

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000761-MR  
AND  
NO. 2001-CA-000862-MR

MITCHELL ANDREW WILLIAMS

APPELLANT/CROSS-APPELLEE

v. APPEALS FROM BELL CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 97-CI-00488

TERESA ANN MILLS WILLIAMS

APPELLEE/CROSS-APPELLANT

### OPINION AND ORDER

(1) REVERSING IN PART, VACATING, AND REMANDING CROSS-APPEAL  
(2) GRANTING MOTION TO DISMISS DIRECT APPEAL

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BEFORE: COMBS, McANULTY AND SCHRODER, JUDGES.

McANULTY, JUDGE: Mitchell Andrew Williams appeals from the amended findings of fact, conclusions of law, and decree of dissolution of marriage entered by the Bell Circuit Court with respect to the granting of joint child custody and the division of property. Teresa Ann Mills Williams has filed a cross-appeal challenging the circuit court's jurisdictional authority to amend the court's initial judgment and a motion to dismiss the direct appeal. We hold that the trial court did not have subject matter jurisdiction to amend its judgment and therefore reverse in part, vacate, and remand with directions with respect to the cross-

appeal. Given our decision on the cross-appeal, we also grant the motion to dismiss the direct appeal.

The parties were married in September 1992 and separated in November 1997. They had one child, Cameron, born in September 1996. Teresa filed a Petition for Dissolution of Marriage in November 1997, and requested, inter alia, temporary and permanent custody of the parties' minor son. Following their separation, Cameron lived primarily with Teresa, but he also spent considerable time with Mitchell, who continued to reside in the family home. On February 2, 1999, Teresa filed a motion for temporary orders that included a request for an award of temporary joint child custody with Teresa serving as primary residential custodian and payment of child support by Mitchell. On February 17, 1999, the trial court entered an order vesting temporary custody of Cameron with Teresa, but later vacated the order upon motion of Mitchell. Following a hearing, on March 31, 1999, the trial court awarded the parties temporary joint custody with Teresa serving as primary residential custodian and Mitchell receiving visitation privileges. Under the order, Mitchell was awarded temporary possession of the family residence and was ordered to pay the monthly mortgage payments.

After conducting extensive discovery, including numerous depositions, the parties filed briefs concerning child custody and property distribution. Both parties sought sole custody of their son. Teresa proposed that she receive approximately \$24,058 as her share of marital property, while Mitchell proposed Teresa receive \$5,433. On January 5, 2001, the

trial court entered its findings of fact, conclusions of law, and decree of dissolution that, inter alia, granted Teresa sole custody of Cameron and awarded her a total of \$16,349.59 as her equal share of the marital property.

On January 16, 2001, Mitchell filed a motion entitled Motion to Alter, Amend or Vacate that referred to CR 59.01 and did not elaborate on the grounds for the motion. On January 25, 2001, Mitchell filed a Memorandum in Support of his Motion to Alter, Amend or Vacate, which discussed his objections to, inter alia, the custody award and the trial court's assessment of his nonmarital contribution to the marital residence. On January 29, 2001, Teresa filed a response to the Motion to Alter, Amend or Vacate, which challenged the timeliness of the motion based on Ligon Specialized Hauler, Inc. v. Smith, Ky. App., 691 S.W.2d 902 (1985). On January 31, 2001, the trial court issued an order allowing the parties 10 days to file simultaneous briefs on Mitchell's residential property division complaint and stating it would reconsider the custody issue. Teresa filed a brief on February 9, 2001, and Mitchell did not file a brief.

On March 22, 2001, the trial court entered an order stating it would exercise its discretion to amend its original findings of fact and conclusions of law under CR 59 and the authority of Carpenter v. Evans, Ky., 363 S.W.2d 108 (1962). The court also stated it had misunderstood the law related to joint custody and would reconsider that issue and subsequently issue additional factual findings. On March 22, 2001, the trial court entered an Amended Findings of Fact, Conclusions of Law, and

Decree of Dissolution of Marriage that changed the award of child custody from sole custody to joint custody after considering the factors set forth in KRS 403.270(2) and the best interest of the child. On April 6, 2001, Mitchell filed a notice of appeal from the order on Motion to Alter, Amend or Vacate and the Amended Findings of Fact, Conclusions of Law, and Decree of Dissolution. On April 23, 2001, Teresa filed a notice of cross-appeal in the circuit court and a motion to dismiss the appeal for lack of subject matter jurisdiction in this Court, which was temporarily denied subject to reconsideration in the main appeal.

