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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002173-MR

GINA F. HINES AND
NATALIE HINES APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 02-CI-00620

JOHNNY CARPENTER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES, SENIOR JUDGE.

NICKELL, JUDGE: Gina F. Hines (Gina), and her daughter, Natalie Hines (Natalie), (collectively "Hines"), have appealed from an order of the Laurel Circuit Court entered on September 20, 2006. That order denied their motion to compel Johnny Carpenter (Carpenter) to pay them a lump sum of $14,175.00 for damages

they allegedly incurred when Carpenter's posting of a supersedeas bond[1] stayed collection of a summary judgment awarded to them for back child support while he appealed to this Court. Hines is now receiving monthly payments of $675.00 from Carpenter's pension plan under a Qualified Domestic Relations Order (QDRO), but claims the trial court should have ordered Carpenter to pay them an additional $675.00 for each of the twenty-one months his appeal was pending and enforcement of the summary judgment was stayed. In contrast, Carpenter argues the trial court properly denied the motion to compel because: (1) the summary judgment covered his entire indebtedness, (2) a court cannot grant a judgment on a summary judgment, and (3) Hines should not be permitted to punish him for exercising his right to appeal an adverse ruling. For the reasons that follow, we affirm.

The procedural history of this case is extensive. It has occupied the attention of the Whitley District Court, the Whitley Circuit Court, the Laurel Circuit Court, and multiple panels of this Court. For this appeal, we limit ourselves to a brief recitation of the facts needed to address the trial court's denial of Hines's motion to compel. A more complete history of the case is found in *Carpenter v. Hines*, No. 2004-CA-001574-MR (rendered 3/3/2006, not-to-be-published).

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[1] The posting of a supersedeas bond is usually at the option of the appellant. Kentucky Rules of Civil Procedure (CR) 62.01. If posted, a supersedeas bond stays execution of the judgment and maintains the status quo during the appeal. If no bond is posted, despite the pending appeal, the party in whose favor judgment was granted may enforce it. However, if the appeal is successful, the party that enforced the judgment would have to repay the amount collected on it.

Natalie is the daughter of Gina and Carpenter.[2] She was born out-of-wedlock on September 22, 1983. Hines has attempted to collect child support from Carpenter since November 9, 1990, when an agreed order of paternity[3] was entered by the Whitley District Court and Carpenter was ordered to pay monthly child support of $100.00 until May of 2002 when Natalie graduated from high school. Although Carpenter never made any payments pursuant to the child support order,[4] Hines did not attempt to enforce the 1990 judgment until 2002 when a verified complaint seeking back child support was filed in Laurel Circuit Court.

On July 6, 2004, summary judgment was entered by the Laurel Circuit Court in favor of Hines. By this time, Carpenter's motion to alter, amend or vacate the 1990 Whitley District Court paternity/child support order had been denied. As a result, the Laurel Circuit Court said its authority was limited to determining any

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[2] DNA testing performed in or around 2003 established Carpenter's paternity of Natalie within a 99.99996 percent probability.

[3] A signature purporting to be that of "Johnny A. Carpenter" appears on the agreed paternity order. In a CR 60.02 motion to alter, amend or vacate filed in 2002, Carpenter claimed his signature had been forged and he had no notice of the order's entry until Hines filed the verified complaint in 2002. In a letter to Carpenter's attorney dated October 24, 2002, a handwriting expert stated her opinion that the signature on the agreed paternity order was inconsistent with samples of Carpenter's signature submitted to her for review. Finding notice of entry of the order had been mailed to Carpenter at his correct address in 1990; the notice was not returned to the Whitley Circuit Court Clerk as undeliverable; and twelve years was an unreasonable time to wait before challenging the order, the Whitley District Court rejected Carpenter's attack on the combined paternity/child support order. On appeal, the Whitley Circuit Court affirmed the order. Thereafter, a panel of this Court denied relief on Carpenter's motion for discretionary review.

