

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000023-MR

MARY J. CRISWELL

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DEBRA HEMBREE LAMBERT, JUDGE  
ACTION NO. 05-CI-00033

RICHARD S. CRISWELL

APPELLEE

AND

NO. 2007-CA-000352-MR

MARY J. CRISWELL

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE WALTER F. MAGUIRE, JUDGE  
ACTION NO. 05-CI-00033

RICHARD S. CRISWELL

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

ACREE, JUDGE: Mary Criswell *pro se* appeals from two orders of the Pulaski Circuit Court. The first is the decree dissolving Mary's marriage from Richard Criswell. The second is the trial court's denial of Mary's motion to set aside or vacate the divorce decree. We reverse and remand.

Mary and Richard were married on November 27, 1982, and separated on December 26, 2004. Two children were born of the marriage, one of which was a minor at the time of the trial. On January 12, 2005, Richard filed for divorce. Both parties were represented by counsel until Mary's attorney was permitted to withdraw on October 13, 2006.

Richard served interrogatories upon Mary on March 17, 2006. After Mary did not answer the interrogatories, Richard filed a motion to compel Mary to provide her answers and a motion to set the matter for a final hearing on all contested issues. A final hearing was scheduled for December 6, 2006, and counsel for the parties agreed that answers to written discovery requests would be provided within 15 days. On August 11, 2006, Richard filed a second motion to compel responses to the discovery requests. At the hearing on the motion, Mary's counsel again agreed to provide the discovery responses within 15 days. On October 13, 2006, Mary's attorney was permitted to withdraw from the case. Richard never received Mary's answers to the interrogatories.

Richard was deposed by his own counsel on November 10, 2006. Mary had not yet obtained new counsel and failed to appear at the deposition. That same day, Richard filed a motion to submit the matter to the court for entry of a final decree. The matter was set to be heard by the trial court on November 17, 2006. Prior to that

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<sup>1</sup> Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

hearing, on November 15, 2006, the court *sua sponte* sent out an order re-scheduling the final hearing from December 6, 2006 to January 3, 2007.

At the November 17, 2006, hearing, a special judge heard the motion to submit and executed an order submitting the matter for judgment and decree on the issues presented. Mary did not attend the hearing. On November 28, 2006, the trial court entered a dissolution decree dividing the parties' assets and debts, deciding issues of child custody, support and visitation.

On December 27, 2006, Mary filed a motion to set aside or vacate the decree pursuant to Kentucky Rule of Civil Procedure (CR) 60.02 (a) and (f). She also filed a notice of appeal with this Court. In accordance with CR 60.04, Mary moved this Court to abate her appeal pending the trial court's decision on her CR 60.02 motion.

On January 17, 2006, the trial court denied Mary's CR 60.02 motion finding it no longer had jurisdiction over the matter as it was on appeal. Mary moved to alter or amend the trial court's order, but was denied again for lack of jurisdiction.

On February 9, 2007, Mary filed a second notice of appeal concerning the trial court's denial of her CR 60.02 motion. The appeals have been consolidated for our review.<sup>2</sup>

We first consider the appeal denying Mary's CR 60.02 motion on jurisdictional grounds, without considering the merits. The trial court and Richard appear to believe that it would be improper for a trial court to consider a motion to vacate a judgment made pursuant to CR 60.02 while a direct appeal from the same judgment is pending. Richard correctly notes that as a general rule, "the filing of a

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<sup>2</sup> Richard filed a motion to strike Mary's appellate brief pursuant to CR 76.12(4). Richard objects to Mary's references to documents and matters not part of the record on appeal as well as hearsay statements made throughout the brief. We believe his request to strike her entire brief is overboard. Though Richard claims it too difficult to merely strike certain portions of the brief, we feel up to the task. For the foregoing reasons, the motion to strike is denied. However, we will be mindful not to allow our decision to be affected by matters that are not part of the record.

notice of appeal divests the trial court of jurisdiction to rule on any new issues while the appeal is pending.” *Johnson v. Commonwealth*, 17 S.W.3d 109, 113 (Ky. 2000).

However, CR 60.04 specifically provides:

If a proceeding by motion or independent action is commenced under Rule 60.02 or 60.03 while an appeal is pending from the original judgment and prior to the time an opinion is rendered by the appellate court, the party commencing such proceeding shall promptly move the appellate court to abate the appeal until a final order is entered therein.

See also Kentucky Rule of Criminal Procedure (RCr) 10.06(2).

In *Wilson v. Commonwealth*, 761 S.W.2d 182 (Ky.App. 1988), this Court discussed the prudence of staying an appeal while the trial court considers a motion made pursuant to RCr 10.02.

The wisdom of permitting such an independent attack on the conviction to proceed without awaiting the disposition of the direct appeal should be apparent. In the first place, the independent attack may render the direct appeal unnecessary.

*Wilson*, 761 S.W.2d at 184-85. The same wisdom is applicable when using what amounts to the civil counterpart of RCr 10.06. It is entirely appropriate, and specifically provided for in our law, that the trial court can and should hear a motion made pursuant to CR 60.02 even when an appeal has been filed with this Court.

It was an abuse of discretion for the trial court to decline to rule on the merits of Mary’s claims of excusable neglect and reasons of such extraordinary nature as to justify relief. We therefore reverse the order and remand the case to the trial court so that it may rule upon the merits of Mary’s CR 60.02 motion. The appeal in the original action will be held in abeyance until we are properly advised of the decision of the trial court in this proceeding.

The judgment of the Pulaski Circuit Court is reversed and remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mary J. Criswell, *pro se*  
Somerset, Kentucky

BRIEF FOR APPELLEE:

Heidi Schultz Powers  
Somerset, Kentucky