

DIVISION I

CA07-273

November 14, 2007

LINDA BAIRD

APPELLANT

APPEAL FROM THE JEFFERSON  
COUNTY CIRCUIT COURT  
[NO. CV-2004-365-1]

V.

HON. BERLIN C. JONES,  
JUDGE

RAYMOND CULP

APPELLEE

AFFIRMED

Appellant Linda Baird brings this one-brief appeal from a January 12, 2007 order of the Jefferson County Circuit Court finding that she failed to prove that she sustained any damages arising from her tort complaint against appellee Raymond Culp. The January 12, 2007 order was issued in accordance with this court's opinion dated April 12, 2006,<sup>1</sup> which reversed and remanded the trial court's initial order due to the failure of the trial court to limit its focus to the issue of what, if any, damages appellant sustained. Now, on appeal, appellant alleges that the trial court erred in failing to award her any damages after default judgment was entered against appellee. We affirm.

The facts, as set forth in this court's previous opinion, are as follows. Appellant met appellee in February 2001. They married in July 2001 only to separate in December 2002.

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<sup>1</sup>See *Baird v. Culp*, CA 05-1086, slip op. at \_\_ (Ark. App. Apr. 12, 2006).

In June or July 2003, the parties divorced. Around the same time as their divorce, appellee began harassing and stalking appellant. Appellee threatened to kill appellant and made several menacing phone calls to her. As a result, appellant filed numerous complaints with the Pine Bluff Police Department. On June 23, 2003, appellant was granted an ex parte temporary order of protection. The existence of the order of protection failed to deter appellee, and on July 11, 2003, the State filed stalking and protection-order-violation charges against appellee. That same day, the Jefferson County Circuit Court entered another order directing appellee to have no contact with appellant. Despite that order, appellee continued to harass and stalk appellant.

On May 18, 2004, appellant filed a complaint in tort against appellee, alleging that he had committed an assault against her when he threatened to kill her. She said that appellee intended to cause her apprehension and that in fact she was put in apprehension of physical harm. She also alleged that appellee had committed the tort of outrage. Appellant asked for compensatory damages in the amount of \$50,000 and punitive damages in the amount of \$100,000. She also asked for a permanent injunction and restraining order.

Appellee did not file an answer, and the trial court held a hearing on September 15, 2004. Appellee did not appear at the hearing. At the beginning of the hearing, the trial court announced, "We are here primarily on proof of damages and that the [appellee] is in default." Appellant testified that since June 2003 appellee had threatened her life and would often call her fifty times a day. She stated that appellee would call her at home and at work. During her testimony, appellant described an incident where appellee managed to obtain her pajama

top, called and directed her to look on her porch, and when she did, she found her pajama top. She also described an incident where she had gone to meet a repairman at her former home, and while she was there with the repairman, appellee kicked in the door.

Appellant testified that, as a result of appellee's behavior, she changed residences. She said that, despite efforts to ensure that appellee could not locate her, appellee managed to locate her new home and also obtained her new phone number. Appellant testified that she works full time for Delta Counseling and also works under contract as a clinical therapist for Pine Bluff Psychological Associates. She explained that appellee's behavior caused her to suffer a financial hardship. She testified that, because she did not feel safe in her home, she had a security system installed and had stayed in a hotel. Appellant also testified that, as a result of appellee's behavior, she began to shake constantly and had a hard time focusing. She also stated that she spent a lot of time in bed. Appellant sought treatment from her family physician and a "residential" psychiatrist and said that she was prescribed medication.

Appellant explained that she was seeking \$50,000 in compensatory damages because, "My whole life turned upside down. I was scared to death and I don't really scare that easily. I had to take on different jobs. I had to charge most of my way through the summer, because I did not have any money." She also believed that appellee's behavior justified an award of punitive damages.

Pam Cooney, testing administrator at Pine Bluff Psychological Associates, testified that, prior to the summer of 2003, appellant was a hard worker, but during that summer

appellant began making mistakes and was unable to work. Ms. Cooney said that appellant worked on a part-time basis and was assigned tasks that did not require a lot of concentration. She stated that, when working full-time, appellant would earn \$800 to \$900 per week. At the conclusion of the hearing, the trial court took the matter under advisement.

