

Commonwealth of Kentucky
Court of Appeals

NO. 2025-CA-1508-ME

A.T.W.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LIBBY G. MESSER, JUDGE
ACTION NO. 15-J-01783-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY;
D.A.N.; J.W.; AND M.N., A MINOR
CHILD

APPELLEES

AND

NO. 2025-CA-1542-ME

A.T.W.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LIBBY G. MESSER, JUDGE
ACTION NO. 16-J-01500-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND

FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY;
J.J.N., A MINOR CHILD; AND V.R.B.

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: THOMPSON, CHIEF JUDGE; CETRULO AND COMBS, JUDGES.

COMBS, JUDGE: Appellant, A.T.W. (Mother), appeals from an Order of the Fayette Circuit Court denying her CR¹ 60.02 motions. After our review, we affirm.

Background

On December 4, 2015, the Cabinet filed a juvenile DNA (dependency, neglect, or abuse) petition regarding M.N., a female child born in 2015 (Fayette Family Court, No. 15-J-01783-001). According to the allegations of the petition, the Cabinet had received a referral after the child (then four months of age) was seen at the University of Kentucky Emergency Room due to concerns of non-accidental trauma. At that time, the child had redness on the bottom of her feet, a blister covering the majority of her right foot, a scratch on her right eyelid, and a bruise above her left eye and on the right abdomen. The child was admitted.

¹ Kentucky Rules of Civil Procedure.

A skeletal survey revealed healing posterolateral 5th rib fracture, three acute rib fractures, and a distal left tibial metaphyseal corner fracture.

“Considering the severity of the injuries, no reasonable explanation given, the child being non-mobile, and being in the care of both parents at the time the injuries could have been inflicted,” the Cabinet recommended that the child be placed in the Cabinet’s custody.

On December 4, 2015, Mother stipulated to probable cause, and the child was placed in the temporary custody of the Cabinet. On April 4, 2016, Mother stipulated to risk of abuse, and the adjudication hearing was cancelled. Disposition was held on May 23, 2016. At that time, Mother was pregnant with her son, J.N.

On October 31, 2016, the Cabinet filed a DNA petition in the interest of J.N. (Fayette Family Court No. 16-J-01500-001). On November 21, 2016, Mother stipulated to risk of neglect. Disposition was held on January 9, 2017.

Both DNA cases were closed in 2017 with custody entrusted to a relative.

On October 1, 2025, Mother filed motions for relief from judgment pursuant to CR 60.02(d), (e), and (f) in both cases. Mother contended that M.N.’s removal was based primarily upon medical proof (from UK Children’s Hospital) of multiple rib fractures and other injuries consistent with non-accidental trauma. She

also contended that J.N.'s removal in 2016 was based upon the removal of M.N. in 2015. Mother argued that the diagnosis of "multiple rib fractures" with respect to M.N. was incorrect because later review confirmed that there was only one rib fracture, which Mother maintained was consistent with an auto accident. Various supporting documentation was dated 2015–2017.

The motions were heard on October 15, 2025. On October 17, 2025, the circuit court entered an Order denying relief from judgment pursuant to CR 60.02. The court found that Mother was represented by appointed counsel at every stage of the underlying juvenile proceedings; that no appeals were ever filed in those cases; and that Mother had failed to complete her case plans, which resulted in closure in 2017 with custody remaining with relatives. In addition, the court found as follows:

6. Several years later, [Mother] filed custody actions in Family Court to re-establish timesharing and custody of her children, case numbers 21-CI-2675 and 22-CI-3273. The Court takes Judicial Notice of its findings and orders therein. There has been consistent and regular litigation in those two matters over the last few years in front of multiple judges, including evidentiary hearings. While the injuries themselves and the neglect and abuse have not been the subject of those proceedings, as they are best interest custody proceedings, some testimony related to the injuries has been relevant. **[Mother] has testified, like her arguments in this motion, that the injuries noted in the medical records are not consistent with the Cabinet's petition and that they can be explained by other non-accidental means. She relied on the same records obtained through this Juvenile action to**

support that claim in the civil action. She was cross examined on this issue by the custodians and confronted with the medical records from this action. While the Court in that case did not specifically re-adjudicate the underlying abuse allegations, it did find in its order that [Mother's] continued refusal to accept the actual medical findings and therefore address the original circumstances leading to the children's removal was a factor in its best interest determination. **This is relevant to this 60.02 motion as it is further evidence that [Mother] has had access to the medical evidence and maintained these opinions regarding the juvenile findings for a number of years prior to filing this motion.**

7. Court takes Judicial Notice that [Mother] has appealed several of the findings in the custody matters and has obtained some favorable and some unfavorable rulings. But no ruling in any of those actions by any Family Court Judge, or Appellate Court has served to vacate, change, or impugn any of the findings in these Juvenile actions.

(Emphases added.)

