

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002426-MR

BILLY JOE YASTE; CHRISTY
JO YASTE; AND BILLY GLENN
YASTE, AS CUSTODIAN FOR
JENNIFER MARIE YASTE

APPELLANTS

v. APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE DOUGLAS M. GEORGE, JUDGE
ACTION NO. 06-CI-00026

LARRY OSBOURN;
BARBARA B. OSBOURN;
DANNY MEDLEY; AND
SHARON MEDLEY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, VANMETER, AND WINE, JUDGES.

VANMETER, JUDGE: Billy Joe Yaste, Christy Jo Yaste, and Billy Glenn Yaste,
as custodian for Jennifer Marie Yaste, (“Yastes”) appeal from an order of the

Washington Circuit Court denying their motion to vacate the summary judgment previously entered in favor of Larry Osbourn, Barbara B. Osbourn, Danny Medley, and Sharon Medley. For the following reasons, we affirm.

In February 2006, the Yastes filed a verified complaint alleging that access to their land was being unlawfully denied by Larry Osbourn and Danny Medley. The Yastes claimed that they were owners of an easement of right of way over Osbourn's and Medley's property to which Osbourn and Medley were blocking access.

In March 2006, Osbourn and Medley moved to dismiss the case for failure to name indispensable parties, their respective spouses. Thereafter, the trial court granted the Yastes an opportunity to file an amended complaint. In April 2006, the court dismissed the matter with prejudice since no amended complaint had been filed. The Yastes then moved the court to alter, amend, or vacate its order dismissing the case, which the court granted and permitted the Yastes to file an amended complaint adding the spouses as defendants.

In January 2008, the court issued a notice to dismiss for lack of prosecution. The record reflects that the case was not dismissed. In February 2008, Osbourn and Medley served discovery requests on the Yastes which went unanswered. On May 30, 2008, Osbourn and Medley filed a motion for summary judgment, which was heard on July 10, 2008, at which time the court granted the Yastes a ten-day extension of time to respond to Osbourn's and Medley's motion for summary judgment and to answer the outstanding discovery requests.

On August 1, 2008, the court entered an order granting Osbourn's and Medley's motion for summary judgment and dismissing the case in its entirety, noting that the Yastes responded neither to Osbourn's and Medley's motion for summary judgment, nor to their discovery requests. The order was designated as a final and appealable order. On August 11, 2008, the Yastes filed a motion pursuant to CR¹ 60.02 requesting that the court vacate the summary judgment previously entered since counsel for the Yastes was unable to meet with the Yastes to discuss the case and the Yastes were unaware of the extension of time granted by the court for responding to Osbourn's and Medley's motion for summary judgment until the day before this time expired.² Counsel for the Yastes further indicated that he was out of the office because of a death in his wife's family.

The court granted the Yastes leave of time to file a belated response to Osbourn's and Medley's motion for summary judgment without setting aside the order granting summary judgment, and reserved ruling on the Yastes' CR 60.02 motion. On November 20, 2008, after reviewing the Yastes' response, the court entered an order denying their CR 60.02 motion since no genuine issues of material fact existed and summary judgment was appropriate as a matter of law. In so ruling, the court noted:

The 40 acres in question was marked "landlocked" by the PVA and was sold to [the Yastes] for only \$6,000. [The Yastes'] only proof entered into the record is a deposition

¹ Kentucky Rules of Civil Procedure.

² The record is not clear as to why the Yastes filed their motion under CR 60.02, since a CR 59.05 motion to alter, amend, or vacate would have been timely at that point, August 11, 2008.

by Ernest Chesser, the brother-in-law of a previous owner of the land. Mr. Chesser's testimony does not prove any adverse use by [the Yastes] over [Osbourn's and Medley's] property, and therefore does not support the claim that [the Yastes] have a prescriptive easement over the property. [The Yastes are] relying on Ernest Chesser's testimony to establish adverse possession and even if the Court believes this testimony and nothing else, [the Yastes'] claim would fail. The Summary Judgment previously entered for [Osbourn and Medley] was proper and shall not be vacated by this Court.

On December 18, 2008, the Yastes filed a notice of appeal.

Thereafter, Osbourn and Medley moved this court to dismiss the appeal since notice was not timely filed.³ Osbourn and Medley pointed out that the notice of appeal states that the Yastes are appealing "from the Summary Judgment entered herein." Since more than thirty days had passed since entry of the August 1, 2008 order granting summary judgment, Osbourn and Medley argued that the appeal should be dismissed as untimely in accordance with CR 73.02(2).⁴ In addition, Osbourn and Medley asserted that the Yastes' CR 60.02 motion stated no grounds for relief under CR 60.02. By order entered April 8, 2009, this court denied Osbourn's and Medley's motion to dismiss and limited review to whether the trial court abused its discretion by denying the Yastes' CR 60.02 motion.

Our standard of review of a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. *Richardson v. Brunner*, 327 S.W.2d

³ CR 73.02(1)(a) provides that the notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).

⁴ CR 73.02(2) provides in relevant part that the failure of a party to file timely a notice of appeal shall result in a dismissal or denial.

572, 574 (Ky. 1959). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

CR 60.02 allows a court to relieve a party from its final order 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;
- (c) perjury or falsified evidence;
- (d) fraud affecting the proceedings, other than perjury or falsified evidence;
- (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (f) any other reason of an extraordinary nature justifying relief.

In this case, it appears that the Yastes are appealing either from the trial court's order granting summary judgment, in which case the appeal is dismissed as untimely, or from the trial court's order denying them CR 60.02 relief. Regarding the latter, our review of the record reveals that the Yastes failed to establish a valid reason under CR 60.02 for not timely responding to Osbourn's and Medley's motion for summary judgment so as to justify vacating the court's order granting summary judgment. *See Richardson*, 327 S.W.2d at 573 (noting that a movant for CR 60.02 relief "must explain why he did not present that [claim] upon the trial and thus excuse his default"). In this instance, Osbourn's and

Medley's discovery went unanswered for approximately five months and their motion for summary judgment was pending for two months. The Yastes' claim that counsel and clients were unable to get together under these circumstances rings hollow, especially since the Yastes were the plaintiffs and had not changed counsel over the course of the proceedings. Accordingly, the trial court did not abuse its discretion by denying them CR 60.02 relief.

The order of the Washington Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Jude A. Hagan
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BRIEF FOR APPELLEES:

William C. Robinson
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