

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001765-MR

KEITH BRADLEY AND
ROCKY ADKINS

APPELLANTS

v.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE FRANK FLETCHER, JUDGE
ACTION NO. 07-CI-00024

ROSEMARY CREECH;
HANK JONES; GLEN SMITH;
RON CREECH; DAVID SPENCER;
and OTHER UNKNOWN
DEFENDANTS, Individually

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND KRAMER, JUDGES.

KRAMER, JUDGE: Keith Bradley and Rocky Adkins appeal from the Wolfe Circuit Court's order dismissing their claims against the above-captioned appellees, with prejudice, for failure to prosecute. We affirm.

This Court has previously stated much of the relevant factual and procedural history of this matter in *Bradley v. Creech*, No. 2011–CA–002289–MR, 2013 WL 3237697 (Ky. App. June 28, 2013):

FACTS [FN]

[FN] Because this case was dismissed before any significant discovery took place, we take our recitation of the underlying facts from the pleadings and the depositions of two of the parties.

On July 30, 2006,^[1] the appellants were involved in an altercation with Glenn Smith and Hank Jones at the Silver Mine Saloon. The appellants allege that Smith and Jones were employed as “bouncers” at the Saloon, and that they used flashlights and a baseball bat to beat the appellants, causing severe injuries.

At the time, the Saloon was owned by Rosemary Creech and the appellants allege that Ron Creech and David Spencer also had ownership interests in the Saloon. According to the appellants, the Creeches and Spencer negligently failed to properly supervise Smith and Jones, thus contributing to the appellants' injuries.

The appellants timely filed a complaint and amended complaint in 2007, and the parties timely filed answers. Throughout 2008, the parties conducted written discovery and, in March 2009, they took several depositions. [FN] In the summer of 2010, the appellants changed attorneys. No other steps were taken until October 4, 2011, when the appellees filed a motion to

¹ According to the record, the altercation that resulted in Adkins' and Bradley's injuries took place either in the late evening of July 29, 2006, or during early morning hours of July 30, 2006.

dismiss for lack of prosecution. On October 5, 2011, the appellants filed a motion to set the case for trial, but did not otherwise respond to the motion to dismiss. On October 20, 2011, the court entered a handwritten docket sheet order stating as follows: “According to Mr. Harris [counsel for the appellees], case had been dormant for almost 18 months. Plaintiffs are incarcerated at present time, but represented by counsel, Mr. Anderson, Esq. Granted—see *Com v. Fireline* 486 S.W.2d 698 ... It is ordered: case dismissed without prejudice.”

[FN] The transcripts of the depositions of Ron Creech and Keith Bradley are the only deposition transcripts in the record. It appears from the record that other depositions were taken; however, the transcripts of those depositions are not in the record.

Id. at *1.

As noted above, the circuit court cursorily dismissed this case via a handwritten docket entry for failure to prosecute, without making any findings pursuant to *Ward v. Housman*, 809 S.W.2d 717, 719 (Ky. App. 1991).² Because of this, this Court could not take an adequate review of the dismissal. Consequently, we vacated the dismissal and remanded for the circuit court to undertake an examination of the *Ward* factors.

² Pursuant to *Ward v. Housman*, the court must consider the following factors: (1) the extent to which the party is personally responsible for the failure to prosecute; (2) the history of dilatoriness; (3) the extent to which the conduct of the dilatory party’s attorney was willful and in bad faith; (4) the extent to which the claim has merit; (5) the extent to which the party seeking dismissal has been or will be prejudiced; and (6) whether alternative sanctions are available.

Following remand, the circuit court then entered the September 29, 2014 order of dismissal that is the subject of our current review. The circuit court's order stated in relevant part:

This action is before the Court to dismiss the current action pursuant to Kentucky Civil Rule 77. This Court previously dismissed this case without prejudice. Plaintiffs appealed to the Ky Court of Appeals, and the KY Court of Appeals remanded the herein case and ordered this Court to evaluate and analysis [sic] the herein case pursuant to **Ward v. Housman**, 809 S.W.2d 717, 719 (Ky. App. 1991).

The testimony in the case is conflicting. Mr. Keith Bradley testified in his deposition that he was struck by Glen Smith and suffered a laceration to the head area. (Depo page 22). Bradley testified that earlier he and the Co-Plaintiff had been asked to leave the bar as a result of a disagreement involving the sister of Rocky Adkins. (Depo page 15).

