

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-002179-MR

JAMES W. FUQUA  
AND SANDRA L. FUQUA

APPELLANTS

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE JAY A. WETHINGTON, JUDGE  
ACTION NO. 04-CI-01285

FLUOR-DANIEL ILLINOIS, INC.,  
MEADWESTVACO CORPORATION;  
GENERAL ELECTRIC COMPANY;  
CBS CORPORATION; RAPID-AMERICAN  
CORPORATION AND METROPOLITAN  
LIFE INSURANCE COMPANY

APPELLEES

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: James and Sandra Fuqua appeal from the Daviess

Circuit Court's order dismissing their claim with prejudice. They do not contend

that dismissal was inappropriate, but argue only that it should have been entered without prejudice. We affirm in part, reverse in part, and remand.

## **I. Background**

The Fuquas filed a number of tort claims against eleven defendants in September of 2004. They claimed James had developed lung disease as a result of repeated exposure to asbestos during his thirty-three years of employment as an insulator.

The defendants answered, and written discovery commenced. In 2008, however, the circuit court issued a notice that it intended to dismiss the Fuquas' claims for lack of prosecution in accordance with CR<sup>1</sup> 77.02(2). Following responses from the parties, the circuit court opted to keep the case on the docket.

Still, the parties took very little action. The Fuquas were deposed in 2009, and they propounded discovery requests in January 2010. Claims against three defendants were dismissed by agreed orders.

When the circuit court entered its second notice to dismiss for lack of prosecution on August 22, 2012, the most recent previous activity had occurred on August 10, 2011, when the court had entered an order permitting the withdrawal of an attorney for defendant National Service Industries, Inc. The last action which involved the participation of the plaintiffs had occurred on July 25, 2011, when the circuit court entered an agreed order dismissing the claims against Cardinal

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<sup>1</sup> Kentucky Rule of Civil Procedure.

Industrial Insulation Company, Inc. Aside from the agreed orders of dismissal, the plaintiffs had filed no discovery requests or pretrial motions after January 2010.

The plaintiffs did not respond directly to the notice of dismissal but filed their own motion to voluntarily dismiss the action without prejudice pursuant to CR 41.01. Defendant General Electric Company (GE) filed a motion to dismiss with prejudice pursuant to CR 41.02.

The circuit court conducted a hearing at which counsel for the Fuquas and counsel for GE argued in support of their respective motions; an attorney representing Fluor-Daniel Illinois, Inc., and MeadWestvaco Corporation orally joined in GE's motion. No other defendant responded to any of the motions to dismiss.<sup>2</sup>

The court eventually entered an order dismissing the claims against all defendants with prejudice, based on CR 41.02 and *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991).

The Fuquas appealed. They do not dispute that dismissal was proper; they claim only that the matter should have been dismissed without prejudice rather than with prejudice.

## **II. Discussion**

CR 77.02 is known as the housekeeping rule. It obligates trial courts, at least once a year, to review their dockets and to give notice “to each attorney of record of every case in which no pretrial step has been taken within the last year,

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<sup>2</sup> GE, Fluor-Daniel, and MeadWestvaco are the only defendants who have participated in the appeal.

that the case will be dismissed in thirty days for want of prosecution except for good cause shown.” CR 77.02. Where good cause is not shown, the matter must be dismissed without prejudice. *Id.* The Rule contemplates that notice will be issued *sua sponte*. *Id.*; *Wildcat Prop. Mgmt., LLC v. Reuss*, 302 S.W.3d 89, 92 (Ky. App. 2009).

Pursuant to CR 41.01(2), a plaintiff may request dismissal of an action or claim, which the trial court may grant if it deems the request proper. “Unless otherwise specified in the order, a dismissal under this section is without prejudice.” CR 41.01(2).

CR 41.02 permits a defendant to seek the involuntary “dismissal of an action or of any claim against him[.]” upon the plaintiff’s failure to prosecute. The dismissal occurs with prejudice unless otherwise specified and may not be issued *sua sponte*.

Questions of interpretation of the Civil Rules are reviewed *de novo*. *See Kentucky Farm Bureau Mut. Ins. Co. v. Blevins*, 268 S.W.3d 368, 372 (Ky. App. 2008). A trial court’s decision to dismiss for lack of prosecution is reviewed under the abuse of discretion standard. *Wildcat Prop. Mgmt.*, 302 S.W.3d at 93.

**a. Whether the circuit court was permitted to dismiss with prejudice**

The Fuquas first argue that it was inappropriate for the circuit court to dismiss their claims with prejudice pursuant to CR 41.02 when it was presented with two avenues to dismiss without prejudice, namely CR 77.02 and CR 41.01.

As we have stated, the trial court may not order involuntary dismissal with prejudice absent a motion by a defendant. CR 41.02(1); *Wildcat Prop. Mgmt.*, 302 S.W.3d at 92. However, GE filed a motion seeking dismissal with prejudice which Fluor-Daniel and MeadWestvaco orally joined. The circuit court did not order dismissal *sua sponte*. The appellants have identified no authority which prohibited dismissal with prejudice based on the motions of these defendants.

**b. Whether dismissal with prejudice could apply to claims against non-moving defendants**

The Fuquas next contend the dismissal with prejudice can apply only to the defendant who filed a written motion seeking that relief.

CR 41.02(1) permits a defendant to seek, and a trial court to afford, “dismissal of an action or of any claim against him.” An *action* is “[a] civil or criminal judicial proceeding[,]” and refers to the plaintiff’s entire case. BLACK’S LAW DICTIONARY, (9<sup>th</sup> ed. 2009). A *claim* refers to the discrete causes of action which form the legal bases of relief. *See* CR 8.01. The Rule permits a defendant to seek dismissal of either the plaintiffs’ entire case against all defendants or of only a claim or claims against the moving defendant.

