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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002543-MR

BRIAN JAROSZEWSKI and
AMY PAGE-JAROSZEWSKI — APPELLANTS

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 01-CI-00163

CHARLES FLEGE and
KAREN JAROSZEWSKI — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND STUMBO, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Brian Jaroszewski (hereinafter Brian) and Amy Page-Jaroszewski (hereinafter Amy) appeal the August 8, 2005, and November 2, 2005, orders

[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 21.580.

of the Grant County Circuit Court, granting Charles Flege's (hereinafter Charles) and Karen Jaroszewski's (hereinafter Karen) motions to dismiss under CR[2] 41.02. We affirm.

On June 9, 1999, Karen was operating an automobile southbound on Interstate 75 in Grant County, Kentucky. Brian and Amy were passengers in the vehicle, which had been leased by Amy from Alamo Rent-A-Car in the state of New York. Karen, Brian and Amy are all residents of New York State. Charles was also operating an automobile southbound on Interstate 75. The two vehicles collided. As a result, Brian and Amy were seriously injured.

On May 14, 2001, Brian and Amy filed a complaint against Charles and Karen, alleging negligence and seeking damages. Charles filed an answer and cross claim against Karen on May 29, 2001. Karen filed an answer to the original claim on June 15, 2001 and a reply to the cross-claim on June 26, 2001. Written discovery and requests for documents were served on the defendants.[3] On August 27, 2001, Karen filed her answers to the first set of interrogatories from Brian and Amy. Three days later, she filed her answers to Brian and Amy's request for production of documents. On October 12, 2001, Karen filed her answers to Charles' interrogatories and request for documents. On January 25, 2002, Alamo Rent-A-Car filed a notice in the record that they had filed bankruptcy and the civil action was to be stayed until further notification.

[2] Kentucky Rule of Civil Procedure.

[3] It is unclear exactly when these interrogatories were served, because no copies were filed in the record.

Various other pleadings were filed in the record over the next 20 months, including deposition notices, depositions, pleadings attempting to compel Brian to attend an independent medical evaluation and responses. On September 16, 2003, an order was entered requiring Brian to attend a defendant's medical evaluation. On February 17, 2004, Charles filed a notice of deposition of Karen and request of documents from Karen. On November 19, 2004, Charles filed his second[4] set of interrogatories and request for production of documents from Brian. No other documents were filed in the record, until June 10, 2005, when Karen filed a motion to dismiss for lack of prosecution and a memorandum in support thereof on June 10, 2005. On June 15, 2005, Brian and Amy moved to set the action for trial. On June 20, 2005, Charles filed a motion to dismiss for failure to prosecute. Brian and Amy filed responses to both motions to dismiss and on August 8, 2005, the court entered an order dismissing. Brian and Amy filed a motion to vacate and memorandum in support thereof, which was denied in an order entered November 5, 2005. This appeal followed.

CR 41.02 is initiated when a defendant moves for dismissal of an action because of the plaintiff's failure to prosecute. The rule reads in part:

> (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.
>
> . . .

[4] The document in the record is listed as the 'second set'. Any prior requests failed to be filed in the record.

> (3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule, and any dismissal not provided for in Rule 41, other than a dismissal for lack of jurisdiction, for improper venue, for want of prosecution under Rule 77.02(2), or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Dismissals for lack of prosecution pursuant to CR 41.02 are reviewed under the standard of abuse of discretion. *Toler v. Rapid American* 190 S.W.3d 348, 351 (Ky.App. 2006). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999); *see also Toler*, 190 S.W.3d at 351. Although the courts are vested with an inherent power to dismiss for lack of prosecution, such discretion is to be exercised with care.

> . . . dismissal of a case pursuant to CR 41.02 or CR 77.02 "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.

Toler, 190 S.W.3d at 351.

