

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000003-MR

VERNON STULL AND
KATHERINE STULL

APPELLANTS

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 09-CI-90395

JOHN WILLIAMS, JR.
AND HELEN WILLIAMS

APPELLEES

OPINION AND ORDER DISMISSING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

TAYLOR, CHIEF JUDGE: Vernon Stull and Katherine Stull bring this appeal from November 8, 2010, November 22, 2010, and December 20, 2010, orders of the Montgomery Circuit Court. Having reviewed the record, we conclude that the above-styled appeal is untimely taken, thus depriving this Court of jurisdiction.

This action originated as a boundary line dispute between adjoining property owners in the Montgomery Circuit Court.

The relevant procedural facts are as follows:

November 8, 2010 -	Findings of Fact, Conclusions of Law and Judgment entered upon a bench trial. The clerk made notation of service on the docket. Kentucky Rules of Civil Procedure
	(CR) 77.04.
November 10, 2010 -	Motion pursuant to CR 59 and CR 52.02 was timely filed by appellants.
November 10, 2010 -	Motion for Emergency Restraining Order/For Stay Upon Execution of Judgment filed by appellants.
November 22, 2010 -	Order granting in part and denying in part CR 59 and CR 52.02 motion.
December 20, 2010 -	Order requiring appellants to post \$800 <i>supersedeas</i> bond to stay enforcement; amend findings in the November 22, 2010, order for “clarification purposes.”
December 29, 2010 -	Notice of appeal filed.

It is well-established that a final judgment adjudicates all the rights of all the parties in an action. CR 54.01. To be timely, a notice of appeal must be filed within thirty days of notation of service of the final judgment appealed. CR 73.02. And, a motion timely filed under CR 50.02, CR 52.02, or CR 59 terminates the running of time to file a notice of appeal. CR 73.02(1)(e). Also, the timely filing of a notice of appeal is subject to strict compliance, and a party’s failure to timely

file the notice deprives this Court of jurisdiction. *See City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990).

In this case, a final judgment was entered on November 8, 2010, and timely CR 59 and CR 52.02 motions were filed on November 10, 2010, by appellants. This motion operated to terminate the time for filing an appeal. CR 73.02(1)(e). Appellants also filed a motion for Emergency Restraining Order or Stay on November 10, 2010; however, this motion did not operate to terminate the time for filing an appeal. CR 73.02(1)(e). On November 22, 2010, an order was entered by the circuit court granting in part and denying in part the CR 59 and CR 52.02 motion. The order amended the November 8, 2010, judgment in part. The November 22, 2010, order also constituted a final order and triggered the running for time to appeal upon the clerk's notation on the docket of service of notice of entry of the order. CR 73.02. The pending motion for emergency restraining order did not terminate the time to appeal and otherwise had no effect on the running of time for the appeal.¹ Thus, appellants should have pursued an appeal within thirty days of the entry of the clerk's notation of service of the November 22, 2010, final order. However, appellants failed to do so in this case. Appellants filed their notice of appeal on December 29, 2010, which was thirty-seven days after the entry of the November 22, 2010, order, and untimely under CR 73.02.

¹ In the Montgomery Circuit Court's order entered December 20, 2010, the court "amended" portions of the final order entered November 22, 2010. This amendment of the final order was void and of no effect as the circuit court lost jurisdiction to amend the final judgment ten days after entry of the November 22, 2010, order. Kentucky Rules of Civil Procedure 52.02; *Yocum v. Oney*, 532 S.W.2d 15 (Ky. 1975). Any judgment or order issued by a court without jurisdiction is "void ab initio." *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky. App. 2008).

To date, the Kentucky Supreme Court has rejected extending the policy of substantial compliance to the filing of a notice of appeal except as provided in CR 73.02(1)(d). The timely filing of a notice of appeal remains mandatory and failure to do so is fatal to the appeal. *Fox v. House*, 912 S.W.2d 450 (Ky. App. 1995). In this case, the notice of appeal has been untimely filed and we are duty bound to follow Supreme Court rules and precedents on this issue. Supreme Court Rule 1.030(8)(a).

In summation, we reluctantly must conclude that appellants' notice of appeal was untimely, and this Court has no jurisdiction herein.

Now, therefore, be it ORDERED that Appeal No. 2011-CA-000003-MR is DISMISSED as being untimely filed.

ALL CONCUR.

ENTERED: February 10, 2012

/s/ Jeff S. Taylor
Chief Judge, Kentucky Court of Appeals

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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