IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 27, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000712-MR

JOHN WESLEY BRETT — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2008-CA-001199
FAYETTE CIRCUIT COURT NO. 03-CI-01785

HONORABLE SHEILA ISAAC, JUDGE,
FAYETTE CIRCUIT COURT, SEVENTH DIVISION — APPELLEE

AND

MEDIA GENERAL OPERATIONS, INC.
D/B/A WTVQ-TV; AND WILLIAM STANLEY — REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

John Wesley Brett appeals, as a matter of right, the decision of the Court of Appeals which denied Brett a writ of prohibition against Judge Sheila Isaac, of the Fayette Circuit Court. Brett was the unsuccessful party in a suit against the real parties in interest. Shortly after final judgment was entered, he received a bill for costs. When he objected to those costs, the trial court entered a supplemental judgment and Brett sought a writ of prohibition with the Court of Appeals, contending the trial court lost jurisdiction under

CR 52.02. The Court of Appeals denied the writ.[1] We affirm the Court of Appeals because the bill for costs is governed by CR 54.04, and the trial court had jurisdiction over costs.

As mentioned above, Brett was unsuccessful in his suit against the real parties in interest. A final judgment was entered by the trial court on March 27, 2008. Brett filed a "Notice of Appeal" the same day. On April 9, 2008, the real parties in interest tendered a "Bill of Costs" to Brett. Brett filed objections thereto on April 14, 2008. On May 19, 2008, the real parties in interest filed a Motion To Enter Supplemental Judgment. The trial court heard and granted the motion on June 20, 2008, and entered the order June 23, 2008. During the June 20, 2008, hearing, the trial court also heard evidence concerning an unpaid invoice for a deposition and the refusal to return discovery material which was subject to prior interlocutory orders of the court. On July 14, 2008, the trial court entered an order regarding the unpaid invoice and return of the discovery material. In addition to two requests for emergency relief no longer in question, Brett requested a writ of prohibition from the Court of Appeals contending the trial court lost jurisdiction to enter a supplemental judgment for costs, or to modify the final judgment, ten days after the entry of the March 27, 2008, final judgment. The Court of Appeals denied the writ and Brett brought the appeal to this Court as a matter of right.[2]

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[1] Also denied emergency relief not in question.

[2] CR 76.36(7).

"The writ of mandamus, like the writ of prohibition, is extraordinary in nature. Such a writ bypasses the regular appellate process and requires significant interference with the lower courts' administration of justice." Cox v. Braden, 266 S.W.3d 792, 795 (Ky. 2008). "[C]ourts of this Commonwealth are – and should be – loath to grant the extraordinary writs unless absolutely necessary." Id. That being said, this Court has recognized the need and has spoken on when writs are applicable.

> A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

Brett contends the trial court lost jurisdiction over the entire matter ten days after entry of the final judgment, citing CR 52.02. CR 52.02 states:

> Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

Our finality rule deprives trial courts of jurisdiction to make new findings after ten days. Yocum v. Oney, 532 S.W.2d 15, 16 (Ky. 1975).

We agree with Brett that the rule is clear that the trial court lost jurisdiction to amend its final judgment ten days after the final judgment was

entered. However, CR 52.02 is not to be read to deprive a trial court of all jurisdiction. For instance, CR 60.01 allows courts to correct clerical mistakes anytime. CR 60.02 allows mistake, newly discovered evidence, etc., to be considered a year after final judgment, and fraud, "or any other reason of an extraordinary nature justifying relief" can be considered within a reasonable time.

More specifically, CR 54.04 addresses costs. The portions of that rule applicable to Brett's judgment are:

> (1) Costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . . In the event of a partial judgment or a judgment in which neither party prevails entirely against the other, costs shall be borne as directed by the trial court.
>
> (2) A party entitled to recover costs shall prepare and serve upon the party liable therefor a bill itemizing the costs incurred by him in the action, including filing fees, fees incident to service of process and summoning of witnesses, jury fees, warning order attorney, and guardian ad litem fees, costs of the originals of any depositions (whether taken stenographically or by other than stenographic means), fees for extraordinary services ordered to be paid by the court, and such other costs as are ordinarily recoverable by the successful party. If within five days after such service no exceptions to the bill are served on the prevailing party, the clerk shall endorse on the face of the judgment the total amount of costs recoverable as a part of the judgment. Exceptions shall be heard and resolved by the trial court in the form of a supplemental judgment.

