

RENDERED: MARCH 30, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2015-CA-001845-MR

JEFFREY DAVIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HON. A.C. MCKAY CHAUVIN, JUDGE  
ACTION NO. 13-CI-000507

M F ENTERPRISES

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, COMBS, AND TAYLOR.

TAYLOR, JUDGE: Jeffrey Davis brings this appeal from a November 3, 2015, order of the Jefferson Circuit Court denying Davis's timely Kentucky Rules of Civil Procedure (CR) 59.05 motion seeking to set aside an order entered by the circuit court on October 5, 2015, dismissing this case for want of prosecution pursuant to CR 77.02(2). For the reasons stated, we affirm.

## BACKGROUND

On January 20, 2013, Davis filed a personal injury complaint against M F Enterprises, Inc. (MF) for injuries he allegedly incurred when he tripped and fell at MF's pub in Louisville, Kentucky, on January 30, 2012. MF filed its answer on February 27, 2013. After filing the complaint, no activity occurred in the case for over a year, whereupon the circuit court, on May 13, 2014, issued a notice to dismiss the case for lack of prosecution pursuant to CR 77.02.

On June 12, 2014, Davis's counsel filed a one-sentence motion requesting a pretrial conference. On June 16, 2014, Davis filed a written response to the CR 77.02 notice explaining that "the reason for the delay in prosecuting this case . . . was that counsel for the Plaintiff had misplaced the Plaintiff's file, and had to reconstruct said file from the Court records."<sup>1</sup> The response also stated that MF's counsel did not object to "setting aside" the CR 77.02 notice of dismissal. On June 16, 2014, the trial court conducted a hearing on Davis's motion for a pretrial conference and later that same day, the circuit court issued an order denying Davis's motion.<sup>2</sup> The order did not reference the pending CR 77.02 dismissal notice and presumably said notice was satisfied as no order of dismissal

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<sup>1</sup> Interestingly, the record to be "reconstructed" at that time in the circuit clerk's office consisted of only ten pages.

<sup>2</sup> Only Jeffrey Davis's attorney appeared at that hearing, for which no videotape can be found in the record on appeal. Apparently, there was some improper service of notices early in this case by both Davis and the circuit clerk, which have no bearing on our resolution of this appeal.

was entered in June of 2014. The case was permitted to proceed on the court's docket.

The record again reflects that no action occurred in prosecuting this case for more than a year until August 25, 2015, when the circuit court issued a second notice to dismiss for lack of prosecution pursuant to CR 77.02. Neither party responded to this notice within thirty days, and the circuit court entered an order dismissing the case without prejudice pursuant to CR 77.02(2) on October 5, 2015. The record reflects that service of the order of dismissal was made upon Davis and his attorney.

Shortly thereafter, on October 15, 2015, Davis timely filed a motion under CR 59.05 to "set aside" the order of dismissal. Davis submitted a "memorandum" in support of his motion which contained seven numerical paragraphs which were identical to the same seven numerical paragraphs set forth in his response to the earlier CR 77.02 notice of dismissal filed with the court in June of 2014. Davis effectively asserted the same identical "excuses" for inaction that had been asserted almost sixteen months earlier in 2014.

On November 2, 2015, the circuit court conducted a hearing on Davis's CR 59.05 motion. Both parties were present by counsel. On November 3, 2015, the court entered an order denying the motion. This appeal follows.

## STANDARD OF REVIEW

CR 77.02 is essentially a “housekeeping rule,” the purpose of which is to expedite removal of stale cases from a court’s docket. *Honeycutt v. Norfolk Southern Ry. Co.*, 336 S.W.3d 133, 135 (Ky. App. 2011). Trial courts have wide discretion in dismissing cases under CR 77.02. *Id.* And, we review dismissals pursuant thereto under the abuse of discretion standard. *Wildcat Prop. Mgmt., LLC v. Reuss*, 302 S.W.3d 89 (Ky. App. 2009). Additionally, because this appeal arises from the denial of a CR 59.05 motion, our review as an appellate court is also under the abuse of discretion standard. *Bowling v. Ky. Dept. of Corr.*, 301 S.W.3d 478 (Ky. 2009). A trial court abuses its discretion when its decision is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Reuss*, 302 S.W.3d at 93 (quoting *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004)).

## ANALYSIS

We begin our analysis by examining the circuit court’s dismissal under CR 77.02. CR 77.02(2) reads as follows:

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.

Appellant's primary argument on appeal is that he did not receive the second notice of dismissal issued by the circuit court clerk on August 25, 2015. Although the notice reflects that it was sent by certified mail to counsel at his address, that mail was returned to the clerk on September 28, 2015, as undeliverable. We cannot ascertain from the record why it was not delivered or whether it was simply not accepted by counsel.

Regardless of the reason, it is immaterial to our analysis and the result reached in this case. As this Court has held previously, because hundreds of cases are disposed of under CR 77.02 each year in Kentucky, it is not feasible to place an onerous burden on the circuit clerks to personally guarantee that every attorney of record receives actual notice that a CR 77.02 dismissal is pending. *Honeycutt*, 336 S.W.3d 133.

In this case, appellant failed to show good cause why the case should not be dismissed. After avoiding dismissal for lack of prosecution in June of 2014 due to inaction for over a year, appellant took no affirmative action or discovery in the case up to the date of dismissal, October 5, 2015. In other words, almost sixteen months more of inactivity in the case occurred of which counsel for appellant had actual knowledge. The lack of good cause is further demonstrated in the memorandum submitted by appellant on October 15, 2015, to support setting

aside the dismissal order. The seven reasons or excuses given in the memorandum were the same seven initial reasons given in appellant's response filed in June of 2014. Frankly, we find these same excuses the second time around to be frivolous and perilously close to a CR 11 violation.

Additionally, Davis argues that the circuit court erred in not considering the six factors in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991), before dismissing this case. However, in *Jaroszewski v. Flege*, 297 S.W.3d 24 (Ky. 2009), the Kentucky Supreme Court held that the *Ward* factors apply to only dismissals with prejudice under CR 41.02(1), and not to a dismissal without prejudice under CR 77.02, as in this case. *Jaroszewski*, 297 S.W.3d 24. Moreover, CR 41.02 and CR 77.02 serve different functions under our rules and thus have different and distinct procedural requirements. *Manning v. Wilkinson*, 264 S.W.3d 620 (Ky. App. 2007). The dismissal in this case was entirely premised upon CR 77.02 and the order entered on October 5, 2015, clearly states that the case was dismissed without prejudice. Thus, the *Ward* factors or analysis were not applicable to this case.

Accordingly, the arguments asserted by Davis on appeal are without merit and the circuit court did not abuse its discretion in dismissing this case pursuant to CR 77.02.

For the foregoing reasons, the orders of the Jefferson Circuit Court dismissing this action are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mark Joseph Smith  
Louisville, Kentucky

BRIEF FOR APPELLEE:

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