

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002409-MR

BELINDA J. WEBB

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT  
HONORABLE ROBERT B. OVERSTREET, JUDGE  
ACTION NO. 00-CI-00262

TOYOTA MOTOR MANUFACTURING,  
KENTUCKY, INC.

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOFF, JUDGES.

EMBERTON, CHIEF JUDGE. Belinda Webb filed a complaint alleging disability discrimination under KRS<sup>1</sup> Chapters 344 and 207.

Toyota filed an answer and motion to dismiss the complaint alleging that Webb failed to file the complaint within the applicable statute of limitations. After both parties appeared before the court to argue their respective positions and the filing of briefs, on October 26, 2000, Judge Robert Overstreet

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<sup>1</sup> Kentucky Revised Statutes.

granted Toyota's motion for summary judgment. The court file reflects that the Scott Circuit Clerk entered a notation on the docket sheet that the court's opinion and order was entered on October 26, 2000, and that a copy was mailed to each counsel for the parties at their respective addresses as noted on the pleadings. Although Toyota's counsel received a copy of the opinion and order on October 27, 2000, Webb's counsel states that he did not receive a copy. On February 22, 2001, pursuant to CR<sup>2</sup> 60.02, Webb's counsel filed a motion to set aside the October 26, 2000, order on the basis that it was "inadvertently or mistakenly signed." The circuit court denied the motion finding that although Webb's counsel did not receive the order, CR 77.04 precluded the court from setting aside the motion. This appeal followed.

CR 77.04(4) provides that the failure of notice of the entry of an order does not affect the validity of the order.

Failure of the trial court to require service of notice of entry of any judgment or order under this rule or the failure of the clerk to serve such notice, or the failure of a party to receive notice, shall not affect the validity of the judgment or order, and does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73.02(1).

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<sup>2</sup> Kentucky Rules of Civil Procedure.

In Stewart v. Kentucky Lottery Corp.,<sup>3</sup> the court held that the failure of either party to receive notice of the entry of an order denying a motion to reconsider did not justify relief under CR 60.02. The court reasoned:

True enough, apparently neither party received notice of entry of the order denying the motion to reconsider. Nevertheless, CR 77.04(4) plainly states that the clerk's failure to serve notice or a party's failure to receive notice does not affect the time for taking an appeal. The rule further provides that a trial court is not authorized to grant an extension of time for filing a notice of appeal for any period beyond ten days past the expiration for the time for taking an appeal. Our courts have consistently enforced the harsh dictates of CR 77.04(4).<sup>4</sup> (Citations omitted.)

Webb argues that Kurtsinger v. Board of Trustees of Kentucky Retirement Systems<sup>5</sup> is controlling. In that case, the appellants and intervening appellants did not receive notice of entry of an order denying a CR 59.05 motion. Pursuant to CR 60.02, the court vacated its previous order and entered a new order from which the appellants appealed. In affirming the circuit court, our Supreme Court distinguished the facts in that case from those in Stewart:

The significant difference between what transpired in Stewart and in this case is that here the trial court merely vacated the

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<sup>3</sup> Ky. App., 986 S.W.2d 918 (1998).

<sup>4</sup> Id. at 920.

<sup>5</sup> Ky., 90 S.W.3d 454 (2002).

initial order denying the motion to alter, amend or vacate the summary judgment. The order vacating was accompanied by findings that the trial court or its staff was at fault for Appellants' failure to learn of entry of the order. The trial court did not attempt to change the date of entry of the order or extend the time for taking an appeal. While the ultimate effect may have been the same, the trial court merely utilized its authority under CR 60.02 to vacate an order in a manner that did not constitute an abuse of discretion.<sup>6</sup>

In this case, there was no mistake made by the court or officer of the court that caused Webb's counsel not to receive notice of the entry of the order. Opposite to the circuit court's finding in Kurtsinger, Judge Overstreet made a specific finding that no mistake had been committed on his part.

There is no basis to grant the relief requested pursuant to CR 60.02 and the order of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jay Delaney  
Cynthiana, Kentucky

BRIEF FOR APPELLEE:

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<sup>6</sup> Id. at 457.