrageousness has been found to be lacking when the defendant "committed 'reprehensible' fraud during divorce proceedings by converting funds belonging to his spouse for the benefit of defendant and his adulterous partner[.]" *Id.* at 790 (quoting *Whittington v. Whittington*, 766 S.W.2d 73, 73-74 (Ky.App. 1989), and detailing several instances where conduct was insufficient to support an IIED claim).

Here, if we assume that Conner's allegations are true, once she and Patton became estranged, he stopped giving Conner's business favored treatment and further used his power to make her "the target of harassment, retaliation and intimidate [sic] by the regulatory agencies of the executive branch[.]" The fact that Patton was in a powerful position as the Governor of Kentucky, and that he therefore was able to express vindictiveness relating to their personal relationship in a manner which could interfere with her financial stability or career, does not elevate the situation to the level of outrageousness required for a plaintiff to recover on a claim for IIED. Accordingly, the circuit court did not err by dismissing Conner's claim for IIED.[8] *See Andrew v. Begley*,

[8] We do not hold that a successful IIED claim can never arise out of an estranged paramour's actions in the aftermath of a breakup. We simply hold that the actions alleged herein do not rise to that level.

203 S.W.3d 165, 173 (Ky.App. 2006) (circuit court must determine "whether the conduct complained of can reasonably be regarded as so extreme and outrageous as to permit recovery, bearing in mind that people are expected to withstand bad manners, petty insults, unkind words and minor indignities").[9]

III. Failure to Prosecute

Alternatively, the circuit court did not err by dismissing Conner's claim pursuant to CR 41.02(1) for failure to prosecute.

In deciding whether to dismiss for lack of prosecution, a court must consider the circumstances of each case. *Gill v. Gill*, 455 S.W.2d 545, 546 (Ky. 1970). While length of time is a factor to consider, it is not the only factor. *Id.* A court should also consider the following factors:

> 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) meritoriousness of the claim;
> 5) prejudice to the other party, and
> 6) alternative sanctions.

Ward v. Housman, 809 S.W.2d 717, 719 (Ky.App. 1991). Although dismissal of a case pursuant to CR 41.02 "should be resorted to only in the most extreme cases[,]" we will review the circuit court's decision "under an abuse of discretion standard." *Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky.App. 2006).

Further, in the context of this case, even if we were to determine that Patton's behavior was outrageous, Conner would have the same immunity hurdle to overcome, as noted in our discussion of KRS 522.020 and 522.030 above.

[9] While the circuit court dismissed Conner's IIED claim because she could not prove that Patton's actions "were intentionally taken to cause [her] emotional distress[,]" we may affirm for any reason sustainable by the record. *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky.App. 1991).

Here, Conner filed her initial complaint in this matter in September 2002. When the circuit court dismissed some of Conner's claims, as set forth above, she appealed to this court in January 2003. After the circuit court also dismissed Conner's defamation claim in January 2003, Conner's counsel withdrew from the case in April 2003. A second attorney entered his appearance for Conner in May 2003, but he too withdrew in December 2003. Thereafter, this court rendered an opinion in April 2004 affirming the circuit court's dismissal of some of Conner's claims. No documents were filed in the circuit court proceedings until Conner's third attorney entered his appearance and moved for leave to file a second amended complaint in October 2005. Later that month, Patton moved for the circuit court to dismiss Conner's action for lack of prosecution, and the circuit court ultimately did so in May 2006.

As such, Conner did not take any action in this matter, other than to change counsel, from January 2003, when she appealed the dismissal of several of her claims to this court and the circuit court further dismissed another of her claims, until October 2005, when her third attorney moved to amend her complaint. Thus, over two and one-half years passed in which the circuit court action did not advance.

A. Party's Personal Responsibility

Conner argues, however, that she was not personally responsible for much of this delay. Instead, she maintains that she was not required to proceed with her case either while her first appeal was pending before this court, or while her bankruptcy petition was pending. With regard to her first appeal, it is settled that if an appeal "does not bring the entire cause into the appellate court, but only sufficient of the record to present the issue as to the propriety of the particular order or judgment, further

proceedings in the conduct of the cause may properly be had in the lower court." *Garnett v. Oliver*, 45 S.W.2d 815, 816 (Ky. 1931). Here, then, when Conner appealed the dismissal of some of her claims to this court, she could have proceeded with her remaining claims in the circuit court. She was not obligated to wait until this court rendered its opinion in April 2004.

