

RENDERED: AUGUST 3, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000299-MR

THE ESTATE OF WALLACE KELLY, JR.
BY AND THROUGH LOUISE R. KELLY,
EXECUTRIX

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 03-CI-00393

THOMAS BEALL AND
JESSAMINE COUNTY FISCAL COURT

APPELLEES

OPINION AND ORDER DISMISSING

** ** * ** * ** *

BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: Louise R. Kelly, as the executrix of the Estate of Wallace (Mike) Kelly, Jr., has appealed from the partial summary judgment of the Jessamine Circuit Court ruling that Thomas Beall owned a 30-foot-wide right-of-way in fee simple absolute. Because we have determined that Kelly did not file an

amended notice of appeal or a new notice of appeal upon the entry of an amended partial summary judgment following a ruling on Beall's Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter or amend the initial judgment, we must dismiss this appeal pursuant to CR 73.02(2).

The underlying suit began in 2003 with the filing of a complaint by Kelly against Beall. In the complaint, Kelly sought a declaration regarding the ownership of a 30-foot-wide right-of-way that provided for ingress and egress to her land across land owned by Beall. Kelly also alleged claims for trespass, slander, and interference with a contractual relationship. Beall filed a counterclaim, seeking a declaration that he was entitled to use the portion of the right-of-way that crossed Kelly's property as well as a permanent injunction enjoining Kelly from depriving him from using Old Sugar Creek Road. Kelly moved to bifurcate the declaration of rights claim from the remainder of the claims in her complaint and in the counterclaim, although the court never ruled on this motion. Beall moved to file an amended counterclaim in 2004, seeking a ruling that he had a fee simple absolute ownership of the right-of-way at issue.

The parties opted to litigate the ownership issue via motions for summary judgment. Prior to ruling on these motions, Kelly moved to join the Jessamine Fiscal Court as a necessary party to the suit in order to determine whether the roads in question were county roads. The fiscal court was joined as a party, and Kelly filed an amended complaint including a request for a declaration of the roads in question as public or private.

The parties then moved the court to enter a partial summary judgment regarding what types of roads existed and the ownership issue. The court ordered additional briefing regarding whether the dedication of a right-of-way by plat conveyed the fee of the roadway or a lesser interest. Beall argued that, assuming Mike Kelly intended to make a dedication, a common law dedication of a roadway by plat did not convey the fee, but only an easement or right to use by the public. The fee remained with the owner subject to the easement. Beall relied on a long line of Kentucky cases and argued that the opinion of the Supreme Court of Kentucky in *Herron v. Boggs*, 582 S.W.2d 643 (Ky. 1979), was an aberration. On the other hand, Kelly relied on the opinion in *Herron* to argue that the creation and dedication of a right-of-way divested Mr. Kelly, or his surviving wife, of the ability to convey a fee interest in the 30-foot-wide right-of-way.

On January 27, 2009, the circuit court entered a calendar order containing the following hand-written ruling:

The roadway in question, as drawn on the plat, was not designed or constructed to county standards, nor was it presented to the Jessamine Fiscal Court for approval. It, therefore, constitutes a common law dedication rather than a dedication by statute.

The circuit court then entered the partial summary judgment as submitted by Beall, ruling that the roads at issue were county roads and that Beall had a fee simple absolute ownership interest in the 30-foot-wide public right-of-way:

6. As a member of the public, the Defendant, Tom Beall, has had in the past and continues to have a right of

access for his trail riding business, his farm equipment, his vehicles and otherwise over the Old Sugar Creek Road, the New Sugar Creek Road and the Richardson/Richardson Ferry/Lock 8 Roads by virtue of their existence as “county roads” as adjudged herein. Additionally, the Defendant, Tom Beall, also has had in the past and continues to have a right of access over that portion of the Lock 8/Richardson Ferry/Richardson Roads, which coincides with the black and white spotted line on Exhibit “1”, because he owns the underlying fee simple absolute interest in said portion pursuant to deed recorded in Deed Book 445, Page 242, in the Jessamine County Clerk’s office. That portion of the black and white spotted line which does not coincide with the Lock 8/Richardson Ferry/Richardson Roads is a 30 foot wide public right of way created by plat recorded in Plat Cabinet 7, Slide 169D, and the said Defendant has had in the past and continues to have a right of access over this portion because he also owns the underlying fee simple absolute interest in it pursuant to the aforementioned Deed.

The order also referenced another exhibit, a December 18, 2007, plat from Moore Surveying Company. Neither exhibit was attached to the partial summary judgment. The circuit court included CR 54.02 finality language.

On February 3, 2009, Beall filed a timely CR 59.05 motion to alter and amend the partial summary judgment regarding erroneous language in paragraph 6 as well as inaccuracies in the revised December 12, 2007, plat. Following a hearing on February 12, 2009, the court entered a docket order a few days later granting Beall’s motion to alter and amend, noting: “Enter Judgment, if Mr. Smith [counsel for Beall] provides Mr. Marshall [counsel for Kelly] w/ copy of Order showing the road per the Amended Judgment.”

On February 17, 2009, Kelly filed a notice of appeal from the January 27, 2009, partial summary judgment. In his supplemental prehearing statement, Beall raised the premature nature of Kelly's notice of appeal, noting that it was filed prior to entry of an amended partial summary judgment and that it might be interlocutory.¹ Kelly then moved this Court to hold the appeal in abeyance and remand the matter to the circuit court for a ruling on remaining undecided matters that were still pending below. In response, Beall moved to dismiss the appeal as prematurely filed. Kelly objected to the motion to dismiss, instead suggesting the appeal be stayed to permit the circuit court to dispose of matters remaining in dispute between the parties, including Beall's CR 59.05 motion. By order entered January 9, 2010, this Court denied the motion to dismiss and abated the appeal to allow for final adjudication of the CR 59.05 motion.

