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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001290-MR

PEGGY BRYANT HILL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA M. BISIG, JUDGE
ACTION NO. 06-CI-006048

VICKI BRYANT; ROSCOE BRYANT III; and CHERI BRYANT HAMILTON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND D. LAMBERT, JUDGES.

KRAMER, CHIEF JUDGE: Peggy Hill appeals from a September 18, 2012 order of the Jefferson Circuit Court setting aside a prior order dismissing various civil claims asserted against her by the above-captioned appellees; she also appeals a subsequent jury verdict and judgment in favor of the appellees relative to those previously-dismissed claims. For the reasons discussed below, we affirm.

The pertinent history of this case is relatively straightforward. On July 11, 2006, the above-captioned appellees filed suit against Hill and also against Chris Meinhart. Hill was the former executor and administrator of the estate of her deceased father, Roscoe Bryant, Jr.; Meinhart, acting as a public administrator, was subsequently appointed to those roles after Hill was removed from them; and the appellees' action sought to have Roscoe's will set aside, alleging that it was the product of Hill's undue influence over Roscoe.

On October 30, 2009, the appellees' suit was dismissed without prejudice for want of prosecution. On November 15, 2011, the appellees moved to set aside the order of dismissal and reopen this matter for trial. Meinhart opposed their motion. Hill did not. And the circuit court ultimately entered an order on September 19, 2012, reopening this matter pursuant to its authority under Kentucky Rule of Civil Procedure (CR) 60.02(f).[1] Thereafter, the parties engaged in a period of motion practice; the appellees tried their claims before a jury; and the jury ultimately found in the appellees' favor.

With that said, Hill's sole argument on appeal is that the circuit court committed reversible error by reopening the appellees' claim pursuant to CR 60.02(f). Before we address more of this argument, however, we will address two misconceptions that are raised in the parties' respective briefs.

First, the appellees argue Hill's appeal is untimely and should be dismissed because Hill filed no notice of appeal within thirty days of September

[1] While it does not affect the merits of this case we note that a different circuit judge entered this order.

19, 2012—the date the circuit court entered its order reopening this matter pursuant to CR 60.02(f). The appellees' argument is based upon Kentucky Supreme Court precedent allowing for an immediate appeal when a trial court improperly reopens a case under the purview of CR 60.02(a), (b), (c), or (f). *See Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. *2007); Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010). The appellees reason that in light of this precedent the only time an order granting a reopening pursuant to CR 60.02(f) may be appealed is within thirty days of such an order.

To be sure, CR 73.02(1)(a) requires a notice of appeal to be filed within thirty days after the date of notation of service of a judgment or order. CR 73.02(2) further provides that the failure of a party to file a timely notice of appeal "shall result in a dismissal or denial." However, the type of appeal contemplated in *Moberly* and *Johnson* relates to an interlocutory order. *See Moberly*, 241 S.W.3d at 332 (explaining an order setting aside a judgment and reopening the case for trial pursuant to CR 60.02 is not final). Failing to file a notice of appeal within thirty days of the entry of such an order would waive the right to an *interlocutory* appeal. *See, e.g., Johnson*, 323 S.W.3d at 649 (interlocutory appeal dismissed as untimely because it was not filed within thirty days of the order granting reopening pursuant to CR 60.02(f)).

But, it would only waive the right to an interlocutory appeal. The availability of an interlocutory appeal under the rule discussed in *Moberly* and *Johnson* is simply an exception to the rule generally disallowing interlocutory

appeals. The fact that these cases authorize an immediate appeal does not change the interlocutory character of an order granting reopening pursuant to CR 60.02. It does not alter the plenary power of a circuit court to revise and reconsider all interlocutory orders, whether such orders are subject to the final judgment rule or excepted from it. *See* CR 54.02(1). And, it does not alter the rule that all prior interlocutory orders and judgments are deemed *readjudicated* finally as of the date and in the same terms upon the entry of a judgment disposing of all remaining claims. *See* CR 54.02(2).

In short, Hill's failure to file an interlocutory appeal within thirty days of the circuit court's order granting reopening did not divest the circuit court of jurisdiction to effectively readjudicate that order on July 23, 2015, when it entered its final judgment disposing of the claims in this matter. And, because July 23, 2015, was within thirty days of the date Hill filed her notice of appeal in this matter, her appeal was timely and does not warrant dismissal on jurisdictional grounds.

