

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-002289-MR

KEITH BRADLEY AND  
ROCKY ADKINS

APPELLANTS

v. APPEAL FROM WOLFE CIRCUIT COURT  
HONORABLE FRANK ALLEN FLETCHER, JUDGE  
ACTION NO. 07-CI-00024

ROSEMARY C. CREECH; RON CREECH;  
HANK JONES; GLENN SMITH;  
AND DAVID SPENCER

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND MOORE, JUDGES.

ACREE, CHIEF JUDGE: The appellants, Keith Bradley and Rocky Adkins, appeal from the circuit court's order dismissing their case, without prejudice, for failure to prosecute. The appellants argue that, because the statute of limitations had expired, the court's dismissal acted as a dismissal with prejudice and the trial court erred by failing to make findings of fact. The appellees argue that the

dismissal was made pursuant to Kentucky Rule of Civil Procedure (CR) 77.02(2), which does not require the court to make any findings of fact. Having reviewed the record, we vacate and remand.

### FACTS<sup>1</sup>

On July 30, 2006, the appellants were involved in an altercation with Glenn Smith and Hank Jones at the Silver Mine Saloon. The appellants allege that Smith and Jones were employed as “bouncers” at the Saloon, and that they used flashlights and a baseball bat to beat the appellants, causing severe injuries.

At the time, the Saloon was owned by Rosemary Creech and the appellants allege that Ron Creech and David Spencer also had ownership interests in the Saloon. According to the appellants, the Creeches and Spencer negligently failed to properly supervise Smith and Jones, thus contributing to the appellants’ injuries.

The appellants timely filed a complaint and amended complaint in 2007, and the parties timely filed answers. Throughout 2008, the parties conducted written discovery and, in March 2009, they took several depositions.<sup>2</sup> In the summer of 2010, the appellants changed attorneys. No other steps were taken until October 4, 2011, when the appellees filed a motion to dismiss for lack of prosecution. On October 5, 2011, the appellants filed a motion to set the case for

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<sup>1</sup> Because this case was dismissed before any significant discovery took place, we take our recitation of the underlying facts from the pleadings and the depositions of two of the parties.

<sup>2</sup> The transcripts of the depositions of Ron Creech and Keith Bradley are the only deposition transcripts in the record. It appears from the record that other depositions were taken; however, the transcripts of those depositions are not in the record.

trial, but did not otherwise respond to the motion to dismiss. On October 20, 2011, the court entered a handwritten docket sheet order stating as follows: “According to Mr. Harris [counsel for the appellees], case had been dormant for almost 18 months. Plaintiffs are incarcerated at present time, but represented by counsel, Mr. Anderson, Esq. Granted - see *Com v. Fireline* 486 S.W.2d 698 . . . It is ordered: case dismissed without prejudice.”

The appellants filed a motion to vacate the order dismissing. In their motion, the appellants argued that, because the statute of limitations had expired, the order had the effect of a dismissal with prejudice. They also argued that they were prepared to try the case and any delay in trying the case had not prejudiced the appellees. The court, again via a docket-sheet order, stated that the “Case remains dismissed without prejudice.” The appellants then filed this appeal.

#### STANDARD OF REVIEW

We review a trial court’s dismissal for failure to prosecute for abuse of discretion. *Manning v. Wilkinson*, 264 S.W.3d 620, 624 (Ky. App. 2007). A court abuses its discretion if its decision is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (citations omitted).

#### ANALYSIS

As noted by the parties, there are two relevant avenues by which a court can involuntarily dismiss an action. CR 77.02(2) provides that:

At least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made.

The purpose of CR 77.02(2) is “to expedite the removal of stale cases from the court's docket.” *Manning*, 264 S.W.3d at 622.

CR 41.02(1) provides that a defendant may move to dismiss a plaintiff's action for failure to prosecute. Unlike a CR 77.02(2) dismissal, a dismissal under CR 41.02(1) “operates as an adjudication upon the merits[,]” unless otherwise specified. CR 41.02(3).

The appellants argue that the court's dismissal was pursuant to CR 41.02(1) because “CR 77.02(2) is to be used only by the courts *sua sponte* and not by the parties.” We disagree. CR 77.02(2) does not limit the trial court's ability to dismiss only those inactive cases it has *sua sponte* identified. CR 77.02(2) simply indicates that the courts must undertake a yearly review to identify inactive cases and, once identified, the court may dismiss them without prejudice. Furthermore, Rule No. 14 of the Wolfe Circuit Court Local Rules provides that: “When any action has remained on the Civil Docket for one (1) year without any step being taken indicating an intention to prosecute said action, the action may be dismissed for want of prosecution on motion of either party or on the Court's own motion.”

Reading these two rules together, it is clear that the court may dismiss an action for failure to prosecute under CR 77.02(2) either *sua sponte* or on motion by a party.

However, that does not end our analysis. As noted by the appellants, because the statute of limitations had expired, the dismissal, even though it was without prejudice, acted to extinguish their cause of action. Therefore, the dismissal had the same impact as if it had been with prejudice. When a dismissal acts to extinguish a claim, whether the dismissal is with or without prejudice, the lower court must undertake an analysis consistent with *Ward v. Housman*, 809 S.W.2d 717, 719 (Ky. App. 1991). That is, the court must consider the following factors: (1) the extent to which the party is personally responsible for the failure to prosecute; (2) the history of dilatoriness; (3) the extent to which the conduct of the dilatory party's attorney was willful and in bad faith; (4) the extent to which the claim has merit; (5) the extent to which the party seeking dismissal has been or will be prejudiced; and (6) whether alternative sanctions are available. *Id.*

Because the court herein did not undertake that analysis, we vacate the order of dismissal and remand. On remand, the court must undertake the analysis set forth in *Housman* before determining whether to dismiss the appellants' action.

#### CONCLUSION

The court did not undertake the appropriate analysis before dismissing the appellants' action. Therefore, the court's order of dismissal is vacated and this matter is remanded with instructions that the circuit court undertake that analysis.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Frederick J. Anderson  
Lexington, Kentucky

BRIEF FOR APPELLEE:

James T. Harris  
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