RENDERED: MAY 29, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000975-MR

DEBBIE HOWARD, AS ADMINISTRATRIX OF
THE ESTATE OF KIMBERLY LANGDON APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 07-CI-00336

MARY BRECKINRIDGE HEALTHCARE, INC. APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

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

STUMBO, JUDGE: Debbie Howard, as administratrix of the estate of Kimberly Langdon, appeals from an order of the Leslie Circuit Court which directed her to pursue her claims only against Mary Breckinridge Healthcare, Inc., denied her the ability to collect interest and costs from a previously entered judgment, and set

aside an award of attorney fees previously granted. We find that Appellant is entitled to the attorney fees, but affirm in all other respects.

On November 21, 2007, Appellant filed a complaint in the Leslie Circuit Court alleging that Appellee, among others, was negligent in its care of Kimberly Langdon, leading to her death. After a mediation, all parties except Appellee settled. In September of 2011, Appellee was sold to a company called Appalachian Regional Healthcare ("ARH"). ARH took over the health care operations of the hospital, as well as assumed some of Appellee's assets and liabilities. A trial was scheduled for March 12, 2012. Five days prior to trial, Appellee's counsel moved to withdraw because Appellee had stopped paying for legal services. Appellee's counsel did not request a continuance in order for Appellee to find new counsel.

Trial commenced as scheduled with Appellee presenting no evidence. On March 16, 2012, the court entered a judgment in favor of Appellant in the amount of $752,957 plus 12% interest. On July 2, 2012, Appellant signed a partial release of all claims in exchange for $215,000 paid by the Lexington Insurance Company. It appears from the evidence in the record that Frontier Nursing Services, Inc. was insured by the Lexington Insurance Company. Appellant claims Frontier is Appellee's parent company, but the record is limited as to information regarding Frontier. The release is four pages long and states that in exchange for the money, Appellant is releasing all claims against any parent company, affiliates, subsidiaries, assigns, directors, and employees of Appellee. It also generally

releases any other person, company, or entity except Appellee. The release specifically states that Appellant is not releasing her claim against Appellee. The release also states that Appellant does not release Appellee "for the amount of the Judgment that is equal to or less than the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000)."

After this settlement was accepted by the trial court, Appellant then began trying to collect the remaining amount of the judgment from Appellee. To do this, Appellant propounded upon Appellee post-judgment discovery requests. On November 7, 2012, the trial court ordered Appellee to provide answers to said discovery and also awarded Appellant $1,000 in attorney fees. On February 6, 2013, the trial court ordered Appellee to provide Kevin Cook, CFO of Appellee, for a deposition. The court also ordered Appellee to pay Appellant another $1,000 in attorney fees.

After some discovery, Appellant made a motion before the court on July 11, 2013. That motion sought to enforce the judgment against both Appellee and Frontier. Appellant alleged that Appellee and Frontier are "so intertwined that under the circumstances there is the requisite domination and injustice to justify that [Appellee] as well as [Frontier] be held equally responsible for the judgment obtained by the [Appellant]." In essence, Appellant alleged that Frontier was the parent corporation of Appellee and she should be allowed to pierce the corporate veil in order to have Frontier satisfy the remainder of the judgment.

On August 12, 2013, the trial court entered an order declining to hear Appellant's motion. The court found that Appellant's motion was not properly served upon Appellee. It further found that if Appellant wished to seek relief from a non-party to the cause of action, such as Frontier, then Appellant would need to join said non-party and serve them with process.

Appellant then filed a series of motions. These motions asked the court for assistance in collecting the remaining amount of the judgment awarded, requested that the court declare the 2011 conveyance of Appellee's assets to ARH as fraudulent, and to allow Appellant to pierce the corporate veil in order to collect the remaining amount of the judgment from entities which were non-parties to the case. On June 11, 2014, the court entered an order addressing these motions. The court held that the partial release precluded Appellant from proceeding against any other person, company, or entity other than Appellee. The court also stated that Appellant never followed its instructions to join non-parties to the case. The court also declined to declare the conveyance to ARH fraudulent and held that "plaintiff has not demonstrated, by deposition testimony or documentation or otherwise, any reason to pierce the corporate veil[.]" The court ultimately held that Appellant may only proceed against Appellee in her efforts to collect on the remaining amount of the judgment. The court further stated that Appellant could only collect a maximum sum of $500,000 "as outlined in the specific terms of [the] partial release". Finally, the court ordered that its previous two orders awarding Appellant a total of $2,000 in attorney fees were set aside. This appeal followed.

