

RENDERED: SEPTEMBER 11, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2008-CA-001548-MR

DANNY CURRAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 07-CI-002733

UNIVERSITY MEDICAL CENTER, INC.;  
MAGDY ABASKARON, M.D.;  
LEELA BHUPALAM, M.D.; AND  
PATRICK HAN, M.D.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: Danny Curran (“Curran”) appeals from an order by the Jefferson Circuit Court which denied his motion to set aside the court’s dismissal of his complaint pursuant to Kentucky Rules of Civil Procedure (“CR”) 77.02. We agree

with the trial court that the dismissal was appropriate and that Curran failed to present any extraordinary grounds for relief under CR 60.02. Hence, we affirm.

The relevant facts of this action are not in dispute. On March 15, 2007, Curran filed a complaint against University Medical Center and Drs. Magdy Braskaron, Leela Bhupalam and Patrick Han (collectively, “the defendants”), alleging medical malpractice occurring on or about March 16, 2006. The defendants were never served with the complaint and Curran filed no additional pleadings for more than a year after filing of the action. On March 17, 2008, the trial court sent a notice, pursuant to CR 77.02, informing Curran that the action would be dismissed unless he filed an affidavit explaining why no steps had been taken for more than one year. Curran did not reply to the notice and the trial court dismissed the action without prejudice on April 17, 2008.

On August 4, 2008, Curran filed a motion pursuant to CR 60.02 seeking to set aside the order of dismissal. The trial court denied the motion in an order entered on August 13, 2008. Curran now appeals from this order.

Under the plain language of CR 77.02(2), the trial court is required to review its cases once a year and dismiss those in which no pretrial steps have been taken in the preceding year unless good cause is shown. *See Bohannon v. Rutland*, 616 S.W.2d 46 (Ky. 1981). CR 77.02 is often referred to as the “housekeeping” rule as it allows trial courts to purge their dockets of stale cases. *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753, 755 (Ky. App. 1982). A dismissal under the terms of this rule is without prejudice.

In this case, Curran failed to respond to the trial court's initial notice and he did not move to set aside the dismissal within ten days from entry of the order. As a result, the order of dismissal is final and not subject to modification except under the provisions of CR 60.02. The rule permits a trial court to relieve a party from a final judgment based upon various grounds, including "(a) mistake, inadvertence, surprise or excusable neglect," and "(f) any other reason of an extraordinary nature justifying relief".

We review both the trial court dismissal of the action under CR 77.02 and its denial of relief under CR 60.02 under an abuse of discretion standard. *See Toler v. Rapid American*, 190 S.W.3d 348, 350 (Ky. App. 2006), and *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327 (Ky. 1994). "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). "The power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process." *Nall v. Woolfolk*, 451 S.W.2d 389, 390 (Ky. 1970). We find no abuse of discretion under either rule.

Curran first argues that the trial court erred by dismissing his action without making the findings required by *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991). However, *Ward v. Housman* involved a dismissal under CR 41.02. In *Manning v. Wilkinson*, 264 S.W.3d 620, 623-624 (Ky. App. 2007), this Court explained that CR 41.02 and CR 77.02 serve different functions and thus have

different and distinct requirements. As a result, this Court concluded that a trial court is not required to address the factors set out in *Ward v. Houseman* prior to dismissing an action under CR 77.02. *Id.* at 623-24. Therefore, the trial court did not err by failing to apply the *Ward v. Houseman* factors.

Nevertheless, Curran maintains that he presented extraordinary equitable grounds to set aside the dismissal of his complaint. In support of the motion, Curran attached an affidavit which stated, among other things, that his former counsel had been suspended from the practice of law as of January 31, 2008.<sup>1</sup> Curran also stated that his former counsel had not informed him of the suspension or of the trial court's dismissal of his complaint. But as the trial court noted, negligence by an attorney is not a ground for relief from a judgment under CR 60.02 (a) or (f). *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797, 799 (Ky. App. 1984).

While Curran agrees that the trial court's dismissal was without prejudice, he points out that the applicable statute of limitations has lapsed, effectively preventing him from re-filing the complaint. However, Curran's malpractice claim would still be time-barred even if it were reinstated. Under CR 3, a civil action is commenced by the filing of the complaint and the issuance of a

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<sup>1</sup> At the time this action was originally filed, Curran was represented by Brentley P. Smith. As stated in the affidavit, Smith was suspended from the practice of law by order of the Kentucky Supreme Court entered January 31, 2008 (for non-compliance with minimal CLE requirements). Thereafter, on May, 23, 2009, the Supreme Court permanently disbarred Smith from the practice of law based upon multiple violations involving failure to communicate with clients and failure to perform legal duties. *Kentucky Bar Association v. Smith*, 283 S.W.3d 738 (Ky. 2009).

summons in good faith. Although Curran's former counsel timely filed the complaint, no summons was ever issued. Since Curran's former counsel failed to take any steps to issue or serve the summons upon the named defendants, the one-year statute of limitations was not tolled by the filing of the complaint. *Halderman v. Sanderson Forklifts Co., Ltd.*, 818 S.W.2d 270, 272 (Ky. App. 1991), *citing Delong v. Delong*, 335 S.W.2d 895 (Ky. 1960). Thus, Curran's action would not be viable even if reinstated.

Accordingly, the order of the Jefferson Circuit Court denying Curran's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED BY APPELLEES

Mat A. Slechter  
Louisville, Kentucky