RENDERED: SEPTEMBER 14, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000439-MR

MICHAEL B. CONWAY APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 07-CI-00061

THE ESTATE OF LEXA CONWAY
AND THE ESTATE OF BILLY
CONWAY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Michael Conway appeals from the Mason Circuit Court's order denying his motion for an enlargement of time to provide expert testimony and his motion to alter, amend or vacate the court's judgment, which denied his

claim for the value of topsoil encumbering property previously owned by his deceased father, William "Billy" Conway. For the following reasons, we affirm.

In a deed dated September 29, 1992, William granted Michael an easement to store topsoil on an 8.1083-acre tract of property located adjacent to a gas station owned by the family's corporation, Conway & Conway, Inc. The easement stated:

> Grantor further grants and confirms unto Grantee an easement for the storage of 3,000 cubic yards of topsoil on the tract described below, such topsoil having been removed from a portion of the property herein conveyed. Grantee shall leave a minimum of 18 inches of topsoil on the entire surface of the tract described below when removing stored topsoil. The easement shall terminate when all stored topsoil is removed, or at such time that Grantee should purchase the tract described below.

On June 20, 1994, William and his wife, Lexa O. Conway, executed separate wills and testaments, and two living trusts, the William E. Conway Living Trust and the Lexa O. Conway Living Trust, naming their surviving ten children as the beneficiaries. Of the surviving ten children, Charles Conway and Ann Conway Kramer were named co-executors of William's estate, and Michael and Charles were named co-executors of Lexa's estate. William passed away, followed by Lexa. After Lexa's death, the beneficiaries quarreled over whether to include the trusts in the settlement of the estate. Emily Conway Conley, an heir, filed an action to remove Michael as co-executor of Lexa's estate. Eventually the beneficiaries reached an agreement to keep the co-executors, including Michael, as well as to include all real property owned by the trusts in the estate. The

beneficiaries also created an "Advisory Committee of the Lexa O. Conway Living Trust" (hereinafter "Committee") to serve as a check and balance on the co-executors.

While part of William's real estate was being prepared for an estate auction, Michael asserted that he had a topsoil easement encumbering a certain 8.1083-acre tract preparing to be sold, and wanted the auctioneer to announce its existence prior to the sale of the property. In order to proceed with the sale of the property, the trial court ordered that the parties place $45,000 in escrow pending resolution of the issue. At this point, the estate of Lexa, by and through its executors, Michael and Charles *et al.*,[1] filed the underlying action against Emily Conway Conley, both individually and in her capacity as a named member of the Committee, and Elaine Conway Green to establish the validity of Michael's claim to, and the value of, the topsoil.

At a hearing before the trial court on November 10, 2010, the court received evidence from Michael and Robert David Horde, a surveyor who surveyed the property in question. Michael claimed approximately 3,000 cubic yards of topsoil existed on the property and stated that he would accept payment of $15 per cubic yard, for a total of $45,000. He established the value of the topsoil

[1] Estate of William "Billy" Conway, by and through its executors, Charles Patrick Conway and Ann Conway Kramer; Michael Conway, Tommy Conway, Charles Patrick Conway and John Conway, as members of the Advisory Committee of the "Lexa O. Conway Living Trust" dated 6/20/1994; Michael Conway, individually; Tommy Conway, individually; Charles Patrick Conway, individually; John Conway, individually; Jack Conway, individually; Ann Conway Kramer, individually; Jill Conway Newton, individually; and Diane Conway Stafford, individually.

per cubic yard through his own testimony that the average price of topsoil in the area was between $20 and $45 per cubic yard. Horde testified that he did not know how deep the soil went from the surface; instead, he relied on the calculations of a civil engineer by the name of Bill Montgomery to establish the depth of the topsoil. Horde testified that he surveyed approximately 200 feet in each direction from the small pile of topsoil remaining as an estimate of how far the topsoil radiated from the small mound. Horde stated that it was hard to tell where the topsoil began and ended along the surface, and he was only able to estimate the surface area covered by the topsoil with 75% accuracy. Horde was prohibited from rendering an opinion as to the value of the topsoil because he had not determined the topsoil's depth. Michael also offered a letter and some preliminary calculations from Montgomery, who estimated 3,100 cubic yards of topsoil. Montgomery's unsigned letter states that no soil borings had been taken on the storage area itself; therefore, existing ground elevations were based on the original ground around the perimeter of the topsoil storage area. Ultimately, the court instructed the parties from the bench that they had until December 10, 2010, to obtain further discovery on the matter, or the court would rule without it. No additional depositions were submitted.

