

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001010-MR

CHERYL A. HENDERSON; AND
MYRA HENDERSON-GREEN, M.D.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 08-CI-006798

HILLIARY M. OLIVER

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * ** * ** *

BEFORE: JONES, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Cheryl A. Henderson and Myra Henderson-Green bring this appeal from a June 14, 2016, order dismissing their complaint against Hilliary M. Oliver. For the reasons stated, we reluctantly must dismiss the appeal as being untimely filed.

The relevant procedural facts are as follows. Appellants filed a complaint against appellee in the Jefferson Circuit Court on June 26, 2008. Therein, appellants alleged that appellee negligently caused a motor vehicle accident resulting in physical injury to both appellants. Appellee timely filed an answer. Thereafter, the case lingered in circuit court for several years due to appellants' inability to obtain medical records from a hospital located in New York. Appellants eventually procured some of the medical records in June 2015.¹

On March 16, 2016, appellee filed a motion to dismiss the action pursuant to Kentucky Rules of Civil Procedure (CR) 41.02(1). By order entered March 22, 2016, the circuit court granted the motion and dismissed appellants' action in its entirety. This was a final and appealable order. On the same day, March 22, appellants filed a "Motion to Set Aside Order" and argued that appellee failed to timely mail to counsel the motion to dismiss in accordance with local rules. As a consequence, appellants claimed that they did not appear at motion hour and failed to file a response thereto. The circuit court denied appellants' motion by Opinion and Order entered April 28, 2016. Thereafter, on May 2, 2016, appellants filed a motion to vacate citing to CR 59.05. By Opinion and Order entered June 14, 2016, the circuit court denied the motion to vacate. Appellants then filed a notice of appeal on July 12, 2016, and specifically identified the June 14, 2016, Opinion and Order in the body thereof.

¹ Appellee disputes that all records were provided, specifically as pertains to post 2012 medical treatment for Cheryl A. Henderson.

A notice of appeal must be filed “within 30 days after the date of notification of service of the judgment or order” to be timely and to transfer jurisdiction to the Court of Appeals. CR 73.02. The thirty-day period to file a notice of appeal may be terminated by a timely CR 50.02, CR 52.02, or CR 59 motion; however, a successive motion will not terminate the time to appeal unless the previous motion was granted in part or *in toto*. *Cumberland Valley Contractors, Inc. v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644 (Ky. 2007); *Mollett v. Trustmark Ins. Co.*, 134 S.W.3d 621 (Ky. App. 2003).

It is well-established that the timely filing of a notice of appeal is mandatory and subject to strict compliance. *Erwin v. Cruz*, 423 S.W.3d 234 (Ky. App. 2014). The failure of a party to timely file a notice of appeal shall result in dismissal of the appeal. *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990).

In this case, a final and appealable order was entered on March 22, 2016; this order dismissed the action in its entirety. CR 54.01. Appellants then filed a motion to set aside the March 22, 2016, order. Appellants did not cite a particular civil rule in the motion, but in order for the motion to have terminated the running of the time to file an appeal from the March 22 order, the motion can only be viewed as a CR 59.05 motion. Otherwise, the notice of appeal should have been filed on or before April 21, 2016. The circuit court denied the motion by Opinion and Order entered April 28, 2016. Instead of filing a notice of appeal within thirty days of April 28, 2016, appellants filed a motion to vacate the April

28, 2016, Opinion and Order citing CR 59.05 as the basis for the motion.

However, this successive motion to vacate under CR 59.05 did not operate to terminate the time to file a notice of appeal; consequently, the notice of appeal was due within thirty days after April 28, 2016, the date of notification of service of the final order entered that date. The second post-judgment motion did not stay the time for filing the notice of appeal. *Mollett*, 134 S.W.3d at 624.

Subsequently, the circuit court denied appellants' second motion to vacate by Opinion and Order entered June 14, 2016. Appellants then filed a Notice of Appeal on July 12, 2016, which was more than thirty days after the order dismissing the case became final on April 28, 2016. Unfortunately, this Court has no alternative but to dismiss the appeal as being untimely filed pursuant to CR 73.02.

Now, therefore, be it ORDERED, that Appeal No. 2016-CA-001010-MR is hereby DISMISSED as having been untimely filed.

ALL CONCUR.

ENTERED: December 22, 2017

/s/ Jeff S. Taylor
JUDGE, COURT OF APPEALS

BRIEFS AND ORAL ARGUMENT
FOR APPELLANTS:

Michael W. Oyler
Louisville, Kentucky

BRIEF FOR APPELLEE:

Marc L. Breit
Scott E. Miller
Louisville, Kentucky

ORAL ARGUMENT FOR
APPELLEE:

Marc L. Breit
Louisville, Kentucky