

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-001964-MR

DONNA KAYE ROYSE

APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT  
HONORABLE A. BAILEY TAYLOR, JUDGE  
ACTION NO. 09-CI-00274

ESTATE OF RALPH LANE ROYSE

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: At issue is whether the Mason Circuit Court abused its discretion when it denied Appellant Donna Kaye Royse's motion under Kentucky Rule of Civil Procedure (CR) 60.02 to re-open and modify the property settlement agreement from her divorce based upon her claim of fraud. Finding no abuse, we affirm.

## I. Facts and Procedure

Donna and Ralph Royse married in 1991 after five years of cohabitation. Shortly before their marriage, Ralph and Donna entered into an Ante-Nuptial Agreement in which Ralph disclosed to Donna his personal net worth of almost \$900,000.00. Donna signed the Ante-Nuptial agreement, acknowledging that if the two should divorce, she would be entitled to half the earnings and property acquired during the marriage.

By the summer of 2009, Ralph and Donna were estranged. Ralph retained the services of Darrell Ruark, an attorney in Flemingsburg, Kentucky, to represent him in divorce proceedings against Donna. Donna did not retain counsel at any time during these proceedings.

On August 11, 2009, Ralph and Donna signed a Property Settlement and Separation Agreement (Settlement Agreement). According to the Settlement Agreement, Donna would keep: (1) her car; (2) her personal checking account; and (3) any clothing and personal items. Also, Ralph and Donna agreed to divide the “furniture, appliances and household goods” from their marital home, sell the home and divide equally the proceeds from the sale.

By signing the Settlement Agreement, Ralph and Donna both acknowledged that it was a “full, fair, just, and final” property settlement and that they each “discharge[d] the other from any and all claims . . . arising out of the marriage or otherwise, but excepting from said releases the obligations contained in the herein agreement.” The agreement also made clear that Donna was unrepresented in the

matter and that she decided to sign the Settlement Agreement without seeking the advice of an attorney.

Also, on August 11, 2009, Donna signed an Entry of Appearance and Waiver certifying that she had read a copy of the divorce petition, and that she believed all supporting affidavits were true and accurate. By signing, Donna also waived service of process and the right to file exceptions to the Decree of Dissolution of Marriage. A Fleming County Deputy Clerk witnessed Donna sign the document.

On August 28, 2009, the Mason Circuit Court issued a Decree of Dissolution of Marriage which incorporated the Settlement Agreement. Ralph died intestate on November 25, 2009, the court appointed Michael M. Clarke as administrator of Ralph's estate. On October 8, 2010, Clarke determined the value of Ralph's estate was in excess of 1.3 million dollars and filed a full inventory of the estate with the circuit court. Later, after discovering that the marital home had yet to be sold, Clarke petitioned the court to allow him to list the home for sale pursuant to the Property Settlement Agreement; the circuit court granted Clarke's petition on November 16, 2010.

On April 1, 2011, Donna filed a motion under CR 60.02(d), claiming that Ralph "fraudulently failed to disclose or include his true holdings or assets" and thus constituted a fraud affecting the proceedings. Later, Donna submitted an affidavit claiming that Ralph tricked her into signing the Settlement Agreement.

Donna's affidavit stated that on August 11, 2009, Ralph told her that he wanted to sell their marital home but he needed her to sign paperwork to permit the sale. Donna maintained that Ralph never told her those documents constituted a settlement agreement. Donna agreed to Ralph's request to sell the home. Later, Ralph took her to Ruark's office in Flemingsburg where she signed documents that she believed would only divide the furniture between them, and allow for the sale of the home. Ralph then took Donna to the courthouse where the clerk witnessed her signing additional documents.

In her affidavit, Donna admitted she did not actually read any of the documents and that she "had no idea that when [she] signed the papers on August 11, that [she] was agreeing to a property settlement, entering [her] appearance, and agreeing to a divorce." According to Donna, she was unaware of what she had signed until the following day, when Ralph told her she had signed a full property settlement agreement and entered her appearance in divorce proceedings. Further, Donna claimed she did not remember signing the Ante-Nuptial Agreement in 1991 until after filing her CR 60.02 motion.

