

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002057-MR

SANDRA K. HONICAN; and  
GERALDINE COX

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA ISAAC, JUDGE  
ACTION NO. 98-CI-00312

ELLERSLIE CORPORATION  
D/B/A FREEDOM DODGE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUDGEL, Chief Judge; EMBERTON AND SCHRODER, JUDGES.

EMBERTON, JUDGE: The single issue in this appeal is whether the trial court erred in granting appellee's Kentucky Rules of Civil Procedure (CR) 41.02 motion to dismiss appellants' complaint for failure to prosecute the action. Having reviewed the arguments presented in light of the record, civil rules and case law, we affirm the order of dismissal.

The complaint was filed in Fayette Circuit Court on January 26, 1998. On June 15, 1999, an order issued under the housekeeping rule directing appellants to show cause why their complaint should not be dismissed for failure for a period of one

year to take steps indicating an intention to prosecute the action. After a hearing, the trial court granted appellants thirty days in which to demonstrate by affirmative action an intention to prosecute their claim. On August 23, 1999, appellants filed a motion requesting mediation, and on September 3, 1999, an agreed order was entered submitting the matter to mediation. There are no subsequent steps appearing of record until July 24, 2000, at which time appellee moved to dismiss under CR 41.02(1) for failure to prosecute the action.

At a hearing conducted on August 11, 2000, the trial court stated that when it gave appellants an additional thirty days to prosecute the action in July 1999, the court expected more than a perfunctory motion for mediation. The fact that the case languished for an additional ten months after the agreed mediation order of September 3, 1999, indicated to the trial court that no genuine effort had been made to fulfill the terms of its July 1999, order. No attempt to select a mediator or otherwise move the case forward had been undertaken until after appellee filed its July 2000, motion to dismiss. Thus, an order dismissing the case with prejudice was entered.

Relying primarily upon the opinion of this court in Ward v. Housman,<sup>1</sup> appellants argue that the trial court abused its discretion in failing to consider other less drastic sanctions than dismissal with prejudice. The flaw in appellants' contention lies in the fact that applying the guidelines approved by Ward, we cannot conclude that the trial court abused its

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<sup>1</sup> Ky. App., 806 S.W.2d 717 (1991).

discretion. In imposing what is clearly the most severe of sanctions, the trial court fully explained its reasoning. It had notified appellants that their case was in danger of dismissal for want of prosecution and had given them an opportunity to avoid that fate by taking steps within thirty days to move their case along. Their response to that grace period was to merely agree to mediation, without taking any further action to effect resolution of their case in that forum. On these facts, we cannot say that the trial court abused its discretion in dismissing appellants' complaint with prejudice.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Sam H. Whitehead  
Lexington, Kentucky

BRIEF FOR APPELLEE:

M. Scott Mattmiller  
Lexington, Kentucky