RENDERED: AUGUST 21, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002197-MR

RONNIE E. CURTIS AND
JUDY F. CURTIS — APPELLANTS

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, SPECIAL JUDGE
ACTION NO. 06-CI-00549

EUGENE BATSON AND
FRANCES BATSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellants, Ronnie E. Curtis and Judy F. Curtis, appeal from an order of the Muhlenberg Circuit Court denying their motion for a new trial based upon newly discovered evidence under CR 60.02. Finding no error, we affirm.

This matter involves a dispute between Appellants and Appellees, Frances and Eugene Batson[1], over the right to access a private roadway. The facts, as set forth by a panel of this Court on direct appeal, are as follows:

> Coleman and Esther Sears owned a tract of land that abutted the south side of Kentucky Highway 176 in Muhlenberg County. Appellees, Eugene and Frances Batson, purchased their first lot from the Searses in 1966. [Footnote omitted]. The lot abutted the highway for a distance of 125 feet. Shortly before this time, the Searses relocated and completed construction on a twenty-foot wide roadway which ran from the highway in a southerly direction to the rear of the Searses' tract. The Searses intended the use of the roadway for the grantees so as to eliminate multiple driveways accessing the highway. The Batsons used the roadway as the sole access to their lot.
>
> In 1967, Appellants, Ronnie E. Curtis and Judy F. Curtis, purchased the Searses' remaining lot which abutted the highway. The deed referenced the roadway as running adjacent with the entire eastern boundary of the Curtises' lot. The roadway separated the Curtises' tract from the Batsons' tract. The Curtises also used the roadway as the sole access to their lot. In 1971, the Curtises purchased a second lot from the Searses, which was located immediately south of the Curtises' home lot and adjacent to the roadway. The roadway was described in the deed and ran the entire eastern boundary of the lot.
>
> In 1975, the Batsons purchased a second lot from the Searses, which was located immediately south of the Batsons' home lot. The deed referenced the roadway, which adjoined the entire western boundary of the lot. Following the purchase of the second lot, the Batsons utilized this area as a garden. The roadway was used to access the garden. The Batsons graveled a portion of the roadway. In 1983, the Batsons constructed a garage on the second lot for woodworking and to house their truck. In 1993, the Batsons purchased their third lot from the

[1] Eugene Batson passed away during the pendency of the direct appeal.

Searses, which also adjoined the roadway. Over the years, the Batsons graveled the roadway on several occasions and blacktopped the portion of the roadway from the highway to their residence.

Also in 1993, the Curtises purchased the Searses' remaining property, which was located south of the Batsons' lots and east of the roadway. This conveyance included the entirety of the most southern portion of the roadway. In 1997, the Curtises purchased from the widow Sears the remaining entirety of the roadway, which extended from the highway to the lot immediately south of the Batsons' land. This conveyance contained the following language:

> This conveyance is also subject to the rights of ingress and egress by Batson and assigns to his lots adjoining and abutting on the private roadway as referred to in the deeds from Sears to Batson. Curtis has heretofore acquired in Deed Book 421, page 646, the South part of the twenty (20) foot private roadway and the use of the roadway applies to the twenty (20) foot strip described herein and extending from Highway # 176 on the North to the Curtis North line established in Deed Book 421, page 646.

In 2006, the Curtises plowed topsoil onto the roadway immediately south of the blacktopped portion. This action interfered with the Batsons' access to their second lot. The Batsons filed suit in Muhlenberg Circuit Court. The court held trial without a jury. The trial court found that the roadway was an easement appurtenant to the Batsons' property on several different bases including easement by implication and estoppel. The court found that the Curtises' placement of a gate on the roadway blocking the approach to the Batsons' garage was an unreasonable interference.

Curtis v. Batson, 2007-CA-001222-MR (March 6, 2009).