Given the dispositive nature of the issue, we will address Teresa's cross-appeal first. She contends the trial court erred in holding it had authority to amend its judgment. More specifically, Teresa argues that the trial court lacked subject matter jurisdiction to enter its amended findings of fact and conclusions of law because Mitchell's post-judgment motion was inadequate. Relying on Ligon Specialized Hauler, Inc., supra, Teresa asserts that Mitchell's failure to state the basis for his Motion to Alter, Amend or Vacate within the ten-day period prescribed by CR 59.02 rendered it inadequate, and thus, was untimely for purposes of extending the subject matter jurisdiction of the trial court after entry of its judgment. On the other hand, Mitchell counters that his motion was filed under CR 59.05 and that Ligon is not applicable. Although the trial court's ultimate decision whether to grant or deny relief from a judgment is reviewed for abuse of discretion, the issue of the trial court's jurisdiction or authority to entertain such relief

is a legal question subject to de novo review. See Spinar v. South Dakota Bd. Of Regents, 796 F.2d 1060 (8<sup>th</sup> Cir. 1986).

As a general proposition, a trial court lacks subject matter jurisdiction to alter its final judgment unless it is reinvested with jurisdiction pursuant to an applicable Rule of Procedure. See, e.g., Commonwealth v. Gross, Ky., 936 S.W.2d 85 (1996) (rejecting view that KRS 439.265 creates "continuing jurisdiction" for trial court modification of sentence outside rules of procedure); Ohio River Pipeline Corp. v. Landrum, Ky. App., 580 S.W.2d 713, 718 (1979) (court loses control of its judgment ten days after date of entry unless authorized motion is made or court action taken within that time). But see Potter v. Eli Lilly & Co., Ky., 926 S.W.2d 449 (1996) (recognizing inherent authority of courts to modify judgment beyond prescribed time limits due to fraud on the court). Either a motion for a new trial brought pursuant to CR 59.01 or a motion to alter, amend or vacate a judgment brought pursuant to CR 59.05 "shall be served not later than 10 days after entry of the final judgment." See CR 59.02 and CR 59.05. A trial court has no jurisdiction to grant a new trial or amend its judgment if the motion is untimely. See, e.g., Ford Motor Credit Co. v. Swarens, Ky., 447 S.W.2d 53 (1969) (involving CR 59.05 motion); Kentucky Farm Bureau Ins. Co. v. Gearhart, Ky. App., 853 S.W.2d 907, 910 (1993) (involving CR 59.05 motion). The ten-day time limits for CR 59.01 and CR 59.05 are jurisdictional and cannot be extended by the trial court. See CR 6.02; Arnett v. Kennard, Ky., 580 S.W.2d 495 (1979); Hertz Corp. v. Alamo Rent-A-Car, Inc., 16 F.3d

1126 (11<sup>th</sup> Cir. 1994). In addition, a notice of appeal must be filed within 30 days after the date of notation of service of the judgment and filing within this time limit is mandatory. See Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., Ky., 37 S.W.3d 713 (2000); CR 73.02 (1)(a) and (e). However, the running of the time for appeal is tolled or suspended by the filing of a timely motion under CR 59 until the trial court rules on the motion. CR 73.02 (1)(e); Johnson v. Smith, Ky., 885 S.W.2d 944 (1994); Moore v. Mack Trucks, Inc., Ky. App., 40 S.W.3d 888 (2001).

In the current case, the original judgment was entered with a notation of service on January 5, 2001, and the Motion to Alter, Amend or Vacate was filed and served on January 16, 2001, which was within the ten-day time limit for purposes of the civil rules because January 15 fell on a legal holiday (Martin Luther King day). See CR 6.01. The motion stated in full:

Comes now the Respondent, Mitchell Andrew Williams, by counsel and pursuant to CR 59.01 MOVES this Court to alter, amend or vacate the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage, as well as Order Sealing Record entered herein on January 5, 2001. In support hereof, the Respondent separately files a Memorandum herein.

WHEREFORE, an Order consistent herewith is respectfully requested.

On January 25, 2001, Mitchell filed and served a seven-page memorandum in support of his Motion to Alter, Amend or Vacate. Teresa objected to the motion as untimely both orally at a hearing held January 29, 2001, and in a written document filed the same day.

On March 22, 2001, the trial court entered an order rejecting Teresa's objection. The court accepted the proposition that it had no discretion to entertain a motion under CR 59.01 when the moving party fails to identify the grounds for the motion, but the court stated it had discretion under CR 59 to reverse earlier findings of fact and conclusions of law and to enter new ones in a case tried without a jury "where the dictates of justice require," citing Carpenter v. Evans, supra.

