RENDERED: JUNE 18, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000389-MR

SANDRA GRISSOM PHILLIPS;
JAMES C. PHILLIPS; DAVE
DOWDELL; HEATHER DOWDELL;
JOHN STONE; BELINDA STONE;
GARY BATES; CYNTHIA BATES;
CHRIS LAVENSON; AND
TONI LAVENSON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 07-CI-010247

HIGHLAND PRESBYTERIAN
CHURCH, INC. — APPELLEE

AND

NO. 2009-CA-000432-MR

HIGHLAND PRESBYTERIAN
CHURCH, INC. — CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 07-CI-010247

SANDRA GRISSOM PHILLIPS;
AND JAMES C. PHILLIPS CROSS-APPELLEES

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: CLAYTON, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Sandra Grissom Phillips, James C. Phillips, Dave Dowdell, Heather Dowdell, John Stone, Belinda Stone, Gary Bates, Cynthia Bates, Chris Lavenson, and Toni Lavenson (collectively referred to as appellants) bring Appeal No. 2009-CA-000389-MR and Highland Presbyterian Church, Inc. (hereinafter referred to as appellee) brings Cross-Appeal No. 2009-CA-000432-MR from a January 21, 2009, opinion and order granting appellee a partial summary judgment and a February 4, 2009, order of the Jefferson Circuit Court amending the January 21, 2009, order as "Final and Appealable." For the reasons stated, we dismiss both appeals.

The underlying dispute arose after appellee installed an air-conditioning unit in an alley that abutted appellants' properties. Appellants filed a complaint against appellee and set forth various claims including trespass,

violation of the noise control act (Kentucky Revised Statutes (KRS) 224.30-100), and nuisance.

In the January 21, 2009, order granting partial summary judgment, the circuit court adjudicated the question of the parties' respective property rights in the alley. The court concluded that appellee owned the alley in fee simple and that appellants' easement claim to the alley had been "extinguished." Thereafter, upon motion by appellants, the circuit court amended the opinion and order by order entered February 4, 2009. In this order, the court specifically held:

> [I]t is hereby Ordered that the Opinion and Order entered January 21, 2009[,] is amended making it Final and Appealable, and bifurcating the action for nuisance so that the nuisance portion of the action may remain on the docket and proceed as scheduled.

Generally, a final and appealable judgment is one that adjudicates all the rights of all the parties. Kentucky Rules of Civil Procedure (CR) 54.01; *King Coal Co. v. King*, 940 S.W.2d 510 (Ky. App. 1997). In an action involving multiple claims or multiple parties, CR 54.01 permits a court to make an otherwise interlocutory order final and appealable in limited circumstances as provided for in CR 54.02. The partial summary judgment is clearly interlocutory. However, under CR 54.02, an interlocutory order may be made final and appealable if the order includes the following recitations: (1) there is no just reason for delay, and (2) the decision is final. *Peters v. Bd. of Education of Hardin Co.*, 378 S.W.2d 638 (Ky. 1964). A court's failure to include both recitations in the order renders it interlocutory and nonappealable. *Turner Const. Co. v. Smith Bros., Inc.*, 295

S.W.2d 569 (Ky. 1956); *Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722 (Ky. 2008).

As noted by this Commonwealth's highest Court in *Peters*, an appellate court must raise the issue of lack of jurisdiction on its own motion where an order lacks finality. By order entered May 25, 2010, this Court ordered the parties to show cause why this appeal and cross-appeal should not be dismissed as being taken from an interlocutory and nonfinal order. The parties submitted simultaneous briefs in response to the show cause order. The parties acknowledged that the order entered on February 4, 2009, did not contain the proper CR 54.02 recitations to make the partial summary judgment final by specifically failing to state that there was no reason or cause to delay an appeal of that order. Both parties further acknowledged that upon receipt of the show cause order from this Court, the parties tendered an agreed order to the Jefferson Circuit Court which was entered on June 4, 2010, that contained the necessary CR 54.02 recitations to purportedly cure the defect of the interlocutory order on appeal.

