IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

YOSRY M. ABOUZAID,

Appellant,

v.

Case No. 5D20-1590
LT Case No. 2011-DR-21248-O

NEHLA E. HELMY,

Appellee.

_____/

Opinion filed October 8, 2021

Appeal from the Circuit
Court for Orange County,
Alice Blackwell, Judge.

Kenneth C. Gallagher, of Law Office
of Kenneth C. Gallagher, LLC,
Orlando, for Appellant.

No Appearance for Appellee.

ON MOTION FOR AWARD OF APPELLATE ATTORNEY'S FEES

PER CURIAM.

We previously affirmed the trial court's ruling on the merits of this appeal. We write separately to address Appellant's Motion for Attorney's Fees, filed pursuant to section 61.16, Florida Statutes (2020). We grant the motion, conditioned upon a finding by the trial court of need and a commensurate ability to pay, after appropriate consideration of the financial

resources of both parties, and we remand this cause to the Orange County Circuit Court for that consideration and to assess the amount of the award, if any.

WOZNIAK, J., concurs.
SASSO, J., concurs and concurs specially, with opinion.
LAMBERT, C.J., dissents, with opinion.

SASSO, J., concurring specially.

Section 61.16(1), Florida Statutes (2020), states in pertinent part: "In determining whether to make attorney's fees and costs awards at the appellate level, the court shall primarily consider the relative financial resources of the parties, unless an appellate party's cause is deemed to be frivolous." Although Appellant has not prevailed on appeal, I do not believe this appeal was frivolous.

The issue presented in this appeal involved a good faith dispute over the amount of damages awarded. And while certain record evidence appeared to support Appellant's argument, our review is hampered by the lack of transcript. Consequently, the presumption in favor of the trial court prevails. *See Fugina v. Fugina*, 874 So. 2d 1268, 1269 (Fla. 5th DCA 2004) ("Because there is no transcript of the hearing in this contempt proceeding, our review is limited to errors of law that are apparent on the face of the record."); *Speer v. Mason*, 769 So. 2d 1102, 1103–04 (Fla. 4th DCA 2000) ("The trial court's factual findings are presumed to be correct and may be reversed only in the absence of substantial, competent evidence, an impossible task given the lack of a transcript."). Under these circumstances, I cannot say that Appellant's claims are completely devoid of merit.

Because the issues raised on appeal are not frivolous, section 61.16 directs us to consider the relative financial resources of the parties rather than who prevailed on appeal. I also view this as a determination best left to the trial court and therefore concur in conditionally granting Appellant's motion for fees. *See Rados v. Rados*, 791 So. 2d 1130, 1132 (Fla. 2d DCA 2001) ("Because an appellate court is not structured to address the factual issues presented in every request for appellate attorney's fees, issues that cannot be resolved on the basis of the appellate record typically must be remanded to the trial court for determination.").

LAMBERT, C.J., dissenting.

In this appeal, Yosry M. Abouzaid ("Former Husband") challenged two "Judgment[s] for Damages in Equitable Distribution" separately entered against him and in favor of Appellee, Nehla E. Helmy ("Former Wife"), almost six years after their marriage was dissolved. The first judgment awarded damages of $25,160.89 to Former Wife while the second judgment awarded her $5,503.21 in damages. The only argument Former Husband raised in his unsuccessful effort here for reversal was that the amount awarded in the second final judgment had been included in the total awarded in the first judgment.

These final judgments were entered by the trial court after an evidentiary hearing at which each party testified. Our record contained no transcript from that hearing, nor did it include an acceptable statement of the evidence prepared under Florida Rule of Appellate Procedure 9.200(b)(5). Accordingly, to be consistent with the familiar dictates of *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) ("Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternate theory."), and because no

error was apparent on the face of either judgment, I concurred in the majority's unelaborated affirmance of both final judgments.

Where I part ways with the majority pertains to the order now entered by our court that conditionally grants Former Husband's motion for appellate attorney's fees filed under section 61.16, Florida Statutes (2020). To explain my reasoning, I will first provide some history of the underlying litigation.

