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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001856-MR

RICHARD M. MITCHELL, JR. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT, FAMILY DIVISION
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 90-CI-01139

KATHLEEN WOODWARD MITCHELL AND
MILLER, GRIFFIN & MARKS, P.S.C. — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Richard M. Mitchell, Jr. appeals from a September 16, 2009, order entered by the Fayette Circuit Court, Family Division, which granted Kathleen Woodward Mitchell's motion for attorney fees, expert fees, and costs

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

incurred as a result of a motion to modify maintenance filed by Richard. Richard argues on appeal that the trial court was without jurisdiction to enter the above order. After careful review of the applicable rules and case law, we agree and therefore reverse.

In October 2008, Richard filed a motion to modify the spousal maintenance he had been paying to his former spouse, Kathleen. Richard and Kathleen had been divorced since 1990, following twenty-four years of marriage. During the divorce proceedings, the parties had entered into a settlement agreement whereby Richard agreed to pay Kathleen $3000.00 per month in maintenance until she remarried, she died, or Richard died, whichever occurred first.[2] By June 2009, Richard had paid Kathleen $681,000.00 in maintenance. The settlement agreement also stated that if Kathleen became more employable due to education she received with Richard's financial assistance, this could be considered a ground for modification. With his financial assistance, Kathleen received a bachelor's degree in social work from the University of Kentucky in 1995.

On June 9, 2009, Kathleen filed a motion, pursuant to KRS 403.220, for attorney fees, expert fees, and costs incurred "incidental to the defense of [Richard's] Motion to modify maintenance." The family court heard testimony regarding Kathleen's motion for fees on June 22, 2009, along with testimony concerning Richard's motion to modify maintenance. Specifically, Kathleen

[2] At the time of Richard's motion to modify, none of these three conditions had occurred.

testified on direct examination as to the amount of billed and unbilled fees she had accumulated over the preceding year, and documentary evidence of these fees was filed at the conclusion of the hearing.

On June 30, 2009, the family court entered a lengthy order entitled "Findings of Fact & Conclusions of Law and Order," which addressed Richard's motion to modify maintenance. The court ultimately found that Richard failed to establish sufficient grounds to support modification and therefore denied his motion. At the conclusion of the order, the family court indicated that the ruling was final and appealable. No appeal was taken from this order. However, the order never referred to or addressed Kathleen's motion for fees, which had been argued in conjunction with the motion to modify. Both parties concede that Kathleen's motion for fees and costs was not addressed in the June 30, 2009, order.

On July 1, 2009, Kathleen's attorney sent the following e-mail to the judge's law clerk:

> Hi Matt, We got the opinion today. Thanks for getting that to us so quickly! I noticed that the Judge did not rule on attorney's fees and was just wondering if he needs that briefed or how he wants us to proceed in that part of the matter. Hope you are having a great day! Thanks, Anna

On July 8, 2009, the law clerk replied by e-mail as follows: "I am on this, give me a day or two."

More than a month later, on August 13, 2009, the judge's secretary called Richard's attorney and informed her about the *ex parte* communication

between Kathleen's attorney and the law clerk. The secretary also faxed Richard's attorney the e-mail messages detailed above as well as a copy of the notes written by chambers staff on the face of Kathleen's motion for fees. She stated that Kathleen's attorney had been instructed by the judge to file an attorney fee affidavit and that Richard's attorney would have a week to respond to the affidavit. The secretary further informed Richard's attorney that the judge would hear arguments regarding Kathleen's motion for fees and costs on September 4, 2009.

Thereafter, Richard filed an objection to the family court's consideration of Kathleen's motion for fees and costs. He argued that the family court was without jurisdiction to award fees and costs at this juncture and that an award of fees and costs was unwarranted. The family court heard arguments from counsel as scheduled on September 4, 2009, and on September 16, 2009, the court granted Kathleen's motion and awarded her $19,161.80 in attorney fees related to the defense of Richard's motion to modify maintenance. The family court found Richard's objection on "technical jurisdictional grounds" to be without merit. In so holding, the family court stated, "Quite simply, the June 9 motion was not ruled on until this date." This appeal by Richard follows.

On appeal, Richard presents three separate arguments supporting his argument that the family court's order granting Kathleen's motion for fees was in error. These are: 1) that the family court lacked jurisdiction to rule on Kathleen's motion for fees and costs; 2) that *ex parte* communication between Kathleen's

attorney and the family court's staff prejudiced Richard; and 3) that the award of fees and costs was unwarranted.