Essentially, the order entered in Jefferson Circuit Court on June 4, 2010, was *nunc pro tunc*.[1] The parties argue that this *nunc pro tunc* order has cured any jurisdictional defect created by the appeal of a nonfinal order and

[1] We do not have before this Court the record of the proceedings in the circuit court after issuance of our show cause order that led to entry of the *nunc pro tunc* order on June 4, 2010, and thus, reach no conclusion on its propriety. However, we note that even if a clerical error occurred below, to correct such an error while an appeal is pending requires leave of the appellate court. *Hinshaw v. Hinshaw*, 216 S.W.3d 653 (Ky. App. 2007). No such leave was granted in this case. We also note that as a general rule, with a few limited exceptions, "the filing of a notice of appeal divests the trial court of jurisdiction to rule on any issues while the appeal is pending." *Young v. Richardson*, 267 S.W.3d 690, 695 (Ky. App. 2008). An order entered without jurisdiction by a trial court is a nullity. *Id.*

effectively breathed finality into the February 4, 2009, order entered by the Jefferson Circuit Court. Our Court has previously looked with displeasure upon such a practice and specifically has reasoned that "a *nunc pro tunc* order cannot retroactively vest finality upon a judgment which was interlocutory when the notice of appeal herein was filed." *Copass v. Monroe Co. Med. Found., Inc.*, 900 S.W.2d 617, 619 (Ky. App. 1995). We view this reasoning as sound and likewise hold that the subsequent entry of a *nunc pro tunc* order adding CR 54.02 finality recitations will not retroactively vest finality upon a judgment which was interlocutory when the notice of appeal was filed. We also note that the parties, by agreement, cannot confer jurisdiction on this Court. *Wilson v. Russell*, 162 S.W.3d 911 (Ky. 2005).

In *Watson v. Best Financial Services, Inc.*, 245 S.W.3d 722 (Ky. 2008), the Kentucky Supreme Court recently reviewed the purpose and function of CR 54.02 in determining whether interlocutory rulings should be subject to appellate review. The Supreme Court discussed the historic policy in Kentucky against piecemeal appeals balanced with the practical needs of the case before the trial court. *Id.* The Supreme Court held that CR 54.02 certifications look to the sound discretion of the trial court and must be thoroughly reviewed by the trial court before making a ruling. The Court noted:

> A trial court should not grant CR 54.02 requests routinely or as a courtesy to counsel. Each case must be evaluated on a case-by-case basis.

Id. at 727.

The underlying action clearly involves multiple parties and multiple claims. The January 21, 2009, opinion and order granting partial summary judgment did not adjudicate all the claims between all the parties; rather, it was a partial summary judgment that adjudicated the parties' respective property rights in the alley. The circuit court attempted to convert the January 21, 2009, partial summary judgment into an appealable judgment by its February 4, 2009, order. Unfortunately, the February 4, 2009, order did not contain both of the required CR 54.02 recitations – that there was no just cause for delay and that the judgment was final. The February 4, 2009, order only contained the recitation that it was "Final and Appealable." Under the mandate of *Watson*, in our first level of review we cannot conclusively determine that finality was reached as required by CR 54.02. Thus, we do not reach the issue of whether the trial court abused its discretion in making a CR 54.02 certification. *Id.* Accordingly, the January 21, 2009, partial summary judgment is interlocutory, nonappealable, and otherwise cannot be cured by the *nunc pro tunc* order entered June 4, 2010.

Now, therefore, be it ORDERED that Appeal No. 2009-CA-000389-MR and Cross-Appeal No. 2009-CA-000432-MR are hereby DISMISSED as being taken from interlocutory and nonappealable orders.

ENTERED: June 18, 2010

/s/ Jeff S. Taylor
JUDGE, COURT OF APPEALS

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent from the majority's opinion that the appellant must file a new notice of appeal from a judgment made final by the trial court's *nunc pro tunc* order. I ask the same question as did our Supreme Court when dealing with the same issue: why and for what purpose? *James v. James*, ___S.W.3d ___ (Ky. 2010) (rendered May 20, 2010).

Although the law cited and the reasoning applied may be sound if a judgment is not final and appealable, that is simply not the situation. The trial court, the parties, and even the majority agree that the trial court's *nunc pro tunc* order included the finality language and, therefore, rendered the judgment final and appealable. Thus, we are not dealing with an appeal from an interlocutory order but, instead, with a prematurely filed notice of appeal.