Clarke responded in opposition to Donna's CR 60.02 motion.<sup>1</sup> In support, Clarke produced a copy of the Ante-Nuptial Agreement featuring Donna's

---

<sup>1</sup> Clarke's response is in the form of a motion to "dismiss Respondent's Motion to Reopen Property Division from Divorce for Fraud Affecting the Proceedings." This Court interprets Clarke's motion to "dismiss" Donna's CR 60.02(d) motion as simply a response in opposition. Motions for relief from a judgment under CR 60.02 are not "dismissed" – they are either granted or denied by the trial court. In evaluating a motion, this Court looks to the motion's substance and legal effect over its linguistic form. *Cargo Truck Leasing Co. v. Piper*, 394 S.W.2d 472, 474 (Ky. 1965). Here, the legal effect of Clarke's filing is to request that the trial court deny Donna any relief under CR 60.02.

signature, as well as a letter from Donna to Ralph, dated August 13, 2009, where Donna stated “You know I could have taken you to court and got a lot more than what I got. I am not stupid. I know what you have. I just thought you would be fair.” (Record 147).

On August 20, 2012, the circuit court denied Donna’s CR 60.02 motion.<sup>2</sup> After considering all affidavits and memoranda submitted in the case, the circuit court determined that Donna and Ralph had negotiated the terms of the Settlement Agreement for a period of five months before reducing it to writing on August 11, 2009. The court also noted that Donna’s letter to Ralph on August 13, 2009, demonstrated Donna’s awareness of Ralph’s wealth and her ability to seek redress in court if she was unsatisfied with the Settlement Agreement. Ultimately, the court concluded Donna could have avoided any of the harm she suffered by retaining counsel during the proceedings or reading the documents before signing them. The court also noted that Donna’s failure to recall the existence of an Antenuptial Agreement was not due to Ralph’s misrepresentation, but her own forgetfulness.

On September 5, 2012, Donna filed a CR 59.05 motion to vacate the court’s order denying her CR 60.02 motion, arguing for the first time that the Settlement Agreement was unconscionable. The court denied Donna’s CR 59.05 motion on October 16, 2012.

---

<sup>2</sup> In its August 20, 2012 order denying Donna’s CR 60.02 motion, the circuit court “granted” Clarke’s “Motion to Dismiss.” As with motions, we look to the substance of the court’s order, not its form. *Id.* Accordingly we construe the circuit court as having denied Donna relief under CR 60.02.

On appeal, Donna challenges the denial of her CR 60.02 motion and asks this Court to declare the Settlement Agreement unconscionable.

## **II. Standard of Review**

CR 60.02 is an exceptional remedy necessitating cautious application. *Louisville Mall Associates, LP v. Wood Center Properties, LLC*, 361 S.W.3d 323, 335 (Ky. App. 2012). Relief under CR 60.02 is appropriate “only under the most unusual and compelling circumstances.” *Age v. Age*, 340 S.W.3d 88, 94 (Ky. App. 2011). For that reason, the decision “to grant or to deny a motion filed pursuant to the provisions of CR 60.02 lies within the sound discretion of the trial court.” *Id.* We will not disturb the circuit court’s decision absent an abuse of that discretion. *Kurtsinger v. Bd. of Trustees of Ky. Ret. Sys.*, 90 S.W.3d 454, 456 (Ky. 2002). Only a decision that is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles[.]” manifests an abuse of discretion. *Artrip v. Noe*, 311 S.W.3d 229, 232 (Ky. 2010).