Second, Hill incorrectly asserts that the circuit court's decision to reopen this matter pursuant to CR 60.02(f) exceeded its subject matter jurisdiction, and thus created an error capable of being raised for the first time on appeal.

As an aside, errors regarding subject matter jurisdiction are capable of being raised for the first time on appeal, or even by the Court *sua sponte*. *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 15 (Ky. 2007). Moreover, the Kentucky Supreme Court explained that a circuit court has no

"jurisdiction" to reopen a case on CR 60.02(a), (b), or (c) grounds (or on any of those grounds under the pretext of CR 60.02(f)) after a period of one year. *Johnson*, 323 S.W.3d at 650. But, the *Johnson* Court's general use of "jurisdiction" in the context presented by that case (and by extension this case) was not a reference to a lack of "subject matter jurisdiction." Rather, it was a reference to "particular case jurisdiction."[2]

The difference between these two types of jurisdiction was explained in *Commonwealth v. Steadman*, 411 S.W.3d 717 (Ky. 2013), in relevant part as follows:

> There is a significant difference between general subject-matter jurisdiction and jurisdiction over a particular case. General subject-matter jurisdiction "refers to a court's authority to determine 'this kind of case' (as opposed to 'this case')." *Commonwealth v. Griffin*, 942 S.W.2d 289, 290 (Ky. 1997). This differs from "another type of jurisdiction, jurisdiction over a particular case, . . . [which] refers to a court's authority to determine a specific case (as opposed to the class of cases of which the court has subject matter jurisdiction)." *Id*.; *see also Milby v. Wright*, 952 S.W.2d 202, 205 (Ky. 1997) ("Finally there is jurisdiction over the particular case at issue, which refers to the authority and power of the court to decide a specific case, rather than the class of cases over which the court has subject-matter jurisdiction.").

[2] To a certain extent, the Kentucky Supreme Court delineated the difference between these two types of jurisdictions in *Johnson* by stating:

> [W]e now state clearly that any attempt on our part in our original opinion to suggest that a trial court lacked jurisdiction to rule on an otherwise properly filed CR 60.02(f) motion—*a motion filed in a court having subject-matter jurisdiction and exercising personal jurisdiction over the parties to the action*—was in error. Generally speaking, a trial court would not lack jurisdiction to *rule* on an otherwise properly filed CR 60.02(f) motion. But we recognize that there are two circumstances in which the trial court would lack jurisdiction to *grant relief* upon a CR 60.02 motion. . . .

Id. at 650 (emphasis added.)

Id. at 722.

> [E]rrors in the procedural invocation of a court's jurisdiction relate to particular-case jurisdiction, not general subject-matter jurisdiction:
>
> > An apt example of this type of jurisdiction [particular-case] would be the instance of the filing of a notice of appeal in a civil case on the thirty-second day after the trial court entered judgment. The Court of Appeals has the authority to decide civil appeals in general, but lacks the power to adjudicate a case filed too late.
>
> *Milby*, 952 S.W.2d 202, 205 (Ky. 1997).
>
> . . .
>
> While *Johnson* used the generic term "jurisdiction," it is clear that it meant *subject-matter* jurisdiction. In discussing the filing of a notice of appeal, for example, it stated: "Our rule does not create jurisdiction, but only prescribes the method by which the jurisdiction of an appellate court is invoked." *Id*. (quotation marks omitted); *see also id*. ("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 of file a timely notice of appeal, but not as a lack of jurisdiction.").
>
> That these procedural rules are concerned with particular-case jurisdiction is also shown by the fact that they turn on particular facts, rather than whether the case fits within a statutorily or constitutionally defined category. "This kind of jurisdiction often turns solely on proof of

> certain compliance with statutory requirements and so-called jurisdictional facts, such as that an action was begun before a limitations period expired." *Nordike* [*v. Nordike*, 231 S.W.3d 733, 738 (Ky. 2007)]. The jurisdictional facts that would decide a particular-case jurisdictional question here are whether the trial court acted within ten days of entering its judgment, or whether Steadman had filed a notice of appeal.

Id. at 723-24.