(Emphasis added.)

Reading the rule provides the obvious - costs are assessed after judgment. Exceptions are to be served within five days and the court is to

decide by way of a "supplemental judgment." Clearly, this retained supplemental judgment jurisdiction has nothing to do with the lost jurisdiction to amend or supplement the final judgment. There is no Kentucky case directly on point, probably because the rule is self-explanatory.[3]

Brett also contends the Court of Appeals ignored the trial court's order of July 14, 2008, in its ruling. We disagree. The matters appear to deal with costs of an expert's deposition and returning discovery materials, all subject to prior orders and discussed at the June 20, 2008, hearing. These matters, if not properly part of the supplemental order, can be decided in the direct appeal to the Court of Appeals, and not in the writ case (in the event the Court of Appeals decides the trial court had jurisdiction but was acting erroneously).

Because the trial court was proceeding on matters within its jurisdiction, with an adequate remedy by appeal, the decision of the Court of Appeals to deny the petition for a writ of prohibition is affirmed.

Minton, C.J., Cunningham, Noble, Schroder, and Venters, JJ., concur. Scott, J., dissents by separate opinion. Abramson, J., not sitting.

SCOTT, JUSTICE, DISSENTING OPINION: I must respectfully dissent from the majority's opinion removing CR 54.04's Bills of Costs[4] from the

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[3] The only direction lacking in the rule is a specific time for filing said bill of costs. Although not in issue here, the bill of costs was filed within a reasonable time.

[4] CR 54.04 authorizes a prevailing party to recover costs such as "filing fees, fees incident to service of process and summoning of witnesses, jury fees, warning order attorney, and guardian ad litem fees, costs of the originals of any depositions . . . fees for extraordinary services ordered to be paid by the court, and such other costs as are ordinarily recoverable by the successful party." Absent other express authority, attorney's fees and witness fees are not allowable as costs. Dulworth & Burress Tobacco Warehouse Co. v. Burress,

strictures of our long-established rules of practice relating to final judgments which, aside from CR 60.01, CR 60.02 and CR 60.03, mandate that motions vacating, altering or amending a judgment must be filed no later then ten (10) days after entry of the final judgment.[5] CR 59.02; CR 59.04; CR 59.05. Excepting CR 59, CR 60.05 mandates that "the procedure for obtaining *any* relief from a judgment shall be as provided in rule 60.02 or 60.03." CR 60.05 (emphasis added).

Thus, the majority's opinion is now contrary to the trial practice I have known for many years and which was served by the filing of Bills of Costs generally post-verdict, but, in all events, no later than ten (10) days after entry of the final judgment. When this practice is followed, everything that needs to be done thereafter can be done. But to hold that there is no initial ten (10) day requirement – that it only has to be filed within a "reasonable time" – departs from a bright-line rule and leaves uncertainty and delay where none existed before.

For example, under this new standard, a motion for costs filed in the trial court *following an appeal* has been held to have been filed within a reasonable time. Avery v. Demetropoulos, 531 N.W.2d 720, 722 (Mich. Ct. App. 1994) ("The appropriate standard to apply . . . is whether the motion for costs was

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369 S.W.2d 129, 133 (Ky. 1963) (attorney's fees); Brookshire v. Lavigne, 713 S.W.2d 481 (Ky. Ct. App. 1986) (witness fees). Reviewing the trial court's order on 07/14/08 and given that the costs awarded totaled $5,583.30, it seems probable that the amount in question included, at least, some witness fees.

[5] The premise of the majority's opinion was that "the bill of costs was filed within a reasonable time." (Slip Op. at 5).

filed within a reasonable time after the prevailing party was determined."). In addition, allowing a bill of costs to be presented within a "reasonable time," rather than within the ten (10) days within which the trial court can amend its judgment, creates the scenario of separate and additional appeals on disputed items of cost. Simply put, relieving CR 54.04 from the strictures of CR 59.02, CR 59.05, CR 60.01, CR 60.02, CR 60.03, and CR 60.05 serves no practical objective or purpose of the bar or the courts.

