MICHAEL J. REYNOLDS, Plaintiff/Appellant, VS. METROPOLITAN NASHVILLE/ DAVIDSON COUNTY, RONNIE SAVAGE, ED RIGSBY, and UNKNOWN OFFICERS OF THE METROPOLITAN NASHVILLE/ DAVIDSON COUNTY POLICE DEPARTMENT VICE SQUAD, Defendants/Appellees.	)	Appeal No. 01-A-01-9509-CV-00406 Davidson Circuit No. 89C-3411

FILED

February 23, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE WALTER C. KURTZ, JUDGE

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
LEWIS, J.

O P I N I O N

The Circuit Court of Davidson County dismissed the plaintiff's action for failure to prosecute. We affirm.

I.

The plaintiff, Michael J. Reynolds, working as an undercover agent for the Metropolitan Nashville Police Department was shot by a police officer during a drug raid. Ten days later the plaintiff signed a release in consideration of the Metropolitan Government's payment of his medical bills and the damage to his car.

Within the original statute of limitations the plaintiff filed an action against the Metropolitan Government and its agents. The trial judge granted the defendants' motion for summary judgment, but this court reversed because we found factual disputes in the record on the plaintiff's contention that the release was signed under duress. This court's judgment was filed on February 21, 1991 and the mandate issued on April 1, 1991. On March 10, 1995 the defendants filed a motion to dismiss for failure to prosecute

On April 10, 1995 the lower court dismissed the plaintiff's case. In the order of dismissal the court recited the following facts:

> 1) the Court of Appeals issued a mandate April 1, 1991, remanding this case to the circuit courts for trial;
>
> 2) the Honorable Marietta Shipley entered an Order September 4, 1991, transferring the case to the Fifth Circuit Court and recommending that the case be set for trial within 90 days;
>
> 3) the Defendants' depositions were scheduled by Plaintiff's attorney for November 17, 1992, at the office

of Plaintiff's attorney. Defendants were present; Plaintiff's attorney failed to appear;

4) a year later, November 4, 1993, notice was sent to Plaintiff's attorney by the court clerk that the case would be dismissed unless a motion to set for trial was filed and heard by the trial judge within 30 days;

5) a motion to set was then filed by Plaintiff November 12, 1993, and it was brought to the trial judge's attention that Plaintiff's attorney had failed to appear for the depositions a year earlier;

6) an Order was entered February 11, 1994, assessing $200 against Plaintiff's attorney as Defendant Metropolitan Government's reasonable expenses for his failure to appear for the depositions;

7) the Order specifically stated that upon payment of the assessment Plaintiff could obtain a court date and set this case for trial;

8) on February 14, 1995, over one year later, the court clerk again sent notice to Plaintiff's attorney that the case would be dismissed if an Order setting the case for trial was not entered within 30 days;

9) on March 6, 1995, eleven days after Plaintiff had filed a motion to set and over one year after this Court had ordered Plaintiff's attorney to pay the $200 assessment, Defendant Metropolitan Government received a check for $200 from Plaintiff's attorney.

The plaintiff does not dispute any of the facts recited by the court. Instead, he seeks to blame the defendants for obstructive and dilatory tactics. The lower court found that "the record fails to support this contention nor has plaintiff's counsel sought the assistance of the court." All of the court's findings are supported by the record. See Rule 13(d), Tenn. R. App. Proc.

II.

Rule 41.02(1) of the Tennessee Rules of Civil Procedure allows a defendant to move for dismissal of any claim against him for the plaintiff's failure to prosecute. This court has held that the dismissal of an action under Rule 41.02(1) is within the discretion of the trial judge and the appellate courts will not disturb the decision in the absence of an affirmative showing that the trial judge acted unreasonably, arbitrarily, or unconscionably. See *Kotil v. Hydra-Sports*, no. 01-A-01-9305-CV-00200, slip op. at 6, filed Oct. 5, 1994.

We are of the opinion that the trial court did not abuse its discretion in dismissing this case. Plaintiff's counsel has never explained why fourteen months passed after the trial court recommended that the case be set for trial within ninety days before he scheduled the depositions of the two individual defendants, or why, when they appeared at his office by agreement on November 17, 1992, the depositions were not taken. After the court ordered plaintiff's counsel to reimburse the defendants for their expenses incurred in the aborted depositions another year passed before the assessment was paid. Any movement in the case was prompted by notice from the court that dismissal was imminent. When the defendants made their motion to dismiss in March of 1995 discovery had not even begun and, so far as this record shows, none of the medical proof had been taken.

The judgment of the lower court is affirmed and the cause is remanded to the Circuit Court of Davidson County for any further necessary proceedings. Tax the costs on appeal to the appellant.

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BEN H. CANTRELL, JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

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SAMUEL L. LEWIS, JUDGE