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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002042-MR

CHRISTOPHER D. HUFF

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 03-CI-00190

RALPH KEPLEY; UNKNOWN DEFENDANT
BEING THE UNKNOWN OWNER OR CO-OWNER
OF 303 HILLCREST ROAD, FRANKLIN,
KENTUCKY 42134; UNKNOWN DEFENDANT
BEING THE UNKNOWN OWNER OR CO-OWNER
OF THAT CERTAIN ANIMAL INVOLVED IN A
TRAFFIC ACCIDENT ON JUNE 6, 2002 THAT IS THE
SUBJECT OF KENTUCKY UNIFORM POLICE
COLLISION REPORT MASTER FILE #00998488; AND
MARK A. BARBER

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: Christopher Huff appeals from an order of the Simpson Circuit Court sustaining the CR 41.02(1)¹ motion of Ralph Kepley to dismiss Huff's action for failure to prosecute. Huff's action alleged that Kepley failed to properly restrain a dog, which ran onto a roadway causing a motorcycle accident. Huff contends that the circuit court abused its discretion in dismissing the action without considering the relevant factors set out in *Jaroszewski v. Flege*, 204 S.W.3d 148 (Ky. App. 2006), *Toler v. Rapid American*, 190 S.W.3d 348 (Ky. App. 2006), and *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991). For the reasons stated below, we vacate the order on appeal and remand the matter for further proceedings.

On June 6, 2002, Huff was operating his motorcycle on KY-73 in Simpson County, Kentucky. According to a police report contained in the record, Huff's motorcycle was following a motorcycle operated by Mark Barber. While Huff and Barber were traveling on KY-73, a dog unexpectedly ran out in front of Barber's motorcycle. Barber's motorcycle may have struck the dog, and Huff's motorcycle ran into the back of Barber's motorcycle. Huff was thrown from his motorcycle and sustained serious injuries. Barber's motorcycle remained operational, and Huff's motorcycle had to be towed from the scene.

Huff filed the instant action in Simpson Circuit Court on May 27, 2003. The action was filed against Barber as the operator of the other motorcycle, and Ralph Kepley who allegedly owned or otherwise possessed or controlled the

¹ Kentucky Rules of Civil Procedure.

parcel of real property adjacent to the accident. The complaint alleged that Kepley or other unknown defendants who owned or co-owned the parcel negligently failed to control the dog, proximately resulting in the accident and Huff's injuries. Huff's action set forth claims of negligence, negligence *per se*, and strict liability arising from Kepley's alleged failure to control the dog.

The matter proceeded in Simpson Circuit Court and discovery was conducted. On August 2, 2006, Kepley filed a motion pursuant to CR 41.02(1) to dismiss Huff's action for lack of prosecution. In support of the motion, Kepley noted that Huff had taken no affirmative steps to move the case forward for more than two years. About one week later, and in apparent response to Kepley's motion, Huff filed a motion seeking a trial date. After proof on Kepley's motion was heard, the circuit court rendered an order on September 1, 2006, sustaining the motion and dismissing the action. This appeal followed.

Huff now argues that the trial court abused its discretion and committed reversible error in sustaining Kepley's motion to dismiss the action. As a basis for the argument, Huff contends that the trial court improperly failed to consider the factors set out in *Jaroszewski*, *Toler*, and *Ward*, *supra*, which he maintains must be considered when ruling on a CR 41.02 motion. He argues that dismissal for lack of prosecution is a harsh remedy which must be used by a trial court only as a matter of last resort, and that the circuit court's failure to demonstrate that it examined the factors requires reversal. In response, Kepley maintains that the circuit court's decision to dismiss Huff's action was reasonable

and fair based on Huff's inactivity for more than two years. He further contends that Huff's action lacks merit which should militate in favor of affirming the dismissal.

We have closely examined the record and the law, and must conclude that the circuit court erred in failing to expressly consider the factors set out in *Ward, supra*, before dismissing Huff's action based on a failure to prosecute. CR 41.02(1) provides that "[F]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him." *Ward* states that,

In ruling on a motion for involuntary dismissal, the trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial. *Scarborough v. Eubanks*, 747 F.2d 871 (3rd Cir. 1984), gives a worthwhile guideline for analysis of these situations under Fed.R.Civ.P. 41(b), which is our counterpart rule on the federal side. Considering whether a case should be dismissed for dilatory conduct of counsel, it would be well for our trial courts to consider the *Scarborough* case and these relevant factors:

- 1) the extent of the party's personal responsibility;
- 2) the history of dilatoriness;
- 3) whether the attorney's conduct was willful and in bad faith;
- 4) meritoriousness of the claim;
- 5) prejudice to the other party, and
- 6) alternative sanctions.