> The Court of Appeals . . . [is] entitled to set aside the trial court's findings only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 353-354 (Ky. 2003)(citations omitted).

Appellant's first argument on appeal is that the court erred when it ordered that Appellant could only collect the remaining amount of the judgment from Appellee. Appellant argues that Appellee and Frontier[1] are connected in such a way as to allow her to pierce the corporate veil. She also alleges that Frontier and Appellee used the purchase of Appellee by ARH to elude creditors. In support of her argument, Appellant has cited to *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152 (Ky. 2012), which sets forth the test for piercing the corporate veil.

[1] This Court uses Frontier as a catch all for the companies Appellant alleges are connected to Appellee. Appellant lists a number of companies it her brief with names similar to Frontier that appear to be subsidiaries of that company.

We believe that the trial court was correct in that Appellant can only collect the remaining amount of the judgment from Appellee. "It is well established that construction and interpretation of a written instrument are questions of law for the court. We review questions of law *de novo* and, thus, without deference to the interpretation afforded by the circuit court." *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998) (citations omitted). The trial court found that Appellant released all claims against all entities except Appellee. The plain language of the partial release is clear in that Appellant did just that. Furthermore, Appellant never sought to join the non-parties she believed could be held accountable for the judgment, like Frontier, to the case *sub judice*. Appellant cites to no rule of law that would allow her to hold a third party liable for the remaining amount of the judgment when those third parties have been released from all claims and have never been joined as parties to the case. We find no error.

Appellant's second argument on appeal is that the court erred when it held that she could only collect a maximum of $500,000 from Appellee. The trial court held that Appellant could only collect a maximum of $500,000 from Appellee "as outlined in the specific terms of [the] partial release". Appellant argues that she should be allowed to collect costs and interest from the judgment as allowed by KRS 360.040. Appellee argues that Appellant contracted away her right to collect interest and costs that might otherwise be available when she agreed to the terms of the partial release. We agree with Appellee.

The release states that Appellant is retaining her right to pursue her claim against Appellee "for the amount of the Judgment that is equal to or less than the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000)." (Emphasis added). This language is reiterated a total of five times in the release. The release is silent as to costs and interest. Appellant agreed to only seek an amount equal to or less than $500,000 from Appellee. When an agreement is silent as to the issue of interest, interest is not owed. *Withers v. Commonwealth, Dept. of Transp., Bureau of Highways*, 656 S.W.2d 747, 749 (Ky. App. 1983). We believe this case law is equally applicable to the issue of costs as well. We find no error in the trial court's holding that the maximum amount recoverable from Appellee is $500,000.

Appellant's final argument on appeal is that the trial court erred when it set aside the previous two orders awarding her a total of $2,000 in attorney fees. In its order, the trial court does not state why it is setting aside the attorney fees. In addition, the Appellee never requested for the court to set aside those fees.

Appellee offers no argument or discussion regarding this claim of error in its brief.

> CR 76.12(4)(d) sets forth the requirements for the organization and content of an appellee brief. CR 76.12(4)(d)(iv) requires the appellee to set forth in his brief an "ARGUMENT" section conforming to the arguments as raised by the appellant in his brief. It has been held that "[a]n appellant's failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues." *Milby v. Mears,* 580 S.W.2d 724, 727(Ky. App. 1979). We believe the same principle is applicable in the case of an appellee brief.

CR 76.12(8)(c) sets forth the penalties for the failure of an appellee to file a brief. The rule provides as follows:

> (c) If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

Baker v. Weinberg, 266 S.W.3d 827, 834 (Ky. App. 2008). Appellee provided no argument on this issue; therefore, we will regard that failure as a confession of error. We reverse and remand as to this issue and direct the trial court to reinstate the two attorney fee awards.

Based on the foregoing, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin W. Johnson
Hazard, Kentucky

BRIEF FOR APPELLEE:

James A. Ridings
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