RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000908-MR

PEGGY SYKES — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 99-CI-01357

SPURLOCK CURE AND
PHYLLIS CURE — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: Peggy Sykes appeals from an April 6, 2004, Pike Circuit Court judgment containing findings of fact and conclusions of law. The case involves a boundary dispute between Sykes and her neighbors, Spurlock and Phyllis Cure.[2] We are asked to determine whether the court erred when it treated

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Appellees' brief states that Spurlock Cure recently died.

an untimely Kentucky Rules of Civil Procedure (CR) 59.05 motion made by the Cures as a motion made pursuant to CR 60.02 and granted the extraordinary relief available under that rule. We are also asked to determine whether the circuit court's findings of fact of April 6, 2004, are clearly erroneous and whether the court erred in awarding costs to the appellees in the second judgment. Because we find that the trial court erred in granting relief pursuant to CR 60.02, we vacate the April 6, 2004, judgment and remand with instructions to reinstate the August 5, 2002, judgment.

On January 17, 2002, a bench trial was held to determine the boundary line between the Sykes and Cure properties. The trial court granted judgment in favor of Sykes on August 5, 2002. The record contains the original judgment on which the clerk of the circuit court certified that a copy of the judgment had been mailed to "all parties and/or attorneys of record" on August 5, 2002.

About four months later, on December 13, 2002, the Cures filed a "motion to alter, amend, or vacate or for additional findings and to be permitted out of time challenge to judgment." This motion was clearly filed far beyond the ten day period permitted under CR 59.05.[3] The Cures claimed that they had only learned of the entry of the final judgment on December

[3] Ky. R. Civ. Proc. (CR) 59.05 requires that the motion "shall be served not later than 10 days after entry of the final judgment."

6, 2002. They explained that "[t]he Clerk never sent the same [the final judgment] to counsel for the Plaintiffs nor to the Plaintiffs and the Plaintiffs nor their attorney had any knowledge of the entry of the Judgment."

Sykes filed a response to the motion, stating that her attorney had received a timely copy of the judgment in the mail, and arguing that the court did not have jurisdiction to alter, amend or vacate the judgment. The circuit court held a hearing into the matter on January 17, 2003, at which the attorneys for both sides presented their arguments on the motion.

On April 6, 2004, almost two years after the entry of the original judgment, new "findings of fact, conclusions of law[,] order and judgment" were entered in which the court stated that it

> believes that Plaintiffs [sic] attorney did not receive notice of the entry of the August 2002 judgment. Pursuant to this finding of fact, It [sic] is hereby ORDERED by the Court that the Plaintiffs will be allowed to challenge that judgment pursuant to C.R.60.01, C.R. 60.02 and *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*.[4]

The court then proceeded to reverse its earlier judgment regarding the location of the boundary line and ruled instead in favor of the Cures. The court also reversed its earlier order that the Cures pay Sykes' costs and instead

[4] 90 S.W.3d 454 (2002).

ordered that the Cures were to recover their costs from Sykes. This appeal followed.

It is well-established that "because of the desirability of according finality to judgments, this clause [CR 60.02(f)] must be invoked only with extreme caution, and only under most unusual circumstances."[5]

As authority for its action in granting relief under CR 60.02, the circuit court relied on Kurtsinger v. Board of Trustees of Kentucky Retirement Systems.[6] In that case, the circuit court had granted summary judgment to the Board. Kurtsinger timely filed a CR 59.05 motion. The motion was denied, but the notice of entry of the order was not sent to Kurtsinger or his attorney. Several weeks later, Kurtsinger's attorney discovered that the judgment had been entered. He immediately filed a motion pursuant to CR 60.02, requesting the trial court to vacate the order and enter a new order ruling on the CR 59.05 motion. A hearing was held into the matter and the judge concluded that his office had made a mistake in not including Kurtsinger on the distribution list of the order. The court therefore granted the CR 60.02 motion on the basis of "mistake, inadvertence, excusable neglect and reasons of an

[5] Cawood v. Cawood, 329 S.W.2d 569, 571 (Ky. 1959).

