

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001556-MR

WELLS ELECTRIC, INC.,  
a Kentucky Corporation, and  
ANNA WELLS

APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 93-CI-00889

ROBERT L. TEMPLETON and  
RODNEY S. JUSTICE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUDGEL, Chief Judge; BUCKINGHAM, and KNOX, Judges.

BUCKINGHAM, JUDGE. Wells Electric, Inc., and Anna Wells (hereinafter collectively referred to as Wells) appeal from an order of the Boyd Circuit Court dismissing their legal malpractice claims against Robert Templeton (Templeton) and Rodney Justice (Justice). We affirm.

In October 1993, Wells filed suit against Templeton and Justice alleging that they had engaged in legal malpractice in their representation of Wells Electric in a debt collection action and in Templeton's representation of Anna Wells in a separate dissolution of marriage action. Templeton and Justice

filed answers to Wells's complaint, and in March 1994, Wells filed answers to requests for admissions. The record reflects that no further action was taken in the case until Templeton and Justice were deposed in August 1995.

The next action in the case occurred on January 22, 1998, when Justice filed a motion to dismiss the case for lack of prosecution under Kentucky Rule of Civil Procedure (CR) 41.02. The motion gave notice that a hearing on it would be held on January 30, 1998, and Templeton subsequently filed a document joining in Justice's motion. When neither Wells nor counsel for Wells appeared at the hearing on Justice's motion, the trial court granted the motion and entered an order dismissing Wells's complaint "for failure of the Plaintiffs to prosecute same[.]"

Wells filed a motion to reconsider the dismissal order, contending that Wells's counsel did not see the notice of the hearing date on the motion to dismiss. Wells's counsel also filed an affidavit stating that his law partner (who is also his wife) suffers from multiple sclerosis which has taken up much of his time. The affidavit also states that Wells's counsel had been busy handling other cases. The trial court held a hearing on Wells's motion to reconsider and then denied the motion and entered a new order dismissing the case with prejudice. This appeal by Wells followed.<sup>1</sup>

CR 41.02(1) provides in relevant part that "[f]or failure of the plaintiff to prosecute . . . , a defendant may

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<sup>1</sup> Wells's notice of appeal states that it is appealing from the order denying the motion to reconsider, not the original order of dismissal.

move for dismissal of an action or of any claim against him.”  
“The power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process. This power exists independent of CR 41.02.” Nall v. Woolfolk, Ky., 451 S.W.2d 389, 390 (1970). A trial court has “broad discretion in determining the question of whether an action should be dismissed for want of diligent prosecution[,]” and an appellate court will not disturb the trial court’s decision on the matter absent an abuse of that discretion. Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equip. Co., Ky., 451 S.W.2d 401, 403-04 (1970).

Wells filed its complaint in October 1993, deposed Templeton and Justice in August 1995, and took no further action to prosecute the case until after the trial court entered an order of dismissal in January 1998. Furthermore, neither Wells nor its counsel attended the hearing on Justice’s motion to dismiss for lack of prosecution. The facts of this case are similar to those in Jenkins v. City of Lexington, Ky., 528 S.W.2d 729 (1975), where the court held that there was “an adequate basis for the trial judge’s discretionary decision to dismiss” where the plaintiffs were inactive in the case for over two years and then failed to attend a pretrial hearing on a motion to dismiss. Id. at 730.

Wells relies on Ward v. Housman, Ky. App., 809 S.W.2d 717 (1991), to support its argument that the trial court should have vacated its order of dismissal. Ward is a medical malpractice case wherein the trial court entered an order

limiting the plaintiffs' expert testimony due to their failure to comply with a pretrial scheduling order. Id. at 718. The trial court later granted summary judgment to the defendants due to the lack of expert testimony to support the medical malpractice claim. This court reversed the trial court, opining that "[s]ummary [j]udgments . . . [are] not to be used as a sanctioning tool of the trial courts." Id. at 719. Although Ward is factually distinguishable from the case sub judice, the court therein did analyze the dismissal under CR 41.02 and listed several factors which a trial court should consider when ruling on a motion to dismiss "for dilatory conduct of counsel . . . ." Id.

Wells has pointed to no sufficient reason for no action being taken on this case from August 1995 (the date of the depositions) until January 1998 (when the motions to dismiss were filed).<sup>2</sup> Furthermore, although Wells's counsel's partner's medical condition is viewed with sympathy, those medical problems are not sufficient reasons to forestall a dismissal of the action. See Modern Heating, supra at 403, wherein the plaintiff's attorney suffered serious injuries in a car accident, and yet the court refused to find that to be a sufficient reason to excuse the lack of prosecution, holding that "[t]he misfortune of plaintiff's attorney, with whom we have great sympathy, did

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<sup>2</sup> In November 1997, Wells's counsel sent a letter to the circuit clerk and to counsel for Templeton and Justice stating that a motion for a trial date would be forthcoming in January 1998. However, this letter is of little consequence as it was not a legitimate pretrial step. Furthermore, the record does not reflect that Wells ever actually filed a motion for a trial date.

not excuse appellant from the duty to prosecute." In short, we conclude that the trial court did not abuse its discretion in dismissing Wells's claim pursuant to CR 41.02(1) for failure to prosecute.

The order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Robert L. Templeton  
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