

RENDERED: NOVEMBER 21, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2006-CA-002476-MR

DAVID L. CRAYTON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 03-CI-00112

MICKEY D. OWEN

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: DIXON AND THOMPSON, JUDGES; LAMBERT,<sup>1</sup> SENIOR  
JUDGE.

THOMPSON, JUDGE: On January 29, 2003, David L. Crayton filed a personal injury action against Mickey D. Owen alleging that he sustained personal injury in an automobile accident caused by Owen's negligence. After Owen unsuccessfully sought to compel Crayton to respond to his discovery requests, pursuant to CR

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

56.02, he moved for summary judgment on the basis that there was no material issue of fact and, therefore, he was entitled to judgment as a matter of law. After time elapsed for Crayton to respond to the motion and without a written response filed, a hearing was held after which the trial court granted Owen's motion and dismissed the complaint with prejudice.

The stark record reveals that throughout the thirty-three months this case remained pending, Crayton consistently failed to respond to discovery requests by Owen and to comply with the orders of the McCracken Circuit Court. In its order, the circuit court specifically cited Crayton's conduct and concluded that summary judgment was appropriate. It recited the following:

1. On April 15, 2003, written discovery was propounded to the Plaintiff;
2. On May 12, 2004, Defendant filed the first of two Motions to Compel after attempts to obtain Plaintiff's responses through other avenues proved unsuccessful. This motion was withdrawn on June 23, 2004, at Plaintiff's behest and he agreed to provide responses to written discovery shortly. Answers were not provided.
3. On November 22, 2005, Defendant filed a second Motion to Compel, and an Order was entered by the Court compelling Plaintiff to respond to written discovery within thirty (30) days. This Order was not complied with.
4. Defendant's Motion for Summary Judgment was filed on July 19, 2006, and Plaintiff did not file a response to that Motion.

Therefore, it is ordered that the Defendant's Motion for Summary Judgment is hereby granted and this case is dismissed with prejudice.

We are aware of the heavy dockets under which our circuit courts labor and the time and funds expended on cases that unnecessarily linger within the judicial system. Nevertheless, our Supreme Court has strongly cautioned the courts and counsel against using summary judgment as an equivalent to a motion filed pursuant to CR 41.02.

In the seminal case, *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991), the Court addressed a summary judgment premised upon the plaintiff's failure to comply with discovery. It pointed out that under the accepted summary judgment standard, the movant can prevail only if, as a matter of law, it appears that it would be impossible for the respondent to prevail at trial. It emphasized that summary judgment is not a substitute for trial nor is it the functional equivalent of a directed verdict. *Id.* at 719. With candor, the Court cautioned that "CR 56, Summary Judgments, is not to be used as a sanctioning tool of the trial courts." *Id.*

In contrast, CR 41.02(1) provides that a defendant may move for dismissal of an action against him "for failure of the plaintiff to prosecute or to comply with these rules or any order of the court . . . ." Because of the deprivation of the litigant's trial and the finality of its action, involuntary dismissal is an extreme tool to be invoked only after the trial courts have considered the following 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 (Ky.App. 1991).

As can be discerned from the court's discussion in *Ward*, a motion pursuant to CR 56 and that made pursuant to CR 41.02 are subject to substantively distinguishable legal standards. Following the *Ward* decision, this Court stressed that the distinctions between the rules are not merely technical and, if the dismissal is imposed as a sanction for the failure to comply with discovery rules or an order of the court, the trial court is required to consider the factors set forth in *Ward* and set forth its relevant findings. *Toler v. Rapid American*, 190 S.W.3d 348, 351-352 (Ky.App. 2006). We reiterate the conclusion reached in *Toler*:

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*.

We are compelled to vacate the McCracken Circuit Court's judgment and remand this case for further proceedings. However, our decision should not be interpreted so as to suggest that a certain result be reached by the circuit court but

only to state that it is incumbent upon the circuit court to apply the standard applicable to the exercise of its discretionary powers pursuant to CR 41.02.

Based on the foregoing, the order of the McCracken Circuit Court is vacated and the case remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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