RENDERED: AUGUST 7, 2020; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001290-MR

DON COOPER AND
CATHY COOPER — APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 09-CI-01301

PULASKI COUNTY FISCAL COURT; JOHN BRUNER; BETH BRUNER; CUMBERLAND SECURITY BANK, INC.; BARRY TODD, AS TRUSTEE FOR THE BARRY L. AND LYNN TODD FAMILY LIVING REVOCABLE TRUST; GARY BALL; JOY BALL; BRODY THOMAS; BETHANY THOMAS; AND BARBARA HENDERSON — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND MCNEILL, JUDGES.

GOODWINE, JUDGE: Don and Cathy Cooper (collectively "the Coopers") appeal the Pulaski Circuit Court's August 7, 2019 order granting summary judgment in favor of John and Beth Bruner (collectively "the Bruners"). The

Coopers allege the circuit court failed to follow the law in granting the Bruners' CR[1] 60.02 motion and in granting the motion to intervene filed by Cumberland Security Bank, Inc., Barry Todd as Trustee for the Barry L. and Lynn Todd Family Living Revocable Trust, Gary Ball, Joy Ball, Brody Thomas, Bethany Thomas, and Barbara Henderson (collectively "the Intervenors"). Finding error, we reverse the judgment and remand for further action consistent with this Opinion.

BACKGROUND

This case has a lengthy procedural history, including two previous appeals. On September 8, 2009, the Coopers began an action to declare "Edward Meece Road" their own private roadway.[2] In their petition, the Coopers listed the Pulaski County Fiscal Court and the Bruners as defendants. The Bruners were named in the action because they used Edward Meece Road to get to their own private property. No other defendants were listed in the original suit.

During the beginning of this action, all parties participated in written discovery, but failed to conduct depositions. The Bruners presented no evidence to the court, but the Pulaski County Fiscal Court did produce some documents and affidavits. This prompted the Coopers to move for a partial summary judgment,

[1] Kentucky Rules of Civil Procedure.

[2] "The road passes through and is bound on both sides by property owned by Don and Cathy Cooper. Edward Meece Road begins at Coleman Road and solely provides access to the Coopers' property and Bruners' property before concluding." *See Bruner v. Cooper*, No. 2015-CA-000742-MR, 2016 WL 5485356, at *1 (Ky. App. Sept. 30, 2016).

arguing there were no genuine issues of material fact. The Bruners responded by arguing Edward Meece Road qualifies as a "public road" or, at least, an easement. The Pulaski County Fiscal Court argued Kentucky law established a "presumption of regularity" for public officers that the Coopers failed to overcome. Ultimately, the circuit court found the Coopers failed to satisfy their burden of proof. This led to the Coopers filing their first appeal in this case.

During that appeal, we found the Pulaski County Fiscal Court failed to produce a formal order qualifying Edward Meece Road as part of the county system. *See Cary v. Pulaski County Fiscal Court*, 420 S.W.3d 500, 509 (Ky. App. 2013).[3] We also noted the Bruners failed to provide evidence supporting their claims that Edward Meece Road was a public road or an easement, so the Coopers had no further obligation to produce rebuttal evidence until the Bruners met their burden. *Id.* Therefore, we reversed the judgment and remanded for an entry of partial summary judgment on the issue of whether the road was a county road and for additional discovery and findings as to whether Edward Meece Road qualified as a public road or easement. *Id.* Following our Opinion, the circuit court reversed its initial finding and found Edward Meece Road did not qualify as a county road.[4]

[3] This case was a consolidated appeal with Ronnie and Grace Cary. These appeals pertained to disputes between abutting owners of roadways and if the roadways were properly categorized as private passways or county roads.

[4] Following our Opinion, Pulaski County Fiscal Court was dismissed as a party.

After the circuit court's judgment, the Coopers filed another motion for summary judgment on December 18, 2014. This time, the Coopers pointed out that despite being directed by this Court to engage in discovery, the Bruners had failed to engage in any discovery since the issuance of our Opinion in June of 2013. The Bruners responded by asking the circuit court for additional discovery time but failed to provide a reason for their lack of discovery efforts. Given the length of time allowed for discovery, the circuit court denied their motion and granted summary judgment in favor of the Coopers. The Bruners appealed.