## **III. Analysis**

We now consider whether the circuit court abused its discretion by denying Donna’s CR 60.02(d) motion. Donna claims Ralph defrauded her by tricking her into signing the Settlement Agreement and entering her appearance in divorce proceedings. Specifically, Donna maintains that she relied on Ralph’s false representation that the documents only allowed for the sale of the house. Had Ralph disclosed the documents’ true nature, Donna would have refused to sign them and, instead, negotiated a different Settlement Agreement.

Generally, a party alleging fraud under CR 60.02(d) must allege extrinsic fraud to warrant relief. *Rasnick v. Rasnick*, 982 S.W.2d 218, 220 (Ky. App. 1998).

[F]raud upon the court is ‘that species of fraud which does or attempts to subvert the integrity of the court itself.’ . . . Such fraud has been construed to include only the most egregious conduct, such as bribery of a judge or a member of the jury, evidence fabrication, and improper attempts to influence the court by counsel.

*Goldsmith*, 297 S.W.3d at 904 (quoting *Rasnick*, 982 S.W.2d at 220). More recently, the definition of extrinsic fraud has been expanded to include “fraud occurring outside the courtroom that interferes with presentation of the losing party’s evidence to the extent that he or she is ‘prevented from appearing or presenting fully and fairly his side of the case[.]’” *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 819 (Ky. 2002) (citation omitted).

A property settlement agreement may be re-opened if the final judgment was obtained by fraud. *McMurry v. McMurry*, 957 S.W.2d 731, 733 (Ky. App. 1997). However, fraud must be proven by clear and convincing evidence. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464 (Ky. 1999). Fraud consists of: (1) a material misrepresentation, (2) which is false, (3) which is known to be false or made recklessly, (4) which was made with inducement to be acted upon, (5) which resulted in action in reliance thereon and (6) which resulted in injury. *Id.*

In light of the record, we are convinced that the court did not abuse its discretion by denying Donna the extraordinary relief contemplated by CR 60.02. The court considered the evidence and determined that Donna’s situation resulted

from her own negligent failure to read the documents. Implicit in the court's analysis is a well-settled principle of Kentucky law: One must use ordinary prudence when signing a contract. Kentucky courts have long recognized:

One *sui juris* and in possession of his faculties, contracting at arm's length, and who is able to read and write, is not permitted by the law to rely exclusively upon the statements of the other contracting party as to the contents of a writing which the former signs. There must be something said or done by the party charged with the fraud which would be reasonably calculated to disarm or deceive one of ordinary prudence and to prevent him from using such diligence as an ordinarily prudent man would use in the execution of a contract under the same or similar circumstances. When, therefore, the law speaks of misrepresentations by the party charged with the fraud, it means that the representations must have been not only untrue, but also made under such circumstances as would be reasonably calculated to deceive one while exercising ordinary care for his own protection.

*Kreate v. Miller*, 226 Ky. 444, 11 S.W.2d 99, 102 (1928)(quoting *United Talking Mach. Co. v. Metcalf*, 174 Ky. 132, 191 S.W. 881, 883 (1917)).

Here, the trial court evaluated the facts and circumstances leading to the signing of the Settlement Agreement and determined that a person exercising ordinary prudence would not have relied solely on Ralph's oral representations as to the contents of the documents. Therefore, the trial court did not abuse its discretion by denying Donna's claim of fraud.

We decline to consider the merits of Donna's argument that the Settlement Agreement is unconscionable because the issue is not properly before this Court. Donna first argued the Settlement Agreement was unconscionable in her CR 59.05



motion. It is axiomatic that “[a] party cannot invoke CR 59.05 to raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment.” *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997). Donna could have presented this argument in her initial CR 60.02 motion under 60.02(f), which allows a litigant to present “any other reason of an extraordinary reason justifying relief.” Accordingly, we decline to address the merits of this argument.

#### **IV. Conclusion**

The Mason Circuit Court properly denied Donna’s CR 60.02 motion. Accordingly, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert E. Reeves  
Lexington, Kentucky

BRIEF FOR APPELLEE:

James L. Clarke  
Maysville, Kentucky