RENDERED: SEPTEMBER 14, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001007-MR

DALLAS SHACKELFORD — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JUDGE
ACTION NO. 91-CI-00494

HENRIETTA AUSMUS, F/K/A
HENRIETTA A. PARTIN; AND
TILMON PARTIN — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Dallas Shackelford has appealed from an order entered by the Bell Circuit Court on March 2, 2000, which set aside an order of garnishment dated January 20, 1998, in favor of Shackelford and released funds to appellee Henrietta Ausmus. Having concluded that the trial court's findings are not clearly erroneous and that its order is correct as a matter of law, we affirm.

This is the third time this case has been before this Court. Not surprisingly, it has a long and convoluted history. On February 16, 1993, a judgment for $35,522.55, with interest at the rate of 12% per annum from April 25, 1990, until paid, was rendered in the Bell Circuit Court reflecting a jury award in favor of plaintiffs, Henrietta Ausmus (formerly Partin) and Tilmon Partin, and against defendants, Dallas Shackelford and Dallas Shackelford II. In the same proceeding, Shackelford, individually, filed a counter-claim against Tilmon Partin, individually. Neither Ausmus nor Shackelford II were parties to this counterclaim. A judgment for $122,700.00, with interest at the rate of 12% per annum until paid, was entered in the Bell Circuit Court on February 23, 1993, in favor of Shackelford and against Partin.

The Shackelfords appealed the two February 1993 judgments to this Court.[1] In an Opinion Affirming, this Court stated as follows:

> The Florida judgment being enforced in Kentucky is by two plaintiffs who have a joint judgment, against two defendants who have joint and severable liability. The judgment on the counterclaim is by one defendant to the original action against one original plaintiff. Since we do not have identical parties to the judgments, how would we determine how much of the original Florida judgment belongs to Henrietta and how much of the liability of the Florida judgment belongs to Dallas Carl Shackelford, II? If we allow the set-off, then how much does Dallas Carl Shackelford, II, owe his father, Dallas

[1]1993-CA-001026-MR, not-to-be-published opinion rendered on June 17, 1994.

> Shackelford? Obviously, the Florida court did not answer these questions. It wasn't asked to. It is just as obvious that Kentucky cannot retry the Florida issues to answer these questions. Although the cases of Bryant Bros. v. Wilson, 253 Ky. 578, 69 S.W.2d 1020 (1934) and Marcum v. Wilhoit, 290 Ky. 532, 162 S.W.2d 10 (1942) would support appellants' request for a set-off if the appellants could show how much of the Florida judgment would go to Tilmon Partin, we don't have those figures. Without these answers, we have a situation much like the Court in Daniel v. Wilhoit, 289 Ky. 79, 158 S.W.2d 153 (1942) wherein the Court considered a set-off demand by one defendant. The Court ruled:
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> > A demand, to be the subject matter of set-off, must be mutual between all the parties to the action; that is, the claim must be due to and from the same parties and in the same capacity.
>
> Id. at 155.
>
> A few lines down, the Court explained:
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> > A joint debt cannot be set-off against a separate demand, nor a separate demand against a joint one.
>
> Id.[2]

Ausmus made numerous attempts at executing on property owned by Shackelford; and Shackelford made numerous attempts at executing on property owned by Partin. On December 18, 1997, the Bell Circuit Court entered a judgment and order of sale on Ausmus' garnishment of 6,666 shares of common stock of Cumberland Mountain Bankshares, Inc., held in escrow by the garnishee,

[2]This Court also held, on an issue that is irrelevant to this appeal, that the Florida judgment had not been released and satisfied.

Middlesboro Federal Bank, FSB, "that was specifically pledged on behalf of the defendant, Dallas Shackelford, as collateral security in satisfaction of the plaintiffs' judgment." The circuit court further ordered that the Master Commissioner be "directed to sell, according to the law, the 6,666 shares of common stock of Cumberland Mountain Bankshares, Inc. and to thereafter pay the sale proceeds to the Clerk of the Bell Circuit Court for distribution pursuant to further orders of this Court."

On December 23, 1997, the Master Commissioner filed a notice of sale, which gave notice that the common stock would be offered for sale at public auction on January 23, 1998. On January 20, 1998, Shackelford filed three separate orders of garnishment on his judgment against Tilmon Partin for $195,093.00, naming as garnishees the Master Commissioner, the Bell Circuit Court Clerk, and Ausmus' attorney.