The court concluded that Mother had failed to plead any facts which would support a finding of fraud affecting the proceedings under CR 60.02(d).

The court rejected Mother's argument under CR 60.02(e) that the judgment is void as follows in relevant part:

No judgment in this action was based upon a judgment that has been rendered, void, satisfied, discharge or vacated under any legal definition. In 15-J-1783 [Mother] argues that the judgment is "void" based on language she quotes as the holding in *Burke v. Sexton*, 814 S.W.2d 290 (Ky. 1991). This case does not state as [Mother] quotes. . . . [*Burke*] does not contain any language which is even close to that quoted in [Mother's]

motion. This causes the Court concern regarding credibility and candor with the Court. Though she is a pro se litigant [Mother] is a trained paralegal and should understand the importance of verifying that her citations to law she provides to this court are not misleading or incorrect. However, to the extent that [Mother] implies that the judgment in these cases should be rendered void and 60.02 apply based on some violation of her due process right to present exculpatory evidence, the Court will address the same. The record is clear that in both cases [Mother] was served with notice of the allegations against her. She was present at all court appearances; she was appointed counsel who represented her at every level of the proceedings. As stated above she was provided access to the evidence that the Commonwealth had against her. . . . She never moved the court for funds to obtain her own expert to evaluate that skeletal survey if she could not afford one, despite the fact she requested and was given an adjudication hearing date. Instead, she chose, with the assistance of counsel, to waive that adjudication hearing and stipulate to Risk of Abuse. She was clearly given notice and a fair opportunity to be heard. She chose not to present a defense to the Court. She was in no way prevented from doing so.

[Mother] relies . . . on this due process argument veiled . . . as 60.02(e) argument in 15-J-1783 to support her related argument . . . in 16-J-1500. . . . However, as that argument has failed, so does her argument in the subsequent action. . . . It should further be noted that in her motion [Mother] cites to non-existent case law Again, this causes the Court concerns regarding [Mother's] candor with the Court, and she has been advised as such.

The circuit court also rejected Mother's argument that relief was warranted under 60.02(f) for extraordinary cause.

Significantly, the court determined that Mother had not filed her motion within a reasonable time:

[Mother] has known about and had access to these medical records she now relies on since 2016; almost 10 years ago. These medical records and her alleged inconsistencies have also been referenced in the civil cases between [Mother] and the custodians of the children beginning in 2021. . . . These children were infants when [Mother] first had access to those records. They are now nine and ten years old. The Court cannot find under those facts and circumstances that this motion was filed within a reasonable time.

Mother appealed. We address her separate briefs together.

ON APPEAL

The burden of proof in a CR 60.02 proceeding falls squarely on the movant to affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief. . . . We review the denial of a CR 60.02 motion under an abuse of discretion standard. The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Therefore, we will affirm the lower court’s decision unless there is a showing of some flagrant miscarriage of justice.

Foley v. Commonwealth, 425 S.W.3d 880, 885–86 (Ky. 2014) (internal quotation marks and citations omitted).

The first issue that Mother raises is that the family court abused its discretion in denying her motion because CR 60.02(e) permits relief where “it is no longer equitable that the judgment should have prospective application.”

In its entirety, CR 60.02 provides as follows:

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 extraordinary nature justifying relief. **The motion shall be made within a reasonable time,** and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

(Emphases added.)

Although Mother based her motion upon CR 60.02(e) in part, it does not appear that she made the particular argument upon which she **now** relies -- that “it is no longer equitable that the judgment should have prospective application.” Rather, as the Commonwealth notes, Mother’s argument below focused on the assertion that due process was violated because she was not given an opportunity to present exculpatory evidence.

When the grounds of the argument are “different from those asserted in the court below, [they] are not properly preserved for appellate review.” *Daugherty v.*

Commonwealth, 572 S.W.2d 861, 863 (Ky. 1978) (citations omitted). “Our jurisprudence will not permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court.” *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (footnote omitted).

Pons v. Commonwealth, 673 S.W.3d 813, 817 (Ky. App. 2023).

We need not address Mother’s remaining arguments because the circuit court’s determination that the CR 60.02 motions were not filed within a reasonable time is dispositive. In her opening Appellant’s briefs, Mother ***did not*** raise an argument that the circuit court erred in concluding that her CR 60.02 motions were not filed within a reasonable time. She addressed that issue only in her reply briefs. Thus, we consider it waived. *Seeger Enterprises, Inc. v. Town & Country Bank and Tr. Company*, 518 S.W.3d 791, 796 (Ky. App. 2017) (where appellant did not raise issue in initial brief, he was not permitted to raise issue for first time in reply brief); *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979) (reply brief not device for raising new issues essential to the success of appeal).

We conclude that the circuit court did not abuse its discretion in denying Mother’s CR 60.02 motions. We affirm the decision of the Fayette Circuit Court.

ALL CONCUR.

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