The jurisdictional facts at issue in *Steadman* concerned whether the ten-day period described in CR 59.05 had expired prior to when the circuit court purported to grant relief. *Id*. Those facts, like facts relative to the timing of a notice of appeal, implicated the circuit court's particular case jurisdiction (the procedural invocation of its jurisdiction to decide a specific case) as opposed to its subject matter jurisdiction (its power to decide a particular class of cases). *Id*. Here, the jurisdictional facts at issue concern whether the relief granted by the circuit court properly fell within its authority enumerated under CR 60.02(a), (b), or (c), as opposed to subsection (f); and, if so, whether the one-year period described in CR 60.02 had expired prior to when the circuit court purported to grant such relief. This likewise implicated the circuit court's particular case jurisdiction, as opposed to its subject matter jurisdiction.

As to why this difference is important: Particular case jurisdiction, unlike subject matter jurisdiction, can in some instances be waived as an issue on appeal if it is not preserved below.[3] *Steadman*, 411 S.W.3d at 724-26. And, this

[3] As a caveat, in certain instances, such as in the case of an untimely filing of a notice of appeal, particular case jurisdiction cannot be waived. This point was discussed at length in *Steadman*, where the Court noted CR 73.02(2) mandated "automatic dismissal" in that context. *Id* at 723-

rule of waiver has been specifically applied and enforced in the instance where, as here, a circuit court decided to reopen an otherwise dismissed case under the purview of CR 60.02(6) (the identical predecessor CR 60.02(f)); and an aggrieved litigant objected to the circuit court's decision for the first and only time on appeal. *See Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 481 S.W.2d 36, 37-8 (Ky. 1972).

With the above in mind, the obstacle standing between Hill's argument regarding CR 60.02(f) and our review of its substance is the matter of preservation. Because her argument does not implicate subject matter jurisdiction, it cannot be raised for the first time on appeal on that basis. This is a situation where an alleged error regarding particular case jurisdiction was required to be preserved below.

Moreover, Hill did not effectively preserve it below. While Hill points out that Meinhart, her former codefendant, raised an objection to the appellees' motion to reopen during the proceedings before the circuit court, Meinhart did not also object on Hill's behalf; Hill did not join his objection; and

> [the Kentucky Supreme] Court, and its predecessor, has repeatedly held that "[t]he objection of an attorney for one co-defendant will not be deemed to be an objection for the other co-defendant unless counsel has made it clear that in making the objection it is made for both defendants." *Brown v. Commonwealth*, 780 S.W.2d 627, 629 (Ky. 1989); *see also Price v. Commonwealth*, 474 S.W.2d 348, 350 (Ky. 1971) ("[W]here two or more defendants are being tried together, it is incumbent upon each party to timely make the court aware of his

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> objection to any of the proceedings. This may be done on behalf of one of the parties or jointly on behalf of others, but the court must be informed of the position taken by a party or he cannot later complain."). [. . .] [t]he fact that co-defendant's counsel made an objection of the issue of which Appellant seeks review is unavailing." *Rice v. Commonwealth*, 199 S.W.3d 732, 738 (Ky. 2006).

McCleery v. Commonwealth, 410 S.W.3d 597, 602 (Ky. 2013).

Lastly, Hill contends this Court could nevertheless review her argument for the first time on appeal for substantial error.

We disagree. The rule providing for this type of review, CR 61.02, provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that *manifest injustice* has resulted from the error.

(Emphasis added.)

"Manifest injustice" exists only if the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be shocking or jurisprudentially intolerable. *Summe v. Gronotte*, 357 S.W.3d 211 (Ky. App. 2011). Here, even if the circuit court did commit some variety of error by reopening this matter, we are unwilling to agree that the only result of that purported error of which Hill complains—namely, a trial on the merits that

apparently provided Hill the full extent of her due process rights[4]—qualifies as either "shocking" or "jurisprudentially intolerable." *Id*.

In short, Hill filed a timely appeal in this matter, but the sole issue she has raised in her appeal was, in the words of *Steadman*, 411 S.W.3d at 726, "dead and decided when the appeal began." Accordingly, we AFFIRM.

ALL CONCUR

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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[4] Hill does not raise any contention of error relating to the conduct of the trial that took place in this matter or the jury's verdict in favor of the appellees.