

RENDERED: August 13, 1999; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court Of Appeals**

No. 1998-CA-001650-MR

JACKIE WOLFINBARGER

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE DENNIS FRITZ, JUDGE  
CIVIL ACTION NO. 97-CI-00458

KENTUCKY DEPARTMENT OF CORRECTIONS,  
WALTER CHAPLEAU, WARDEN KENTUCKY STATE REFORMATORY,  
DOCTOR RISHI, DOCTOR MCCRACKLIN, NURSE RAISOR, and  
UNKNOWN EMPLOYEES & AGENTS OF KENTUCKY DEPARTMENT  
OF CORRECTIONS

APPELLEES

OPINION

REVERSING AND REMANDING

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BEFORE: GUDGEL, Chief Judge; HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Jackie Wolfinbarger brings this appeal from an order of the Oldham Circuit Court dismissing his civil complaint for failure to prosecute. We reverse and remand with directions to reinstate the complaint.

On October 4, 1995, Wolfinbarger filed a pro se civil complaint in Oldham Circuit Court naming the following defendants: Jack C. Lewis, commissioner of the Kentucky Department of Corrections; Walter Chapleau, warden of the Kentucky State Reformatory at LaGrange; Doctor Rishi, medical director at the Kentucky State Reformatory at LaGrange; Nurse Raisor [sic], a nurse at the Kentucky State Reformatory at LaGrange; Doctor McCracklin,

a doctor at the Kentucky State Reformatory at LaGrange; and unknown employees and agents of the Kentucky Department of Corrections. In the complaint, Wolfinbarger, who is a paraplegic, alleged that on October 30, 1994, he received a severe burn on his back when Nurse Resiner left him unattended for an extended period of time with a heating pad on his back. He alleged that Dr. McCracklin applied an "unknown purple medication" to the burns, which worsened his condition. After the burns failed to heal, Wolfinbarger was transported to a local hospital where he received a skin graft for the burn. He further alleged that he contracted a urinary infection because of the prison hospital's improper treatment of the burns. Wolfinbarger sought compensatory and punitive damages from the defendants for their alleged negligent medical treatment. Wolfinbarger also asserted that the defendants' conduct violated his constitutional rights.

On November 28, 1995, the Department of Corrections filed an answer admitting that Wolfinbarger had been hospitalized and had received a skin graft, but denying the majority of the allegations or that his constitutional rights had been infringed. In its answer, the Corrections Department stated that Dr. Rishi had retired from employment with Corrections and that Nurse Mary Resiner no longer worked at the Kentucky State Reformatory. In a subsequent motion, the Department of Corrections sought to withdraw waiver of service for Nurse Resiner because she was not an employee of the Department of Corrections.

In April 1996, a private attorney filed an entry of appearance notifying the circuit court that he would be

representing Wolfinbarger. In December 1996, however, Wolfinbarger's attorney filed a motion to withdraw from the case, which the trial court granted by order dated December 16, 1996. On January 7, 1997, Wolfinbarger filed a pro se motion to hold the civil action in abeyance given his attorney's withdrawal from the case. The Department of Corrections filed a response stating it had no objection to the motion to hold the action in abeyance. On January 10, 1997, the court granted the motion and ordered the case held in abeyance.

On March 4, 1998, the circuit court issued a notice to dismiss for lack of prosecution ordering the parties to show cause why the action should not be dismissed. On March 24, 1998, Wolfinbarger filed a response to the show cause order stating that he was having difficulty obtaining legal representation by a private attorney and requesting the appointment of a prison legal aide to represent him. On April 20, 1998, Wolfinbarger filed a motion to amend the complaint, and attached a new pleading entitled "Civil Rights Complaint with Jury Demand," and an affidavit. On April 23, 1998, Lawrence Froman, a prison inmate legal aide, filed a formal entry of appearance seeking a court order designating him as Wolfinbarger's "legal counsel." On May 8, 1998, the trial court denied Wolfinbarger's motion to file an amended complaint for failure to serve all the parties, and denied appointment or recognition of the inmate legal aide as counsel because he was not a licensed attorney.

On May 15, 1998, Wolfinbarger refiled his "Civil Rights Complaint" with an amended certificate of service indicating

service to all the defendants by mailing it to the Kentucky State Reformatory. At the same time, he filed a motion for discovery requesting the production of numerous prison documents. On June 3, 1998, the Department of Corrections filed a motion to dismiss for lack of prosecution pursuant to CR 41.02(1). On June 9, 1998, the trial court granted the motion to dismiss. This appeal followed.

