

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001402-MR

DONNA GRIFFIN

APPELLANT

v. APPEAL FROM UNION CIRCUIT COURT
HONORABLE DENNIS R. FOUST, SPECIAL JUDGE
ACTION NO. 99-CI-00132

COMMONWEALTH OF KENTUCKY,
UNION COUNTY, KENTUCKY, A BODY
POLITIC; BY AND THROUGH ITS FISCAL
COURT; GEORGE L. DRURY, ESQUIRE, AS
AN INDIVIDUAL BEING THE FORMER
COUNTY ATTORNEY FOR UNION
COUNTY, KENTUCKY; SAM MCLEOD, AS
AN INDIVIDUAL, BEING THE FORMER
MAGISTRATE FOR UNION COUNTY,
KENTUCKY; AND JAMES D. VEATCH, AS
AN INDIVIDUAL, BEING THE FORMER
COUNTY JUDGE EXECUTIVE

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: TAYLOR AND THOMPSON, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Donna Griffin brings this appeal from a June 1, 2005, order dismissing her action for failure to prosecute under Ky. R. Civ. P. (CR) 41.02 and a January 9, 2006, order, denying Griffin's motion to vacate the June 1, 2005, order. We vacate and remand.

A review of the record reveals that the order dismissing Griffin's action under CR 41.02 was entered on June 1, 2005; however, the order itself states that it was signed on June 1, 2002, an apparent discrepancy of three years. Appellees argue that this discrepancy is nothing more than a clerical error, asserting that the order signed was a form order tendered by appellees at the time the motion to dismiss was filed on November 13, 2002. If, in fact, this was a clerical error or oversight by the circuit judge, it should have been corrected pursuant to CR 60.01, especially since this case remained in the circuit court for almost a year after entry of the order of dismissal, for consideration of Griffin's motion to vacate, which was filed on June 10, 2005. Given that any error in the order was not corrected in the court below, we are bound by the record before us that indicates the order was signed on June 1, 2002.

The order also specifically states that the “[c]ourt, having reviewed the record, and noted that plaintiff [Griffin] has taken no action since the court's order of October 19, 2001.” The record clearly refutes this statement; Griffin filed a notice of subpoena *duces tecum* on December 2, 2002, and a second amended complaint on December 22, 2003. Considering the obvious misstatement of fact in the order and the

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 21.580.

time discrepancy between the order's entry date and rendered date, we believe this action should be vacated and remanded to the circuit court for reconsideration of its dismissal under CR 41.02.² Additionally, the circuit court seemed to base dismissal solely upon lack of activity, and it is unclear whether the circuit court considered the factors outlined in *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991). See *Jaroszewski v. Flege*, 204 S.W.3d 148 (Ky.App. 2006). Thus, upon reconsideration, we urge the circuit court to render an order that more accurately reflects the record and to consider the factors in *Ward*, 809 S.W.2d 717. And, we remind the circuit court that it speaks only through its orders and official record. See *McDonald v. Whallen*, 415 S.W.2d 840 (Ky. 1967).³

For the foregoing reasons, the order of the Union Circuit Court is vacated and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Fox DeMoisey
Louisville, Kentucky

BRIEF FOR APPELLEES:

Marvin P. Nunley
Owensboro, Kentucky

² Our opinion, however, should not be misconstrued as passing upon the merits of dismissal under Ky. R. Civ. P. (CR) 41.02. We express no view thereupon.

³ While this Court maybe sympathetic to appellees' arguments that Donna Griffin has been dilatory in presenting this case, if dismissal is warranted under CR 41.02, the circuit court must consider the factors and follow the authority cited, which should be reflected in its order.