

RENDERED: OCTOBER 11, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001115-MR
AND
NO. 2011-CA-001172-MR

TERRY BRENNAN AND
VICTORIA BRENNAN

APPELLANTS/CROSS-APPELLEES

v. APPEAL AND CROSS-APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 10-CI-02424

EAST KENTUCKY POWER
COOPERATIVE, INC., A
KENTUCKY CORPORATION

APPELLEE/CROSS-APPELLANT

OPINION AND ORDER DISMISSING

** ** * * * * *

BEFORE: NICKELL, TAYLOR AND VANMETER, JUDGES.

NICKELL, JUDGE: Terry and Victoria Brennan (collectively “Brennan”) have appealed from the Boone Circuit Court’s May 27, 2011, order granting their motion for post-judgment relief and the contemporaneously entered Amended

Interlocutory Judgment. Having reviewed the record, we conclude the appeal is untimely taken, thus depriving this Court of jurisdiction.

This action originated as a condemnation proceeding filed by East Kentucky Power Cooperative, Inc. (“EKP”), a rural electric cooperative corporation, seeking authority to condemn an easement across Brennan’s lands for the purpose of constructing and maintaining electricity transmission lines. The action was instituted under the authority of the Eminent Domain Act of Kentucky.¹

The relevant procedural facts are as follows:

March 16, 2011—Interlocutory judgment² entered following a bench trial. The Clerk noted service on the docket. CR³ 77.04.

April 8, 2011—Motion pursuant to CR 60.02 filed by Brennan.

May 27, 2011—Order granting Brennan’s CR 60.02 motion.

May 27, 2011—Amended interlocutory judgment entered.

June 23, 2011—Notice of appeal filed.

EKP asserts the trial court’s initial judgment, rendered March 16, 2011, was final and appealable and Brennan’s failure to file a notice of appeal within thirty days from entry of that judgment barred this appeal as untimely pursuant to CR 73.02(1). We agree.

¹ Kentucky Revised Statutes (KRS) 416.540 *et seq.*

² Pursuant to KRS 416.610, an “interlocutory judgment” entered in eminent domain cases is final and appealable in relation to the right to condemn. *See Hagg v. Kentucky Utilities Co.*, 660 S.W.2d 680, 681 (Ky. App. 1983).

³ Kentucky Rules of Civil Procedure.

CR 73.02(1)(a) provides that “[t]he 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).” Because compliance with the time requirements of CR 73.02 is mandatory, failure to comply shall result in dismissal of the appeal. CR 73.02(2); *Stinson v. Stinson*, 381 S.W.3d 333, 336 (Ky. App. 2012) (citing *United Tobacco Warehouse, Inc. v. S. States Frankfort Coop., Inc.*, 737 S.W.2d 708, 710 (Ky. App. 1987)). The rule also specifies that only timely motions made pursuant to CR 50.02, CR 52.02, and CR 59, serve to toll the running of time for taking an appeal. Notably for purposes of this appeal, motions made pursuant to CR 60 are not encompassed by the specific language of CR 73.02. In analyzing amended judgments that correct clerical errors in an original judgment, “[t]he time for appeal from the underlying judgment correspondingly dates from the original rendition of judgment . . .’ and not from the entry of an amended judgment.” *United Tobacco Warehouse*, 737 S.W.2d at 709–10 (citation omitted). However, “when a trial court makes substantive changes—as opposed to merely correcting errors—in entering an amended judgment, the time for filing an appeal starts from the entering of the amended judgment rather than the original judgment.” *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 648 (Ky. 2007) (citations omitted).

Although Brennan’s motion for post-judgment relief was brought under the auspices of CR 60.02, the only relief sought—and ultimately granted by

the trial court—was removal of a single line of text from the eight-page judgment.⁴ EKP admitted the challenged language was inadvertently included in the proposed judgment it tendered to the trial court and referenced a right it had not sought in this action. While Brennan had deemed inclusion of the language a “mistake,” EKP argued the facts of the matter revealed the judgment merely contained a “clerical error” that should be corrected under CR 59.05 or CR 60.01. We have reviewed the record and conclude Brennan’s motion was certainly made to correct a clerical error and cannot reasonably be otherwise interpreted.

CR 60.01 defines clerical mistakes in judgments as those arising from oversight or omission, which “may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.” CR 60.01. “The Rule not only encompasses mistakes of the clerk but also errors or oversight or omission by the court and others.” D. Kramer and K. Phillips, *7 Kentucky Practice* CR 60.01 (6th ed. 2012) (citation omitted). The function of CR 60.01 “is primarily for mistakes that do not attack a party’s fundamental right to a judgment at the time it was entered.” *Id.* The distinction between a clerical error subject to correction and a judicial error is not dependent upon the person making the error, but rather “whether it was the deliberate result of judicial reasoning and determination, regardless of whether it was made by the

⁴ The interlocutory judgment granted EKP the right to condemn and enter the right-of-way for the construction and maintenance of its electric transmission lines, “together with the right to locate necessary guying facilities adjacent to said right-of-way” Brennan’s objection was limited to inclusion of the quoted phrase.

clerk, by counsel, or by the judge.” *Machniak v. Commonwealth*, 351 S.W.3d 648, 652 (Ky. 2011) (citation omitted).

In the case *sub judice*, the trial court’s amended judgment removed a reference to guying facilities which were never sought by EKP in this action. The amended judgment did not alter the substance of the original judgment; the court simply clarified its original judgment. This clarification is analogous to correction of a clerical error. Indeed, the original judgment granted EKP the right to condemn the property for the purpose of constructing its electric transmission line and related facilities, a right that was unchallenged and unchanged by entry of the amended judgment. As a result, the time for perfecting the appeal dates from entry of the original judgment on March 16, 2011.

Brennan’s notice of appeal, while filed within thirty days from entry of the amended interlocutory judgment, was not filed within thirty days from entry of the original, final judgment. Brennan could have—but did not—file a notice of appeal simultaneously with the filing of the post-judgment motion for relief if they desired to preserve the right to appeal the interlocutory judgment. Nor did Brennan move for relief under CR 52.02 or CR 59,⁵ either of which would have tolled the running of the time in which an appeal could be filed.

The *timely* filing of a notice of appeal remains mandatory and failure to do so is fatal to the appeal. *Fox v. House*, 912 S.W.2d 450 (Ky. App. 1995).

⁵ Although a motion made pursuant to CR 50.02 would likewise toll the running of the time to file an appeal, no motions for directed verdict were made before the trial court, thereby negating the need for or propriety of a post-judgment motion under CR 50.02.

Since the filing of the notice of appeal was outside the thirty-day time limit set forth in CR 73.02, we lack jurisdiction to consider the appeal and it must be dismissed.

Now, therefore, be it ORDERED that Appeal No. 2011-CA-001115-MR is DISMISSED as being untimely filed. Further, as a result of the dismissal of the direct appeal herein, the cross-appeal in Appeal No. 2011-CA-001172-MR, is DISMISSED as moot.

ALL CONCUR.

ENTERED: October 11, 2013

/s/ C. Shea Nickell
JUDGE, COURT OF APPEALS

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