RENDERED: MAY 4, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000328-MR

CLAUDE JOHNSON; GRANVILLE JOHNSON,
MOLLIE THORNBURY;
PRISCILLA STILLNER;
ESTATES OF BEN JOHNSON AND
HAZEL JOHNSON, MARTHA KINDER
AND CHARLIE JOHNSON — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 98-CI-00698

RAY THORNBURY;
CHURCH AND MULLINS
CORPORATION; APPALACHIAN
MINERAL DEVELOPMENT
CORPORATION AND PANTHER
LAND CORPORATION — APPELLEES

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: BARBER, GUIDUGLI AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. Appellants have appealed an order and summary judgment entered by the Pike Circuit Court on November 22, 1999, and an order entered January 21, 2000, which denied their motion for reconsideration as being "filed outside the ten day limit of CR 52.02 and is ineffective." Having determined that appellant's CR 52.02 motion was timely made, we vacate the January 21, 2000,

order and remand this matter for reconsideration of the motion on its merits.

The underlying facts are not necessary to the issue to be addressed in this opinion and will not be recited in detail. However, it should be noted that this case involves the mineral rights on land known as Tract 42 on Three Mile Creek in Pike County, Kentucky. John Johnson (Johnson) owned the surface rights to this 365 acre piece of property. In 1964, Bethlehem Minerals Company sued Johnson claiming ownership to the mineral rights of this property . During the pendency of that action on February 21, 1978, Johnson, Ray Thornbury and Church and Mullins signed the master lease and master sublease agreements which appellants dispute. Johnson, who was in his nineties when the agreements were entered, died in 1984. In early 1995, the Bethlehem Minerals Company litigation was finally litigated to a conclusion. In that case, Bethlehem Minerals Company was directed to pay damages to both the Johnson's estate and Church and Mullins.

On May 21, 1998, the appellants filed the complaint in this action challenging the validity of the master lease and master sublease alleging the incompetency of Johnson, undue influence, lack of consideration, and unconscionability of the contract. On November 22, 1999, the Pike Circuit Court entered summary judgment in favor of appellees. The court ruled that summary judgment was appropriate because the leases in question had been deemed valid in the prior litigation and because the action was barred by the statute of limitations. What transpired

next is the subject of great controversy and the main issue that this Court must determine. On December 3, 1999, appellants, through counsel, filed what is termed a motion for reconsideration. The certificate of service indicates that counsel for appellants served a true copy of said motion on opposing parties on December 2, 1999. The motion states:

> The Plaintiffs [appellants], by Counsel, hereby move the Court to reconsider the Summary Judgment and Order which was entered on November 22, 1999. As grounds therefor, Plaintiffs state that the action was not barred by the applicable limitations of actions statute. Further, Plaintiffs state that the issue of the breach of contract by the Defendants has not been addressed in the Judgment.

The motion was scheduled for a hearing on January 14, 2000. Each party filed supplemental memoranda regarding the motion prior to the hearing date. In appellees' response, they argued the motion was untimely in that "CR 52.02 requires a motion to be filed no later than ten (10) days after the entry of judgment in an action." (Emphasis added). The record before this Court contains no audio, video or written transcript of what occurred at the January 14, 2000 hearing on the motion. The next entry in the court record is the order entered January 21, 2000, denying appellants' motion for reconsideration because "[the] motion was filed outside the ten day limit of CR 52.02 and is ineffective." See Stallins v. City of Madisonville, Ky. App., 707 S.W.2d 349, 351 (1986). (Emphasis added). The appellants thereafter, on January 24, 2000, filed a reply (it appears they did not know the trail court had already entered its order denying the motion) in which they argued their motion was filed pursuant to CR 59.02

which permits a motion to be served no later than ten days after entry of the judgment. In that the trial court had already rendered its order denying appellants' motion to reconsider by this time, appellants subsequently filed their notice of appeal.

On appeal, appellees filed a motion to dismiss arguing the appeal was untimely. They argue that since the trial court found the motion for reconsideration to be filed untimely and thus "ineffective", that the motion therefore did not stop the running of time for appeal purposes. Appellees further argue that:

> Kentucky Civil Rule 73.02(1)(e) states that "The running of the time for appeal is terminated by a **timely** motion pursuant to any of the Rules hereinafter enumerated, and the full time for appeal fixed in this Rule commences to run upon entry and service under Rule 77.04(2) of an order granting or denying a motion under Rules 50.02, 52.02 or 59, except when a new trial is granted under Rule 59."
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> The plaintiffs/appellants' Motion for Reconsideration was found to be untimely by the trial court and therefore did not terminate the running of time for appeal of the summary judgment granted to the defendants/appellees on November 22, 1999.

Thus, appellees argued that the notice of appeal filed on February 3, 2000, was untimely.