Ron Creech, one of the Defendants, was the operator of the bar and Creech testified that they did not employ bouncers or security people. (Depo page 10). Creech testified that he went outside when trouble first started. (Depo pages 16, 21 & 25). According to Creech, Bradley had made the remarks he was going to burn the bar and kill everybody in there. (Depo pages 17 & 38). Bradley further stated that he would be back and that he was going to get a gun and kill everybody in there and burn the bar down. (Depo page 38). Bradley had been drinking beer during that day. (Depo pages 10, 34 & 35).

The record indicates that the herein case was filed on or about February 13, 2007. (Court of Appeals record, page 1). Depositions were taken on March 10, 2009 in Campton, Kentucky at the Wolfe County Law Library. The original action was filed by Chadwick A. Wells, Esq. of Clark and Ward, 333 W. Vine Street, Suite 1100, Lexington, KY 40507. (Court of Appeals record, page 144). The motion was granted on July 7, 2010. (Court of

Appeals record, page 146). On July 8, 2010 a substitution of counsel was noted by Mr. Wells that Jerry Anderson, Esq. would be representing the Plaintiffs. (Court of Appeals record, page 148). No action was taken on the case from July 8, 2010 until October 4, 2011 at which time the Defendants, through counsel James T. Harris, Esq., moved to dismiss the action for lack of prosecution pursuant to **Dept of Highways v. Fireline**, 486 S.W.2d 698. (Court of Appeals record, page 150). Thereafter, on October 5, 2011 Mr. Anderson filed a Motion to Set for Trial. (Court of Appeals record, page 154). By decision of the KY Court of Appeals on September 5, 2013, the herein case was final and ordered that the herein case be examined and evaluated pursuant to **Ward**, *supra*. (See Wolfe Circuit Court file upon remand).

The basic purposes of dismissals for want of prosecution are (1) to protect the defendant from the prejudice of being a defendant in a lawsuit for a protracted period (including monetary and psychological costs, as well as problems developing one's defense where delay creates loss of or difficulty obtaining evidence); and (2) "to preserve the integrity of the judicial system" by encouraging quick resolution of cases, "disposing of inactive cases [that] clog the calendar" and sanctioning "misuse or abuse of the legal system." See **Jaroszewski v. Flege**, 297 S.W.2d 24 (Ky. 2009) at page 39.

The Court must note that one thing that is troubling in this case are the medical records regarding the two plaintiffs herein. The medical records of KY River Medical Center regarding Keith Bradley dated July 30, 2006 at 2:35 indicate "patient has laceration to left side of head that is 3 inches in length. Patient stated that his head hit a rock when he landed from a 4-wheeler accident." (See Wolfe Circuit Court record upon remand). The medical records of KY River Medical Center dated July 30, 2006 at 02:05 regarding Rocky Adkins indicate "patient is a 36 year old white male whom states that he was driving too fast on his ATV and crashed into a tree. The patient had a laceration on his scalp and the patient was found to have a fracture of the

right tibia.” (See Wolfe Circuit Court upon remand). There is absolutely no mention of an altercation at the Silver Mine Saloon on July 29, 2006,^[3] and the medical records do not note anywhere that the injuries to the Plaintiffs are inconsistent with an ATV rollover accident.

The Court would note that after Mr. Wells, Esq., withdrew as counsel that no action was taken on the case for a period of July 8, 2010 until motion to dismiss on October 4, 2011, consisting of a period of approximately 15 months. (Court of Appeals record, pages 146-150).

Unfortunately, one of the Plaintiffs, Rocky Adkins, was sentenced in a criminal case to 14 years for a charge of manslaughter, 1st Degree. According to the KY Online Offender Outlook, the parole eligibility date for Mr. Adkins is February 21, 2019. Mr. Keith Bradley is presently on parole after serving a sentence for a trafficking charge. Mr. Bradley’s parole date will end on January 8, 2016. As related to the factors in **Ward**, *supra*, Factor 1 it would seem that the Plaintiffs are partially responsible for the failure to prosecute as, unfortunately, they have been incarcerated during a major portion of the history of this case. This Court understands that it is unfortunate that Mr. Adkins is incarcerated and therefore, may suffer some prejudice. However, this is of no fault of the Defendants. There appears to be no other appropriate sanctions (Factor 6) that are available as indicated in **Ward**, *supra*. This case is seven years old and it is the understanding of this Court that the Commonwealth will not pay to have an inmate transported for a civil trial. Mr. Anderson, Esq., is to be commended for attempting to get the herein case to trial. However, this Court would argue that his clients have not dealt him the best hand of cards.