On appeal, the Bruners argued the circuit court abused its discretion by denying additional discovery time. *See Bruner v. Cooper*, No. 2015-CA-000742-MR, 2016 WL 5485356 (Ky. App. Sept. 30, 2016). We affirmed the circuit court, holding that the circuit court did not abuse its discretion and that Edward Meece Road is neither a public road nor an easement by means of prescription or otherwise. In the spring of 2017, the Coopers installed a gate across the road.

On July 6, 2017, the Intervenors filed a motion seeking to intervene in the action pursuant to CR 24.01 and for CR 60.02 relief. The individual Intervenors claimed that they owned property serviced by Edward Meece Road and that their access to their land was foreclosed because the Coopers had installed a gate across the road. Cumberland Security Bank alleged that it was the mortgagee

for the Bruners' property, had issued that mortgage on the presumption that the land was serviced by either a public or county road, and had only been notified of the proceedings when, due to the Coopers' gate, the Bruner property became landlocked. The Intervenors all alleged they only became aware of the litigation surrounding the road when the Coopers installed their gate.

On November 17, 2017, the Bruners also moved for relief under CR 60.02. The Bruners claim they conducted their own independent research and found copies of the minutes from a Pulaski County Fiscal Court meeting in 1990—which were not provided in original discovery. In those minutes was a motion to accept a map presented by the Kentucky Department of Transportation as the official system of county roads for Pulaski County and to reject any road not on the map as a county road. Edward Meece Road was on the approved map.

The Bruners contend this qualifies as a reason for relief under CR 60.02(e) or (f). On the other hand, the Coopers argue these records, because of their availability in the prior litigation, do not constitute "newly discovered evidence" under CR 60.02. On June 6, 2018, the circuit court granted the Bruners' CR 60.02 motion and the Intervenors' CR 24.01 motion, finding it was no longer equitable that the judgment should be satisfied.

Following the circuit court's June 6, 2018 order, the Bruners filed various maps, affidavits, and other exhibits in the record. Later that month, the Intervenors and the Bruners filed their respective motions for summary judgment. On August 7, 2019, the circuit court entered summary judgment in favor of the Bruners, finding that Edward Meece Road is a public road through dedication by prescription. This appeal followed.

STANDARD OF REVIEW

The standard of review on appeal from a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The record must be viewed in a light most favorable to the non-moving party and the circuit court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). This Court's review is *de novo*, such that we owe no deference to the conclusions of the circuit court. *Scifres*, 916 S.W.2d at 781. Prior to granting

summary judgment, the circuit court granted the Bruners' CR 60.02 motion and the Intervenors' CR 24.01 motion. We review each under a different standard, which we separately address below.

ANALYSIS

1. CR 60.02

The Coopers argue the circuit court should be bound by the "law-of-the-case" doctrine and, therefore, erred by granting the Bruners' CR 60.02 motion. We agree. We review whether the circuit court abused its discretion in granting the Bruners' CR 60.02 motion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Generally, the circuit court may relieve a party from a final judgment under certain circumstances. *See* CR 60.02.[5] Whether such relief is appropriate is

[5] "On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an

left to the sound discretion of the circuit court. Two of the factors the circuit court must consider in exercising its discretion to grant or deny CR 60.02 relief "are whether the movant had a fair opportunity to present his claim at the trial on the merits and whether the granting of the relief sought would be inequitable to other parties." *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957). The circuit court must also determine whether the motion was filed within a reasonable time. The circuit court's discretion to grant or deny CR 60.02 relief following appellate review is far more restrictive.

"The law-of-the-case doctrine is 'an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.'" *University Medical Center, Inc. v. Beglin*, 432 S.W.3d 175, 178 (Ky. App. 2014) (quoting *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956)).

The Bruners rely on an exception to the law-of-the-case doctrine carved out by our Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Johnson*, 323 S.W.3d 646, 653 (Ky. 2010).[6] "In short, we conclude that the law

extraordinary nature[.]" CR 60.02. Subsections (a)-(c) must be filed within one year. Subsections (d)-(f) must be filed within a reasonable time. *Id.*

[6] Generally, a circuit court lacks jurisdiction to grant a CR 60.02 motion brought under subsections (a)-(c) if more than a year has passed. *Johnson*, 323 S.W.3d at 650.

of the case doctrine does not invariably deprive a trial court of jurisdiction to reconsider under CR 60.02(f) an issue already decided if the law upon which the original decision was based—including a controlling appellate opinion—has materially changed." *Id.*

The plain language of the exception is inapplicable to the case before us and, thus, CR 60.02 relief was prohibited. The Supreme Court only allowed for an exception of an *extraordinary nature*, which is confined to the language set out in CR 60.02(f).[7] The Bruners alleged that they are entitled to relief under CR 60.02(e) and (f).