In response to the motion to dismiss, appellants argued that the trial court erred in relying on Stallins, supra, and that the case of Huddleston v. Murley, Ky. App., 757 S.W.2d 216 (1988), is controlling. They contend that Huddleston stands for the proposition that the Kentucky Civil Rules simply require

service pursuant to CR 5 within ten days, not filing as is required by the Federal Rules. They proceed to argue:

> CR 52.02 says that a court may amend its findings, make additional findings, or amend the Judgment upon a Motion made not later than ten (10) days after entry of Judgment. CR 52.02 further states that the Motion may be made with a Motion for a new trial pursuant to CR 59.
>
> CR 59.02 says that a Motion for a new trial shall be served not later than ten (10) days after the entry of Judgment.
>
> Neither of the above rules require filing to occur on or before the 10th day. Since CR 52.02 specifically refers to CR 59, which requires service no later than ten (10) days, it would be inconsistent and oppressive to interpret the word "made" to constitute filing. The Federal Rules of Civil Procedure are specific and require filing; not the state rules. Since the certificate was not challenged, according to Huddleston v. Murley, supra, the Appellants' Motion to Reconsider was timely filed. The Appellee's(sic) Motion to Dismiss should be overruled.

A three-judge motion panel of this Court denied appellees' motion to dismiss the appeal in an order entered June 26, 2000. Though that order does not provide any analysis or legal reasoning for its decision, this Court is bound by its holding. It appears that the motion panel held, and we do hold, that appellants' motion for reconsideration required service of the motion within ten days and did not require the actual filing within ten days.

Despite appellees' argument to the contrary, CR 52.02 does not require a motion to be filed not later than ten days after the entry of judgment in an action. Specifically, CR 52.02 states:

> Not later than 10 days after entry of judgment the court of its own initiative or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

The rule uses the term "made." Since this term is not defined, it permits the parties to argue their opposing beliefs that it could mean "served" or "filed" depending on which side one finds himself. The outcome of this case depends on the interpretation this Court gives to the term "made."

The trial court relied upon Stallins, supra, which held:

> The appellant, ostensibly pursuant to CR 52.02, on June 17, 1985, filed a motion and amended motion "for additional findings of fact and/or reconsideration..." which was overruled by the trial court on July 1, 1985. The motions are ineffective for the reason that they were filed beyond ten days after the original findings and judgment were entered on June 6, 1985, and they requested recitation of conclusionry statements rather than of facts. See CR 52.02 and CR 52.04.

Stallins, Id. at 351.

However, we believe Stallins can be distinguished in that there is no mention as to whether the motion had been served within the permitted ten day time frame as in this case. Appellants contend the Huddleston case, which requires service pursuant to CR 5 within ten days, is more consistent with the facts of this case. However, Huddleston, supra, is a case dealing with a CR 59.02 motion for a new trial. CR 59.02 specifically states, "A motion for a new trail shall be served not later than 10 days after the entry of the judgment." Though

appellants now argue that their motion for reconsideration was, in fact, a CR 59.02 motion, we are not so inclined to merely accept their after-the-fact gratuitous statement to that effect. However, even without accepting appellants' motion to be under CR 59.02, the facts in the Huddleston case are somewhat similar to this case as can be seen by the holding in that case:

> We reverse the trial court's order overruling appellants' motion for a new trial and to alter, amend or vacate the judgment. The appellees and the trial court have confused the crucial difference between the filing of a motion and the serving of a motion.
>
> The requirements for timeliness of a motion for new trial under CR 59.02, and to alter, amend, or vacate a judgment under CR 59.05, is that they be served not later than ten days from the entry of the final judgment. Counsel for appellants certified upon his motion that he served it on what was the tenth day following entry of the judgment. The circuit clerk file-stamped the motion the next day, and the envelope containing the copy mailed to the appellees' counsel was postmarked the next day, or what was the eleventh day following entry of judgment. It was because the motion was filed on the eleventh day that the trial court deemed it untimely. However, as we said, the rules require that the motion be served within the ten day time frame.

Huddleston, supra, at 217. (Emphasis in original).

If we had accepted appellants' argument that their motion was filed pursuant to CR 59.02, then there would be no dispute service would have been timely and permitted. However, if we accept appellees' argument that this is a CR 52.02 motion, then the question becomes what does "made" mean - service or filing? As a starting point, we know that a CR 52.02 motion may be made with a motion for a new trial pursuant to CR 59. In that

case, service of the CR 59 motion is permitted on the tenth day following the judgment. Though not so stated, one would think if they can be made together that the applicable deadline would be the same - service within ten days of judgment. If this is true, would it make sense that if the CR 52.02 motion were filed by itself and not in conjunction with a CR 59 motion, that the term "made" would change to mean filed instead of served? We think not. The terms "served" and "filed" are often confused and used inter-changeably within the cited cases and in legal treatises reviewed by this Court. However, after thorough examination we believe the use of the term "made" in CR 52.02 is more appropriately meant in the context of service and not that of filing. We believe the prior motion panel in this case based its order on that construction also.

As such, we believe the trial court erred when it found otherwise and declined to address the merits of appellants' motion to reconsider its summary judgment of November 22, 1999. We, therefore, vacate the Pike Circuit Court's order of January 21, 2000, and remand this matter for further action, consistent with this opinion. We further believe it would be premature to address the other issues raised in this appeal until the trial court has had an opportunity to thoroughly and adequately address them on remand.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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