

RENDERED: SEPTEMBER 3, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001965-MR

RANDY JONES AND
VONDA JONES

APPELLANTS

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 04-CI-00218

CLINTON DOBBS
AND LINDA DOBBS

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Randy and Vonda Jones appeal from the order of the
McCreary Circuit Court dismissing with prejudice their claim against Clinton (now

deceased) and Linda Dobbs for failure to prosecute under CR¹ 77.02(2). For the following reasons, we vacate and remand.

In 2004, the Joneses filed this lawsuit against the Dobbs alleging the Dobbs were interfering with the ingress and egress across an easement held by the Joneses for access to their property which adjoined the Dobbs' property. In July 2008, pursuant to CR 77.02(2), the McCreary Circuit Court Clerk issued a notice to dismiss for lack of prosecution since no pretrial step had been taken during the previous year. The notice provided that the case would be dismissed without prejudice on September 22, 2008 at 9:30 a.m. unless sufficient answer to the notice was made. Thereafter, the Joneses filed a motion for a scheduling order for pretrial and trial dates.

On September 22, 2008, the trial court called the action at 9:07 a.m. prior to the arrival of counsel for the Joneses. The trial court overruled the Joneses' motion and dismissed the case. Counsel for the Joneses arrived at the courtroom at 9:15 a.m. and was informed the case had already been dismissed. On October 1, 2008, an order was entered dismissing the Joneses' action with prejudice. This appeal followed.

The Joneses argue the trial court erred by dismissing their claim with prejudice because CR 77.02(2) requires dismissal to be without prejudice. We agree.

¹ Kentucky Rules of Civil Procedure.

Our review of a dismissal for lack of prosecution pursuant to CR 77.02(2) is under an abuse of discretion standard. *Toler v. Rapid Am.*, 190 S.W.3d 348, 351 (Ky.App. 2006). A trial court has abused its discretion if its “decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (citations omitted).

CR 77.02(2) provides:

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.

(emphasis added). Since the case was dismissed pursuant to CR 77.02(2), the trial court was required to dismiss the action without prejudice. Additionally, the minimum requirements of due process require a meaningful opportunity to be heard. *See P.J.H. v. Cabinet for Human Resources*, 743 S.W.2d 852 (Ky.App. 1987) (citations omitted). By dismissing the action with prejudice after calling the action to be heard prior to the time provided in the notice of hearing sent to the parties, the trial court failed to provide the Joneses with a meaningful opportunity to be heard. Accordingly, the trial court abused its discretion by dismissing the Joneses’ action with prejudice.

The order of the McCreary Circuit Court is vacated and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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