On July 17, 2008, prior to the opinion of this Court affirming the lower court's judgment, Appellants filed a CR 60.02 motion to set aside the judgment. During a subsequent hearing, Appellants argued that a 1984 aerial photograph of the subject property discovered in a relative's possession contradicted Appellees' claims at trial. However, Appellants' counsel conceded that Appellants obtained the photograph prior to filing their direct appeal in this Court in 2007. Appellants also attempted to introduce numerous photographs taken after the trial in support of their position.

At the conclusion of the hearing, the trial court noted that the 1984 photograph clearly fell within the guise of newly discovered evidence under CR 60.02(b). As such, any motion based upon the photograph would necessarily have had to have been filed within one year of the May 21, 2007, final judgment. The trial court further commented that Appellants had failed to demonstrate that the evidence could not have been discovered prior to trial. In fact, even counsel acknowledged that such was the result of "investigatory efforts after the fact." Finally, the trial court concluded that not only was the evidence not of such an extraordinary nature to warrant relief under CR 60.02(f), but also that Appellants were precluded from claiming relief under subsection (f) as a matter of law. This appeal ensued.

Appellants argue in this Court that the trial court erred in failing to grant their motion to set aside the judgment based on the new photographic evidence. As they did in the trial court, Appellants contend that the evidence is of

such a persuasive nature that it warrants extraordinary relief under CR 60.02(f). We disagree.

CR 60.02 states, in relevant part:

> On a motion a Court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; . . . (f) any other reason of an extraordinary nature justifying relief.

Furthermore, any motion for relief "shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one (1) year after the judgment, order or proceeding was entered or taken." CR 60.02.

Clearly, by Appellants' own admission, they were in possession of the 1984 photograph prior to filing their appellate brief in this Court in the direct appeal. Nevertheless, instead of filing a timely motion pursuant to CR 60.02 (a) or (b), they elected to proceed with the appeal, and only file the motion to set aside after the expiration of the one-year limitations period.

Furthermore, the trial court correctly concluded that Appellants are not entitled to rely upon the "catch-all" language in CR 60.02(f). As noted by a panel of this Court in *McMurry v. McMurry*, 957 S.W.2d 731, 733 (Ky. App. 1997), relief from judgment for "any other reason justifying relief" is not available unless asserted grounds for relief are not encompassed within any of the first five clauses of rule governing relief from judgment. As we agree with the trial court

that the grounds set forth by Appellants fall within the purview of CR 60.02(b), CR 60.02(f) is unavailable.

Even assuming, however, that CR 60.02(f) was applicable herein, we fail to perceive how it would entitle Appellants 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. 2004); *Berry v. Cabinet for Families & Children ex rel. Howard*, 998 S.W.2d 464 (Ky. 1999). Furthermore, "[r]elief 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). The standard of review for relief under CR 60.02(f) is whether the trial court abused its discretion. *Dull v. George*, 982 S.W.2d 227 (Ky. App. 1998) (*Citing Bethlehem Minerals Company v. Church and Mullins Corporation*., 887 S.W.2d 327 (Ky. 1994)).

We simply cannot conclude that Appellants' evidence constitutes a reason of an extraordinary nature justifying relief of the type envisioned under CR 60.02(f). Our Supreme Court has warned that because of the desirability of according finality to judgments, CR 60.02(f) must be invoked only with extreme caution, and only under most unusual circumstances. *Cawood v. Cawood*, 329 S.W.2d 569 (Ky. 1959). It is apparent from the pleadings and the hearing below, that Appellants' wish to relitigate the action herein. However, merely because their further investigation resulted in evidence that unquestionably existed prior to the trial does not warrant setting aside the final judgment. Accordingly, the trial

court did not abuse its discretion in denying Appellants relief under CR 60.02. *Bethlehem Minerals Company*.

The order of the Muhlenberg Circuit Court denying Appellants' CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

John W. Tullis
Owensboro, Kentucky

BRIEF FOR APPELLEES:

Ralph D. Vick
Greenville, Kentucky