For his first argument, Richard contends that the family court erred as a matter of law in determining that it had jurisdiction to make an award of attorney fees and costs pursuant to KRS 403.220 more than ten days after entry of the order ruling on Richard's motion to modify maintenance. Richard points out that the family court did not reserve the issue of fees or pass the motion for additional evidence or consideration. He also argues that contact between Kathleen's attorney and the judge's chambers was insufficient to keep the matter within the family court's jurisdiction. "[J]urisdiction is generally only a question of law." *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004); *see also Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 13 (Ky. 2007). Therefore, we review this question *de novo*. Our review necessarily centers on whether the order ruling on Richard's motion for modification was final and appealable.

Richard cites to Kentucky Rules of Civil Procedure (CR) 52.02 and CR 59.05 as authority for his position. CR 52.02 provides as follows:

> Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

In conjunction with CR 52.02, CR 52.04 provides:

> A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

CR 59.05 states as follows:

> A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment.

Richard argues that the family court's order granting Kathleen's motion for fees and costs pursuant to KRS 403.220 was an alteration or amendment of the June 30, 2009, final order adjudicating his motion to modify maintenance. As such, Richard contends the family court lost jurisdiction to consider Kathleen's motion because she failed to file a motion under CR 52.02 or CR 59.05 within ten days of the June 30, 2009, order. On the other hand, Kathleen argues that the June 30th order was interlocutory and did not adjudicate all the rights of the parties because her motion for fees was still pending. Furthermore, she asserts that the "final and appealable" recitation at the conclusion of the order did not transform the interlocutory order into one that is final because the family court did not include the necessary finding that there was no just cause for delay pursuant to CR 54.02.

We agree with Richard that the order denying his motion to modify was final and that the family court had lost jurisdiction to enter the subsequent

order awarding fees because Kathleen failed to timely request additional findings of fact and a modification of the order pursuant to CR 52.02.

Both parties cite to unpublished decisions of this Court as authority for their respective positions. Richard cites to *Mobley v. Mobley*, 2009 WL 792523 (Ky. App. 2009) (2007-CA-000561-MR and 2007-CA-000596-MR), in which this Court held that a wife's failure to file a post-judgment motion for additional findings of fact pursuant to CR 52.04 was fatal to her motion for attorney fees incurred in the enforcement of a settlement agreement as her motion constituted an "issue essential" to the court's consideration of her motion to compel. Kathleen, in turn, cites to *Hazelwood v. Hazelwood*, 2008 WL 2152349 (Ky. App. 2008) (2007-CA-001598-ME), and *Moorhead v. Manning Equip. Co.*, 2003 WL 1342949 (Ky. App. 2003) (2001-CA-002061-MR), which address whether a claim for attorney fees was collateral or not. However, we need not address these unpublished decisions as there is adequate published case law addressing this issue.

Our first consideration is whether the order was inherently final or whether it was one that could be made final by operation of CR 54.02. We conclude that it was inherently final because the case addressed a single claim, that being Richard's motion to modify maintenance. In *Webster Co. Soil Conservation District v. Shelton*, 437 S.W.2d 934 (Ky. 1969), the former Court of Appeals addressed whether a judgment that reserved a party's future claim for attorney fees was sufficient to convert a single-claim case to a multiple-claim case for purposes

of CR 54.02. The *Shelton* court ultimately determined that the reservation in the judgment did not create a separate claim because the motion for attorney fees had not yet been filed; the trial court merely anticipated its future filing.

More recently, this Court discussed and distinguished *Shelton* in *Francis v. Crounse Corp.*, 98 S.W.3d 62 (Ky. App. 2002).