As a practical matter, aside from attorneys' and witness' fees (which are *not* covered by CR 54.04), most attorneys prepare their Bill of Costs between the rendition of the verdict and the issuance of the subsequent judgment. Thus, the amounts and awards, if significant, are reflected in the judgment, or at least reserved, pending their resolution. See CR 54.02. In the small number of cases where the judgment awards costs but does not incorporate the amount awarded, appropriate bills and/or motions are filed within ten (10) days of the rendition, reserving the courts' right to adjudicate any dispute, which is thereafter incorporated in the award. This practice is consistent with the holding in Kentucky Ass'n of Counties, Inc. v. Boyce & Associates, Inc., 2002-CA-001170-MR, 2003 WL 1949201 (Ky. Ct. App. 2003), wherein the court noted:

> The procedural facts are undisputed. Judgment was entered on December 20, 2000; the judgment failed to reference in any manner the issue of costs. As neither a motion to alter, amend or vacate nor a notice of appeal was filed, the judgment became final ten days later on December 30, 2000. CR 52.02. It is axiomatic that the circuit court loses jurisdiction over a judgment upon finality. As the circuit court was without jurisdiction to amend its judgment after December 30, 2000, we are of the opinion that the

> circuit court properly denied appellants' motion for costs. Additionally, we observe that an award of costs is not a separate action which can be pursued independently of the underlying claim. By its very nature, an award of costs is dependent upon the success of the underlying claim and may be viewed simply as a claim of relief. Upon the whole, we hold that the circuit court properly denied appellants' motion for costs.

Id. at *1. Given that a "court loses jurisdiction once its judgment is final," Mullins v. Hess, 131 S.W.3d 769, 774 (Ky. Ct. App. 2004), there is simply no leeway or reason to exempt a simple bill of costs from this limitation.

Moreover, contrary to the majority's assertion that a "[r]eading [of] the rule provides the obvious, costs are assessed after judgment." Slip Op. at 5, I believe that the applicability of the ten (10) day rule is buttressed by a plain reading of CR 54.04. CR 54.04 is contained within Part VII of our civil rules, which deals with "Judgments and Costs." CR 54.04(1) indicates that "[c]osts shall be allowed as [a matter] of course to the prevailing party unless the court otherwise directs," indicating that costs are a matter to be addressed by the court in the *original* judgment. CR 54.04(2) directs that the "party entitled to recover costs shall prepare and serve upon the party liable therefore a bill itemizing the costs incurred by him in the action." It further provides that, "[i]f within five days after such service no exceptions to the bill are served on the prevailing party, *the clerk shall endorse on the face of the judgment the total amount of costs recoverable as a part of the judgment.*" Id. (emphasis added). If nothing else, this clearly indicates an intent to

conclude this often perfunctory matter swiftly, leading to one appeal – not two.

Only if there are exceptions to the bill of costs is the matter to be "heard and resolved by the trial court in the form of a supplemental judgment." Id. "Supplemental" is defined as "[t]hat which is added to a thing to complete it." Black's Law Dictionary 1608 (3rd ed. 1968). A "supplemental act" is defined as "[t]hat which supplies a deficiency, adds to or completes, or extends that which is already in existence without changing or modifying the original." Id. Thus, it merely adds the findings and orders relating to costs.

Given that costs are to be reflected on or in the judgment and/or supplemental judgment, the rules applying to judgments surely apply. CR 59.02; CR 59.04 – 05; CR 60.01 – 03; CR 60.05. It is for these reasons that I dissent from the majority's opinion asserting that the Bill of Costs was timely filed in this matter.

COUNSEL FOR APPELLANT:

Sharon K. H. Morris
James Michael Morris
Morris and Morris, PSC
217 North Upper Street
P.O. Box 394
Lexington, KY 40507

COUNSEL FOR APPELLEE:

Sheila R. Isaac
Judge, Fayette Circuit Court
551 Robert F. Stephens Courthouse
120 N. Limestone Street
Lexington, KY 40507

COUNSEL FOR REAL PARTIES IN INTEREST:

Susan C. Sears
John Moose Spires
Catherine S. Wright
Dinsmore & Shohl, LLP
250 W. Main St. Ste 1400
Lexington, KY 40507