

IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON  
April 22, 2014 Session

**DERECK CRUZ LEGENS v. BOBBY LECORNU, ET AL.**

**Direct Appeal from the Chancery Court for Obion County  
No. 30136 William Michael Maloan, Chancellor**

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**No. W2013-01800-COA-R3-CV- Filed June 26, 2014**

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**SEPARATE CONCURRING OPINION**

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HOLLY M. KIRBY, J., CONCURRING SEPARATELY:

I concur fully with the result reached in this case and agree with virtually all of the analysis. I write separately only to draw out and emphasize a couple of issues.

The first issue is the subject matter jurisdiction of the trial court and the appellate court in this case, where the appeal follows serial post-judgment motions. I concur separately to differentiate between subject matter jurisdiction to hear (or review on appeal) issues such as the substantive issues in the trial court's final judgment, and subject matter jurisdiction to hear (or review a trial court's disposition of) a post-judgment motion.

In *Chorost v. Chorost*, No. M2000-00251-COA-R3-CV, 2003 WL 21392065 (Tenn. Ct. App. June 17, 2003), in adjudicating the appellant's untimely post-judgment motion, the trial court reached the substantive issues in the parties' divorce. *Chorost* held that the post-judgment motion was untimely and did not extend the time period to file a notice of appeal. The fact that the divorce decree became final and unappealable, the appellate court held, "prevented the trial court from considering [the appellant's] issues regarding the divorce . . . and rendered void the portions of the trial court's . . . orders dealing with those issues." *Id.* at \*5. In discussing appellate court jurisdiction, *Chorost* likewise focused on subject matter jurisdiction to adjudicate issues. It held that the appellate court had jurisdiction to review the trial court's adjudication of the untimely motion – and jurisdiction to declare parts of the trial court's order void – but did not have subject matter jurisdiction to review the substantive issues in the parties' divorce. *Id.* at \*6.

In contrast, in this Court's recent opinion in *Fleming v. Saini*, No. W2013-01540-COA-R3-CV, 2014 WL 2592548 (Tenn. Ct. App. June 10, 2014), the appellate court construed the *pro se* appellant's issue as appealing *only* from the untimely post-judgment motion. *Id.* at \*4. The appellees argued that the trial court lacked subject matter jurisdiction to adjudicate the untimely post-judgment motion, and that consequently the appellate court lacked subject matter jurisdiction, and so asked the appellate court to dismiss the appeal. The *Fleming* Court held that the fact that the post-judgment motion was untimely meant "that the motion does not extend the time for Fleming to appeal the judgment, and is a valid reason for the trial court to deny Fleming's motion, but it does not deprive the trial court of subject matter jurisdiction to adjudicate Fleming's motion." *Id.* The *Fleming* Court also held that the fact that the underlying trial court judgment had become final and unappealable did not deprive the appellate court of subject matter jurisdiction to review the trial court's disposition of the untimely post-judgment motion. "If that were true," the *Fleming* Court commented, "there would be no way for any appellate court to determine whether the trial court ruled correctly on the post-judgment motion." *Id.*

Therefore, I would clarify that, if the second post-judgment motion in this case had not operated to extend the time for filing the notice of appeal, the trial court would have had to deny the motion as untimely, but this Court would have had subject matter jurisdiction to review the trial court's disposition of the motion. *See* 12-59 Moore's Federal Practice - Civil § 59.31 (2014) ("Although the district court lacks the power to extend the 28-day limit for filing a Rule 59(e) motion to alter o[r] amend a judgment, a failure to comply with the time limit does not deprive the district court of jurisdiction to hear the motion."); 11 Wright & Miller's Federal Practice & Procedure, Civ. § 2812 (3d ed.) (Apr. 2014).

The second issue on which I write separately relates to the majority's holding that the trial court erred in granting the motion to alter or amend because, in the course of arguing the post-judgment motion, Plaintiff's counsel presented new facts and evidence to the trial court. In footnote 6, the majority states that, "[e]ven if we were to find that Plaintiff's counsel's statements at the hearing constituted simple legal argument, it is well settled that a motion to alter or amend "may not be used to raise issues or legal arguments that previously were not tried or asserted." This alternative basis for our holding, I believe, deserves greater emphasis. Even if Plaintiff's counsel in this case had not sought to rely on a handbook for notaries that was not admitted into evidence in the trial, it is clear that his argument alone was new, and thus could not be a basis for altering or amending the original judgment. *See* 12-59 Moore's Federal Practice - Civil § 59.30 (2014) ("a motion to alter or amend generally may not be used to raise new arguments . . . that could reasonably have been raised or presented before the entry of judgment.").

I concur fully in the majority opinion and submit this Separate Concurrence only to further elaborate on these points.

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HOLLY M. KIRBY, JUDGE