We believe the trial court's reliance on Carpenter is misplaced. In that case, the court held that CR 59.07 is a broad and sweeping grant of power that allows a trial court to grant a new trial or enter new findings, conclusions and judgment where the dictates of justice require in an action tried without a jury. Id. at 109-10. The area of dispute in that case, however, concerned whether a trial court could issue new findings of fact and conclusions of law or was limited to merely ordering a new trial. The court stated: "[t]he question presented on this appeal is whether the trial court, where a timely motion was filed under CR 52.02, CR 59.01, and CR 59.07, has the authority to reverse earlier findings and conclusions and enter new findings and conclusions and judgment." Id. at 109 (emphasis added). In Carpenter, there was no question the motion was timely. In our situation, Teresa challenges the authority of the court to entertain the motion as an initial matter rather than the type of action it may take. Carpenter is distinguishable and does not resolve the issue in this appeal as to the timeliness of Mitchell's motion.

Teresa asserts that Ligon Specialized Hauler, Inc. v. Smith, supra is the controlling precedent supporting her position. In Ligon, the appellant filed a "bare motion" for a new trial within 10 days of the judgment but failed to submit supporting grounds and affidavits until three weeks later. The court held that although the civil rules did not expressly require that supporting documents be filed at any given time, the implication from CR 59.03 is that a party must satisfy the ten-day time limits for those documents as well as the motion itself. It stated:

If a motion for a new trial is not timely served or filed, the trial court has no discretion to consider a tardy motion or to grant subsequent new trial relief. The plain purpose of the appellate time limits and CR 6 is to fix a definite time when judgments become final and free from attack. We think the plain purpose of CR 59.02 would stand defeated if we allow appellant to toll its provisions by filing a timely but unexplained CR 59.01 motion, while submitting grounds and affidavits to the court at its leisure. Accordingly, Ligon's allegations of juror misconduct were not timely raised at trial and are not preserved for our review.

691 S.W.2d at 904 (citations omitted).

Mitchell states that he "does not dispute that a motion for new trial filed pursuant to CR 59.01 and CR 59.02, not only must be filed no later than 10 days, but also must set forth sufficient grounds in support thereof." He maintains that Ligon only applies to CR 59.01 motions and has not been extended to motions to alter, amend or vacate under CR 59.05. Mitchell further postulates that his motion was filed pursuant to CR 59.05. Unfortunately, the text of the motion itself is confusing



and contradictory on this question. It specifically cites to CR 59.01, but also includes language reminiscent of CR 59.05 by asking the court to "alter, amend or vacate" the original judgment. Given the fact that the motion specifically cites CR 59.01, did not refer to CR 59.05, and a trial court may modify its factual findings and conclusions of law pursuant to CR 59.01, treating it as a CR 59.01 motion would be the most logical approach. Under this scenario, the motion would be considered untimely under the authority of the Ligon opinion.

Nevertheless, even if the motion is treated as a CR 59.05 motion, the trial court did not have jurisdiction to consider it. CR 7.02(1) states:

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. (Emphasis added).

Since there is little Kentucky case law construing this rule, we will look to federal law dealing with the similar Fed. R. Civ. P. 7(b)(1) on which the Kentucky rule was based. See, e.g., Sexton v. Bates, Ky. App., 41 S.W.3d 452, 456 (2001); Morrow v. Brown, Todd & Heyburn, Ky., 957 S.W.2d 722 (1997).

The federal courts have utilized a somewhat flexible approach by applying a "reasonable specification" standard to the particularity requirement. See 5 Charles Alan Wright & Arthur R. Miller, Federal Practices and Procedure § 1192 (2<sup>nd</sup> ed. 1990). The purpose of the particularity requirement of Fed. R. Civ. P. 7

is to afford notice of the grounds for and relief sought to both the court and the opposing party so the opponent will have an opportunity to respond and the court will have enough information to consider the motion. See Registration Control Systems, Inc. v. Compusystems, Inc., 922 F.2d 805, 807 (Fed. Cir. 1990); Cf. Tennessee Products & Chemical Corp. v. Miller, Ky., 282 S.W.2d 52, 53 (1955) (particularity requirement of CR 7.02 is not a mere technical form requirement but is designed to apprise the trial court of the specific basis upon which the party casts his request for a ruling). One procedural authority has stated that the courts consider whether any party is prejudiced by the lack of particularity and whether the court can comprehend the basis for the motion and deal with it fairly. See 5 Charles Allen Wright and Arthur R. Miller, Federal Practice and Procedure § 1192, at 42.

In the current case, Mitchell's motion fails to state any reason or grounds whatsoever for the motion. It provides no notice to either the court or Teresa which of the several issues addressed in the original judgment were being opposed or the basis for any objection. Consequently, even if the motion were treated as one falling within CR 59.05, it did not satisfy even a reasonable specification standard for the particularity requirements of CR 7.02.

In addition, Mitchell's filing and acceptance by the trial court of his subsequent memorandum in support of the motion did not serve to cure the defect. In Martinez v. Trainor, 556 F.2d 818, 820 (7<sup>th</sup> Cir. 1977), the court succinctly explained the

reasons for not allowing an untimely supplemental brief or memorandum that provides the reasons for an otherwise nonconforming motion to satisfy the particularity requirement of the civil rules.