The parties' marriage was dissolved in 2014 following trial. In the amended final judgment, Former Husband was ordered by the trial court to pay to Former Wife non-modifiable, durational alimony of $2,300 per month for a period of eight years, plus $792.57 per month in child support for the parties' three minor children. Former Husband was also ordered to pay $200 per month towards his $11,500 accrued temporary support arrearage. The trial court found that Former Husband's "available income" was $155,776.33 per year while Former Wife, who was attending college, was earning a net income of $225 per month as a teacher's aide or assistant.

The trial court's amended final judgment also equitably distributed the parties' marital assets and liabilities. Significant here, Former Wife was awarded a condominium located in Orlando, Florida. The court found that there were unpaid property taxes and a "claim or debt" by the Homeowner's Association assessed against this condominium that had accumulated

during the marriage from the various financial arrangements of the parties and "[Former Husband's] financial machinations." Former Husband was ordered to fully pay these outstanding property taxes and Homeowner's Association debts within thirty days of the final judgment and to "provide written evidence of his full payment immediately afterward to [Former Wife]." He did neither.

The trial court also ordered the parties to file a joint tax return for 2013 and directed that any refund received by them be split equally. Lastly, the court found that Former Wife had a "need and an entitlement" to an award of her attorney's fees and costs "based on vexation of litigation and disparate income" and that Former Husband was able to pay these attorney's fees and costs. The court retained jurisdiction to set the amount for the attorney's fees and costs, which it eventually did.

With this backdrop, I move forward to the present proceedings. In December 2019, the trial court entered a judgment and sentence finding Former Husband in contempt of court for not paying his alimony, which, by the time, was $20,911.71 in arrears. Former Husband was sentenced to serve 179 days in jail, with the court setting a purge amount of $7,400, which it found that Former Husband had the present ability to pay.

Approximately two weeks later, Former Husband filed a "Motion for Enforcement" where, among other things, he asked that the trial court credit the sum of $19,851.56 against his aforementioned alimony arrearage total. Former Husband reasoned that because the trial court had previously determined, in a 2017 order, that Former Husband had actually overpaid Former Wife the sum of $19,851.56 in attorney's fees, this amount should be offset against his present alimony liability.

Following a hearing held in February 2020 on Former Husband's motion, attended by both parties, the court entered an order in which it reserved ruling on Former Husband's motion. The order instead directed Former Husband to provide proof that he had paid both the previously-described taxes and Homeowner's Association debt on Former Wife's condominium and to also show proof that he had paid to Former Wife her one-half share of the parties' 2013 income tax refund.

In June 2020, the trial court held a second evidentiary hearing on Former Husband's motion to enforce. Preliminarily, Former Wife consented to Former Husband receiving his requested credit against the alimony arrearage that he owed to her. The trial court then received testimony from both parties regarding the unpaid taxes and Homeowner's Association debt owed on Former Wife's condominium, as well as the receipt and distribution

of the 2013 income tax refund. From this evidence, the court determined that Former Husband owed Former Wife the sum of $19,690 for the taxes and the Homeowner's Association debt, plus accrued interest since 2014, for a total of $25,160.89. This sum is reflected in the first final judgment for damages on equitable distribution that we have just recently affirmed. The trial court also found that Former Husband received the parties' 2013 income tax refund in the sum of $8,280. Former Husband acknowledged that he did not pay Former Wife her one-half share of this refund as ordered in the dissolution final judgment. The trial court entered a second final judgment, awarding Former Wife $4,140 in damages for her one-half share of the tax refund, plus accrued interest from April 15, 2014, for a total of $5,503.21. This judgment has also been affirmed in this appeal.

These two final judgments resulted directly from Former Husband's protracted failure to comply with the amended final judgment of dissolution of marriage. Moreover, as Former Husband's only argument here was that the second judgment for $5,503.21 should be vacated because that amount was already considered and included in the $25,160.89 first final judgment, he essentially did not contest that he owed Former Wife the $25,160.89 awarded in the first final judgment.

Returning to the focus of my dissent, we have provisionally granted Former Husband's motion for appellate attorney's fees filed under section 61.16, Florida Statutes, conditioned "upon a finding by the trial court of [Former Husband's] need and a commensurate ability of [Former Wife] to pay after appropriate consideration of the financial resources of both parties." Thus, Former Wife, who filed no brief and made no appearance in the instant appeal, will necessarily have to appear for an evidentiary hearing before the trial court to defend against appellate attorney's fees being assessed in favor of her ex-husband against her. Under the circumstances of this case and appeal, I believe Former Husband's motion should be denied.