[4] While Carpenter never paid child support, between November 1990 and December 1994 he did pay Gina's rent of $195.00 per month. Carpenter then said he could no longer pay their rent, but claimed a trust fund had been established in Natalie's name which would be worth about $80,000.00 when Natalie was ready to enroll in college. However, when Natalie graduated from high school, she received only $500.00 and the promise of $1,000.00 when she turned twenty-one. In calculating the arrearage, Carpenter was credited with $9,750.00 in rent payments.

current child support arrearage. The court found Carpenter never paid child support to Hines but did credit him with paying their rent for fifty months. The court entered judgment in favor of Hines for $50,450.00 for the period of November 9, 1990, through May of 2002. The court further awarded prejudgment interest as each payment became due at the legal rate of 12 percent per annum. Finally, Hines was awarded costs and postjudgment interest at a rate of 12 percent. On August 4, 2004, Carpenter appealed the grant of summary judgment to this Court.

On August 23, 2004, Carpenter filed a supersedeas bond in the amount of $102,000.00.[5] He was listed as both principal and surety in the bond's narrative; however, there was no surety's signature, no surety's address, and the affidavit of surety was not completed. Despite the absence of a surety's address, a requirement of CR 73.04(1), the bond was approved by a special judge and enforcement of the summary judgment was stayed.

On March 3, 2006, a panel of this Court affirmed the trial court's grant of summary judgment in favor of Hines. Carpenter had claimed the 1990 paternity order was obtained by fraud in that his signature was forged and he was denied due process when the Whitley Circuit Court affirmed the district court order

[5] This was the second supersedeas bond filed by Carpenter in this litigation. The first bond, filed in February of 2002, was for $90,000.00. Carpenter signed that bond as both principal and surety and provided the same address for both. Under *Webb v. Webb*, 500 S.W.2d 59, 60 (Ky.App. 1973), a valid supersedeas bond cannot have the same surety and principal. The 2002 bond was notarized, but based on the record presented to us, it does not appear it was approved by a circuit court judge or the circuit court clerk as required by CR 62.03(1).

without affording him an evidentiary hearing. We held Carpenter could not relitigate the underlying Whitley District Court paternity/child support order in Laurel Circuit Court since it had already been litigated in the Whitley District Court, affirmed on appeal by the Whitley Circuit Court, and this Court had denied discretionary review. We further held relitigation was barred by the doctrine of *res judicata* since the parties and cause of action were identical. Our opinion in that appeal became final April 12, 2006.

On April 7, 2006, a QDRO was entered by the Laurel Circuit Court. It identified Gina and Natalie as the alternate payees of Carpenter's pension and required them to be paid 50 percent of Carpenter's monthly benefit "until the sum of $149,495.01 is paid in full, or both [Gina and Natalie] die, or Johnny Carpenter dies, whichever first occurs."

On April 18, 2006, a supplemental summary judgment, bearing interest from April 7, 2005, forward, was entered by the Laurel Circuit Court in favor of Hines for $149,495.01. The same order awarded Hines $171.50 in costs.

On May 10, 2006, Hines filed a notice of judgment lien for the full amount of the supplemental summary judgment against any property owned by Carpenter.[6] That same month, Hines finally began receiving monthly payments of $675.00 pursuant to the QDRO.

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[6] An affidavit signed by Hines in October of 2004 said Carpenter's only real estate holding was a one-half interest with his wife in a parcel of property appraised at $53,000.00 but encumbered by four mortgages. Hines claimed Carpenter's only other asset was his UPS pension.

The activities pertinent to this appeal began on August 25, 2006, when Hines moved for judgment on the $102,000.00 supersedeas bond Carpenter had posted on August 23, 2004. Hines had previously objected to the supersedeas bond and moved to strike it because the principal and the surety were the same in contravention of *Webb, supra.* Hines now claimed posting of the bond prevented them from enforcing the July 6, 2004, QDRO for twenty-one months, the length of time the appeal was pending. As a result, they asked the Laurel Circuit Court to order Carpenter to pay them a lump sum of $14,175.00, the equivalent of $675.00 for each of the twenty-one months. Carpenter objected to the motion, stating that his entire indebtedness was covered by the summary judgment (which prompted the unsuccessful appeal) and any further judgment was barred.

