

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000816-MR

HENRY NUNN AND  
ESTELLE NUNN, his wife

APPELLANTS

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE JOSEPH F. BAMBERGER, JUDGE  
ACTION NO. 92-CI-00467

JAMES R. TURNER AND  
BONNIE JO KELLY

APPELLEES

OPINION

AFFIRMING

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BEFORE: COMBS, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from an order of the Boone Circuit Court denying appellants' post judgment motion for relief. For the following reasons, we affirm.

In June 1992, appellants filed an action seeking a declaration that an easement for their benefit existed over appellees' property. In June 1994, the master commissioner issued a report recommending that the court find in favor of the

easement's existence. The court overruled the parties' objections except as to the issue concerning maintenance of the easement, which was referred back to the master commissioner. Finally, in August 2000 the court adopted the master commissioner's report.

Subsequently, in April 2001 the court held appellee James Turner in contempt for maintaining a number of 8-foot iron posts in the easement area, but directed that he could purge himself of the contempt if he removed the posts within 30 days. Following appellants' additional allegations that Turner had failed to remove the posts, the court ordered, with the parties' agreement, that surveyors should examine the property to determine if there were any posts left in the easement area. The record reflects that the surveyors issued both a report concluding that the posts did not obstruct the easement area, and a revised plat which allegedly altered the dimensions of the easement. Some twenty-one days after the court issued an order adopting the surveyors' report, appellants filed a "motion and objections" to the order. After the parties submitted written arguments, the court overruled appellants' motion. This appeal followed.

Although appellants' motion did not refer to a specific civil rule, they now claim that they proceeded under CR 60.01 and CR 60.02, and that the trial court should have

amended, altered, or modified its order to correct the surveyors' error. We disagree.

CR 60.01 states in pertinent part that

[c]lerical 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.

Appellants allege that they are entitled to CR 60.01 relief because the surveyors exceeded the scope of the court's directions regarding the survey by including a revised plat in their report. However, as this argument addressed a substantive issue rather than an alleged clerical mistake, and there is no evidence that the court was inadequately informed as to the issues and circumstances before it rendered its decision, we must conclude that the court did not err by denying CR 60.01 relief since a motion under that rule "may not be made to correct errors of law or relitigate a case." Prichard v. Bank Josephine, Ky. App., 723 S.W.2d 883, 885 (1987) (citations omitted).

Appellants alternatively claim that their motion should have been granted pursuant to CR 60.02(f), which permits a court to relieve a party from its final judgment or order based upon "any reason of an extraordinary nature justifying relief." However, "the remedy provided by CR 60.02 applies only

in extraordinary situations," and the "trial court's exercise of discretion will not be disturbed on appeal except for abuse." Fortney v. Mahan, Ky., 302 S.W.2d 842, 843 (1957). See also Berry v. Cabinet for Families & Children, Ky., 998 S.W.2d 464, 467 (1999). Stated otherwise, CR 60.02 is "a safety valve, error correcting device for trial courts." Kurtsinger v. Board of Trustees of Kentucky Retirement Systems, Ky., 90 S.W.3d 454, 456 (2002). More specifically, "because of the desirability of according finality to judgments, this clause [CR 60.02(f)] must be invoked only with extreme caution, and only under most unusual circumstances." Cawood v. Cawood, Ky., 329 S.W.2d 569, 571 (1959). See also Fry v. Kersey, Ky. App., 833 S.W.2d 392 (1992). Further, "[t]he two factors for the trial court to consider in exercising its discretion are '(1) whether the moving party had a fair opportunity to present his claim at the trial on the merits and (2) whether the granting of CR 60.02(f) relief would be inequitable to other parties.'" Dull v. George, Ky. App., 982 S.W.2d 227, 229 (1998) (citations omitted). The record clearly shows that the trial court afforded each party an opportunity to be heard before it entered an order adopting the surveyors' plat. In addition, it is clear from the record that since appellees timely presented their case to the trial court during the eleven years this matter was pending, it would be inequitable to allow appellants to now succeed in having the

judgment set aside based on arguments which should have been made prior to entry of the order. That being so, we cannot say that the trial court abused its discretion by denying appellants' motion for relief.

The order of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Joanne F. Grogan  
Florence, Kentucky

BRIEF FOR APPELLEES:

Thomas R. Nienaber  
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