

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-000445-MR

BREN JONES

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 16-CI-00973

JERRY BALL; SHARI L. BALL;  
AND BILLY R. BISHOP

APPELLEES

OPINION  
AFFIRMING

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BEFORE: TAYLOR, K. THOMPSON AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Bren Jones appeals from an order dismissing his case against Jerry Ball, Shari Ball, and Billy Bishop. We find no error and affirm.

The underlying lawsuit arises from a motor vehicle accident which occurred on September 28, 2014. Appellant was injured when a vehicle owned by the Balls and operated by Mr. Bishop struck Ms. Jones' vehicle. Appellant filed

her complaint on September 13, 2016, but failed to effectuate service of process on any of the Appellees. In early January of 2018, Appellees all filed motions to dismiss for failure to complete service of process. These motions were all filed via limited and special appearances so as to not waive the service issue. A hearing was held and on January 23, 2018, the trial court entered an order which stated it “**GRANTS** Defendants’ Motion to Dismiss.”

Only the Balls had been discussed in the order; therefore, Mr. Bishop was unsure if the order applied to him too. On February 27, 2018, Mr. Bishop filed a motion to set aside the order and brought to the court’s attention the issue. The Balls responded to the motion asking the court to deny it and instead enter a separate order dismissing the case against Mr. Bishop. Appellant then filed a motion indicating that the filings made by Appellees negated their special appearances and waived the service of process issue. Appellant then asked that the cause of action be reinstated.

The trial court ultimately entered a new order in which it clarified that the original order should have dismissed the case against all of the Appellees. This appeal followed.

As a preliminary matter, we must determine pursuant to what rule this new order was entered. Neither the parties nor the trial court addressed this issue. When Mr. Bishop filed his motion to set aside the order, the time for an appeal and

the time to file a motion to alter, amend, or vacate pursuant to Kentucky Rule of Civil Procedure (CR) 59.05 had lapsed. In addition, this motion could not have been brought via CR 60.02 because that rule only pertains to issues which could not have been timely raised and ruled on by the court. *Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011). This issue clearly could have been remedied by a timely CR 59.05 motion. We find, therefore, that this issue was properly brought to the court's attention via CR 60.01, the clerical error rule. CR 60.01 states in relevant part: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission 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." Here, the trial court indicated it was merely clarifying its previous order and that the court had intended for the original order to encompass all Appellees.

We now move on to Appellant's argument. Appellant maintains that when Mr. Bishop filed his motion to alter the order and the Balls filed their response, they entered general appearances, waived the service of process issue, and came under the jurisdiction of the court. Appellant believes this entitles her to revive her cause of action. We disagree.

Appellees timely raised the lack of service issue from the very beginning of this case. Their later motion and response did not waive this defense.

An appearance has generally been found when a defendant has so participated in the action as to indicate an intention to defend. Of course, when the intention is to defend on the basis of lack of jurisdiction, one does not thereby lose that very defense. The distinction between the “general” and the “special” appearance was eliminated by the Rules of Civil Procedure. CR 12.02 specifically states that “No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion.” In Bertelsmann and Philipps, 6 *Kentucky Practice* at 215 (1984), note 4 to that rule states:

Whatever rights a party formerly could assert by special appearance may be preserved regardless of whether or not a general appearance has been entered, provided the defense or objection is timely presented under Rule 12. Even though the party at the same time or subsequently enters a general appearance, or by pleading or motion raises an issue with respect to the merits of the action, his special defenses remain intact if properly asserted.

*First Nat. Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 615-16 (Ky. App. 1988) (citation omitted).

Appellees did not waive their lack of service of process defense by filing subsequent pleadings in this case; therefore, we affirm the judgment of the Franklin Circuit Court.

ALL CONCUR.

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