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# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-001805-MR

HARRY COOPER, EXECUTOR OF THE ESTATE
OF ELIZABETH COOPER, AND HARRY COOPER — APPELLANTS

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 12-CI-00470

DANIEL R. TOWNER AND JAMIE ARMSTRONG — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND JONES, JUDGES.

CLAYTON, JUDGE: Harry Cooper, Executor of the Estate of Elizabeth Cooper, and Harry Cooper, individually, appeal the September 17, 2014 order of the Bullitt Circuit Court dismissing this case under Kentucky Rules of Civil Procedure (CR) 77.02 for lack of prosecution. After careful consideration of the record and the legal arguments, we affirm the order of dismissal.

Elizabeth Cooper,[1] now deceased, filed two separate lawsuits in Jefferson County and Bullitt County. The complaints alleged medical negligence on the part of two paramedics, Daniel R. Towner and Jamie Armstrong, and Regency Nursing, LLC d/b/a Regency Care and Rehabilitation Center ("Regency Care") which was added as a third party defendant by Towner and Armstrong. Sometime later, on August 22, 2014, the trial court in the Bullitt County case entered an agreed order dismissing the third-party complaint against Regency Care.

Notice was provided on July 28, 2014, that because no pretrial steps had been taken within the last year, the case would be dismissed by the trial court for lack of prosecution on September 15, 2014. On September 2, 2014, the Appellants responded to this notice and maintained that mediation was being sought in the case and that discovery had begun, and as such, they asked the trial court not to dismiss the case. Daniel R. Towner and Jamie Armstrong, the Appellees, responded to the Appellants' motion that they had taken no pretrial steps since February 11, 2013, and that the case should be dismissed for lack of prosecution.

On September 15, 2014, the trial court held a show cause hearing on the matter, and while the Appellees, as well as counsel for Regency Care, were present at the hearing, the Appellants did not appear. Consequently, on September 17, 2014, the trial court granted the order to dismiss for lack of prosecution pursuant to CR 77.02. The Appellants then filed a motion to set aside the order

[1] Ms. Cooper died during the pendency of the action, and the estate was substituted as the real party in interest.

based on their earlier response not to dismiss the case. Again, at the trial court's motion hour on September 29, 2014, they failed to appear. The trial court took the motion under submission and on October 7, 2014, entered an order denying the motion to reconsider.

Then, on November 7, 2014, the Appellants appealed from the September 17, 2014, and October 7, 2014 orders, dismissing the case for lack of prosecution.

## ISSUES

The issue on appeal is whether dismissal under CR 77.02(2) is appropriate. The Appellants argue that pretrial steps had been taken within the year of dismissal; that they submitted a response and affidavit responding to the CR 77.02 notice; that the dismissal, although ostensibly without prejudice, is "with prejudice" because the claims are now barred by the statute of limitations; and finally, that the trial court failed to perform an appropriate analysis of the requirements for such a dismissal.

The Appellees counter that the record shows that the Appellants took absolutely no pretrial steps of any kind for almost a year and a half prior to the trial court's show cause order. In fact, the Appellants' counsel failed to appear for the show cause hearing even after filing a motion to reconsider the dismissal.

## STANDARD OF REVIEW

We review dismissals for lack of prosecution pursuant to CR 77.02 under an abuse of discretion standard. *Toler v. Rapid American*, 190 S.W.3d 348,

351 (Ky. App. 2006). And, as observed in *Manning v. Wilkinson*, 264 S.W.3d 620, 624 (Ky. App. 2007), "[t]he power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process." *See Nall v. Woolfolk*, 451 S.W.2d 389, 390 (Ky. 1970). Further, "[t]he 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).

ANALYSIS

CR 77.02, states in pertinent part:

> (2) 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.

CR 77.02(2). This rule is commonly referred to as the "housekeeping rule," and is intended to expedite the removal of stale cases from the court's docket. *Hertz Commercial Leasing Corporation v. Joseph*, 641 S.W.2d 753 (Ky. App. 1982).

Under the plain language of the rule, the trial court is required once a year to review its cases and dismiss those in which no pretrial steps have been taken in the preceding year unless good cause is shown. *See Manning*, 264 S.W.3d at 623 (Citations omitted). Notably, however, the rule does provide that cases shall be dismissed "without prejudice." *Id*. at 622-23.

Appellees maintain that not a single pretrial step has been taken since February 11, 2013, when the motion to substitute Harry Cooper, Executor of the Estate of Elizabeth Cooper, as party plaintiff was entered. Nonetheless, Appellants proffer that the parties' agreed order entered on August 22, 2014, to dismiss Regency Care is an example of pretrial activity in the last year. We disagree. First, this agreed motion is not an example of a pretrial step like discovery. This action was a voluntary procedural action, agreed to by Regency Care and the Appellees to dismiss Regency Care. The motion to dismiss Regency Care was made by Regency Care. It was not an affirmative action by the Appellants. Indeed, the agreed order to dismiss Regency Care included only the Appellees and Regency Care.

In addition, the Appellants did not appear at either hearing on the CR 77.02 motion. The mere filing of an objection to dismissal for lack of prosecution is insufficient to stop dismissal under CR 77.02(2). As noted in the rule "The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made." CR 77.02(2). The trial court deemed the answer was insufficient even though Appellants had two opportunities to argue that the case should not be dismissed at both a hearing and at motion hour. Moreover, the Appellants reliance on *Ward v. Houseman*, 809 S.W.2d 717 (Ky. App. 1991), is misplaced. The factors discussed in *Ward* apply to involuntary dismissals under CR 41.02, and not those initiated by the trial court in accordance with CR 77.02. *Manning*, 264 S.W.3d at 624.

