RENDERED: JUNE 22, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000691-MR

RICHARD HOSKINS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 13-CI-002207

AUTO-OWNERS INSURANCE COMPANY
AND BYRON M. MASON — APPELLEES

AND

NO. 2017-CA-000579-MR

RICHARD HOSKINS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE,
ACTION NO. 16-CI-001768

AUTO-OWNERS INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: These consolidated appeals arise from the dismissal of two separate civil actions filed by Richard Hoskins seeking damages for personal injury resulting from a motor vehicle collision. Following a careful review, we affirm in both appeals.

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On April 30, 2011, Hoskins was injured when the automobile he was driving was struck in a secondary collision after a vehicle driven by Byron M. Mason ran a red light. At the time of the collision, Hoskins was acting in the course and scope of his employment. His employer was insured by Auto-Owners Insurance Company ("Owners Insurance"). On April 29, 2013, Hoskins sued Mason for his injuries and, asserting his damages would be in excess of the coverage provided by Mason's insurance coverage, sued Owners Insurance seeking underinsured motorists ("UIM") coverage. Answers were filed by Owners Insurance and Mason on May 14, 2013, and August 7, 2013, respectively. Although discovery was apparently occurring, no further action was taken on the record until November 4, 2014, when the trial court entered a notice to dismiss for

want of prosecution pursuant to CR[1] 77.02.[2] No pleadings were filed in response to the notice and on December 4, 2014, the case was dismissed without prejudice. For reasons unclear from the record, none of the parties received a copy of the final order.

More than a year later, Hoskins filed a motion to schedule a pretrial conference. Upon learning the matter had been dismissed, Hoskins moved to set aside the CR 77.02 dismissal, asserting he had been actively litigating a workers' compensation case arising from the same collision which had recently concluded thereby making the instant action ripe for prosecution. He further argued he had received neither the November 4, 2014, notice to dismiss nor the December 4, 2014, order, thus reversal was warranted. He believed no prejudice to the opposing parties would occur were the case to be reinstated. Finally, he alleged the notice and order of dismissal were contrary to the plain language of CR 77.02 as the rule allows dismissal when no pretrial action has been taken for one year, not the six months of inaction cited by the trial court. Mason and Owners

[1] Kentucky Rules of Civil Procedure.

[2] The notice stated:

> [t]o effectuate timely disposition of the above-styled action, you are hereby advised that the Order set forth below will be entered by the Court thirty (30) days from the date of entry of this Order unless there is filed in the record prior thereto a pleading, with affidavit, showing good cause why no steps have been taken of record herein for more than six months.

Insurance opposed the motion. Following a hearing, the trial court entered a nine-page opinion and order on April 13, 2016, denying the request to reinstate the action. Hoskins timely appealed.

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Five days after dismissal of his 2013 complaint, Hoskins filed suit against Owners Insurance, again seeking UIM benefits. Owners Insurance moved for summary judgment, asserting Hoskins' claim was barred by explicit language in the policy requiring a person seeking payment under UIM coverage "conform with any applicable statute of limitations applying to **bodily injury** claims in the state in which the **occurrence** took place." (Emphasis in original.) Owners Insurance posited the applicable limitations period was two years as set forth in the Kentucky Motor Vehicle Reparations Act ("MVRA").[3] Because no basic or added reparations benefits were paid, the limitations period expired on April 30, 2013, nearly three years before the instant complaint was filed. Hoskins responded, arguing the policy language did not link the limitations period to the MVRA, nor did it effectively restrict the fifteen-year period for general actions on written contracts. On February 3, 2017, the trial court granted summary judgment in favor of Owners Insurance. Hoskins' subsequent motion to reconsider was denied and he timely appealed.

[3] Kentucky Revised Statutes (KRS) 304.39-010 *et seq*.

In the interest of judicial economy, the two appeals were designated to be considered by the same merits panel. We address the merits of each appeal in this single Opinion.