With regard to her bankruptcy petition, Conner apparently filed the petition in September 2004. In April 2005, the bankruptcy trustee abandoned Conner's IIED claim against Patton as it was "burdensome and of inconsequential value to the estate." Even if Conner was unable to personally prosecute her IIED claim against Patton until the bankruptcy trustee abandoned it, *see In re Cottrell*, 876 F.2d 540, 543 (6th Cir. 1989) (debtor's personal injury action was an asset of the bankruptcy estate; bankruptcy court did not err by substituting trustee's counsel for debtor's personal counsel), she did not take further action in the circuit court proceeding until six months after the bankruptcy trustee abandoned her IIED claim. The circuit court proceeding thus remained dormant for over two years after the first appeal was filed, excluding the time the claim was the bankruptcy trustee's asset.

Conner attempted to explain the delay in her affidavit, wherein she stated that when she was not represented by counsel, she "vigorously sought to retain counsel. [She] contacted no less than seventeen (17) attorneys attempting to retain counsel to represent [her] in this action." While we appreciate that Conner had difficulty in finding counsel, it was nevertheless her responsibility to pursue the matter.

B. The History of Dilatoriness

In regard to this factor, Conner's brief discusses the delays created by her pending first appeal and bankruptcy petition, as well as her vigorous search for counsel when she was not represented. These facts more aptly relate to whether Conner was responsible for the lengthy delay in the matter. *See supra* Part IIIA.

Instead, according to *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984),[10] this factor concerns matters such as whether a party failed to comply with time limits imposed by the rules and the court. There is no evidence that this factor is applicable to the matter now before us.

C. Whether Attorney's Conduct was Willful and in Bad Faith

We agree with Conner that this factor is not applicable to the matter at bar. The circuit court did not discuss this factor, and Patton has not advanced it as a reason to affirm the circuit court's decision.

D. Meritoriousness of the Claim

In analyzing this factor, "a claim will be considered meritorious when the allegations of the pleading, if established at trial, would support recovery by plaintiff." *Scarborough v. Eubanks*, 747 F.2d 871, 875 (3d Cir. 1984).[11] At this point, it will suffice to say that for the reasons set forth in Parts I and II above, this factor weighs in favor of the circuit court's dismissal of Conner's claim for lack of prosecution.

E. Prejudice to the Other Party

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[10] The Third Circuit decided *Poulis* on the same day as *Scarborough v. Eubanks*, 747 F.2d 871, 875 (3d Cir. 1984). *See infra* note 11.

[11] This court adopted the factors a circuit court should consider when ruling on a motion for involuntary dismissal from *Scarborough*. *Ward*, 809 S.W.2d at 719.

As the circuit court noted and as Patton argues, Patton has suffered prejudice in defending this action due to passage of time. Memories have faded, records lost.[12] We cannot say that the circuit court erred in so holding.

F. Alternative Sanctions

Conner expressly indicated in her brief that she declined to address this issue because the circuit court did not rely on this factor. However, the circuit court clearly concluded in its order that there were "no alternative sanctions which would enable the defendant to properly defend this action." Since Conner does not offer any suggestions to the contrary, we will not disturb the circuit court's conclusion and will weigh this factor in favor of the circuit court's decision.

G. Conclusion

It is clear from our review of the application of the *Ward* factors that the circuit court did not abuse its discretion by dismissing Conner's complaint for lack of prosecution. Despite Conner's assertion to the contrary at oral argument, a court need not find that all of the *Ward* factors support dismissal for failure to prosecute before the court may decide that the matter should be dismissed for that reason.

The Franklin Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT AND ORAL ARGUMENT:

William C. Jacobs
Lexington, Kentucky

BRIEF FOR APPELLEE:

Sheryl G. Snyder
Jason Renzelmann
Louisville, Kentucky

[12] Notwithstanding Conner's argument, not all of Patton's executive records are forwarded to the state archives for safekeeping. *See* KRS 171.710.

ORAL ARGUMENT FOR APPELLEE:

Sheryl G. Snyder
Louisville, Kentucky