

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002948-MR

STANLEY O. HICKERSON;  
and MARTHA E. HICKERSON

APPELLANTS

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 95-CI-2889

GALEN OF VIRGINIA, INC.,  
d/b/a UNIVERSITY OF  
LOUISVILLE HOSPITAL

APPELLEE

### OPINION AND ORDER DISMISSING APPEAL

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BEFORE: GUDGEL, Chief Judge; COMBS and GARDNER, Judges.

GUDGEL, CHIEF JUDGE: The above-captioned appeal is pending before this panel on a motion to dismiss which was filed by appellee Galen of Virginia, Inc., d/b/a University of Louisville Hospital (Galen). For the reasons stated hereafter, we are constrained to grant Galen's motion and to dismiss the appeal.

Originally, appellants filed a medical negligence action against certain doctors, related entities and Galen, asserting claims for damages stemming from the alleged negligent medical treatment of appellant Martha E. Hickerson. In May 1997, the court ordered that all of the claims against the doctors and

their related entities should be "dismissed as settled with prejudice," but it left pending the action against Galen. Appellants filed a notice of appeal from that dismissal order on June 10, 1997, and that matter is now pending before this court in Appeal No. 1997-CA-001430-MR.

Next, on June 20, 1997, the court signed an order dismissing all claims against Galen and denying appellants' motion for leave to file a second amended complaint. The order was entered on June 23, and the clerk's electronic docket sheet states that counsel was given notice of the order's entry by first class mail on the same date. Three days later, appellants' counsel timely filed a motion asking the court to vacate and/or reconsider the Galen dismissal order. On August 6, the court signed a properly captioned order which denied "the motion to reconsider and to vacate." The clerk's electronic docket sheet indicates both that the order was entered and that counsel was given notice of that fact, by first class mail, on August 7. The record shows that no other motions to vacate and/or reconsider were pending in the action on August 7.

During a hearing on a related matter on October 28, appellants' counsel informed the court that he had never received from the clerk a copy of the order entered on August 7. In response, the court on its own motion signed an order on October 30 which purported to vacate the August 7 order. The court again denied the motion to vacate and/or reconsider the June 23 order dismissing the claims against Galen, but it amended that order to

include the finality language specified in CR 54.02(1). On November 12, appellants filed a notice of appeal "from the order entered by the Circuit Court on June 23, 1997, but signed on June 20, 1997. The order was amended by order of October 30, 1997, which also denied Appellants' motion to vacate."

Galen filed a motion to dismiss appellants' November 12 appeal as untimely. On February 2, 1998, a motion panel of this court ordered the motion passed to this panel for a ruling on the merits. It is clear, from our review of the record, that except for the claims asserted against Galen, all pending claims in this action were dismissed prior to June 1997. Thus, the June 23, 1997, order dismissing the action against Galen was a final and appealable order because it finally adjudicated all pending claims in the action. CR 54.01. Although appellants' timely CR 59.05 motion to vacate and/or reconsider stayed the running of time for taking an appeal from that dismissal order, the time for taking an appeal commenced to run on August 7 when the clerk entered the court's order denying the motion and made the docket notation that counsel was given notice of the order's entry. See Stewart v. Kentucky Lottery Corporation, Ky. App., \_\_\_\_ S.W.2d \_\_\_\_, 46 Ky.L.Summ. 3 (February 26, 1999). Moreover, the time for taking an appeal was not delayed even if, contrary to the clerk's docket notation, notice of entry of the August 7 order was not timely given to or received by appellants' counsel. Id. Thus, the time for taking an appeal herein obviously expired long before appellants' notice of appeal was filed on November 12.

Further, although a trial court may extend by ten days the time for taking an appeal, based upon excusable neglect and/or a failure to learn of a judgment's entry, see CR 73.02(1)(d), those ten days were long expired and the October 30 order did not somehow vest the court with authority to extend the time for taking an appeal from the August 7 order. See Brown v. Harris, Ky., 321 S.W.2d 781 (1959). Indeed, by October 30 the court had lost all jurisdiction over its order of dismissal as some eighty-four days passed since its denial of appellants' CR 59.05 motion to vacate and/or reconsider. See James v. Hillerich & Bradsby Co., Ky., 299 S.W.2d 92 (1956). Thus, because appellants clearly did not file a timely notice of appeal within thirty days of the date upon which the time for taking an appeal commenced, i.e., August 7, we are constrained to grant the pending motion to dismiss. See Johnson v. Smith, Ky., 885 S.W.2d 944 (1994).

Finally, we note that there is no merit to appellants' argument that the June 23, 1997, order was not final and appealable. Since all remaining claims in the action had earlier been dismissed with prejudice as settled, the June 23 order which dismissed all pending claims against Galen clearly was a final order as defined in CR 54.01.<sup>1</sup> Moreover, contrary to appellants'

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<sup>1</sup>Contrary to appellants' contention, Civil Action No. 96-CI-7236 was not consolidated generally with Civil Action No. 95-CI-2889. Because the actions instead were consolidated only for purposes of discovery, they otherwise remained independent. Thus, the June 23 order dismissing the remaining claims in Civil  
(continued...)

argument, the court was not required to include CR 54.02 recitations in order to make that particular order final and appealable.

For the reasons stated, Appeal No. 1997-CA-002948-MR is hereby ORDERED dismissed.

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<sup>1</sup>(...continued)  
Action No. 95-CI-2889 was final and appealable, even though other claims were still pending in Civil Action No. 96-CI-7236. See Melone v. Morgan, Ky. App., 676 S.W.2d 805 (1984).

ALL CONCUR.

ENTERED: March 26, 1999

/s/ Paul D. Gudgel  
CHIEF JUDGE, COURT OF APPEALS

BRIEF AND ORAL ARGUMENT FOR  
STANLEY O. HICKERSON; and  
MARTHA E. HICKERSON:

Gregg Y. Neal  
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BRIEF FOR GALEN OF VIRGINIA,  
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ORAL ARGUMENT FOR GALEN OF  
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