RENDERED: MARCH 11, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000505-MR

FORREST ALAN MOSELEY — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NO. 04-CI-01201

HAILEY M. NORRIS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR AND STUMBO, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Forrest Alan Moseley appeals *pro se* from the Daviess Circuit Court's order denying his motion to "Vacate Void Judgment." For the reasons stated herein, we affirm.

[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 Statutes (KRS) 21.580.

Hailey Norris filed suit against Forrest Alan Moseley for loss of parental consortium stemming from events that occurred on January 31, 1995 which resulted in the shooting death of Norris's mother, Mary Yvette Fuqua Norris. Norris was a minor at the time of the shooting. Moseley was subsequently convicted of the wanton murder of Norris's mother.

Upon obtaining the age of majority, Norris filed suit against Moseley. Moseley was serving a forty year sentence at the time that Norris filed the suit. The trial court granted partial summary judgment in favor of Norris on the issue of liability based on Moseley's conviction. A jury trial was held, attended by Moseley via telephone, on the issue of damages. The jury awarded Norris $150,000 for the loss of parental consortium. Thereafter, an order and judgment to that effect was entered on January 27, 2005.

Moseley filed a motion to vacate with the trial court claiming improper communications with jurors, and this motion was denied. Thereafter, Moseley filed a direct appeal with this Court. However, the parties subsequently filed a joint motion to dismiss the appeal. To memorialize a settlement of the action, Norris agreed to pay $500 in a check payable to counsel for Moseley as soon as certain property was sold, the proceeds distributed, and the time had run on the appeal of the action. Norris also agreed to enter a notice of satisfaction of the judgment, which was filed on February 16, 2006.

On October 16, 2009, approximately four years after the trial court's original order and judgment in the civil action, Moseley filed a "motion to vacate

void judgment" the trial court's judgment of January 27, 2005. The trial court denied the motion, finding, among many things, that Moseley's motion was untimely under Kentucky Civil Rule (CR) 60.02. Moseley has appealed from the trial court's order denying his motion to vacate.

We do not reach the merits of Moseley's appeal, however, because his motion was untimely. As already stated, Moseley filed a motion to vacate a judgment entered on January 27, 2005. CR 60.02 provides:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. *The motion shall be made within a reasonable time*, *and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken.* A motion under this rule does not affect the finality of a judgment or suspend its operation.

(Emphasis added). Because Moseley's motion was filed more than four years after the January 27, 2005 judgment, the motion is not timely filed to permit relief for the grounds stated in CR 60.02(a), (b), or (c).

Moseley also seeks relief under CR 60.02(d)-(f), and the rule requires that any motion brought under these provision must be brought within a

"reasonable time." "What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983); *see Reyna v. Commonwealth*, 217 S.W.3d 274, 276 (Ky. App. 2007) (finding that a delay of four years between the judgment and the filing of the CR 60.02 motion was unreasonable). The trial court in this case found, among other things, that Moseley's motion was not brought within a reasonable time, and we have been provided with no reason to doubt this finding. Therefore, because Moseley's CR 60.02 motion was not timely filed, we need not address the merits of the motion.

Additionally, motions under CR 60.02 are "not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal . . .[.]" *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (citations omitted). A motion pursuant to CR 60.02 "is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *Id.*

Moseley makes the conclusory claim that fraud was committed by his attorney and the plaintiff's attorney, that there was misconduct by the trial judge, and that there was a conspiracy among the three of them in Moseley's civil trial. Moseley bases these allegations on the fact that the trial judge ruled that the cause of action for loss of parental consortium declared in the case of *Giuliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997), was retroactive and applied to Moseley having killed Norris's mother, either by negligent or willful act.

When the facts are considered, however, Moseley's claim of error amounts to no more than an error of law, and the remedy was an appeal to the Court of Appeals. Moseley had the opportunity to appeal the judgment which he now seeks to vacate, and it was in fact appealed by him. However, that appeal was dismissed on the joint motion of both parties entered on October 17, 2005. As the trial judge stated:

> . . . Even if . . . the Court was in error, the circuit court as a court of general jurisdiction had the legal authority to adjudicate the claims.

Moreover, Moseley was aware of this issue when he voluntarily dismissed his direct appeal. In a letter placed by Moseley into the record, he stated:

> There is an issue that I need your opinion about. This case is about an incident that took place on January 31, 1995, in [*Giuliani*], the Kentucky Supreme Court said on page 319, paragraph three, (see case attached), that "such a cause of action does not currently exist in Kentucky, but it should."
>
> Since the state of Kentucky didn't even recognize a child's loss of parental consortium until the 2nd of October, in 1997, and the incident that caused the death took place on January 31, 1995, the civil suit should have been dismissed with prejudice as soon as it was filed. No circuit court in Kentucky, nor the Kentucky Court of Appeals, nor the Kentucky Supreme Court even recognized parental consortium until two, (2), years after the incident that caused the death . . . [.]

Therefore, because Moseley could have raised the issue on direct appeal, the trial court did not err in denying the motion.

Moseley also argues that the trial court violated the Ex Post Facto clause of the United States Constitution and the Kentucky Constitution. This is a civil matter, however, and those clauses concern only criminal matters. *See Nicholson v. Judicial Retirement and Removal Commission*, 562 S.W.2d 306, 308 (Ky. 1978) (citing *Beazell v. Ohio*, 269 U.S. 167, 169, 46 S.Ct. 68, 70 L.Ed. 216 (1925); *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898); *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed.506 (1883); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798) ("It is clear that the 'ex post facto' prohibition applies only to criminal matters").

Additionally, Moseley argues that he was entitled to an evidentiary hearing on his motion. However, in *Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999), the Kentucky Supreme Court held that "[t]he decision to hold an evidentiary hearing is within the trial court's discretion and we will not disturb such absent any abuse of that discretion."

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Forrest Alan Moseley, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Ronald M. Sullivan
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