On September 23, 2004, appellee filed an answer to appellant's complaint along with a motion to set aside default judgment. Appellee's answer was untimely; however, at that time, default judgment had yet to be entered. That same day, appellant's counsel, Maxie G. Kizer, filed a motion for the trial judge to recuse.<sup>2</sup> On October 7, 2004, the trial court entered an order denying the recusal motion, but an amended recusal motion was filed on October 19, 2004.<sup>3</sup> Subsequently, attorney F. Wilson Bynum, Jr. was hired by appellant to pursue the recusal matter. Mr. Bynum later filed a motion for the trial court to recuse from hearing the motion for recusal. In an order entered April 12, 2005, that was prepared by Mr. Bynum, the trial court allowed appellant to withdraw her motion for the trial court to recuse and the motion for the court to recuse from hearing the motion for recusal.

On June 24, 2005, the trial court entered an order addressing the matters raised in appellant's complaint. In the first paragraph of the order the trial court stated, "Defendant

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<sup>2</sup>Attorney Kizer alleged that, based upon comments the trial court had made to the district's prosecuting attorney regarding Kizer's representation of appellant, the trial court could not be fair and impartial. In addition to his private practice, attorney Kizer also worked as a part-time prosecutor.

<sup>3</sup>In the amended motion, attorney Kizer alleged that, in an unrelated matter, he had been granted summary judgment in a case against the court's case coordinator, and due to the court's close working relationship with the case coordinator, the court should recuse to avoid a conflict of interest or the appearance of a conflict.

declared to be in default for failing to answer in a timely manner after proper service. The matter proceeded to trial on damages only.” However, the trial court then addressed the merits of the liability claims and entered an order that appeared to decide the case on the issue of liability. On appeal this court found that appellant was only required to present proof of her damages and that the trial court erred when it looked to the merits of appellant’s liability claim instead of limiting its focus to the issue of damages. In an opinion dated April 12, 2006, we reversed the trial court’s decision and remanded the matter back to the trial court for an order consistent with the opinion. Based upon our review of the record before us, it appears that no additional hearing was held subsequent to this court’s initial opinion, and the only additional order from the trial court was filed on January 12, 2007. Appellant filed a timely notice of appeal, and this appeal followed.

When a civil case is tried by a circuit court sitting without a jury, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but whether the findings are clearly erroneous, or clearly against the preponderance of the evidence. *Tygart v. Kohler*, 82 Ark. App. 380, 109 S.W.3d 147 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id.*

On appeal appellant argues that the trial court erred in not awarding her any damages after default judgment was entered against appellee. Our supreme court has stated that a default judgment establishes liability but not the extent of damages. *See B & F Engineering, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). Proof is still required to establish

the amount of damages unless a verified amount has been submitted to the court. *Id.*; see also *Byrd v. Dark*, 322 Ark. 640, 911 S.W.2d 572 (1995).

Appellant abstracts a fair amount of the testimony from the original hearing before the trial court, including her daughter's observation that appellant was "completely distraught," shaking, staying in bed, and unable to eat or work. There was also testimony from appellant's employer, Pam Cooney, that, prior to appellee's harassing and stalking behavior, appellant had been a hard worker, but afterward, she was in no condition to accomplish her work responsibilities. Appellant contends that she proved that she suffered mental anguish, she lost wages of \$800 - \$900 per week, and had to obtain medical treatment; accordingly, she was entitled to judgment against appellee in *some* reasonable amount, which she deemed to be \$50,000.

