RENDERED: JUNE 15, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001481-MR

EDWARD MUSSELMAN — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 98-CI-000745

DONALD ALVEY — APPELLEE

OPINION AND ORDER REVERSING AND REMANDING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; BARBER and COMBS, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment entered by the Jefferson Circuit Court in a defamation action. For the reasons stated hereafter, we are constrained to reverse and remand the court's judgment with directions to dismiss appellee's complaint.

On June 2, 1999, the Jefferson Circuit Court entered a final judgment in this action awarding appellee compensatory damages in a defamation action. On June 14 appellant, the defendant below, filed a notice of appeal. He perfected that appeal by filing a brief on November 22, 1999. Thereafter, an order was entered permitting the Kentucky Press Association to file an amicus curiae brief in support of appellant's position.

Subsequently, appellee untimely tendered for filing a brief which was returned to him by the clerk. Based upon this fact, appellant filed a motion seeking the imposition of sanctions pursuant to CR 76.12(8)(c) and the reversal of the underlying judgment. This motion was ordered to be passed to the panel assigned to hear the appeal on the merits. More than two months later, appellee filed a motion seeking the enlargement of time for filing his brief. This motion was also passed to the merits panel for decision. On November 6, 2000, the merits panel entered an order denying appellee's motion for enlargement of time for filing his brief and granting appellant's CR 76.12(8)(c) motion for relief. The order further indicated that the case would proceed to a decision without an oral argument. Noteworthy is the fact that the order did not specify the exact CR 76.12(8)(c) relief which would be granted, presumably because the nature of such relief would be addressed in the final decision.

With one judge dissenting, a final opinion was rendered on December 8. Although that opinion addressed the merits of the appeal, it did not impose the CR 76.12(8)(c) sanctions promised in the November 6 order. Appellant therefore filed a timely petition for rehearing, bringing to the court's attention the inconsistencies between the November 6 order and the December 8 opinion. By order and amended order entered February 14 and 15, 2001, this panel granted appellant's petition for rehearing, ordered the December 8 opinion withdrawn, and indicated that a new opinion would be issued.

It is significant that appellee failed to respond to appellant's original motion seeking CR 76.12(8)(c) relief.

Instead, over two months later, after the certified record was received and the appeal was submitted, appellee for the first time asked for additional time in which to file a brief. Moreover, although he was entitled to do so, appellee failed to file a response to appellant's petition for rehearing.

Given the fact that appellee filed no response to appellant's CR 76.12(8)(c) motion, the fact that appellee made no effort to ask for an enlargement of time in which to file a brief until after this appeal was submitted, and the fact that appellee filed no response to appellant's petition for rehearing which partially was based on the inconsistencies between the November 6 order and the December 8 opinion, we conclude that this appeal should be disposed of consistent with the dictates of CR 76.12(8)(c) and our November 6 order granting such relief. For the reasons stated, and due to appellee's failure to timely file a brief herein, we elect pursuant to CR 76.12(8)(c) to accept appellant's statement of the facts and issues as correct and, because appellant's brief reasonably appears to warrant such action, to reverse the judgment from which this appeal was taken.

For the reasons stated, the court's judgment of May 25, 1999, which was entered on June 2, 1999, is hereby ORDERED reversed and remanded with directions on remand to dismiss appellee's underlying complaint.

BARBER, J., CONCURS.

COMBS, J., DISSENTS BY SEPARATE OPINION.

ENTERED: June 15, 2001

/s/ Paul D. Gudgel
CHIEF JUDGE, COURT OF APPEALS

COMBS, JUDGE, DISSENTING: I respectfully but strenuously dissent in this case. The majority opinion correctly notes that Alvey failed to file a proper appellate brief after several attempts to do so, that oral argument was canceled, and that we granted appellant's CR 76.12(8)(c) motion for relief on November 6, 2000. In granting that motion, which sought imposition of sanctions and reversal of the underlying judgment, we were silent as to what specific relief would be forthcoming and proceeded to decide the merits of the case based on the record, the appellant's brief, and the *amicus curiae* brief — without the assistance of the stricken appellee's brief. There was no guarantee, promise, or representation by the panel through its order that appellant would automatically prevail. It is significant that we passed the case for a consideration of the merits rather than entering an order of dismissal concurrently with the November 6, 2000, order.

Although the majority opinion recognizes and recites that "[n]oteworthy is the fact that the order did not specify the exact CR 76.12(8)(c) relief which would be granted," it later recites "inconsistencies" between the order of November 6, 2000, and the final opinion rendered on December 8, 2000. There is no inconsistency because there was no assurance — either implied or procedurally required — that appellant would prevail after we conscientiously reviewed this case on the record and on its

merits — regardless of Alvey's obvious dereliction in failing to articulate his own position on appeal.

In the Petition for Rehearing, appellant relies on CR 76.12(8)(c) as if mandatorily compelling a reversal of the decision below solely because of appellee's failure to file a proper appellate brief. Despite the four precedents cited in appellee's persuasive petition for rehearing, I do not read CR 76.12(8)(c) as compelling an appellate court to enter what amounts to a default judgment in favor of the only party filing a brief on appeal. Certainly the rule permits — and perhaps even invites — such an extreme result. However, it does not require or dictate that we ignore the findings and conclusions of the trial court, disregard a jury verdict, and/or punish an appellee by denying him relief that may have been properly granted in the court below — solely because of his failure to tender an appropriate appellate brief.

It is a settled principle that default judgments are not favored creatures in the law. Appellant is essentially demanding that we enter just such a judgment — even if it would mean that we shackle ourselves with blinders as to the proceedings below. While the invitation to be punitive in this case is a tempting one — and surely one that would have resulted in far less of a struggle for the panel to review and study the record below without the assistance of a second brief, we nonetheless undertook that effort in the overriding interest of justice.

When this panel granted Musselman's CR 76.12(8)(c) motion on November 6, 2000, it did not abdicate its duty to

examine the record of this case by electing to end the appeal at that point. We agreed that the motion was well-taken and that we would certainly entertain the three avenues of relief available to us pursuant to that rule. Appellant will note that we did not simultaneously enter an order dismissing the appeal.

The result in this case overturning a jury verdict is a lamentable (and unnecessary) elevation of procedure over substance. The heart of this appeal has been forgotten: whether the trial court and the jury erred in determining that Alvey was a private figure for purposes of application of the appropriate standards of the law of defamation. The original opinion in this case concluded that there was no substantive error as to the defamation case. I believe that it reached the correct result. As to the issue of damages, I am persuaded by Musselman's argument in his Petition for Rehearing that Alvey failed to establish with reasonable certainty the fact of his loss of income as well as the amount. I would, therefore, remand this case to the trial court for a determination of this troublesome issue of the damages suffered by Alvey — but on that narrow issue alone.

However, as to the defamation issue, I submit that the "inconsistency" urged by appellant between the order of November 6, 2000, and the opinion of December 8, 2000, is a procedural red-herring that has regrettably been adopted by the new majority opinion written in response to the Petition for Rehearing.

BRIEF FOR APPELLANT:

Robert L. Heleringer
Louisville, KY

AMICUS CURIAE BRIEF FOR
KENTUCKY PRESS ASSOCIATION:

Jon L. Fleischaker
R. Kenyon Meyer
Louisville, KY