In *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991), a panel of this court addressed dismissals under CR 41.02. The lower court in *Ward* had actually issued a summary judgment as a sanctioning tool, an act which this court treated as an involuntary

dismissal under CR 41.02(1). Upon reversing the lower court's dismissal, this court stated:

> In ruling on a motion for involuntary dismissal, the trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial. *Scarborough v. Eubanks*, 747 F.2d 871 (3rd Cir.1984), gives a worthwhile guideline for analysis of these situations under Fed.R.Civ.P. 41(b), which is our counterpart rule on the federal side. Considering whether a case should be dismissed for dilatory conduct of counsel, it would be well for our trial courts to consider the *Scarborough* case and these relevant 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.
>
> *Id.*, pp. 875-878.
>
> Although CR 41.02(1) refers to dismissal of an action or a claim therein as the sole remedy for a violation of the rule, it is our conclusion that a sanction less than dismissal is also appropriate. Needless to say, the rule is subject to the sound discretion of the trial judge.
>
> It is our opinion that the trial court abused its discretion if the dismissal is one under CR 41.02(1). By dismissing the complaint for a one-time dilatory act of counsel when no other alternative sanctions were considered, the trial court

> inappropriately applied the "death sentence" to this civil action.

Ward, *supra*, at 719-720.

In the case before us now, the record discloses that Brian and Amy have failed to prosecute the action in a timely manner. Brian and Amy argue that the lower court failed to consider the factors of *Ward* prior to dismissing their claim. In support of their argument, they argued a lack of evidentiary proof that they alone were responsible for the totality of delays in getting the case to trial. Specifically, Brian and Amy cite to their repeated attempts to settle the action through mediation, evidenced through numerous documents between the parties. However, none of these documents made it into the record at the time they were created. Although the court considered them, it was only when the action was at risk of being terminated that these documents came to light. In fact, the record is devoid of any proof that much action has been taken at all towards a conclusion.

In its order denying Brian and Amy's motion to vacate the August 8, 2005 order dismissing, the Grant Circuit Court supported its decision by stating:

> In particular, the Court would note, from the Affidavit of Plaintiffs' counsel,[5] that after the depositions of the Plaintiffs on February 27, 2004, other than telephone conferences and some suggestion of mediation proposed by attorney for the Defendants, and discovery propounded to Plaintiffs by Defendants, and even though Plaintiffs' counsel indicates that they were taking actions to deal with various issues, there is

[5] This affidavit was included as an exhibit with the memorandum in support of motion to vacate the August 8, 2005, judgment.

> **no** affirmative action reflected by the file or by the affidavit of Plaintiffs' attorney that made any real progress toward moving this matter forward. Reviewing the file once again on this motion, this Court cannot fathom why this case has languished on the Court's docket for all these years. The only apparent explanation is a lack of interest on the part of the Plaintiffs themselves or on the part of the out-of-state counsel or both.

(emphasis in original).

The record reflects that since the filing of the complaint in 2001, the parties only filed one set of interrogatories and one set of answers. Court records serve as validation of the efforts, interactions and outcomes between parties. If either party fails to utilize the function of the record, it is to their own detriment. A trial court must consider each case in light of its unique circumstances without relying upon the passage of time as solely indicative of a lack of due diligence. *Gill v. Gill*, 455 S.W.2d 545, 546 (Ky. 1970). However, the record in this case, or lack thereof, speaks volumes to the diligence of the parties.

Brian and Amy emphatically argue that there were efforts between the parties to settle the dispute out of court in mediation. While meditation has often been praised by the courts as an alternative to the timely and costly practices of litigation, there is no duty of any party to partake in mediation. In their brief, Brian and Amy claim that talks of mediation first surfaced in April of 2003 and it was not until they realized that mediation was not an option that they attempted to set the matter for trial. This motion was in June of 2005, over 2 years since talks of mediation had begun. Clearly, the trial

court believed 26 months to be more than a sufficient amount of time for the parties to ascertain that mediation was not going to take place. We agree. Furthermore, since mediation is done outside of the courtroom and the law, there is no reason to believe that delays in discovery would have completely hindered the ability to mediate. Lastly, we think it important to note that there is no obligation on the part of the defendant to bring the case to trial or other disposition. *Gill, supra*, at 545. We see no abuse of discretion in the trial court's decision to dismiss this action.

For the foregoing reasons, the August 8, 2005 and November 2, 2005, orders of the Grant County Circuit Court are hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Penny Unkraut Hendy
Ft. Wright, Kentucky

BRIEF FOR APPELLEES:

Jack S. Gatlin
Williamstown, Kentucky

Edward J. Lorenz
Williamstown, Kentucky