First, amendments are not allowed unless they consist of an elaboration of a ground already set out in the original motion. Secondly, if a party could file a skeleton motion and later fill it in, the purpose of the time limitation would be defeated.

See also Talano v. Northwestern Medical Faculty Foundation, Inc., 273 F.3d 757, 761 (7<sup>th</sup> Cir. 2001) (finding motion asking the court to reconsider its judgment for "several reasons" and because the district court "misapplied fundamental principles, failed to apply other well-recognized principles, and is in conflict with precedent of the Seventh Circuit construing Illinois state contract law" was not sufficiently specific and later memorandum in support of motion did not satisfy rule); Riley v. Northwestern Bell Telephone Co., 1 F.3d 725 (8<sup>th</sup> Cir. 1993) (memorandum of law in support of bare bones motion filed outside of ten-day time period did not cure defect of otherwise timely motion). Mitchell indicated in the motion that he was filing a supporting memorandum but in fact he did not file the memorandum until January 25, 2001, 15 days after entry of the original judgment and outside the ten-day time limit for either a CR 59.01 or CR 59.05 motion. While documents filed contemporaneously with or accompanying a summary motion that provide the basis for the motion would satisfy the particularity requirement of CR 7.02, "an empty motion cannot reserve time to file an explanation after the ten days allowed by Rule 59(b)." Lac Du Flambeau Indians v.

State of Wisconsin, 957 F.2d 515, 517 (7<sup>th</sup> Cir. 1992).

Mitchell's bare bones motion did not satisfy CR 7.02 and the memorandum in support of the motion filed outside the ten-day limitations period did not serve to cure that defect or satisfy the particularity requirement.

As a result, Mitchell's January 16, 2001 Motion to Alter, Amend or Vacate was untimely and the trial court erred in holding that it had subject matter jurisdiction to modify its original findings of fact, conclusions of law, and dissolution of marriage. In effect, the amended judgment is a nullity because the trial court could not extend its jurisdiction to give it authority to issue a new judgment. Since Mitchell's motion did not toll the time for taking the appeal on the original judgment, this Court is without appellate authority to review the merits of the original January 5, 2001 judgment or the March 22, 2001 judgment. Consequently, the motion to dismiss the direct appeal of the amended findings of fact, conclusions of law, and dissolution of marriage will be granted. See, e.g., Smith v. Evans, 853 F.2d 155 (3<sup>rd</sup> Cir. 1988); Spinar, supra.

Although we lack appellate jurisdiction over the direct appeal, we do have appellate jurisdiction to review the trial court's ruling on the Motion to Alter, Amend or Vacate and the validity of the amended judgment as part of the timely cross-appeal of the March 22, 2001 amended judgment.<sup>1</sup> See, e.g.,

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<sup>1</sup>We note that while the issue of the trial court's subject matter jurisdiction was specifically raised in the cross-appeal, subject matter jurisdiction is a threshold issue that cannot be created or waived by the parties and can be raised at any time, even for the first time on appeal, by either party or the court.

(continued...)

Kentucky Farm Bureau Ins. Co. v. Gearhart, supra; Commonwealth v. Gross, supra. Having concluded that the trial court erred in holding that Mitchell's Motion to Alter, Amend or Vacate was timely and it had subject matter jurisdiction to modify the original judgment, we reverse its January 31, 2001 order finding the motion timely and vacate its March 22, 2001 amended findings of fact, conclusions of law and dissolution of marriage. We further hold that the January 5, 2001 findings of fact, conclusions of law and dissolution of marriage should be reinstated.<sup>2</sup>

For the forgoing reasons, we reverse the January 31, 2001 order of the Bell Circuit Court on cross-appeal, vacate the March 22, 2001 amended findings of fact, conclusions of law, and dissolution of marriage, and remand to the Bell Circuit Court for entry of an order reinstating the original January 5, 2001 judgment.

It is further ORDERED that the motion to dismiss the direct appeal is hereby GRANTED.

ALL CONCUR.

ENTERED: October 25, 2002

/s/William E. McAnulty, Jr.  
JUDGE, COURT OF APPEALS

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<sup>1</sup>(...continued)  
CR 12.08; Privett v. Clendenin, Ky., 52 S.W.3d 530, 532 (2001);  
Gullett v. Gullett, Ky. App., 992 S.W.2d 866, 868-69 (1999).

<sup>2</sup>Even though the original judgment granting sole custody to Teresa must be reinstated, we note that the trial court retains jurisdiction and discretion over the extent of visitation to grant Mitchell.

BRIEF FOR APPELLANT/CROSS-  
APPELLEE:

Jane R. Butcher  
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BRIEF FOR APPELLEE/CROSS-  
APPELLANT:

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