

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-001193-MR

DALE BATTS, EXECUTRIX OF  
THE ESTATE OF CHARLES BATTS

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 03-CI-00207

ILLINOIS CENTRAL RAILROAD CO.

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Dale Batts (Batts), as the executrix of the estate of her late husband, Charles Batts, appeals from the McCracken Circuit Court's order granting Illinois Central Railroad Company's (ICRR) motion to dismiss for failure to prosecute pursuant to CR<sup>1</sup> 41.02. For the following reasons, we affirm.

---

<sup>1</sup> Kentucky Rules of Civil Procedure.

In February 2003, Charles Batts filed a complaint in circuit court alleging that he contracted asbestosis as a result of his exposure to asbestos and asbestos-containing products during the course of his employment with ICRR, which ICRR denied. On April 27, 2004, the circuit court issued a notice of intent to dismiss the case for lack of prosecution pursuant to CR 77.02 unless good cause was shown otherwise. Upon receiving notice of Charles Batts' April 21, 2004 death and of Batts' intent to revive the action in her name, the court entered an order retaining the case on its active docket.

On April 21, 2005, exactly one year after Charles Batts' death, Batts moved for substitution and revival of the claim in the circuit court. On that same date, the Hickman District Court judge signed an order appointing Batts as the executrix of Charles Batts' estate. However, since that order was not provided to the district court clerk by Batts' counsel until nineteen days later, it was not entered into the record until May 10.

Meanwhile, ICRR moved to dismiss Batts' motion for substitution and revival on the ground that revival was barred by KRS<sup>2</sup> 395.278 as it did not occur within one year of Charles Batts' death. The circuit court dismissed Batts' motion as barred by the statute of limitations, holding that the April 21 order appointing her as the executrix did not become effective until it was entered into the record on May 10, over a year after Charles Batts' death. Batts' motion to vacate the judgment was denied. Thereafter, Batts appealed.

---

<sup>2</sup> Kentucky Revised Statutes.

On March 2, 2007, in Appeal No. 2005-CA-001594, a panel of this court reversed and remanded the circuit court's order on the ground that the April 21 order appointing Batts as the executrix of the estate became effective the day it was signed by the judge. Thus, Batts' motion for substitution and revival was not barred by KRS 395.278.<sup>3</sup>

ICRR then moved to dismiss the action on January 28, 2008 for failure to prosecute pursuant to CR 41.02(1). Batts responded and ICRR replied. Ultimately, the circuit court granted ICRR's motion and dismissed the case. This appeal followed.

CR 41.02(1) provides: "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." Since dismissal with prejudice deprives a litigant of the opportunity to pursue his or her claim, the trial court is obligated to consider all relevant factors and lesser sanctions. *Ward v. Housman*, 809 S.W.2d 717, 719 (Ky.App. 1991). "Involuntary dismissal of a case with prejudice 'should be resorted to only in the most extreme cases' and a reviewing court must 'carefully scrutinize the trial court's exercise of discretion in doing so.'" *Manning v. Wilkinson*, 264 S.W.3d 620, 624 (Ky.App. 2007) (quoting *Polk v. Wimsatt*, 689 S.W.2d 363, 364-65 (Ky.App. 1985) (citations omitted)).

Our review of a trial court's dismissal of an action pursuant to CR 41.02 is limited to whether the trial court abused its discretion. The test for abuse

---

<sup>3</sup> *Batts v. Illinois Cent. R.R. Co.*, 217 S.W.2d 881 (Ky.App. 2007).

of discretion is whether the trial judge's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Commonwealth, Cabinet for Health & Family Serv. v. Byer*, 173 S.W.3d 247, 249 (Ky.App. 2005) (citing *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

In *Ward v. Housman*, this court adopted the guidelines set forth in *Scarborough v. Eubanks*, 747 F.2d 871 (3<sup>rd</sup> 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 Kentucky's CR 41.02(1). *Manning*, 264 S.W.3d at 624. *Ward* specifically held that the following six 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. The responsibility to make such findings before dismissing a case with prejudice falls solely upon the trial court. *Manning*, 264 S.W.3d at 624 (quoting *Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky.App. 2006)).

Here, the circuit court addressed and applied the *Ward* factors to the particular circumstances of this case in a fifteen-page order, while remaining cognizant of the fact that dismissal of an action on the merits "is a drastic measure, and should be utilized cautiously and judiciously." *Natural Res. & Env't. Prot. Cabinet v. Williams*, 768 S.W.2d 47, 50 (Ky. 1989). Batts primarily argues that the case should not be dismissed because the trial court's order does not contain

“findings of fact” to support its conclusion. We find no support for this argument, however, since the order clearly contains adequate findings of fact, albeit not necessarily labeled as such.

In particular, the circuit court found that in the five years this case has been pending, Batts has filed only a complaint, a motion for substitution and revival, an appeal regarding the circuit court’s decision to dismiss for lack of prosecution pursuant to CR 77.02, and a response to ICRR’s January 2008 motion to dismiss pursuant to CR 41.02. Regarding the latter motion, Batts also argues that the case should not be dismissed because she had one year in which to show activity in the file from the case’s remand date of March 2, 2007. However, Batts cites no law to support this argument and no grounds exist for concluding that the one-year rule applicable to CR 77.02(2) motions similarly applies to CR 41.02 motions.

Pursuant to *Ward*, the circuit court held that Batts bears some responsibility for her voluntarily-selected counsel’s failure to timely prosecute the case, as a “litigant may not employ an attorney and then wash his hands of all responsibility.” *Gorin v. Gorin*, 167 S.W.2d 52, 55 (Ky. 1943). Moreover, the court found that minimal action taken by counsel in the five years this case has been pending evinces a history of dilatoriness, not a one-time dilatory act. Counsel’s nineteen-day delay in delivering a signed court order to the court clerk, counsel’s delay until the last possible day before filing a motion for substitution

and revival, and counsel's one-year delay in taking further action after the first appeal further evinces willful conduct and bad faith.

The court also found that the record lacks probative evidence addressing the merits of Batts' claim. Batts argues that her claim's merits were established by the fact that a complaint was filed, an x-ray of her husband's lungs was sent to a B-reader for interpretation, and the case is being pursued by counsel on a contingency basis. However, to date no x-ray has been produced and ICRR knows nothing about Batts' claim beyond the original allegations.

Since this case has been pending for five years with minimal action, the circuit court found that ICRR likely has been prejudiced by "irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive and possibly irremediable burdens or costs imposed." *Scarborough*, 747 F.2d at 876 (cited approvingly in *Ward*, 809 S.W.2d at 719). Such delay evidently burdened ICRR with an increasingly more difficult and expensive discovery process than if the claim had been prosecuted diligently. Given Batts' history of dilatoriness, and the absence of any reasonable excuse therefor, alternative sanctions to dismissal with prejudice were rejected. In so ruling, the circuit court did not abuse its discretion.

The order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Owens  
Paducah, Kentucky

BRIEF FOR APPELLEE:

L. Miller Grumley  
Paducah, Kentucky