

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001638-MR

RICK BARKER

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT  
HONORABLE ROBERT B. CONLEY, JUDGE  
ACTION NO. 10-CI-00062

PAMELA THURMAN, EXECUTRIX OF  
THE ESTATE OF WILLIAM RUARK

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Appellant appeals from an order overruling his Kentucky Rules of Civil Procedure (CR) 60.02 motion. We find no error and affirm.

Appellant filed a complaint in the Lewis Circuit Court on March 18, 2010, alleging personal injury from a motor vehicle collision on April 17, 2008. After learning that the original Defendant, William Ruark, was deceased,

Appellant substituted the current Appellee, the executrix of Ruark's estate, as Defendant.

On November 7, 2011, Appellee filed her answer and served interrogatories and requests for production of documents on Appellant. The response date on the discovery requests was December 12, 2011. Appellant failed to answer Appellee's written discovery requests. Appellee then filed a motion for an order compelling discovery. That order was sustained on April 13, 2012, and Appellant was given 20 days to comply.

Appellant failed to comply with the discovery order. Instead, Appellant's attorney, Michael Fox, moved for permission to withdraw as Appellant's attorney because Appellant failed to maintain contact with counsel. Mr. Fox was permitted to withdraw as counsel by order on June 1, 2012. Appellant was given 30 days to obtain new counsel.

Appellant did not obtain new counsel. On July 3, 2012, Appellee filed a motion to dismiss the case with prejudice for failing to acquire new counsel and for failing to abide by the discovery order. A hearing was held on July 27, 2012. An order was entered on July 31, 2012, dismissing the case with prejudice.

On August 13, 2012, Patrick Flannery made an entry of appearance as Appellant's new counsel and moved, pursuant to CR 60.02, to vacate the order dismissing Appellant's cause of action. A hearing was held on August 17, 2012. On September 10, 2012, the court entered an order overruling Appellant's motion. This appeal followed.

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.

CR 60.02. “On review of the denial of a CR 60.02 motion, we review for an abuse of discretion. The test for abuse of discretion is ‘whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.’”

*Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008) (citations omitted).

In the case at hand, Appellant argues that the trial court erred when it overruled his CR 60.02 motion. He claims that he was unable to participate in answering the discovery requests due to ill health and that dismissing the case would be a miscarriage of justice. We disagree.

We begin by restating a few basic principles relating to CR 60.02 proceedings. First, CR 60.02 allows appeals based upon claims of error that “were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to have been otherwise presented to the court.” The rule represents the codification of the common law writ of coram nobis,

which allows a judgment to be corrected or vacated based “upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief.”

*Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011) (citations omitted).

CR 60.02 “is designed to provide relief where the reasons for the relief are of an extraordinary nature.” A very substantial showing is required to merit relief under its provisions. Moreover, one of the chief factors guiding the granting of CR 60.02 relief is the moving party’s ability to present his claim prior to the entry of the order sought to be set aside.

*U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 541 -542 (Ky. App. 2007) (citations omitted).

Appellant failed to keep in contact with his original attorney, failed to respond to discovery requests, and failed to obtain new counsel within the time permitted by the trial court. These reasons are not of an extraordinary nature required to invoke the relief sought via CR 60.02. The proper procedure for setting aside or vacating the order dismissing the action would have been to file a CR 59.05 motion or a direct appeal to this Court. The trial court did not abuse its discretion in overruling Appellant’s CR 60.02 motion. Appellant’s reasons for not participating in the legal action he initiated do not meet the criteria listed in CR 60.02(a)-(f).

For the foregoing reasons, we affirm the order of the Lewis Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Patrick Flannery  
Olive Hill, Kentucky

BRIEF FOR APPELLEE:

Ralph T. McDermott  
Ashland, Kentucky

Lloyd E. Spear  
Vanceburg, Kentucky