

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002441-MR

BOYD GODBY AND  
JUDITH GODBY

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHELIA R. ISAAC, JUDGE  
ACTION NO. 98-CI-00693

RUSSELL SMITH

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: GUIDUGLI, MILLER AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. The sole question in this appeal is, did the Fayette circuit Court abuse its discretion in dismissing this action from the docket for want of prosecution? CR 41.02. We do not believe there was an abuse of discretion, thus we affirm.

The underlying cause of action arose as a result of an automobile accident in Lexington, Kentucky, on April 23, 1996. The complaint initiating this action was filed on February 25, 1998. Summons was eventually served on September 22, 1998.

Appellants' present attorney entered the case in 1999.<sup>1</sup> No additional action was taken in this matter by appellants. On August 25, 2000, appellee filed a motion to dismiss pursuant to Kentucky Rules of Civil Procedure (CR) 41.02(1). Thereafter, on August 28, 2000 and September 1, 2000, appellants filed motions "to assign the within action for pretrial conference and for trial." A hearing was held before the Fayette Circuit Court on September 8, 2000. After hearing arguments of counsel for the parties, the trial court orally granted the appellee's motion to dismiss. The final order of dismissal was entered on September 15, 2000. This appeal followed.

On appeal, appellants argue that since appellee had taken pre-trial steps (interrogatories, request for production of documents, and offer of judgment) within the year preceding the dismissal and had taken appellants' deposition three months prior to the dismissal, that these actions by appellee were sufficient pre-trial action to prevent dismissal. Based upon these pre-trial actions by appellee, appellants claim the trial court was precluded from entering a dismissal pursuant to CR 41.02(1) and thus, the trial court's order of dismissal was an abuse of discretion.

CR 41.02(1) states:

For failure of the plaintiff to  
prosecute or to comply with these rules or

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<sup>1</sup>Attorney, James M. Clement of Louisville, filed the original complaint. On January 4, 1999, a motion to substitute attorney, David VanHorn was filed. Although the motion was never set for a hearing and no order was entered granting the motion, Attorney Van Horn appears as attorney of record thereafter and filed this appeal.

any order of the court, a defendant may move for dismissal of an action or of any claim against him.

Appellants concede that dismissal under this rule is discretionary subject to review under the abuse of discretion standard. The test for abuse of discretion is whether the trial court judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2001); Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). Applying this test, we conclude that the trial judge did not abuse her discretion in dismissing this action.

Despite appellants' arguments to the contrary and their reliance upon several Kentucky cases, as well as, cases cited from other states and federal jurisdiction, we do not believe the trial court abused its discretion in this matter. The automobile accident occurred in April, 1996, and suit was filed approximately two years later in February, 1998. Appellants took no affirmative action in this matter until after appellee filed his motion to dismiss in August, 2000, over two years since the complaint was filed. The Kentucky cases cited by appellants of Bohanon v. Rutland, Ky., 616 S.W.2d 46 (1981), Polk v. Wimsatt, Ky. App., 689 S.W.2d 363 (1985), Gill v. Gill, Ky., 455 S.W.2d 545 (1970), as well as, Nall v. Woolfolk, Ky., 451 S.W.2d 389 (1970), and Modern Heat and Sup. Co. v. Ohio Bank Bldg. And Equip. Co., Ky., 451 S.W.2d 401 (1970), all speak to the discretionary power of the court in addressing motions for failure to prosecute under CR 41.02(1). Although conceding that

a dismissal with prejudice is the most severe and grave consequence, and advising that appellate courts should carefully scrutinize the trial court's exercise of this kind of dismissal which should be resorted to only in the most extreme cases, this Court in Polk, supra, found that the trial court did not abuse its discretion in dismissing that case. We believe the same analysis of this case results in the same conclusion: that despite the grave consequences resulting from a dismissal with prejudice, the Fayette Circuit Court did not abuse its discretion. The automobile accident occurred over four years prior to the dismissal and appellants had taken no action to bring the case to trial in over two years. CR 41.02(1) is intended to deal with this type of case. The rule insures that cases do not linger indefinitely and protects the integrity of the judicial process.

For the foregoing reasons, we affirm the Fayette Circuit Court's order of dismissal pursuant to CR 41.02(1).

ALL CONCUR.

BRIEF FOR APPELLANTS:

David L. VanHorn  
Lexington, KY

BRIEF FOR APPELLEE:

E. Douglas Stephan  
Lexington, KY