

RENDERED: January 16, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1497-MR

PAUL J. WEBER

APPELLANT

V. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 90-CI-0162

ANDREA J. WEBER

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, COMBS and GARDNER, Judges.

GARDNER, JUDGE: Paul Weber (Paul) appeals from an order of the Clark Circuit Court compelling him to comply with the terms of a prior decree of dissolution. We affirm.

Paul and Andrea Weber (Andrea) were married on October 1, 1977, and separated in January of 1990. One child was born of the marriage. On September 1, 1993, a decree of dissolution was entered in Clark Circuit Court. The decree terminated the marriage, and addressed related issues including custody, child support, and the disposition of marital assets. Paul appealed to this Court, disputing the valuation and division of marital property and the amount of child support awarded. This Court

affirmed the judgment by opinion rendered June 9, 1995. Paul's petition for rehearing was denied on August 25, 1995, and a motion for discretionary review was denied by the Kentucky Supreme Court on March 13, 1996.

Following the denial of Paul's motion before the Kentucky Supreme Court, Andrea moved the trial court for an order enforcing the terms of the September 1, 1993 decree of dissolution. Upon hearing proof on the motion, the court entered an order on April 24, 1996 enforcing disputed and/or unresolved portions of the original decree. The order held as follows:

1) Child Support: The 1993 decree ordered Paul to pay child support in the amount of \$344.00 per month effective August 11, 1991. Paul actually paid \$269.00 per month, leaving a deficiency of \$4,200. The trial court ordered payment of that deficiency along with interest at the rate of 12% per annum on each payment as it became due.

2) Promissory Note: The 1993 decree ordered Paul to deliver to Andrea a promissory note in the amount of \$27,776.00, payable at 10% interest and secured by a mortgage on a parcel of real property. The April 24, 1996 order simply reiterated this obligation and calculated the interest due in accordance with the terms of the original decree.

3) IRAs and Securities: The 1993 decree ordered Paul to deliver to Andrea IRAs and securities then valued at \$39,059.00. Paul attempted to transfer those assets in 1996. However, their value had declined to \$33,981.77. The April 24, 1996 order reiterated

that Andrea was entitled to \$39,059.00 plus interest at the rate of 12% per annum.

4) Damages for Stay on Collection of Judgment: Pursuant to KRS 26A.300(2), the April 24, 1996 order awarded damages of \$6,683.60, representing 10% of the promissory note and securities awarded under the decree. Such damages may be awarded where a second unsuccessful appeal is taken which stays the collection of the original award.

5) Interest: The trial court ordered that interest was payable from the date of the commissioner's findings on August 19, 1991.

6) Letter of Credit: Prior to the entry of the order now on appeal, Paul caused a letter of credit to be issued in lieu of a supersedeas bond. The April 24, 1996 order caused the proceeds of that letter of credit to be paid to Andrea in partial satisfaction of all amounts awarded under the decree.

Paul now appeals from the entry of this order. He argues that the court erred in awarding interest on the unpaid child support and property award from the date of the commissioner's findings rather than the date of the decree. He also maintains that the court committed reversible error in awarding 10% damages under KRS 26A.300(2) when no stay or supersedeas bond had been executed and no second appeal had been taken. We have closely examined these arguments and affirm the trial court.

On the question of whether the court erred in awarding interest from the date of the commissioner's findings rather than the date of the decree, we find no error. As a general rule,

prejudgment interest may be awarded where justified by the facts of a particular case. State Farm Mutual Automobile Ins. Co. v. Reeder, Ky., 763 S.W.2d 116 (1988) citing 22 Am.Jur.2d, Damages §179. In addressing the question of prejudgment interest, the distinction is often drawn between liquidated and unliquidated damages. The Kentucky Supreme Court addressed this distinction in Nucor Corp. v. General Electric Co., Ky., 812 S.W.2d 136 (1991), wherein it stated:

When the damages are 'liquidated,' prejudgment interest follows as a matter of course. Precisely when the amount involved qualifies as 'liquidated' is not always clear, but in general 'liquidated' means '[m]ade certain or fixed by agreement of parties or by operation of law.' Black's Law Dictionary 930 (6th ed. 1990). Common examples are a bill or note past due, an amount due on an open account, or an unpaid fixed contract price. In the present case, all parties agree the amount due General Electric for its property damage qualifies as 'unliquidated,' defined in Black's as '[d]amages which have not been determined or calculated, . . . not yet reduced to a certainty in respect to amount.' Black's supra at 1537.

Nucor, at 141.

While it appears that prejudgment interest follows as a matter of course from an award of liquidated damages, the question is less clear when addressing unliquidated damages. The case law does reveal a general proposition, though, that an award of prejudgment interest on unliquidated damages is left to the discretion of the trial court. Middleton v. Middleton, 287 Ky. 1, 152 S.W.2d 266, 268 (1941) (stating that it has long been held in

Kentucky that "interest runs as a matter of right on a liquidated demand, and, in the case of an unliquidated claim, the allowance of interest rests in the discretion of the jury or the court trying the case."); Brown v. Fulton, Hubbard & Hubbard, Ky. App., 817 S.W.2d 899 (1991); City of Henderson Police & Fireman Pension Board v. Riley, Ky. App., 674 S.W.2d 27 (1984).

Thus, to prevail on the instant appeal, Paul must show by credible evidence that the lower court abused this discretion in awarding prejudgment interest. We cannot conclude that he has met this burden. It is the duty of this Court to search for errors of law, Old Republic Insurance Co. v. Ashley, Ky. App., 722 S.W.2d 55 (1986), and to recognize that the trial court is presumptively correct in its rulings. City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964) (overruled on other grounds Nolan v. Spears, Ky., 432 S.W.2d 425 (1968)). Having closely examined the facts and the law on this issue, we find no error.

Paul next maintains that the court committed reversible error in awarding 10% damages under KRS 26A.300(2) when no stay or supersedeas bond has been executed and no second appeal had been taken. Citing Ford v. Ford, Ky., 623 S.W.2d 903 (1981), he argues that the Supreme Court of Kentucky has specifically held that the division of property in a divorce action does not constitute a judgment for purposes of imposing the 10% penalty. We are not persuaded by this argument.

Contrary to Paul's assertion, Ford, does not stand for the proposition that the division of property in a divorce action

does not constitute a judgment for purposes of awarding 10% damages under KRS 26A.300(2).¹ Rather, Ford merely held that the award must be a sum certain in order to calculate the 10% penalty. "Logic dictates that in order for the penalty to apply, there must be judgment in an amount definite, certain, and readily ascertainable. Otherwise, there is no figure from which to calculate the ten percent (10%) penalty." Ford v. Ford, 623 S.W.2d at 904, citing Kelley v. Kelley, 183 Ky. 576, 209 S.W. 335 (1919). In the matter at bar, the property award was fixed and readily ascertainable, and Ford cannot serve to bar the application of KRS 26A.300(2).

Paul also maintains that he has not prosecuted a second appeal as required by KRS 26A.300(2), and that the 10% penalty therefore is not applicable. We disagree. The filing of a motion for discretionary review is sufficient to support application of KRS 26A.300(2). Wells v. Southern Railway Co., Ky., 633 S.W.2d 406 (1982). We find no basis for concluding that the facts of the present case bar application of the 10% penalty.

For the foregoing reasons, the order of the Clark Circuit Court is affirmed.

¹KRS 26A.300(2) provides that:

When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure pending any other appeal, damages of ten percent (10%) on the amount stayed shall be imposed against the appellant in the event the judgment is affirmed or the appeal is dismissed after having been docketed in an appellate court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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