> A similar issue was addressed in *Webster County Soil Conservation Dist. v. Shelton*, Ky., 437 S.W.2d 934 (1969). In that case, the trial court entered an order adjudging that the plaintiffs were entitled to the assets of a soil conservation district upon its dissolution and ordering the proceeds returned to the plaintiffs in proportion to the respective amounts paid in by them. *Id*. at 935-36. The judgment also stated that all other matters, "'including plaintiffs' attorney fee,' were 'continued and reserved for the court's further consideration.'" *Id*. at 936. Following the entry of that judgment, the defendants appealed. Thereafter, the court entered a supplemental judgment awarding the plaintiffs' attorney a fee for his legal services. The attorney then appealed that order on the ground that the awarded fee was less than that called for in the contingent fee agreement he had with the plaintiffs.
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> The plaintiffs in *Shelton* then moved the appellate court to dismiss the defendants' appeal from the initial judgment on the ground that it was not a final judgment but was interlocutory since the judgment reserved the question of attorney fees. *Id*. at 936. The court framed the issue as "whether this case is a 'multiple claims' action within the meaning of CR 54.02." *Id*. The court first held that the circuit court cannot "reserve" a question that was not before it. *Id*. The court noted that the plaintiffs' attorney did not become a party to the litigation until after the initial judgment had been entered. *Id*. at 937. Thus, the court denied the plaintiffs' motion to dismiss the defendants' initial appeal on the ground that the case was not a "multiple claims" action within the meaning of CR 54.02. *Id*.

> The facts in the case *sub judice* are distinguishable from the facts in *Shelton*. In *Shelton*, the attorney fees claim did not arise until after the initial judgment and the defendants' appeal therefrom. *Id*. at 937. In this case, however, Francis's claim for attorney fees was a part of his KRS Chapter 344 claim as set forth in his complaint. Furthermore, KRS 344.450 required the final judgment to include a reasonable fee for Francis's attorney.

Francis, 98 S.W.3d at 66. The *Francis* Court went on to state:

> We conclude that the determination of whether the judgment is final when the amount of the attorney fees has not been resolved should rest on whether attorney fees were part of the claim or whether they were collateral to the merits of the action as was the case in *Shelton*. If attorney fees were part of Francis's civil rights violation claim, then the judgment was not final and appealable under CR 54.02(1). *See Hale*, 528 S.W.2d at 722.
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> In the case *sub judice*, the claim for attorney fees was pursuant to statute and was pled by Francis in his complaint. Further, the statute required that the judgment include a reasonable attorney fee. KRS 344.450. We conclude that Francis's KRS Chapter 344 claim for civil rights violations and for attorney fees constituted only a single claim for purposes of CR 54.01 and CR 54.02. We do not see the attorney fees claim as collateral to the civil rights violation claim.

Francis, 98 S.W.3d at 67 (footnotes omitted). Unlike the present case, *Francis* dealt with statutorily mandated attorney fees.

In the present matter, we hold that Kathleen's motion for attorney fees and costs was collateral to the family court's ruling on Richard's motion to modify.[3] The only "claim" before the family court was Richard's motion to

[3] In *Hazelwood*, *supra*, another panel of this Court held that the wife's claim for attorney fees was not collateral, but was part of her underlying claim. However, the facts in that unpublished

modify maintenance. Kathleen's motion for fees did not constitute a separate claim or right so as to create a multi-claim case, to which CR 54.02 might apply. Rather, the issue of an award of attorney fees was left to the sound discretion of the family court. *See Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519-20 (Ky. 2001).

Because the order was final, a ten-day window existed for the family court to modify or Kathleen to move for modification of the order ruling on Richard's motion to include findings and a ruling on her motion for attorney fees. While Kathleen's motion did not constitute a separate claim, we hold that it was an issue essential to the "judgment," as it related to the subject matter before the family court (*i.e.*, Richard's motion to modify maintenance). Once the ten days permitted by CR 52.02 or CR 59.05 had expired, the family court lost its authority to amend its initial ruling. While it does appear that the family court through inadvertence or mistake failed to rule on Kathleen's motion in the initial order, there was only a short window during which the family court could rectify its error and rule on the pending motion. Kathleen did not officially move the family court for a ruling on her motion by filing a proper post-judgment motion. Communication, *ex parte* or not, between Kathleen's counsel and the judge's law clerk was insufficient to toll the time for amendment. Accordingly, the entry of the September 16, 2009, order awarding Kathleen attorney fees constitutes reversible error.

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decision differ from those in the present case as the wife in *Hazelwood* filed both the motion for modification of child support and the motion for attorney fees.

Because our decision on the jurisdictional argument is determinative of the case as a whole, we need not address Richard's remaining two arguments.

For the foregoing reasons, the September 16, 2009, order of the Fayette Circuit Court, Family Division, is reversed.

ALL CONCUR.

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