The circuit court began its analysis under CR 60.02(e) and concluded "that it is no longer equitable that the judgment should have prospective application, all things considered." Record ("R.") at 445. The circuit court ended its analysis there, finding that it could grant the Bruners relief under CR 60.02(e) or (f), but not both. R. at 444.

However, under the facts of this case, neither CR 60.02(e) nor (f) applies. Subsection (e) is inapplicable because inaction does not render the prospective application of a judgment inequitable. This Court has previously held that inaction is not an extraordinary circumstance warranting relief under CR

[7] "I view today's opinion as quite narrow in scope." *Id.* at 655 (Abramson, J., concurring).

60.02(e) or (f). *See Greenamyer v. Louisville Metro Government*, No. 2011-CA-000009-MR, 2012 WL 917167 (Ky. App. Mar. 16, 2012).[8]

To justify their requested relief under CR 60.02, the Bruners submitted a copy of the minutes from a Pulaski County Fiscal Court meeting in 1990, along with a proposed map. The Coopers argued these records, because of their availability at all points in the prior litigation, do not constitute "newly discovered evidence" as covered in CR 60.02.

The circuit court acknowledged that "[i]n ideal circumstances, the proposed map and Fiscal Court minutes would have been found at a much earlier date and timely submitted into evidence; however, to ignore such now would be to value form over substance."[9] R. at 444. However, the law-of-the-case doctrine states otherwise and prohibits such relief.

The law-of-the-case doctrine provides an exception of an *extraordinary nature*, which is confined to the language set out in CR 60.02(f).

[8] "CR 60.02 is to be used to set aside orders based on facts that were unknown and could not be known at the time of the order. Here, Greenamyer could have discovered the lack of solid waste and hazardous materials in 2003, but did not." *Greenamyer*, 2012 WL 917167, at *4. Likewise, the Bruners could have discovered the Pulaski County Fiscal Court minutes and the proposed map after the Coopers' complaint was filed in 2009, or prior to entry of summary judgment in 2015, or anytime following this Court's decision on September 30, 2016, and before the erection of the Coopers' gate.

[9] The circuit court took judicial notice of two lawsuits filed by the Bruners: (1) *Bruner v. Scott T. Foster Attorney-At-Law, PLLC*, Pulaski Circuit Court Div. II, Civil Action No. 17-CI-00924; and (2) *Bruner v. Cooper*, Pulaski Circuit Court Div. II, Civil Action No. 17-CI-00448.

CR 60.02(f) aims "to provide relief where the reasons for the relief are of an extraordinary nature." *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 541 (Ky. App. 2007) (citation omitted).

Relief under CR 60.02(f) is only available if "none of that rule's [other] specific provisions applies." *Snodgrass v. Snodgrass*, 297 S.W.3d 878, 884 (Ky. App. 2009) (quoting *Alliant Hospitals, Inc. v. Benham*, 105 S.W.3d 473, 478 (Ky. App. 2003)); *see also Commonwealth v. Spaulding*, 991 S.W.2d 651, 655 (Ky. 1999) ("60.02(f) is a catch-all provision that encompasses those grounds, which would justify relief . . . that are not otherwise set forth in the rule."). "The point is that subsection (f) was not intended to provide a means for evading the strictures of the other subsections." *Alliant Hospitals*, 105 S.W.3d at 479. Thus, if the asserted ground for relief plainly falls under subsections (a)-(e) of the rule, then the more specific subsection, rather than the more general CR 60.02(f), applies. Here, the specific subsection, CR 60.02(b), applies, not subsection (f). *Stoker v. Commonwealth*, 289 S.W.3d 592, 597 (Ky. App. 2009) (holding claims for newly discovered evidence reviewable under CR 60.02(b), not CR 60.02(f)). Thus, even if the circuit court had granted relief under CR 60.02(f) rather than (e), that decision, likewise, would have been an abuse of discretion because the specific subsection (b) applies to the Bruners' claim.