The majority heavily relies on *Copass v. Monroe Co. Med. Found.*, 900 S.W.2d 617 (Ky. App. 1995), and, in doing so, quotes a statement in the opinion that "a *nunc pro tunc* order cannot retroactively vest finality upon a judgment which was interlocutory when the notice of appeal was filed." *Id*. at 619. I point out that this Court's statement was made in the context of describing the procedures leading to the appeal and was not its holding. Most significantly, the order of this Court was apparently entered in early 1994 and presumably prior to

the Supreme Court's October 1994 decision in *Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994).

In *Johnson,* multiple notices of appeal were filed from a judgment not technically final because a CR 59 motion remained pending. Following the federal courts, our Supreme Court adopted the rule of relation forward. It held that the notices of appeal related forward to the time when final judgment was entered *Id*. at 950. Consistent with the substantial compliance doctrine, the Court emphasized that a premature appeal does not harm the opposing party who has notice of the intent to appeal before the expiration of the thirty-day time limit in CR 73.02(1)(a). Moreover, the Supreme Court specifically held that the Court of Appeals erred when it stated that the filing of a notice of appeal is a matter of jurisdiction. To emphasize my point, I quote the Court's holding:

> To be precise, losing litigants are constitutionally vested with a right of appeal and appellate courts are constitutionally vested with jurisdiction. Strictly speaking, the notice of appeal is *not* jurisdictional. It is a procedural device prescribed by the rules of the court by which a litigant may invoke the exercise of the inherent jurisdiction of the court as constitutionally delegated. This is why CR 73.02(2) describes automatic dismissal as the penalty for failure of a party to file a timely notice of appeal, but not as a lack of jurisdiction.
>
> If it were otherwise, the rules could not be changed except by constitutional amendment. This Court has the power to deny or dismiss an appeal if the rules are not followed, based on its own rules, but no power to create or deny jurisdiction. The battle between strict compliance with the rules of appellate practice to avoid dismissal (*Foremost Ins. Co. v. Shepard,* Ky., 588 S.W.2d 468 (1979) and *Manly v. Manly, supra*), and

> substantial compliance (*Ready v. Jamison, supra* and *Foxworthy v. Norstam Veneers, Inc., supra*) is now over. Excepting for tardy appeals and the naming of indispensable parties, we follow a rule of substantial compliance.

Id.

The rule of relation forward was again invoked in *Board of Regents of Western Kentucky University v. Clark,* 276 S.W.3d 819 (Ky. 2009), a condemnation case where the notice of appeal was filed prior to the expiration of the time for the filing of exceptions. *Id.* at 820-821. Although the appeal was from an interlocutory judgment, the Court relied on *Johnson* and held that the notice of appeal related forward to the time when the trial court's interlocutory judgment became final and could properly be heard and decided by the appellate court. *Id*. at 821.

Recently, in *James*, the Supreme Court reinforced its adherence to the rule of relation forward. The appellant filed a late notice of appeal and a motion to extend the time to file an appeal pursuant to CR 73.02(1)(d) based on excusable neglect. Because the motion for an extension remained pending, this Court dismissed the appeal holding that jurisdiction was transferred when the notice of appeal was filed and, therefore, was filed in an untimely manner without leave to do so. *Id*. at ___. The Supreme Court disagreed and reiterated that the rule of relation forward is one based on common sense. "[I]f an otherwise appropriate notice of appeal is filed as to an order or judgment of a trial court and it appears otherwise reasonable under the circumstances, precedents, and the rules of

procedure applicable to have done so, the notice of appeal may operate prospectively." *Id*. at ___.

The Supreme Court has repeatedly held that the rule of relation forward has been adopted in this jurisdiction. Additionally, the majority of the federal court's addressing the issue have held that the rule of relation forward applies when the judgment or order is made final by a *nunc pro tunc* order. *See Good v. Ohio Edison Company*, 104 F.3d 93 (6th Cir. 1997). Yet, this Court has again ignored the Supreme Court's directive and dismisses the appeal. Particularly vexing is that the order entered by the Court omitted the finality language by mere mistake which was corrected by the Court's *nunc pro tunc* order. Under the erroneous conception that the notice of appeal is a matter of jurisdiction and that Kentucky adheres to the rigid substantial compliance doctrine, the appellant will have to re-file a notice of appeal which will impose additional costs on the parties and delay finality of the case. Again, I ask why and for what purpose?

I would decide the case on its merits.

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