The Bell Circuit Court did not take any further action until it entered an order on January 27, 1998, "setting proof schedules and directing deposit of funds." Specifically, the circuit court noted that Shackelford had "paid into Court the sum of $68,526.80 and by reason thereof, the Court . . . cancelled the January 23, 1998 scheduled sale of the bank stock in question." The Court further noted that "following a hearing held on January 26, 1998,"[3] it ordered (1) Shackelford to pay the Master Commissioner's sale costs; (2) "[b]y agreement of all the

[3]The record on appeal does not include any motion for a hearing or any record of the hearing.

parties, the Clerk shall forthwith deposit the $68,526.80 at Middlesboro Federal Bank, FSB in a six month certificate to be held in the name of the Clerk and pending further Orders of the Court"; and (3) set a briefing schedule on "the propriety of a credit or setoff in favor of . . . Shackelford, as against any interest of the plaintiff, Tillman [sic] Partin, in the judgment and proceeds paid into Court." The circuit court entered an amended order on January 29, 1998, which also ordered that the parties could file briefs concerning Shackelford's garnishment against the funds held by the Bell Circuit Court Clerk.

On May 6, 1998, the circuit court entered a final judgment and held that this Court's Opinion rendered in 1994 which addressed the issue of set-off had become the law of the case and Shackelford was not entitled to a set-off. The circuit court's judgment, however, failed to specifically discuss the enforceability of Shackelford's garnishment against the funds held by the Clerk. In its judgment, the circuit court stated:

> The issue before this Court now, Is he entitle [sic] to a set-off based on his Judgment against the Plaintiff Partin on a Counter-Claim?
>
> . . .
>
> The issues attempted to be raised regarding a set-off have been clearly discussed, considered and ruled on by the Court of Appeals in an appeal from Bell Circuit Court. This ruling became final.
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> The ruling in that appeal becomes the "LAW OF THE CASE" and disposes of the issue before this Court [emphasis original].

Shackelford filed a motion to alter, amend or vacate the judgment. He argued that the issue presented to the circuit court was not whether set-off was allowable, but "the issue of the legality, validity and enforceability of [the] Garnishments against Tilmon Partin's funds which were in the possession of the Clerk of this Court." He maintained that garnishment and set-off were separate and distinct legal theories and that the circuit court erred in failing to address garnishment. Shackelford argued:

> [That he stood] in the same position with the same rights as any other person or party who may hold a judgment against Tilmon Partin. It does not matter in whose hands the Tilmon Partin funds were held. Mr. Shackelford has the right under the Kentucky Revised Statutes and Civil Rules to enforce his Judgment and proceed by Garnishment or Execution against funds or property belonging to Tilmon Partin.

The circuit court denied the motion and Shackelford appealed that decision to this Court.

On December 30, 1999, this Court rendered an Opinion which remanded the case to the Bell Circuit Court "for consideration of Shackelford's assertion that he is entitled to garnishment." This Court stated in part:

> The corpus of Shackelford's argument is that garnishment and set-off [are] separate and distinct legal theories. We must agree. Garnishment is a creation of the legislature, and its application is expressly governed [by] the civil rules . . . .
>
> Conversely, the term "set-off" does not have a statutory origin, and is equitable in nature and subject to the discretion of the trial court . . . [citations omitted].

> Though the case law in this jurisdiction comparing garnishment and set-off is sparse if not non-existent, it is clear that garnishment is a statutory mechanism facilitating the collection of judgments, while a set-off is a court-created term of art allowing for the equitable resolution of opposing judgments. In the matter at bar, while set-off is inappropriate (for the reasons addressed in our prior opinion), the applicability of garnishment, if at all, was raised by Shackelford but not addressed by the circuit court. We do not believe that our opinion[4] addressing set-off may be relied upon as a basis for summarily disposing of Shackelford's motion for garnishment. Shackelford is entitled to have the garnishment issue adjudicated, and accordingly we must remand the judgment at issue.

On March 2, 2000, the Bell Circuit Court entered an order "releasing funds toward satisfaction of judgment," and stating in part:

> On January 29, 1998, the Defendant, Dallas Shackelford, deposited into Court the sum of $68,526.80 representing the original trial judgment plus accrued interest. It is important to note that this money was paid into Court in order to avert a Court ordered sale of certain stock held by Defendant Dallas Shackelford.
>
> The Court finds that the Defendant Dallas Shackelford expressly dedicated these funds toward the satisfaction of judgment and to avert the sale of Defendant Dallas Shackelford's stock. Since the funds deposited by Shackelford were dedicated toward the satisfaction of the judgment the Court finds that to allow Shackelford to now garnish these funds in satisfaction of Shackelford's separate and distinct judgment against Plaintiff Tilmon Partin would be equivalent to allowing Shackelford to garnish his own stock.

