

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002471-MR

ALMEDIA ADKINS

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 96-CI-01592

JUDI PATTON

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, HENRY, AND TAYLOR, JUDGES.

HENRY, JUDGE: Almedia Adkins appeals from a November 3, 2004 Order of the Pike Circuit Court denying her motion to re-enter a final order that was issued on May 13, 2002 following a jury trial. Upon review, we affirm.

This case stems from a property dispute in which both parties claimed ownership of the same parcel of land. The land had apparently been owned by Adkins' family for several years until legal title of it was passed to Patton's former husband by deed in 1968. Adkins claimed that the consideration paid for that deed - a car and a motorcycle - were stolen from her and

her husband within a few days of the execution and delivery of the deed to Patton's ex-husband, and that she remained in possession of the land at all times. On October 18, 2001, a Pike County jury determined that Adkins had failed to prove that she was in adverse possession of the land so as to divest Patton of legal title. On November 1, 2001, the trial court entered an "Order of Proceedings and Judgment" consistent with the jury's decision. On November 8, 2001, Adkins filed a "Motion for New Trial or Judgment Notwithstanding the Verdict and to Alter, Amend, or Vacate." Following a hearing, this Motion was denied by the trial court in an order entered on May 13, 2002.

It is at this point that the events leading to the present appeal began to take shape. On September 2, 2004, Adkins filed a "Motion to Re-enter Final Order" pursuant to CR¹ 60.02. The basis for this Motion was that the May 13, 2002 denial order "was not sent by the Clerk's Office to counsel for [Adkins], delivered nor otherwise transmitted." The Motion further provided:

Counsel received a note from the Trial Judge in this case that a final Order had been entered and then began to search for the court record. On various occasions, Robert Page, a former Deputy Clerk, was sent to the Clerk's Office to hunt for the court record and could not find it. The court record, now located, indicates a final Order in response to post-judgment motions.

¹ Kentucky Rules of Civil Procedure.

Adkins' counsel also filed an affidavit with the Motion setting forth that he failed to receive a copy of the trial court's order, and that he "received a note from the Trial Judge in this case that a Judgment had been entered and the court record was said by the Clerk's Office to be misplaced for months." The Motion and affidavit provide no indication as to on what dates the aforementioned events occurred.

Patton responded to Adkins' Motion by noting that the May 13, 2002 order in question included a certification by the Pike Circuit Court Clerk that a copy of the order had been sent to Adkins' counsel. She further argued that the docket sheet report for the case also indicated that a copy of the order was mailed to all counsel of record on the day that it was entered, and that her counsel had received a copy of it on May 17, 2002. Patton further argued that Adkins' Motion was not timely filed, and that the case law relied upon in the Motion did not support Adkins' position.

On October 29, 2004, a brief hearing was held on Adkins' Motion. Counsel for Adkins stated at the hearing that his runner had begun searching for the order once counsel learned that it had been entered. He also advised the trial court that he had found a copy of the order among his runner's papers and other belongings after the runner became ill and no

longer worked for counsel's firm, a fact that was not set forth in Adkins' original Motion and accompanying affidavit. Again, the date that this event occurred was not provided. The trial court subsequently denied the Motion without any comment as to the substantive basis for its decision. On November 3, 2004, the trial court entered an order setting forth its denial of the Motion - again without further elaboration. This appeal followed.

On appeal, Adkins argues that the trial court abused its broad discretion in failing to re-enter its May 13, 2002 order when she failed to receive notice of the entry of that order, when court records of the case were missing, and when the governor's wife is a party. Patton counters that Adkins' Motion was untimely filed, that the case law relied upon by Adkins does not support her position, and that the record does not clearly or convincingly demonstrate a failure on the part of the circuit court clerk's office to send a copy of the order to Adkins.

It is well-established that any motion or action under CR 60.02 addresses itself to the sound discretion of the trial court, and - for that reason - the trial court's denial of a CR 60.02 motion will not be disturbed unless there has been an abuse of that discretion. See Kurtsinger v. Board of Trustees of Kentucky Retirement Systems, 90 S.W.3d 454, 456 (Ky. 2002) (Citation omitted); Berry v. Cabinet for Families & Children,

998 S.W.2d 464, 467 (Ky. 1999) (Citations omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000) (Citation omitted). The purpose of CR 60.02 is "to provide relief where the reasons for the relief are of an extraordinary nature." Ray v. Commonwealth, 633 S.W.2d 71, 73 (Ky.App. 1982). The rule "requires a very substantial showing to merit relief under its provisions." Ringo v. Commonwealth, 455 S.W.2d 49, 50 (Ky. 1970).

We first address Patton's contention that Adkins' "Motion to Re-enter Final Order" was not timely filed. CR 60.02 sets forth that any motion for relief brought pursuant to CR 60.02(a) - which covers the grounds of "mistake, inadvertence, surprise or excusable neglect" - must be brought not more than one (1) year after the judgment, order, or proceeding in issue. We make note of this because Adkins relies almost exclusively on the case of Kurtsinger v. Board of Trustees of Kentucky Retirement Systems, supra, in support of her appeal.