Factor 2 is to consider the history of dilatoriness and apparently Mr. Anderson, Esq. was unable to proceed with the case, due to no fault of his own, because his clients were apparently incarcerated. The court can find no willful or bad faith actions by Mr. Anderson, Esq. (Factor 3). Mr. Anderson, Esq. is sincere in his actions.

³ See *supra*, note 1.

In **Ward**, *supra*, this court must look to the extent which the claim has merit. (Factor [4]). This Court cannot understand why these two Plaintiffs went to the emergency room complaining of an ATV accident when, according to their complaint and their testimony, they were involved in this altercation at the Silver Mine Saloon 2-3 hours earlier.

Regarding Factor 5, it would seem that the Defendants, whom [sic] are seeking dismissal, will be prejudice [sic] substantially by failure to dismiss the herein action. One of the Plaintiffs, Rocky Adkins, is presently incarcerated for manslaughter with an expectation of release not until the year 2019, and the remaining Plaintiff, Keith Bradley, was released on parole in August, 2014. The record establishes that the Defendants did not have any insurance and deny that those charged with striking the Plaintiffs were agents of the Silver Mine Saloon. This case is over seven years old. The Defendants are entitled to some peace of mind as well.

It is doubtful that the herein case could pass a motion for directed verdict at the conclusion of Plaintiffs evidence because of the hospital records of KY River Medical Center.

The Court having evaluated the case and the evidence therein,

IT IS HEREBY ORDERED AND ADJUDGED pursuant to KY Civil Rule 77[⁴] and **Ward**, *supra*, that the herein case is hereby DISMISSED.

This appeal followed shortly after the above-referenced order was entered.

⁴ Despite the circuit court's repeated reference to CR 77, there is no dispute that the instant matter was dismissed with prejudice. As explained in *Wildcat Property Management, LLC v. Reuss*, 302 S.W.3d 89 (Ky. App. 2009), "*Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991) . . . sets forth six nonexclusive factors for a trial court to consider and apply as appropriate and where applicable prior to *dismissal with prejudice* under CR 41.02." (Emphasis added.)

Taken generously, the appellants' argument in their three-page brief before this Court is that the circuit court failed to address the six factors enumerated in *Ward v. Housman*, 809 S.W.2d at 719, relating to involuntary dismissals. Their argument, however, is flatly refuted by a cursory review of the circuit court's order as it appears above.⁵ We have reviewed the order for an abuse of discretion; finding none, we affirm.

We pause to note that no reason is given by the Appellants for their lack of prosecution of this case. They concede that it has nothing to do with Adkins' incarceration. Specifically, in their brief, they state "The fact that one of its Appellants (Adkins) is imprisoned created no impediment to the proceedings in this case. Adkins and his family have the financial ability to obtain his attendance at trial. However, the presence of a party at trial in a civil case is not required." We are left to ponder why this case has not otherwise moved along. Regardless, the circuit court did not abuse its discretion in dismissing it.

We therefore AFFIRM.

ALL CONCUR.

⁵ Moreover, we are obligated to presume that the 150 or so pages of record that were previously before this court in 2011-CA-002289-MR, along with the two depositions extensively referenced in the circuit court's order, support the circuit court's judgment. This is because it is the appellants' responsibility to designate the appellate record. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky.1985); see also *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky.1968); CR 75.01; CR 98(3). If the complete record is not designated for our review, we "assume that the omitted record supports the decision of the trial court." *Thompson*, 697 S.W.2d at 145. And here, the appellants failed to designate these materials as part of the appellate record before us, which in its entirety consists of 22 pages (*i.e.*, the appellees' renewed motion to dismiss; a two-page response filed by the appellants; the circuit court's order; and the notice of appeal).

BRIEF FOR APPELLANTS:

Frederick J. Anderson
Lexington, Kentucky

BRIEF FOR APPELLEES:

James T. Harris
Lexington, Kentucky