

RENDERED: OCTOBER 26, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000951-MR

CELIA BROOK WARD ISAAC,
EXECUTRIX OF THE ESTATE OF
WILLIAM JEFFERSON WARD IV¹

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 06-CI-01109

JOHN D. FORSYTH III

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; STUMBO, JUDGE; LAMBERT,² SENIOR
JUDGE.

¹ An order granting Appellee's motion to substitute Celia Brook Ward Isaac as Executrix of the Estate of William Jefferson Ward IV was entered on February 17, 2012.

² Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, SENIOR JUDGE: William Ward has sought review of the trial court's denial of his motion to vacate a default judgment entered against him in favor of John D. Forsyth. Upon review of the record, we reverse the judgment of the Pike Circuit Court.

On May 1, 2006, William Ward was driving his automobile and James R. McClanahan was his passenger. Ward was stopped by the police and arrested for driving under the influence and other offenses. The police seized the keys to the vehicle and Ward instructed McClanahan to call Ward's wife and tell her he had been arrested. Although McClanahan was not arrested, he was specifically told by the police officer not to drive the vehicle because he, too, appeared to be intoxicated. Ward later claimed to barely know McClanahan and that they were not "really friends," although he did admit to "getting high" with him at least ten times in the prior week.

Later that day, and despite the police officer's instructions, McClanahan drove Ward's vehicle and became involved in an accident when he struck the rear of a vehicle driven by John D. Forsyth. At the time of the collision, Ward was in custody in the county detention center. Shortly after the accident, Ward's wife told a Kentucky State Police trooper that McClanahan had been given permission to drive Ward's vehicle. Within a week, however, she contacted the trooper and recanted that statement. There was evidence that the steering column

and ignition system of the vehicle had been tampered with permitting the vehicle to be driven without using the keys. Ward now alleges that McClanahan stole the vehicle while Ward was in custody, but he never sought criminal charges against McClanahan.

On September 20, 2006, while incarcerated in the Pike County Detention Center, Ward was served with summons and a copy of the complaint by personal service informing him that a civil action had been brought seeking damages against him arising from the accident by the plaintiff, John D. Forsyth. No guardian ad litem was ever appointed for Ward and he claims he never received the summons. On September 25, 2006, Ward was placed on home incarceration and was released from the custody of the county jail. He never filed an answer to Forsyth's complaint.

On November 17, 2006, while Ward was on home incarceration, the Pike Circuit Court entered an order of default against him. A copy of that order was mailed to Ward on November 22, 2006, the day his home incarceration ended, by the circuit court clerk. Ward ultimately filed a motion to set aside the default judgment which was denied by the trial court on March 19, 2007. Ward's motion to reconsider was also denied by order of April 17, 2007. Thereafter, the trial court held a hearing on damages and found against Ward and McClanahan jointly and severally in favor of Forsyth in the amount of \$2,819,456.10. Ward appealed to this Court claiming error in the trial court's refusal to set aside the default judgment.

We are at once confronted by Kentucky Rules of Civil Procedure (CR) 17.04(1). That rule provides that

Actions involving adult prisoners confined either within or without the State may be brought or defended by the prisoner. If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he or she is unable to make defense.

It is undisputed that at the time the suit was brought and at the time of service of process, Ward was a prisoner in the Pike County Detention Center. As quoted above, CR 17.04 is rigid and uncompromising, and there is no distinction made among prisoners in a state penal institution, a county jail or those who are on home incarceration. Throughout the second sentence, the word “shall” is used repeatedly, and we have no doubt that use of such language was not inadvertent. This Court’s decision in *Davidson v. Boggs*, 859 S.W.2d 662 (Ky. App. 1993), is similarly forthright. Accordingly, we need not engage in an extensive analysis of the rule. We need only apply it, and upon that application, reversal is mandated.

Upon the foregoing, we have determined that the judgment against Ward was voidable on his motion, and that the trial court erred in failing to grant relief pursuant to CR 55.02. The judgment is reversed and this cause is remanded for further consistent proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darrell E. Sammons
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Benjamin L. Carter
Pikeville, Kentucky