If GE’s motion sought dismissal of the entire action, then the circuit court was authorized by CR 41.02 to order dismissal with respect to all the defendants even if no other defendants had sought dismissal with prejudice. But if GE’s motion sought only dismissal of the claims against GE, then the circuit court was

not authorized, on the basis of that motion, to dismiss with prejudice the claims against the other defendants. CR 41.02(1).

Stated another way, where no defendant has requested dismissal with prejudice of the entire action, a trial court is not permitted to dismiss with prejudice a claim against a defendant who has not filed a CR 41.02 motion at all, where the only matters before the court concerning that defendant are the CR 77.02 notice and a plaintiff's motion to dismiss without prejudice.<sup>3</sup> In *Louisville Label, Inc. v. Hildesheim*, the Supreme Court determined that CR 41.01(2) "does not contemplate that the trial judge may elect to transform a voluntary dismissal into an involuntary dismissal on the merits, *i.e.*, with prejudice." 843 S.W.2d 321, 325 (Ky. 1992).

Whether the circuit court in this case was authorized to dismiss with prejudice the Fuquas' claims against all the defendants depends on the relief the moving defendants sought. GE's motion asked the circuit court to "dismiss plaintiffs' claims against GE based on plaintiffs' lack of prosecution." (Trial record, p. 401). By this language, the movant sought dismissal only of the claims against it, and not of the entire action. The circuit court was not authorized by the written motion to dismiss with prejudice the claims of any other defendants than GE. *Louisville Label*, 843 S.W.2d at 325.

However, GE was not the only defendant that made a proper motion to dismiss with prejudice under CR 41.02. Fluor-Daniel and MeadWestvaco's oral

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<sup>3</sup> However, we see nothing to prohibit dismissal with prejudice under CR 41.01 if such a dismissal is sought by the plaintiff.

motions joining GE's written motion were sufficient to invoke CR 41.02, with respect to the claims against them. CR 7.02 (requiring that motions be made either in writing or orally during a hearing or trial).<sup>4</sup>

Because the remaining defendants did not move for dismissal of the claims against them, and no defendant moved for dismissal of the whole action, the circuit court was not authorized to dismiss the claims against the non-moving defendants. We are compelled to reverse the dismissal with prejudice to the extent that it did so.

**c. Whether the circuit court properly relied on the factors of *Ward v. Housman* to dismiss with prejudice**

The Fuquas' final argument is that dismissal with prejudice was too harsh a penalty and that the factors enumerated in *Ward v. Housman* militated against it. They claim the circuit court's determination to the contrary was an abuse of discretion. 809 S.W.2d 717 (Ky. App. 1991). We disagree.

When dismissing with prejudice for lack of prosecution based on CR 41.02, the trial court is obligated to "consider[] all relevant facts and circumstances[]" to determine whether the totality of the circumstances warrants dismissal with prejudice. *Jaroszewski v. Flege*, 297 S.W. 24, 32-33 (Ky. 2009). All or some of

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<sup>4</sup> Because Fluor-Daniel and MeadWestvaco merely "joined in" GE's motion and did not expand upon it or request dismissal of the entire action, we conclude that these two movants adopted GE's language seeking dismissal of the plaintiffs' claims against them and on the same grounds.

the *Ward* factors<sup>5</sup> may be instructive, but they are not mandatory where they are irrelevant to the question before the trial court. *Id.*, at 33-36.

In considering each of the *Ward* factors, the circuit court appropriately assessed the propriety of dismissal with prejudice, including the impact on the parties and the interests of justice. It concluded, based on the Fuquas' lengthy period of inactivity and the failure to meaningfully pursue their claims following the first notice of dismissal in 2008, that dismissal on the merits was the best solution. Furthermore, the court noted that the only reason the Fuquas wished to keep the matter open to future prosecution was the possibility that James' medical condition would worsen and the parties might then "develop a more actionable claim[.]" although they expressed no intention to develop the current claim. (Trial record, p. 524).

We agree with the circuit court. The Fuquas and their attorneys failed to diligently pursue the case toward completion in the eight years it remained on the docket. *Jaroszewski*, 297 S.W.3d at 32. They propounded only a handful of discovery requests and took zero depositions; they requested a pretrial conference and a trial date only once, in response to the 2008 notice that the case could be dismissed pursuant to CR 77.02. The Fuquas were then warned that further inactivity could result in dismissal of their claims, but they still failed to take meaningful steps to resolve the case. The trial record, which documents eight

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<sup>5</sup> The *Ward* factors are: "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." 809 S.W.2d at 719 (citing *Scarborough v. Eubanks*, 747 F.2d 871 (3rd Cir. 1984)).



years of litigation of personal injury claims against eleven defendants, consists of less than six hundred pages. It is apparent from their attorney's representations at the October 2012 hearing that the Fuquas still did not intend to proceed to trial, but hoped to leave open the door to future claims on the speculative hope that additional injuries would emerge. Given the totality of these circumstances, it was not an abuse of the circuit court's discretion to dismiss the claims with prejudice.

## **II. Conclusion**

We affirm the circuit court's dismissal with prejudice of the Fuquas' claims against GE, Fluor-Daniel, and MeadWestvaco. However, we reverse that portion of the order which dismisses the claims against the remaining, non-moving defendants with prejudice. We remand for entry of an order which makes this distinction.

ALL CONCUR.

### **BRIEFS FOR APPELLANTS:**

Joseph D. Satterley  
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Louisville, Kentucky

**BRIEF FOR APPELLEE, FLUOR-DANIEL ILLINOIS, INC., MEADWESTVACO CORPORATION; GENERAL ELECTRIC COMPANY; CBS CORPORATION :**

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