Initially, in contravention of CR 76.12(4)(c)(v), Hoskins does not state how he preserved any of his arguments in the trial court.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (1987)). We require a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Further, in contravention of CR 76.12(4)(c)(iv) and (v) which require ample references to the trial court record supporting each argument, Hoskins' brief filed in 2016-CA-000691 contains not a single reference to the record, and the

brief filed in 2017-CA-000579—which was returned as deficient for failing to include ample references to the circuit court record—contains only two such references in the argument section.

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis,* 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the briefs or dismiss the appeals for Hoskins' failure to comply. *Elwell*. While we have chosen not to impose such a harsh sanction, we caution counsel such latitude may not be extended in the future.

We first are called on to determine the propriety of the trial court's CR 77.02 dismissal of the 2013 action for Hoskins' failure to timely prosecute the matter. We then must decide if the trial court's refusal to grant Hoskins' motion to reinstate the case was proper.

CR 77.02(2) is a "housekeeping rule." *Manning v. Wilkinson*, 264 S.W.3d 620, 622 (Ky. App. 2007). It requires each trial court in the Commonwealth to review all pending matters on its docket "at least once a year" to identify those cases in which "no pretrial step has been taken within the last year." CR 77.02(2). Upon identifying any such case, the trial court must then provide notice to the attorneys of record that "the case will be dismissed in thirty days for want of prosecution except for good cause shown." *Id*. If the attorneys

fail to answer the notice or provide an insufficient answer, the trial court is obligated to dismiss the action without prejudice. *Id*. "[T]he power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process." *Manning*, at 624 (quoting *Nall v. Woolfolk*, 451 S.W.2d 389, 390 (Ky. 1970)).

We review dismissals for lack of prosecution pursuant to CR 77.02 for an abuse of discretion. *See 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." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Hoskins argues the trial court erred in reducing the time of inactivity in the case necessary to require dismissal to six months instead of the one year as required under the rule. He contends pretrial steps had been taken in the case and, because it was not stale, dismissal was unwarranted.[4] We disagree.

[4] Hoskins advances several other reasons purporting to support reversal of the trial court's decision. However, they fall wide of the mark. Some of the arguments were never presented to the trial court and are improper to raise for the first time on appeal. *Elwell*. The remaining arguments are inapposite and warrant no discussion as they are premised on cases reviewing dismissals for lack of prosecution pursuant to CR 41.02—a rule with notably different requirements and results. *See Jaroszewski v. Flege*, 297 S.W.3d 24, 31 (Ky. 2009) (CR 77.02(2) dismissal, also known as an "administrative dismissal," is without prejudice; in contrast, CR 41.02 dismissal is with prejudice); *Manning*, 264 S.W.3d at 624 ("CR 41.02 and CR 77.02 serve different functions and thus have different and distinct requirements.").

Although the CR 77.02 notice issued by the trial court referenced a reduced period of six months of inactivity, under the facts of this case, any error in the language of the notice was harmless at best. This is so because the record clearly reflects the last activity of record occurred on August 7, 2013, when Mason's answer to the complaint was filed. The trial court did not issue the notice until November 4, 2014—meaning some fifteen months passed without activity of record on the matter. Further, Hoskins' contention pretrial steps had been taken because he had answered discovery requests in that time is unpersuasive. Even taking his assertions of activity as true, after filing the complaint Hoskins took no active steps to advance and prosecute his case prior to the trial court's notice to dismiss. The discovery he contends occurred was admittedly initiated by the defendants. Nothing was filed of record to notify the court the matter was not stagnant. Hoskins did not respond to the notice. Under these circumstances, we cannot say the trial court abused its discretion in dismissing the matter without prejudice for Hoskins' failure to prosecute.

Next, Hoskins argues the trial court erred in denying his motion to set aside the CR 77.02 order of dismissal. Although his motion did not specify the authority under which he sought relief, Hoskins now contends the motion was brought pursuant to CR 60.02(f) which permits a party to request relief from a judgment for "any other reason of extraordinary nature justifying relief." He alleges the trial court failed to consider all the facts and circumstances of the case

before denying relief, most notably his failure to receive either the notice or order dismissing the case.[5] We disagree.