On September 1, 2006, Hines moved the court to compel Carpenter to reimburse them $14,175.00 for the damages they incurred as a result of the filing of the failed appeal. Without citing any authority, Hines argued it would be "wrong" for Carpenter to pay nothing for delaying execution of Hines's judgment for back child support. Carpenter opposed the motion, arguing it would be unfair for the court to order him to pay more than he owed and suggested that if he were ordered to pay an amount as surety, then the amount he owed under the summary judgment should be reduced by a like amount.

In denying the motion to compel, the circuit court wrote:

> Indeed, the Plaintiffs have been denied their rightful child support payment for far too long, but the Court simply cannot side with the Plaintiffs for the specific relief

> requested. The Plaintiffs have successfully obtained a Judgment for what is owed in child support, plus interest and taxable costs. Likewise, the Defendant exercised, though unsuccessfully, his prerogative in prosecuting an appeal. The Plaintiffs have a Judgment and may pursue all legal means and remedies to collect that Judgment, but the Court is of the opinion that the relief currently requested by the Plaintiffs seeks more than this Court is authorized to give, over and above the Judgment of record. Thus, Plaintiffs' motion is DENIED.

This appeal[7] by Hines followed. We now affirm.

The sole question on appeal is whether the trial court erred in denying Hines's motion to compel Carpenter to pay them a lump sum of $14,175.00. Hines argues the motion to compel should have been granted because interest on the uncollected judgment is accruing at more than twice the rate of the monthly payments being paid to Hines by Carpenter's pension plan. Hines further argues they will never recoup the full amount owed since Carpenter, sixty-two years of age when the motion to compel was filed, must live another eighteen years for them to receive just the principal amount of the judgment.

In reviewing a trial court's denial of a motion to compel, we "defer to the trial court's factual findings, upsetting them only if clearly erroneous or unsupported by substantial evidence. . . ." *Conseco Finance Servicing Corp., v.*

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[7] Hines's brief fails to meet the requirements of CR 76.12(4)(c)(v) in that it does not state with specificity how and where the claim of error was preserved. Stating generally, "[t]his issue has been preserved for appellate review by virtue of all of the motions and arguments made before the Trial Court[,]" does not satisfy the letter or the purpose of the rule or case law interpreting it. *Elwell v. Stone,* 799 S.W.2d 46 (Ky. 1990). However, because Hines's brief is sufficient for the Court's review of the matters raised in this appeal, and because we hold Hines's arguments clearly fail on the merits, we will not impose sanctions in this particular case even though we are authorized to do so by the rule.

Wilder, 47 S.W.3d 335, 340 (Ky.App. 2001). Like the trial court, we acknowledge Gina and Natalie have been without the funds awarded to them by the summary judgment for far too long. However, § 115 of the Kentucky Constitution allows a party one matter-of-right appeal. While Carpenter has perfected more than one appeal in his effort to stall paying back child support, he has appealed the Laurel Circuit Court's entry of the supplemental summary judgment only once.[8] It was unsuccessful, but it was his first appeal of that issue. Pursuant to Kentucky Revised Statutes (KRS) 26A.300(1), "[w]hen collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure, there shall be no damages assessed on the first appeal as a matter of right contemplated by Section 115 of the Constitution of Kentucky." Thus, Hines's motion to compel asked the trial court to grant relief that was statutorily forbidden. *See generally Elk Horn Coal Corporation v. Cheyenne Resources, Inc.,* 163 S.W.3d 408, 413 (Ky. 2005); *Coomer v. Gray,* 750 S.W.2d 424, 426 (Ky. 1988); *Wells v. Southern Railway Company,* 633 S.W.2d 406 (Ky. 1982); *Watts v. Laboratory Corporation of America,* 139 S.W.3d 534 (Ky.App. 2004). Since the trial court did not commit clear error and there is no lack of substantial evidence, there is no justification for reversal. Furthermore, because this appeal is resolved by KRS 26A.300(1) and the Kentucky Constitution, we need not comment on the sufficiency of the bond.

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[8] *Carpenter v. Hines, supra.*

For the foregoing reasons, the order of the Laurel Circuit Court denying Hines's motion to compel is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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