Over the course of the next year and a half, the parties continued to litigate the basis of the CR 59.05 motion at the circuit court level, including the creation of a drawing of the location of various roads and the language of the partial summary judgment. On April 20, 2011, this Court placed the appeal back on the active docket, noting that the amended partial summary judgment had been entered on April 4, 2011. We note that a subsequent amended partial summary judgment was then entered on May 16, 2011, which was set aside the following day. The circuit court clerk certified the record on appeal on May 23, 2011.

¹ Beall later dropped his assertion that the partial summary judgment was interlocutory.

After the record was certified, the parties jointly moved this Court to allow the circuit court to correct a clerical error in the amended partial summary judgment. On August 3, 2011, this Court granted the motion and directed the parties to file a CR 60.01 motion requesting the circuit court to correct the amended partial summary judgment and to then certify a supplemental record. On August 12, 2011, the circuit court entered an order correcting the clerical errors regarding dates in the amended partial summary judgment and inserting a missing exhibit in a book of exhibits. The amended partial summary judgment (corrected version) was entered the same day. Paragraph 6 provides as follows:

As a member of the public, the Defendant, Thomas Beall, has had in the past, and continues to have a right of access for his trail riding business, his farm equipment, his vehicles and otherwise over the “Old” Sugar Creek Road (now known as Sugar Creek Road), the “New” Sugar Creek Road (now known as Sugar Creek Pike) and the Richardson/Richardson Ferry/Lock 8 Roads by virtue of their existence as “county roads” as adjudged herein. Additionally, the Defendant, Thomas Beall, also has had in the past and continues to have a right of access over that portion of the Lock 8/Richardson Ferry/Richardson Roads, delineated by the black and white spotted line on Exhibit 2 and by plat recorded in Plat Cabinet 7, Slide 69D, Jessamine County Clerk’s office (Exhibit 3), because it is owned in fee simple absolute by the said Defendant pursuant to deed recorded in Deed Book 445, Book 242, in the Jessamine County Clerk’s office. Only a portion of the Richardson/Richardson Ferry Road that is owned in fee simple absolute by Tom Beall is shown on Exhibit 1.

The circuit court again included CR 54.02 language making the judgment final and appealable.

The sole issue addressed by the parties in their briefs relates to whether the circuit court properly found that Beall owned a fee simple absolute interest in the 30-foot-wide right-of-way. However, we cannot reach the merits of this appeal because Kelly failed to properly invoke the jurisdiction of this Court.

There is no question or dispute between the parties that the notice of appeal initiating this case was prematurely filed in 2009 while a CR 59.05 motion was still pending. While such action was at one time fatal to an appeal, Kentucky's civil rules have been amended to provide for such a situation. In CR 73.02(1), the civil rules now provide for premature notices of appeal:

(e) The running of the time for appeal is terminated by a timely motion pursuant to any of the Rules hereinafter enumerated, and the full time for appeal fixed in this Rule commences to run upon entry and service under Rule 77.04(2) of an order granting or denying a motion under Rules 50.02, 52.02 or 59, except when a new trial is granted under Rule 59.

(i) If a party files a notice of appeal after the date of the docket notation of service of the judgment required by CR 77.04(2), but before disposition of any of the motions listed in this rule, the notice of appeal becomes effective when an order disposing of the last such remaining motion is entered.

However, the rule goes on to provide that a party must then file an amended notice of appeal or a new notice of appeal once the motion is ruled upon or the judgment is altered or amended:

(ii) A party intending to challenge a post-judgment order listed in this rule, or a judgment altered or amended upon such motion, must file a notice of appeal, or an amended notice of appeal, within the time prescribed by this rule

measured by the date of the CR 77.04(2) docket notation regarding service of the order disposing of the last such remaining motion.

In *James v. James*, 313 S.W.3d 17, 24 (Ky. 2010), the Supreme Court addressed this rule, stating:

CR 73.02(1)(e)(i) (effective in 2009) now recognizes the validity of prematurely filed notices of appeal and their effectiveness “when an order disposing of the last such remaining motion is entered.” Under CR 73.02(1)(e)(i), if the judgment is thereafter altered or amended, or a party intends to challenge a post-judgment order on such motions, he may then file a “notice of appeal, or an amended notice of appeal, within the time prescribed” from the entry date of “the last such remaining motion.” CR 73.02(1)(e)(ii). However, if there is no change post-judgment, he does not.

Finally, CR 73.02(2) provides: “The failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial.”

In the present case, Kelly did not file an amended notice of appeal or a new notice of appeal from either the April 4, 2011, amended partial summary judgment or from the corrected version entered on August 12, 2011. Therefore, Kelly did not comply with CR 73.02(1)(e)(ii) to make the 2009 notice of appeal effective or to invoke the jurisdiction of this Court. Accordingly, we must dismiss the appeal for failure to file an amended or new notice of appeal from the amended version of the partial summary judgment.

For the foregoing reasons, the above-styled appeal is ORDERED DISMISSED.

ALL CONCUR.

/s/ James H. Lambert
JUDGE, COURT OF APPEALS

ENTERED: August 3, 2012

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, THOMAS
BEALL:

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