

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2007-CA-000586-MR

JEAN ACTON

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 03-CI-010598 & 03-CI-009362

WILLIAM GEARY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Jean Acton appeals the February 27, 2007, involuntary dismissal of her breach of contract action against William Geary. We affirm.

These parties are before this court for a second time.<sup>2</sup> A more detailed account of the facts can be found in the first opinion and need not be repeated here. The

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<sup>1</sup> Senior Judge William L. Knopf 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.

<sup>2</sup> See *Acton v. Geary* 2005-CA-000402 (not to be published).

facts relevant to this appeal are as follows: sometime in 1995, Acton entered into multiple contracts with Geary, hiring him to perform roofing work on various properties that she owned in Louisville, Kentucky. After the completion of the work, Acton filed suit in Jefferson County Circuit Court, claiming that Geary's work on four properties was deficient. Acton sought damages for repairs to the faulty roofs, punitive damages and attorney's fees for fraud. The matter was heard on September 24, 2004. The trial court found in favor of Geary for the claims of fraud and punitive damages. The court then awarded Acton \$1,812.97 for damages to one of the properties,<sup>3</sup> but found for Geary on the other three.

Acton appealed the trial court's judgment of March 10, 2006, and a panel of this court rendered an opinion affirming the circuit court's judgment in part and reversing and remanding in part. Specifically, this court found that Acton was also entitled to damages for a second property.<sup>4</sup> The trial court was given instructions to take additional proof in an effort to determine what damages Acton should receive for the second property. Additionally, this court concluded that a recitation by Acton of an estimate would be insufficient to prove her damages.

After the case was remanded to the trial court, Acton filed a motion seeking the recusal of Judge Morris. The trial court conducted a hearing on Acton's motion and subsequently denied it. The matter was set for a hearing on February 1, 2007. At the hearing, Acton acted as her sole witness and provided repair estimates and product cost estimates as evidence of the damages due to her for the second property. On February

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<sup>3</sup> This property was located at 1131 Reutlinger Avenue.

<sup>4</sup> This property was located at 994 Goss Avenue.

27, 2007, the trial court entered an involuntary dismissal pursuant to CR<sup>5</sup> 41.02. This appeal followed.

Involuntary dismissals 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 courts are vested with an inherent power to dismiss for lack of prosecution in order to preserve the integrity and management of the judicial process, 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. The rule permitting a court to involuntarily dismiss an action envisions a consciousness and intentional failure to comply with the provisions thereof. 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.

*Toler*, 190 S.W.3d at 351 (internal quotations and citations omitted).

In her appeal, Acton makes two arguments: 1) the court should have recused due to abundant and unequivocal denial of her right to a fair and impartial trial; and 2) involuntary dismissal of her claim for damages was clearly erroneous and an abuse of discretion.

“The burden of proof required to demonstrate that recusal of a trial judge is mandated is an onerous one. It must be shown that the trial judge is prejudiced to a degree that she cannot be impartial.” *Brand v. Commonwealth*, 939 S.W.2d 358, 359

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<sup>5</sup> Kentucky Rules of Civil Procedure.

(Ky.App. 1997) ( internal citations omitted). In support of her argument that she did not receive a fair and impartial trial, Acton references the court's referring to her as a “lawyer and owner of forty-five rental properties.” We fail to see how this evidences an impartial trial. Both of these statements are fact. Furthermore, we do not believe, as Acton does, that they were used in an offensive or ridiculing manner. The trial court heard Acton's motion for recusal and appeared genuinely surprised at the offense taken by Acton. Quite frankly, so are we. Although Acton has shown that she was unhappy with the language of the court, she has failed to prove prejudice and we therefore affirm the trial court's decision to deny a motion for recusal.

Acton next argues that involuntary dismissal of her claim for damages was clearly erroneous and an abuse of discretion. In support of this argument, Acton references the testimony of her expert witness<sup>6</sup> regarding Geary's work performance. We fail to see how this is relevant. The manner in which Geary breached his contract, and any testimony thereto, is irrelevant at this point. It has already been decided that he did. The role of the trial court and the burden of Acton were clear from our prior opinion: the trial court was to hear evidence on the issue of damages to the second property and Acton was to prove them. The only evidence which Acton produced at trial was estimates. In its dismissal, the trial court stated:

[a]fter testifying, Plaintiff announced that she had no additional witnesses. Plaintiff did not present any admissible evidence to support a claim for damages as a result of Mr. Geary's breach of contract.

Acton argues that her requested amount of \$2,000 in damages would not make her whole.

While this may be true, it is still her duty to show the trial court how she arrived at this

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<sup>6</sup> This witness testified at the original hearing and did not reappear at the hearing which took place after this court's first opinion.

and any other figure. Furthermore, it has already been mandated that the use of estimates is an insufficient manner in which to do so.

Acton's final argument is that the dismissal was erroneous because it had been requested via Geary's motion for "directed verdict" and not "involuntary dismissal." She further argues error based on the trial court's failure to write its own findings of fact. In this situation, we feel that the wording of Geary's motion to dismiss is irrelevant. The trial court was given guidance via the Court of Appeals opinion and therefore did not require a motion in order to find Acton's proof insufficient. Geary's incorrect use of terminology does not change the fact that Acton failed to meet her burden. Furthermore, the dismissal was styled "Involuntary Dismissal Pursuant to CR 41.02." Therefore, we find the wording of the motion for dismissal to be harmless error.

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment.

CR 52.01.

Acton argues that because the trial court's findings of fact were tendered by Geary's attorney, that they are in violation of CR 52.01. We disagree. The Supreme Court of Kentucky has found that "the delegation of the clerical task of drafting proposed findings of fact and conclusions of law under the proper circumstances does not violate the trial court's responsibility." *Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982). Although the trial court in *Bingham* had made several changes to the proposed findings and conclusions, we believe it to be applicable to the case before us.

Careful scrutiny of the record reveals that the court was thoroughly familiar with the proceedings and facts of this case. . . . There has been no showing that the decision-making

process was not under the control of the trial judge, nor that these findings and conclusions were not the product of the deliberations of the trial judge's mind.

*Id.* at 629-30. Therefore, we find that, although not written by the trial judge, adopted findings become the findings of the court and, absent any showing of abuse of discretion, are an insufficient reason to warrant a reversal.

For the foregoing reasons, we affirm the February 27, 2007, order of the Jefferson County Circuit Court.

ALL CONCUR.

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