

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002091-MR

THELMA SPENCER COMBS;
BRANDON COMBS; AND PAULA
SPENCER CAMPBELL

APPELLANTS

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 08-CI-00015

DELORES JETT GILBERT;
DOUG GROSS; KELSIE GROSS,
as primary appellees; BONNIE
SPENCER GARRETT; ALEENE
SPENCER CREECH; AND FAYE
SPENCER CAUDILL, as indispensable
parties

APPELLEES

OPINION AND ORDER
DISMISSING

** ** *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

VANMETER, JUDGE: Thelma Spencer Combs, Brandon Combs and Paula Spencer Campbell (hereinafter collectively referred to as “Combs & Campbell”) appeal from a judgment of the Breathitt Circuit Court entered September 10, 2008 granting Combs & Campbell a permanent right of easement to a private cemetery for ingress and egress and otherwise dismissing the case against Delores Jett Gilbert, Doug Gross, and Kelsie Gross, as well as Bonnie Spencer Garrett, Aleene Spencer Creech, and Faye Spencer Caudill (hereinafter collectively referred to as “Gilbert & Gross”). Upon review, we are obligated to dismiss this appeal.

This matter arises from a dispute over the use of a private cemetery by the relatives and friends of those buried there. Evidently, since the early 1900’s, an annual “Gilbert Cemetery Meeting” has been held at the cemetery. Family and friends of the deceased attend the meeting, during which a memorial service is held with ministers, singers, and a dinner on the grounds.

During the annual graveside meeting held on Sunday, July 29, 2007, which Combs & Campbell attended, Gilbert & Gross distributed newsletters informing those in attendance that they would manage all future cemetery activities. By letter dated November 26, 2007, Delores Jett Gilbert informed Thelma Combs that the cemetery was owned by Delores, as a result of a deed in 1908, and would thereafter be closed to outsiders. Delores further stated that no more memorial services would be held on the hill, the gates allowing access to the cemetery would

be locked, and anyone on the property would be considered a trespasser subject to arrest.

In January 2008, Combs & Campbell filed, *pro se*, a complaint for declaratory and injunctive relief against Gilbert & Gross, requesting a declaration of easement by operation of law to the cemetery, a declaration of ingress and egress over the private road accessing the cemetery, an injunction allowing access to the cemetery and enjoining locking of the gates, and an injunction prohibiting interference with graveside services. On July 25, 2008, the trial court entered an order granting partial summary judgment to Combs & Campbell and awarding them a permanent injunction enjoining Gilbert & Gross from prohibiting their access to the cemetery, including access to the private gravel road leading to the cemetery, the parking area adjacent to the cemetery, and locking the gates to the private road and cemetery. The court's order further awarded Combs & Campbell a permanent injunction enjoining Gilbert & Gross from interfering with the annual "Gilbert Cemetery Meeting," held annually on the Sunday after the fourth Saturday each July, by distributing newsletters, representing they are in control of, or interfering in the services. The order was designated as final and appealable, yet no appeal was taken.

On September 10, 2008, the trial court entered a judgment granting summary judgment to Combs & Campbell and awarding them a permanent right of easement to the cemetery for ingress and egress. Thereafter, on September 22, 2008, Combs & Campbell served and filed a post-judgment motion to alter, amend, or vacate the

September 10, 2008, judgment. The trial court denied their post-judgment motion by order entered October 27, 2008. Combs & Campbell filed a notice of appeal from the September 10, 2008, judgment on November 5, 2008.²

After careful review of the record, we are compelled to dismiss this appeal. The post-judgment motion, served and filed September 22, 2008, is time-barred since served more than 10 days after entry of the September 10, 2008, judgment. CR³ 59.05 (“[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment.”). *See also Marrs Elec. Co., Inc. v. Rubloff Bashford, LLC*, 190 S.W.3d 363, 367 (2006) (“a trial court loses control of a judgment ten (10) days after the entry of the judgment, except to the extent an authorized, timely motion under CR 59 is made.”) (quoting *Ky. Farm Bureau Ins. Co. v. Gearhart*, 853 S.W.2d 907 (Ky.App. 1993) (citation omitted)).

The September 10, 2008, judgment was designated as “final and appealable.” Thus, in order for a motion to alter, amend, or vacate that judgment to be considered by the trial court, it must have been served within 10 days after its entry. Because Combs & Campbell failed to do so, the trial court “lost control and jurisdiction over the judgment ten days after its entry,” and any subsequent effort to amend it should have been dismissed as untimely. *Marrs Elec. Co.*, 190 S.W.3d

² Combs & Campbell filed an amended notice of appeal on November 12, 2008 from the September 10, 2008, judgment, the September 9, 2008, docket order denying discovery and discovery sanctions, the August 22, 2008 and September 9, 2008, docket orders denying recusal, the September 24, 2008, order clarifying that the September 10, 2008, judgment was a summary judgment, and the October 24, 2008 and October 27, 2008, orders denying all remaining post-judgment motions.

³ Kentucky Rules of Civil Procedure.

at 367. An additional effect of the failure to serve a CR 59.05 motion within 10 days of entry of the September 10, 2008, judgment “is that the 30-day time period during which an appeal from the . . . judgment could have been taken was not tolled and consequently expired well before the notice of appeal here was filed.” *Id.* (citing CR 73.02(1)(e); *Merrick v. Commonwealth*, 132 S.W.3d 220, 222 (Ky.App. 2004)). While “[u]nder the civil rules concerning appellate procedure, the filing of a CR 59.05 motion suspends the running of the time for an appeal, and the entry of an order overruling a CR 59.05 motion resets the time for appeal so that a party has the full thirty-days to begin the appeals process[,]” in this case the CR 59.05 motion was not timely filed and thus Combs’ & Campbell’s notice of appeal was untimely as well. *Mills v. Commonwealth*, 170 S.W.3d 310, 322 (Ky. 2005) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). As a result, we are obligated to dismiss this appeal as untimely. *See Marrs Elec. Co.*, 190 S.W.3d at 367 (citing CR 73.02(2); *see also Fox v. House*, 912 S.W.2d 450, 451 (Ky.App. 1995) (citations omitted) (failure to file notice of appeal within prescribed time frame is fatal to appeal)).

Based on the foregoing, Appeal No. 2008-CA-002091-MR is hereby dismissed.

ALL CONCUR.

ENTERED: January 7, 2011 /s/ Laurance B. VanMeter
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANTS:

Paula Spencer Campbell, *Pro se*
Nicholasville, Kentucky

BRIEF FOR APPELLEES:

Patrick E. O'Neill
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