Wolfinbarger challenges the trial court's dismissal of his complaint. Although the trial court's notice of dismissal for lack of prosecution apparently was initiated pursuant to CR 77.02(2), the Corrections Department's motion to dismiss for lack of prosecution was filed pursuant to CR 41.02(1). Given the trial court's order granting appellee's motion to dismiss, we will analyze the present appeal in light of the case law construing CR 41.02(1). See Polk v. Wimsatt, Ky. App., 689 S.W.2d 363 (1985) (discussing CR 41.02 and the former version of CR 77.02). The trial court's order did not indicate explicitly whether the dismissal was "with prejudice" or "without prejudice." However, CR 41.02(3) states that an order entered pursuant to CR 41.02 that fails to otherwise specify "operates as an adjudication upon the merits."<sup>1</sup> Therefore, the trial court's order granting the motion to dismiss will be treated as a dismissal with prejudice. See, e.g., Commonwealth v. Taber, Ky., 941 S.W.2d 463 (1997).

Generally, dismissal of an action upon a motion of the defendant pursuant to CR 41.02 is within the sound discretion of

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<sup>1</sup> In contrast, CR 77.02(2) states that a trial court "shall enter an order dismissing without prejudice . . ." CR 41.02(3) excludes a dismissal for lack of prosecution under CR 77.02(2) as a dismissal on the merits.

the trial court. Thompson v. Kentucky Power Co., Ky. App., 551 S.W.2d 815 (1977); Modern Heating & Supply Co., Ky., 451 S.W.2d 401 (1970). However, dismissal pursuant to CR 41.02 for failure to prosecute is an extreme remedy, and an appellate court "should carefully scrutinize the exercise of discretion in doing so . . . . Less drastic remedies, including dismissal without prejudice, would normally suffice to punish a dilatory, but not recalcitrant, party where the rights of other parties have not been prejudiced by the delay." Polk, 689 S.W.2d at 365. "Each case must be considered in the light of the particular circumstances involved and length of time is not alone the test of diligence." Gill v. Gill, Ky., 455 S.W.2d 545, 546 (1970). Factors relevant in considering whether a case should be dismissed for lack of prosecution include: "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) meritoriousness of the claim; 5) prejudice to the other party; [and] 6) alternative sanctions." Ward v. Housman, Ky. App., 809 S.W.2d 717, 719 (1991) (citing Scarborough v. Eubanks, 747 F.2d 871 (3rd Cir. 1984).

We believe the trial court acted prematurely in dismissing the case for lack of prosecution under CR 41.02. While Wolfinbarger's action has been pending for over four years, the record does not indicate that he has acted in bad faith or wilfully in not pursuing his complaint more diligently. In January 1997, Wolfinbarger filed a motion to hold the case in abeyance because his private attorney withdrew from the case. The Department of Corrections did not object, and the trial court granted the motion

to hold the case in abeyance without specifying any time limitation. When the trial court issued its notice to dismiss for lack of prosecution in March 1998, Wolfinbarger filed a response twenty days later asking the court not to dismiss the action because he had had difficulty finding a new attorney. A short time later, he also filed a motion to supplement the pleadings with an amended complaint. In May 1998, Wolfinbarger filed a motion for discovery seeking production of several documents from the Department of Corrections. The record also contains copies of letters to Wolfinbarger from several different attorneys declining to provide legal representation for him. The record indicates that in addition to his severe physical limitations, Wolfinbarger has a very limited education and relies heavily on the prison inmate legal aids.

The Department of Corrections contends that it has been prejudiced by the delay in prosecuting this action, but it has failed to provide specific information to support this contention. It alleges that three of the five individuals named in the original complaint no longer are employed by the Corrections Department, but it does not claim that they are unavailable. It also asserts that attempting to comply with Wolfinbarger's discovery requests would be "at best manifestly burdensome and at worse, impossible," again without providing any specifics.

In conclusion, we do not believe that the record in this case supports the drastic remedy of involuntary dismissal of Wolfinbarger's action with prejudice under CR 41.02. Without expressing an opinion on the validity of the complaint, we cannot

say that Wolfinbarger's action is totally without merit. The Department of Corrections consented to a portion of the delay by not opposing the motion to hold the case in abeyance, and it has failed to present a convincing argument of prejudice caused by the delay. Furthermore, it does not appear that the trial court considered alternative, less drastic sanctions to dismissal. Therefore, we hold that the trial court abused its discretion in dismissing the action for failure to prosecute.

For the foregoing reasons, we reverse the order of the Oldham Circuit Court, and remand for reinstatement of the complaint.

KNOPF, Judge, concurs.

GUDGEL, Judge, dissents without separate opinion.

BRIEF FOR APPELLANT:

Jackie Wolfinbarger, pro se  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Rebecca Baylous  
Department of Corrections  
Frankfort, Kentucky