In denying Hoskins' motion for relief, the trial court entered a nine-page opinion and order. That opinion and order recounted, in detail, the factual and procedural background, the arguments of each of the parties, and the appropriate legal standard to be applied. The trial court then completed its analysis and concluded none of the reasons raised in Hoskins' motion rose to the level warranting the extraordinary relief provided by CR 60.02(f). Relying on the holding in *Honeycutt v. Norfolk Southern Ry. Co.*, 336 S.W.3d 133, 135 (Ky. App. 2011), it concluded actual notice was not required under CR 77.02(2). Further, the fact Hoskins was focused on and actively pursuing his workers' compensation case was not a valid excuse for neglecting and failing to prosecute the instant action. With no other reasonably valid arguments being advanced, the trial court denied relief.

Contrary to his assertion, our review indicates the trial court clearly understood and considered all the factors of the case prior to denying Hoskins' motion. He has failed to persuade us otherwise or provide any reasonable argument warranting reversal. We are convinced there was no error.

[5] Hoskins again advances arguments not raised before the trial court or which are grounded on precedents examining CR 41.02 dismissals. As before, these arguments are improper and warrant no discussion.

We now turn to the grant of summary judgment in Hoskins' 2016 action brought solely against Owners Insurance. Hoskins argues, as he did below, that the policy language did not link the limitations period to the MVRA and the policy's attempt at restricting the time in which to file suit was ineffective. Thus, he contends the fifteen-year limitations period for general actions on written contracts is applicable, the action was timely filed, and the trial court erred in not so concluding. We disagree.

An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in determining no genuine issue of material fact exists and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698 (Ky. App. 2000)).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The narrow issue presented in this appeal is whether the limitations period set forth in the UIM policy is valid. The interpretation of a contract is a question of law. *Baker v. Coombs*, 219 S.W.3d 204, 207 (Ky. App. 2007). "In the absence of

ambiguity a written instrument will be enforced strictly according to its terms." *O'Bryan v. Massey-Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky. 1966). Courts will interpret the contract terms by assigning language its ordinary meaning without resort to extrinsic evidence. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000).

The crux of Hoskins' argument centers on his fixation with the word "any" from the policy's limitations provision, alleging use of that word makes the contract language expansive rather than restrictive. Hoskins believes since the policy references "any" statute of limitations applicable to "bodily injury," it is ambiguous, unreasonable and unenforceable. Further, because the MVRA is not specifically mentioned anywhere in the policy, he contends application of the two-year limitations period contained in KRS 304.39-230(6) would be improper. We disagree.

Hoskins' interpretation of the contract language is incomplete and erroneous. The restricting language in the policy expressly refers to "*any applicable*" limitations period. Hoskins focuses on the word "any" and completely ignores the word "applicable." This is improper. "Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible." *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986). To be "applicable" a statute of limitations must be suitable, appropriate and relevant. By the very nature of UIM claims, and as indicated by the language of the specific policy at issue

here, benefits are payable only for injuries arising from motor vehicle accidents. The only "applicable" statute of limitations would therefore be the MVRA's two-year limitation period found at KRS 304.39-230(6). Contractual limitations periods conforming to the flexible limitations period of the MVRA are reasonable and enforceable. *State Farm Mutual Auto Ins. Co. v. Riggs*, 484 S.W.3d 724, 727-28 (Ky. 2016). The limiting provision in the policy at issue is appropriately linked to the MVRA and is valid.

It is undisputed the accident occurred on April 30, 2011, and no basic reparations benefits were paid because Hoskins' medical expenses were paid by the workers' compensation insurance carrier. The window for filing suit for damages resulting from the accident closed on April 30, 2013. The instant action was filed on April 18, 2016, nearly three years outside the applicable limitations period. Clearly, Owners Insurance was entitled to judgment as a matter of law and the trial court did not err in granting the motion for summary judgment.

For the foregoing reasons, the judgments of the Jefferson Circuit Court in Civil Action Nos. 2013-CI-002207 and 2016-CI-001768 are AFFIRMED.

ALL CONCUR.

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