In Kurtsinger, the Kentucky Supreme Court dealt with the issue of whether a trial court may vacate a CR 59.05 order under CR 60.02 upon a finding that a party did not receive notice of entry of the order. The particular facts of that case are as follows: Thirteen (13) weeks following oral argument on a

summary judgment motion, the trial court entered summary judgment in favor of the Board of Trustees. The appellants subsequently filed a timely motion to alter, amend or vacate the summary judgment pursuant to CR 59.05, but the motion was denied on June 29, 2000. Notice of entry of the order was sent to the Board of Trustees but not to the appellants. The appellants became aware of the June 29th order on August 15, 2000, when a telephone call was made by their counsel to check the status of the CR 59.05 motion.

On learning of the June 29th order, the appellants immediately filed a motion pursuant to CR 60.02 requesting the trial court to vacate the June 29th order and to enter a new order ruling on the CR 59.05 motion. A hearing was conducted on the matter, and the trial court concluded that his office had made a mistake in not including the appellants 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 extraordinary nature justifying relief," apparently relying on CR 60.02(a), which - as noted - permits a court to grant relief on the grounds of "mistake, inadvertence, surprise or excusable neglect," and CR 60.02(f), which permits a court to grant relief for "any other reason of an extraordinary nature justifying relief." The court also based its decision on the fact that the appellants "acted

with due diligence and acted promptly." It then consequently vacated its earlier order and entered a new one denying the CR 59.05 motion. Kurtsinger, 90 S.W.3d at 455.

After the Court of Appeals subsequently dismissed the appeal, finding that the appellants were not entitled to CR 60.02 relief, the case proceeded to the Supreme Court. There, the Court reaffirmed the trial court's decision, concluding that CR 60.02 was adopted to address circumstances such as the one presented in that case, and that the trial court did not abuse its discretion in employing the rule to grant relief to the appellants. See id. at 456 (Citations omitted).

While the trial court in Kurtsinger granted relief on the grounds of "mistake, inadvertence, excusable neglect and reasons of an extraordinary nature justifying relief," a combination of CR 60.02(a) and (f), it is clear from the opinion that the Supreme Court treated the case as one involving only the application of CR 60.02(a). See id. ("Instead, this is nothing more than a trial court vacating an order on the basis of mistake, inadvertence, or excusable neglect and there is no doubt that a trial court has authority pursuant to CR 60.02 to grant such relief."). Indeed, there appears to have been no reason for the trial court to invoke CR 60.02(f) in its decision, as the situation there was amply covered by the provisions of CR 60.02(a) since the trial court admitted that it

had made a mistake. Moreover, the motion for CR 60.02 relief filed by the appellants was done so within the one-year limitation period for relief under CR 60.02(a).

Consequently, we consider Adkins' claim for relief as one falling within the confines of CR 60.02(a). As her Motion was filed more than two (2) years after entry of the applicable order here, it is apparent that she is not eligible for CR 60.02(a) relief. See O'Neal v. O'Neal, 122 S.W.3d 588, 590 (Ky.App. 2002) (Citation omitted). Furthermore, it appears as if Adkins is not entitled to rely upon the "catch-all" language in CR 60.02(f) for assistance, as we have previously held that "relief is not available under CR 60.02(f) unless the asserted grounds for relief are not recognized under subsections (a), (b), (c), (d), or (e) of the rule." McMurry v. McMurry, 957 S.W.2d 731, 733 (Ky.App. 1997) (Citation omitted). As we have determined that the grounds set forth by Adkins here fall within the purview of CR 60.02(a), we must decline to consider them under CR 60.02(f).

However, even assuming that CR 60.02(f) was applicable here, we fail to see how it would entitle Adkins to relief. "It is axiomatic that CR 60.02(f) requires extraordinary circumstances to be shown before relief will be granted." Commonwealth v. Bustamonte, 140 S.W.3d 581, 583 (Ky.App. 2001) (Citations omitted). "Relief under CR 60.02(f) is available

where a clear showing of extraordinary and compelling equities is made." Bishir v. Bishir, 698 S.W.2d 823, 826 (Ky. 1985).

In Kurtsinger, only six (6) weeks and two (2) days passed before the appellants became aware of the fact that they did not receive a notice or copy of the final order; moreover, when this fact was discovered, they immediately filed their motion for relief. Here, Adkins filed her motion for relief more than two (2) years after judgment was entered. Counsel for Adkins admitted that he had received a note from the trial court indicating that a final order had been entered, but there is nothing within the record to indicate when this occurred. Instead, the record simply indicates that, upon finding out that an order had been entered, counsel undertook to search for the court records of the case on "various occasions"; however, again, no specifics are provided as to when these efforts occurred.

Furthermore, in Kurtsinger, the trial judge concluded that either he or his staff was fully culpable in failing to effectuate service of the order to the appellants. Here, the May 13, 2002 order itself and the docket sheet report from the court record both indicate that a copy of the order was sent to Adkins; moreover, counsel for Adkins admitted at the hearing that he had found a copy of the order within the papers of one of his employees. Again, however, the date that this occurred

was not given. Consequently, we fail to see how these facts would demonstrate that Adkins is entitled to relief here under the heightened standards of CR 60.02(f), as we do not believe that "a clear showing of extraordinary and compelling equities" has been made.

Accordingly, the November 3, 2004 Order of the Pike Circuit Court denying Adkins' "Motion to Re-enter Final Order" is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

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BRIEF FOR APPELLEE:

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