Section 61.16(1), the cited authority in Former Husband's motion and our order, reads, in pertinent part:

> The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals. In those cases in which an action is brought for enforcement and the court finds that the noncompliant party is without justification in the refusal to follow a court order, the court may not award attorney's fees, suit money, and costs to the noncompliant party. . . . In determining whether to make attorney's fees and costs awards at the appellate level, the court shall primarily consider the relative financial resources of the parties, unless an appellate party's cause is deemed to be frivolous.

Preliminarily, I recognize that, under this statute, an award of appellate attorney's fees is not based upon which party "prevailed." Moreover, I acknowledge that, as an appellate court, we are not equipped for the taking of evidence and thus have no way of knowing whether the financial resources of the parties may have changed during the pendency of the appeal, which is the rationale given by appellate courts when provisionally granting this type of motion. *See Rados v. Rados*, 791 So. 2d 1130, 1133 (Fla. 2d DCA 2001); *White v. White*, 683 So. 2d 510, 512–13 (Fla. 4th DCA 1996), *disapproved of on other grounds by Rosen v. Rosen*, 696 So. 2d 697, 700 (Fla. 1997).

Nevertheless, I dissent from the conditional grant of Former Husband's motion because I find his appeal to be frivolous, which, under section 61.16(1), disqualifies him from being awarded appellate attorney's fees. The two final judgments for damages in equitable distribution on appeal were entered after the trial court considered and weighed testimony and other evidence from both parties. For more than forty years, *Applegate* has made clear that without the record on appeal containing a transcript of the evidence presented at trial or an evidentiary hearing, absent some apparent error on the face of the judgment, which was neither present in either final judgment nor had been argued here by Former Husband, affirmance is required. It

should have been readily apparent to Former Husband's counsel that, without any record of the evidence presented at the motion for enforcement hearing,[1] Former Husband's appeal had little to no prospect of succeeding. *See Aspen Air Conditioning v. Safeco Ins. Co. of Am.*, 170 So. 3d 892, 896 (Fla. 3d DCA 2015) ("An appeal is defined as frivolous if it presents no justiciable question and is so devoid of merit on the face of the record that there is little prospect it will ever succeed.").

Additionally, I dissent because Former Husband has not been compliant with the amended final judgment of dissolution of marriage for several years. Section 61.16(1) precludes an award of attorney's fees to the noncompliant party in an action brought for enforcement when the court finds that the noncompliant party is without justification in the refusal to follow a court order. It is incongruous to me that, under the facts and chronology that I have related, Former Wife could nevertheless be ordered to pay all or a portion of Former Husband's appellate attorney's fees for this appeal of the final judgments entered following his motion for enforcement. To do so has the net practical effect of reducing the value of the damages awarded to Former Wife in the final judgments entered that only resulted, in my view,

[1] Former Husband's counsel on appeal did not represent him at the evidentiary hearing at issue.

from Former Husband's unjustified and lengthy refusal to comply with the plain language of the dissolution of marriage final judgment.

Lastly, as my view here has not carried the day, I would nevertheless remind the trial court that it should not interpret our order as a directive that, on remand, it must award appellate attorney's fees to Former Husband. Rather, the order merely provides that the issue of *whether* to award such fees is to be further addressed upon the trial court's evaluation of the parties' financial resources at an evidentiary hearing. Our order directs the trial court to consider the parties' financial resources "and to assess the amount of the award, *if any*." (Emphasis supplied). Accordingly, if, after due consideration of the parties' financial resources, the trial court concludes that, based upon the evidence presented, the party who was awarded alimony (Former Wife) does not have the financial ability to pay all or any part of the appellate attorney's fees of the party who is still obligated to pay alimony (Former Husband), it is not precluded from denying the motion.[2]

[2] Notably, at a hearing on Former Husband's motion to stay held approximately three months after the instant notice of appeal was filed, Former Wife advised the trial court, under oath, that she needed to hire counsel to try to collect the money damages determined by the final judgments to be owed to her by Former Husband so that she could pay her own outstanding attorney's fees and to repay friends from whom she had previously borrowed money.