[6] Supra, note 4.

extraordinary nature justifying relief."[7] It vacated the earlier order and then entered a new order denying the CR 59.05 motion. This enabled Kurtsinger to file a timely appeal from the summary judgment that had become final by virtue of the order denying the CR 59.05 motion.

The trial judge in Kurtsinger justified the granting of the CR 60.02 motion as follows:

> It is our mistake. **This is not a situation where there's at least an argument that it went out to them and they are saying that they did not receive it or something like that. I looked at the order after they filed this and this was typed in our office and the distribution was not put on it to them. So I know it did not go to them** and I don't think it would be fair to hold them at this point in time. Justice requires a little bit more than that. (Emphasis supplied.)[8]

In affirming the circuit court's decision, the Supreme Court noted that the order vacating "was accompanied by findings that the trial court or its staff was at fault for Appellants' [Kurtsinger's] failure to learn of entry of the order."[9]

The present case is distinguishable. Although the circuit court made a "finding of fact" that the Cures' attorney had not received the first judgment, there was no evidence

[7] The court was relying on CR 60.02(a), which permits a court to grant relief on the grounds of "mistake, inadvertence, surprise or excusable neglect", and CR 60.02(f), for "any other reason of an extraordinary nature justifying relief."

[8] Supra, note 4, at 455, n. 1.

[9] Id. at 457.

underlying this finding, beyond an unsworn statement of the attorney. There was no affidavit or sworn testimony from the attorney or any member of his office staff stating that notice of entry of the judgment had not been received. Under CR 43.12,

> [w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

The appellees argue that "[n]either an officer of the Court nor attorneys need be sworn for a court to rely upon his or her word," and have drawn our attention to Supreme Court Rule 8.3(c) which states that it is professional misconduct for an attorney to "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation;" and to Rule 3.3(a)(1) of the Kentucky Rules of Professional Conduct which states that "[a] lawyer shall not knowingly: . . . Make a false statement of material fact or law to a tribunal."

But the Cures' attorney was not merely making a representation to the court; he was presenting evidence. Yet this evidence was not subject to cross-examination and it was unsworn. Such statements are not converted into evidence by virtue of being the representations of an attorney. Such statements cannot form the evidentiary basis for a finding of fact. In other words, there was no adequate factual basis for

setting aside the prior judgment. In Kurtsinger, by contrast, the judge took judicial notice[10] that the judgment had not been served; and it was obvious on the face of the record that the judgment had not been served. We agree with Sykes that the unsworn assertions of the appellees' attorney are simply not enough to justify vacating a judgment.

In an analogous criminal case, McMurray v. Commonwealth,[11] this Court held that it was improper for a circuit court to amend a defendant's sentence pursuant to CR 60.02 on the basis of statements made in a letter from a probation officer. We explained that "[t]he only proper procedure available for the trial court to vacate or amend the earlier judgment would have been as a result of a hearing had on the basis of the Commonwealth filing a CR 60.02 judgment procured by fraud motion, **supported by sufficient affidavit**[.]"[12] The letter from the probation officer was inadequate because it was "unverified . . . and not supported by affidavit as required by CR 43.12."[13]

[10] See Ky. R. Evid. (KRE) 201(2).

[11] 682 S.W.2d 794 (Ky.App. 1985).

[12] Id. at 795 (Emphasis supplied).

[13] Id.

For the foregoing reasons, the April 6, 2004, judgment is vacated and this case is remanded to Pike Circuit Court with directions to reinstate the August 5, 2002, judgment.

JOHNSON, JUDGE, CONCURS.

BARBER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BARBER, JUDGE, DISSENTING: I respectfully dissent. Rule 60.02 is the method our courts use to avoid manifest injustice. I believe the trial court should have deference to factually determine if a party receives a pleading, and that finding should not be disturbed on appeal unless clearly erroneous.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Joseph W. Justice Della M. Justice Pikeville, Kentucky	Lawrence R. Webster Pikeville, Kentucky