She cites *National Bank of Commerce v. McNeill Trucking*, 309 Ark. 80, 828 S.W.2d 584 (1992), for the prospect that, under Rule 59 of the Arkansas Rules of Civil Procedure, the inadequacy of a recovery is a ground for a new trial even in the absence of other error. Likewise, in the same case, our supreme court held that punitive damages are only justified when a defendant acts wantonly or with such conscious indifference to the consequences of his acts that malice may be inferred. *Id.* She asserts that mental anguish and pain and suffering are elements of damage for both assault and outrage claims and that she has clearly proven that she endured just that. Appellant also maintains that there is no other explanation of appellee's behavior than that he acted "wantonly." Aside from the evidence she presented regarding her lost earnings, she asserts that she has proven that she suffered insult, indignity,

humiliation, and was required to endure conduct by appellee that was so outrageous that society has deemed that conduct to be illegal and punishable by imprisonment. She maintains that she was in mortal fear for her safety, was unable to sleep or eat, had nightmares, and literally hid in her home hoping that appellee would not come and do her harm.

The trial court's order of January 12, 2007, sets forth many of appellant's allegations in its findings, but also states that she did not submit any documents, testimony, exhibits, or anything to verify what her losses or expenses were, nor did she submit testimony or exhibits to verify any lost days, time, or contracts related to her work. She also failed to submit any medical statements, bills, invoices, reports, or receipts relating to any of the services procured or for damages caused when appellee allegedly kicked in her door. While it is true that the trial court did not specifically address those less objective damages that might have been suffered by appellant and focused more on the objective, out-of-pocket expenses, we hold that the trial court simply did not believe that appellant's suffering and anguish rose to such a level that an award of damages was appropriate. As the finder of fact, it is within the trial court's province to believe or disbelieve the testimony of any witness. *Taylor v. George*, 92 Ark. App. 264, 212 S.W.3d 17 (2005).

In the trial court's original order from June 24, 2005, which was referred to in this court's previous opinion in the case, the issue of damages was, at least to some extent, addressed. In summary, the trial court found, as related to damages, with respect to the various counts in the complaint:

1. Count One-Tort of Assault - [Appellant] failed to present credible, persuasive evidence that [appellee's] conduct was in any way calculated to cause [appellant] to be in fear for her bodily safety. [Appellant] failed to present any medical evidence that established any relationships between any of [appellee's] conduct and any alleged trauma or distress experienced by [appellant]. Moreover, the vast majority of the evidence presented by [appellant], demonstrated the contrary, i.e., [appellee] was in love with [appellant], wanted to be with her, wanted to provide and protect her. [Appellant] failed to establish any of [appellee's] conduct with any injury, illness, pain or suffering on the part of [appellant]. That [appellant] failed to establish that [appellee's] conduct would cause a reasonable person to be in fear of their bodily safety.

2. Count Two-Tort of Outrage - [Appellant] failed to present evidence that [appellee's] conduct was so outrageous that it would shock the conscience of a reasonable person or was beyond the comprehension of members of society.

3. Count Three-Injunction - [Appellant] presented much evidence that [appellee] has interfered in her life to the extent [appellant] desires assistance from the law enforcement, judicial authorities or the other agencies to correct the problem or punish [appellant] for his conduct. The criminal action is pending and a temporary restraining order is presently in effect, with a court date to make the same permanent. This could result in [appellee] being incarcerated, thus the petition is premature and is hereby denied.

4. Count Four-Punitive Damages - [Appellant] failed to succeed on her claim for compensatory damages. The Court further finds [appellant] has not presented any credible evidence that rises to the level that [appellee's] conduct was such that [appellee] should be punished for engaging in said conduct, nor that [appellee] should be so punished as to cause [appellee] and others similarly situated, to not engage in same or similar conduct against [appellant] or other members of society similarly situated.

The problem appears to be the trial court's specific comments regarding the denial of appellant's claims of assault and outrage because a default had already been declared. Although there was a default judgment, which settles the issue of liability, appellant failed to meet her burden of proof with respect to proving damages. *See Baker v. Rogers*, 368 Ark.



134, \_\_ S.W. 3d \_\_ (2006). We hold that the findings of the trial court are neither clearly erroneous nor clearly against the preponderance of the evidence. Accordingly, we affirm.

Affirmed.

BIRD and HEFFLEY, JJ., agree.