In an order entered January 7, 2011, the trial court found that Michael's and Horde's testimony, as well as Montgomery's letter, were insufficient to prove the amount and value of topsoil. Under the terms of the easement, the court held that Michael was not entitled to any topsoil because he

failed to prove more topsoil existed beyond the 18 inches of required depth. The court ordered the $45,000 held in escrow to be distributed to the heirs of the Lexa O. Conway Estate according to the terms of her Last Will and Testament. Michael moved to alter, amend or vacate the judgment pursuant to CR[2] 59.05, and for an enlargement of time pursuant to CR 6.02 to provide expert testimony, which were denied by the court. This appeal followed.

The standard of review on appeal of a trial court's ruling on a motion to enlarge the period of time to complete discovery is for an abuse of discretion. *Armstrong v. Biggs*, 275 S.W.2d 60, 63 (Ky. 1955). This Court also reviews a trial court's ruling pursuant to CR 59.05 for an abuse of discretion. *Bowling v. Kentucky Dep't of Corr.*, 301 S.W.3d 478, 483 (Ky. 2009). An abuse of discretion occurred if "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citation omitted).

Michael first contends that the trial court's instruction from the bench requiring the parties to submit expert witness depositions by December 10, 2010, did not constitute an order because it was not a written order. However, the law is clear that an oral order from the court has authority equal to a written one and will stand unless contradicted by a written order by the court. *Commonwealth v. Taber*, 941 S.W.2d 463, 464 (Ky. 1997). Here, no written order contradicts the court's oral ruling and thus, we find no merit in this claim of error.

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[2] Kentucky Rules of Civil Procedure.

Michael next argues that his failure to submit an expert witness deposition by the December 10 deadline constitutes "excusable neglect," which provides grounds for granting his motion for an enlargement of time pursuant to CR 6.02. Under CR 6.02, a motion to enlarge a time period given by the court must be made within the time period allotted. Because Michael submitted his motion for an enlargement of time after December 10, his motion was barred and properly denied by the trial court.

Finally, Michael argues that the trial court abused its discretion by denying his motion to alter, amend or vacate its judgment. CR 59.05 grants a trial court "unlimited power to amend and alter its own judgments." *Gullion v. Gullion*, 163 S.W.3d 888, 891-92 (Ky. 2005). In *Bowling*, 301 S.W.3d at 483, this Court cited favorably the grounds federal courts recognize to grant a motion under CR 59.05's federal counterpart, FRCP[3] 59(e):

> There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

Id. (citations omitted).

[3] Federal Rules of Civil Procedure.

In his motion to alter, amend or vacate, Michael insists that his expert witness developed "cold feet" and refused to testify, apparently due to the notoriety of the case in the community, or possibly harassment by one or more of Lexa and William Conway's heirs. Michael states that he sought a new expert, but was turned down by three local firms, again likely due to the notoriety of the case. In December, Michael found an engineering firm that agreed to view the site, but not until January. Michael claims that after the holidays, the engineering firm could survey the tract of land and be ready for deposition within three weeks of completion of field work. Michael attached a copy of the firm's proposal to his motion. He maintains that he was in the process of notifying the court of the development in writing when the January 7, 2011, judgment was issued.

Our review of the record shows that the deadline for submitting additional expert depositions, per the court's oral ruling, had expired. While Michael's explanations for missing the deadline show that he was apparently working in good faith to secure additional expert evidence, he has failed to meet the criteria set forth in FRCP 59(e). Thus, in this instance, the trial court did not abuse its discretion by denying Michael's motion to alter, amend or vacate.

The order of the Mason Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	No Brief for Appelees
Steven R. Zweigart Flemingsburg, Kentucky	