With diligence, the evidence the Bruners introduced could have been discovered prior to the appeals. The judgment should not be disturbed based on inaction or lack of oversight. Although this Court is sympathetic to the Bruners' claims, we cannot make an exception to the law on their behalf simply because they failed for more than 14 months to pursue discovery. Therefore, our prior holdings that Edward Meece Road is not a county road, a public road, nor an easement by prescription or otherwise still apply.

2. Intervention

Additionally, the Coopers allege the circuit court erred in granting the Intervenors' motion to intervene. We review the circuit court's decision regarding intervention for clear error. *Carter v. Smith*, 170 S.W.3d 402, 409 (Ky. App. 2004). Under this standard, this Court will only set aside findings of fact if those findings are clearly erroneous. *A.H. v. W.R.L.*, 482 S.W.3d 372, 373 (Ky. 2016) (citing *Moore v. Asente*, 110 S.W.3d 336, 353-54 (Ky. 2003)). The circuit court's findings are clearly erroneous if not supported by substantial evidence. *Id.* (citing *Moore*, 110 S.W.3d at 353-54); *see also* CR 52.01. Generally, the circuit court is given broad discretion in determining whether one should be permitted to intervene. *Ipock v. Ipock*, 403 S.W.3d 580, 583 (Ky. App. 2013) (citing *Allen Calculators v. National Cash Register Co.*, 322 U.S. 771, 64 S.Ct. 1257, 88 L.Ed. 1596 (1944)).

A non-party's right to intervene is governed exclusively by CR 24. *Murphy v. Lexington-Fayette County Airport Bd.*, 472 S.W.2d 688, 689-90 (Ky. 1971). "An applicant must meet a four-prong test before being entitled to intervene in a lawsuit pursuant to CR 24.01(1): (1) the motion must be timely; (2) the applicant must have an interest relating to the subject of the action; (3) the applicant's ability to protect his interest may be impaired or impeded[;] and (4) none of the existing parties could adequately represent the applicant's interests." *Roberts v. Estate of Bramble*, No. 2009-CA-001233-MR, 2010 WL 3927793, at *2 (Ky. App. Oct. 8, 2010), *as modified* (Nov. 5, 2010) (citing CR 24.01(1)(b); *Carter*, 170 S.W.3d at 407). The burden of proving each of these requirements rests with the applicant. *Id.*

Here, the circuit court did not conduct a proper intervention analysis. The circuit court never addressed whether any of the Intervenors' interests were adequately represented by the Bruners under CR 24.01(1)(b). The Intervenors did not meet their burden of proving each of the requirements set forth above for intervention. The circuit court found only that the Intervenors' motion to intervene was timely. We disagree.

A party seeking to intervene in an action after judgment is entered has a "special burden" to justify the untimeliness. *Arnold v. Commonwealth ex rel. Chandler*, 62 S.W.3d 366, 369 (Ky. 2001) (citation omitted). Timeliness is a

question of fact. *Ambassador College v. Combs*, 636 S.W.2d 305, 307 (Ky. 1982) (citing *Dairyland Insurance Company v. Clark*, 476 S.W.2d 202 (Ky. 1972)).

We have previously held that to determine the issue of timeliness, the circuit court must consider several factors:

> (1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Carter, 170 S.W.3d at 408 (quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)).

In assessing timeliness, the circuit court stated: "The Intervenors allege that they were never named as a party and notified of the action only after the land allegedly became 'land-locked' after a gate was erected. Based on the affidavits of the Intervenors, this Court finds that their proposed intervention is timely." R. at 446. The circuit court failed to analyze each of the *Carter* factors set forth above regarding timeliness and, as previously noted, failed to separately analyze each Intervenor's right to intervene under CR 24. Thus, the circuit court's findings of timeliness and the Intervenors' right to intervene are not supported by

substantial evidence and are clearly erroneous.[10]

CONCLUSION

Based on the foregoing reasons, we reverse the Pulaski Circuit Court's August 7, 2019 order and remand for entry of summary judgment in favor of the Coopers.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Matthew Baker
Bowling Green, Kentucky

BRIEF FOR APPELLEES JOHN AND BETH BRUNER:

Bradford L. Breeding
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[10] We note that following the circuit court's CR 24 finding, it did not rule on the Intervenors' motion for summary judgment, nor did it mention the Intervenors in its August 7, 2019 summary judgment in favor of the Bruners.