Ward, 809 S.W.2d at 719.

In *Toler, supra*, a panel of this Court made it clear that the application of the *Ward* factors is mandatory, and that the burden to make findings in accordance with *Ward* “falls solely upon the trial court.” *Toler*, 190 S.W.3d at 351. *Toler* states,

As the trial court’s decision to dismiss here appears to have been based almost exclusively on the Tolers’ inaction from January 2002 to May 2004, we believe that the *Ward* factors are particularly relevant. Accordingly, we find ourselves hesitant to affirm or reverse the trial court because the record is unclear as to whether the *Ward* factors were properly considered or even considered at all. It instead reflects that the court’s decision was based almost exclusively upon the fact that there was a two-and-a-half-year lack of activity. While such a fact must certainly be considered in determining whether to dismiss a case for lack of prosecution, it is not the only fact to be examined. (Citation omitted).

The responsibility to make such findings as are set forth in *Ward* before dismissing a case with prejudice falls solely upon the trial court. Accordingly, even though we understand and sympathize with the court’s desire to move the cases on its docket along in a timely and expeditious manner, we find ourselves compelled to vacate its orders as to dismissal here and to remand this action for further consideration in light of *Ward*. In doing so, we express no view as to whether dismissal with prejudice will ultimately be merited.

Id.

As in *Toler*, the record herein does not reveal whether the *Ward* factors were properly considered or even considered at all. The hearing on Kepley’s motion to dismiss was not videotaped or transcribed, and the order sustaining Kepley’s motion does not set out the basis for the dismissal. While we

may reasonably assume that the dismissal resulted from Huff's failure to move the case forward for a period of about twenty-seven months, we may not assume that the *Ward* factors were considered in disposing of Kepley's motion. *Toler* is directly on point and dispositive, and in concert with *Ward* requires the circuit court to produce findings demonstrating that the involuntary dismissal - a harsh remedy which constitutes a death sentence to the proceeding - was rendered only after thoughtful consideration of all relevant factors. And as in *Toler*, we understand and sympathize with the Simpson Circuit Court's desire to move the cases on its docket along in a timely and expeditious manner, and express no view as to whether dismissal with prejudice will ultimately be merited. Whatever the outcome, the resolution of Kepley's motion must be supported by application of the *Ward* factors.

Accordingly, we vacate the order of the Simpson Circuit Court dismissing Huff's action and remand the matter for findings in accordance with *Ward* and *Toler*, *supra*.

MOORE, JUDGE, CONCURS.

NICKELL, JUDGE, DISSENTS BY SEPARATE OPINION.

NICKELL, JUDGE, DISSENTING: Respectfully, I dissent and would affirm the trial court's dismissal for three reasons. First, under CR 41.02(2), a trial court must make findings of fact before granting a motion for involuntary dismissal in a case decided on the merits. The case *sub judice* was not decided on

the merits; it was dismissed due to Huff's failure to prosecute. Therefore, findings of fact were not required and their absence does not require reversal and remand.

Second, Huff did not preserve the alleged error by calling the absence of essential findings of fact to the trial court's attention as required by CR 52.02 and CR 52.04. Therefore, he waived review of any alleged error. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

Third, the line of cases relied upon by the majority appears to be in conflict with CR 41.02 and CR 52.04. *Toler, supra*, makes the trial court responsible for making findings of fact on the six factors discussed in *Ward* before dismissing a case with prejudice. However, I cannot overlook CR 54.02 which directs:

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Huff did not adhere to the rule as he did not request specific findings from the trial court.

Therefore, I would not reverse and remand this case to the trial court for findings of fact. My view is consistent with our unanimous opinion in *McKinney v. McKinney*, 257 S.W.3d 130 (Ky. App. 2008) wherein the appellant moved for additional findings. As stated by Judge William Howerton in his dissent in *Ward*, “[w]hile dismissals may be disfavored, rules of procedure and

court orders do have a legitimate purpose.” *Ward, supra*, 809 S.W.2d at 720

(Howerton, J., dissenting).

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ORAL ARGUMENT FOR
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BRIEF FOR APPELLEE:

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