And our review of the record shows that Appellants have issued no written discovery and taken no depositions since April 2012. Further, the Appellees maintain that they made numerous attempts to move the case forward, and the Appellants were unresponsive. Indeed, the Appellees' brief claims that the Appellants ignored phone calls, letters, emails, a mediation request, and a good faith settlement offer. The Appellants contend that the Appellees are not allowed to reference these attempts at communication because they are not part of the record. However, these allegations are part of the record since they were cited in two separate filings of the Appellees responding to Appellants' motions not to dismiss the action.

The last order entered was on February 12, 2013, when an order substituted Harry Cooper, as Executor of Elizabeth Cooper's estate, as the plaintiff. The next order was the July 28, 2014 order to dismiss for lack of prosecution. The motion to substitute the plaintiff was 17 months prior to the trial court's filing of the show cause notice. The Appellants have not established that any pretrial activity occurred or proffered a valid reason for not taking any steps.

Finally, this matter was not dismissed "with prejudice." The order dismissing under CR 77.02(2) clearly states that the action was dismissed "without prejudice." The statute of limitations has no bearing on this order as it is made under the auspices of CR 77.02. Any ramifications from the statute of limitations are the result of something other than this order. And the case cited by the Appellants to support their position is unpublished.

Therefore, the trial court used its discretion and determined that the Appellants had taken no steps in the action for over a year and demonstrated no rationale for not taking any steps. As a result, the trial court exercised its power of dismissal for lack of prosecution and dismissed the action. In doing so, the trial court did not make a decision that was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *See*, *English*, 993 S.W.2d at 945. Consequently, we affirm the decision of the Bullitt Circuit Court.

JONES, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, CONCURS IN RESULT AND WILL FILE SEPARATE OPINION.

ACREE, CHIEF JUDGE, CONCURRING: I fully concur in the majority opinion but write separately to express my understanding of this Court's prior ruling in *Bradley v. Creech*, 2011-CA-002289-MR, 2013 WL 3237697 (Ky. App. June 28, 2013).

In part, Appellants in the case now under review rely on *Bradley* for two propositions cited in the Kentucky Practice Handbook series: (1) "a defendant may move to dismiss a plaintiff's action for failure to prosecute"; and (2) "[w]hen a dismissal acts to extinguish a claim, whether the dismissal is with or without prejudice, the lower court must undertake an analysis" under *Ward v. Housman*. 22 Ky. Prac. Sum. Jdgmt. & Rel. Term. Motions §§ 6:15, 6:18 (citing *Bradley*).

The former point is nothing new. Authority to move for dismissal of unprosecuted cases has been part of our jurisprudence for well over a hundred

years. *Welch v. National Cash-Register Co.*, 103 Ky. 192, 44 S.W. 640, 641 (1898) ("proper for the court, on defendant's motion, to dismiss an action on account of the failure of plaintiff to prosecute same, but that is a privilege that the defendant may or may not exercise"). It is now expressly permitted under CR 41.02(1) ("For failure of the plaintiff to prosecute . . . a defendant may move for the dismissal of an action").

The second point is an overly broad expression of the intended ruling. In *Bradley*, we were reviewing the grant of a motion brought pursuant to Wolfe Circuit Court Local Rule 14. That local rule mirrors the language of CR 41.02(1) allowing a party to file a motion to dismiss for plaintiff's failure to prosecute; however, it fails to reference either CR 77.02(2) or CR 41.02(1). We expressly referenced both the local rule and CR 77.02(2) when we said: "*Reading these two rules together* . . . the court may dismiss an action for failure to prosecute under CR 77.02(2) either *sua sponte* or on motion by a party [and under such circumstances] the lower court must undertake an analysis consistent with *Ward v. Housman*[.]" *Bradley*, 2013 WL 3237697 at *2 (emphasis added).

Frankly and in retrospect, we[2] should have been clearer. The local rule upon which that case turned has the effect of eliminating a factor of great consequence distinguishing CR 41.02(1) from CR 77.02(2) – dismissal under the former is at the urging of a party defendant and dismissal under the latter is at the instigation of the court and court clerk. A lawyer filing a motion under CR 41.02(1) must comply

[2] As a matter of candor, the author of this opinion was also the presiding judge and author of *Bradley v. Creech*.

with CR 11 and must comport with ethical duties of candor to the court and fairness to opposing counsel and other parties. Furthermore, the order of dismissal "operates as an adjudication upon the merits" unless otherwise specified. CR 41.02(3).

On the other hand, a court and clerk who serves a notice pursuant to CR 77.02(2) are merely engaging in required administrative housekeeping by dismissing dormant matters without any duty to consider ramifications not brought to the court's attention by the negatively affected party in the form of "good cause shown" not to dismiss. That order of dismissal is always without prejudice and not upon the merits. CR 77.02(2).

A lawyer who files a motion under Wolfe Circuit Court Rule 14 also certainly owes the court his or her compliance with procedural rules and ethical duties, making such a motion far more akin to one brought pursuant to CR 41.02(1).

Therefore, Wolfe Circuit Court Rule 14, and any motion pursuant to it, shifts the analysis away from CR 77.02(2) and compels review as if the dismissal was pursuant to CR 41.02(1), whether with or without prejudice, thereby necessitating consideration of the totality of the circumstances, not simply application of the *Ward v. Housman* factors. *Jaroszewski v. Flege*, 297 S.W.3d 24, 36 (Ky. 2009) ("trial court must base its decision to dismiss under CR 41.02 upon the totality of the circumstances"). In my opinion, that is what we should have said

in *Bradley v. Creech*. While the outcome of that case would not have changed, our unpublished jurisprudence would have been clearer.

Notwithstanding *Bradley v. Creech* as rendered, I concur.

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