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[4]The 1994 Court of Appeals' Opinion.

> Additionally, the Court finds that the original judgment against Shackelford was granted to the Plaintiffs Ausmus and Partin, jointly and severally, meaning that either Ausmus or Partin or both together may enforce the trial judgment. Only Ausmus is seeking an enforcement of this judgment.

The circuit court directed the Clerk to pay the funds to Ausmus. Shackelford's motion to alter, amend or vacate the order was denied on May 29, 2000. This appeal followed.

Kentucky's garnishment statute at KRS[5] 425.501 states in relevant part:

> (1) Any person in whose favor a final judgment in personam has been entered in any court of record of this state may, upon the filing of an affidavit by him or his agent or attorney in the office of the clerk of the court in which the judgment was entered, and in the same cause in which said judgment was obtained showing the date of the judgment and the amount due thereon, and that one or more name persons hold property belonging to, or are indebted to, the judgment debtor, obtain an order of garnishment to be served in accordance with the Rules of Civil Procedure.
>
> . . .
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> (5) If the court finds that the garnishee was, at the time of service of the order upon him, possessed of any property of the judgment debtor, or was indebted to him, and the property or debt is not exempt from execution, the court shall order the property or the proceeds of the debt applied upon the judgment [emphasis added].

The interpretation of a statute is, of course, a question of law; and this Court reviews the trial court's legal

[5]Kentucky Revised Statutes.

conclusions de novo.[6] When interpreting a statute, we look to the statute's express language and overall purpose.[7] The task begins with the language of the statute itself. When a statute's language is plain, "the sole function of the courts is to enforce it according to its terms."[8] When the statute's language admits of more than one reasonable interpretation, however, courts attempt to understand the legislative intent by considering the legislative history, the statutory context, and, where the statute is plainly based on or intended to coordinate with legislation from another jurisdiction, the construction of similar statutes by other courts.[9]

We believe Shackelford fails to recognize a fundamental requirement of KRS 425.501(5). We agree with Shackelford's basic contention that if he follows the necessary requirements of the statute that application of the proceeds under KRS 425.501(5) is mandatory; but the judgment creditor can only acquire an interest in the garnished property to the extent the judgment debtor has

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[6]Louisville & Nashville Railroad Co. v. Commonwealth, ex rel. Kentucky Railroad Commission, Ky., 314 S.W.2d 940, 943 (1958).

[7]Democratic Party of Kentucky v. Graham, Ky., 976 S.W.2d 423 (1998); Kentucky Region Eight v. Commonwealth, Ky., 507 S.W.2d 489 (1974).

[8]Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917); Bailey v. Reeves, Ky., 662 S.W.2d 832 (1984).

[9]Schmitt Furniture Co., Inc. v. Commonwealth of Kentucky Revenue Cabinet, Ky., 722 S.W.2d 889 (1987); Burke v. Stephenson, Ky., 305 S.W.2d 926 (1957); City of Owensboro v. Noffsinger, Ky., 280 S.W.2d 517 (1955); City of Covington v. State Tax Commission, 257 Ky. 84, 77 S.W.2d 386 (1934).

an interest in that property. Proof of the debtor's non-interest will defeat the garnishment.[10] Thus, the issue to be decided is to what extent the garnishee is "possessed of any property of the judgment debtor . . . ."

Ausmus and Partin have a joint and severable judgment against Shackelford for $68,526.80, while Shackelford only has a judgment against Partin individually. This Court in its 1994 Opinion has already held that it is impossible to determine what portion of the original judgment belongs to Ausmus and what portion belongs to Partin. On remand following this Court's 1999 Opinion, the circuit court made a finding that only Ausmus had acted to garnish the common stock held at the bank and that Partin had no interest in the funds on deposit with the Clerk. To accept Shackelford's argument would require a finding that Partin possessed an interest in Ausmus' garnishment of the common stock. While Partin holds a judgment against Shackelford, he has no claim to Ausmus' garnishment.

Accordingly, the order of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Daniel Jackson Tribell
Middlesboro, KY

BRIEF FOR APPELLEES:

Robert B. Bowling
Middlesboro, KY

[10]Bank One, Pikeville, Kentucky v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, Ky.App., 901 S.W.2d 52 (1995).