

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001463-MR

AMICA MUTUAL INSURANCE CO.,  
A/S/O TIFFANY SIMMONS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE A.C. MCKAY CHAUVIN, JUDGE  
ACTION NO. 14-CI-005199

MACK C. MARZETTE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: J. LAMBERT, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: This appeal arises from an order of the Jefferson Circuit Court denying Appellant's CR<sup>1</sup> 60.02 motion for relief from the court's dismissal of the Appellant's case based on CR 41.02. We affirm.

Background

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

This case began as a civil action brought by Amica Mutual Insurance Co. (Amica) for damages against Mark C. Marzette due to a car wreck in which its insured, Tiffany Simmons, suffered damages. Over the course of the litigation, Amica, whose counsel is located in Indianapolis, filed several motions for default judgment. Marzette had filed an answer with the court, but did not send a copy to Amica's counsel. Amica's counsel contends that he called the clerk to inquire as to whether or not an answer had been filed and the clerk told him no.

Additionally, it is undisputed, and supported by emails in the record, that the clerk was sending the court's orders, including orders to appear, to an attorney in Louisville as opposed to the correct attorney in Indianapolis (the two had the same name). The Louisville attorney responded several times explaining that the clerk was sending notices to the wrong attorney, even though Amica had included its counsel's correct contact information and the contact information had not changed. As a result, Amica failed to appear at scheduled hearings on more than one occasion. The court therefore dismissed the case pursuant to CR 41.02.

After this, Amica discovered that the reason it had not been appearing was because the court's orders were repeatedly sent to the wrong attorney. In response Amica filed a motion to set aside the dismissal based on the discovery of these mistakes. In response the court issued a corrected order. Amica then filed a motion pursuant to CR 60.02 to set aside the court's corrected order. The court

denied the motion. This appeal follows. Marzette has not filed an Appellee Brief. More facts will be developed as necessary.

### Standard of Review

“Given the high standard for granting a CR 60.02 motion, a trial court’s ruling on the motion receives great deference on appeal and will not be overturned except for an abuse of discretion.” *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998) (citations omitted). Similarly, a CR 41.02 dismissal is reviewed under the same abuse of discretion standard. *Jaroszewski v. Flege*, 297 S.W.3d 24, 32 (Ky. 2009). To amount to an abuse of discretion, the trial court’s decision must be “arbitrary, unreasonable, unfair or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). In considering whether the denial of a CR 60.02 was an abuse of discretion, the two factors to be considered are whether the movant had a fair opportunity to present his claim and whether the granting of the relief sought would be inequitable to the other parties. *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957).

### Analysis

On appeal, Amica contends that the trial court erred in dismissing the case under CR 41.02 without considering the totality of the circumstances, and then erred by not granting the CR 60.02 motion in response to the clerk’s mistake. While we believe the outcome to be unfortunate, we are compelled due to existing case law to disagree and affirm the decision.

Amica first contends that the trial court erred by not applying the “totality of the circumstances” analysis described in *Jaroszewski* 297 S.W.3d at 33. In *Jaroszewski*, the Kentucky Supreme Court explained that, “[s]ince the issue of whether a case must be dismissed for lack of prosecution is inherently fact-specific, demanding that a rigid list of factors must be addressed by the trial court in each case is inconsistent with the traditional ‘totality of the circumstances’ approach.” *Id.* The Court held that trial courts should assess all relevant factors, but there are no required factors that must be considered. *Id.*

Here, the trial court dismissed the action pursuant to CR 41.02. The trial court found that there were a series of intolerable events which occurred resulting in the dismissal. This included the plaintiff “ignoring” the court’s orders to appear and claiming that the defendant had not filed an answer, when in fact they did. Later on it would be discovered that Amica did not receive notice of the court’s orders because the clerk was sending the orders to the wrong attorney. It would also become clear that Amica did not know an answer was filed because the answer was only filed with the court, and after calling to inquire, Amica’s counsel was told an answer had not been filed. Regardless, at the time the court dismissed the action, the court did not know of these mistakes by the clerk. Therefore, we cannot say that the court abused its discretion in dismissing the action because the court did consider the totality of the circumstances, as they were known to the court at that time.

Next, Amica contends that the court erred by not granting its CR 60.02 motion after the clerk's mistakes were discovered. CR 60.02 states that in the event of mistake, such as this, "a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding...." CR 60.02. The key word is *may*, not *shall*. While we agree that the clerk's continual mistake was egregious and not in any way Amica's fault, we are forced to find that the trial court did not abuse its discretion in denying the CR 60.02 motion.

The trial court found that the court,

is left to presume that the Plaintiff was ignorant of its obligations under those Orders...[and] it may not be fair to say that the Plaintiff was *intentionally* or *willfully* ignoring its obligations or this [c]ourt's orders.

However, if so, then there is a strong argument to made that the Plaintiff was *passively* and *negligently* ignoring its obligations and this [c]ourt's Orders.

The court also concluded that because Amica mentioned the date given for Marzette to file an answer, "Plaintiff acknowledge[d] his knowledge of both the hearing and the attendant Order." It appears the court, while acknowledging the court's mistake, believed that Amica failed to meet their responsibility to prosecute their case. It was in the discretion of the trial court to grant the motion, and in this particular case the trial court decided against granting the motion. As the trial court's findings were not an abuse of discretion, we must affirm.

#### Conclusion

For the reasons discussed herein, we affirm.

NICKELL, JUDGE, CONCURS IN RESULT ONLY.

LAMBERT, J., JUDGE, DISSENTS WITHOUT A SEPARATE  
OPINION.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE.

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