

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000774-MR

KAREN GLASS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-01506

SANDY AMANOR

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: KELLER, TAYLOR, AND THOMPSON, JUDGES.

KELLER, JUDGE: Following the death of Billy Wayne Glass (Billy), his widow, Karen Glass (Karen), settled a wrongful death claim. Sandy Amanor (Sandy), as Billy's putative daughter, brought an action against Karen seeking a portion of the settlement proceeds. Karen argued that Billy was not Sandy's father and that Sandy was not entitled to any portion of the settlement. The court issued an

opinion and order granting summary judgment in favor of Sandy and awarding Sandy attorney fees and costs. However, for the reasons set forth below, we have determined that the court's summary judgment was not a final and appealable order. Therefore, we dismiss Karen's appeal as premature.

FACTS

The underlying facts are not in dispute. Kathleen Glass (Kathleen) and Billy married on April 6, 1979. Sandy was born of that marriage on November 23, 1980. The marriage ended in divorce on November 20, 1984. The decree of dissolution stated that Billy was Sandy's father and, pursuant to an agreed order, Billy paid child support on behalf of Sandy. At some point following the dissolution of his marriage to Kathleen, Billy married Karen. No children were born of that marriage.

On September 22, 2008, Billy died of renal and heart failure. Following Billy's death, Karen brought a wrongful death claim against Kindred Hospital-Louisville, a claim that she settled in early September 2010, netting \$107,006 in settlement proceeds. On September 23, 2010, approximately two weeks after Karen settled the wrongful death claim, Sandy brought suit seeking half of the settlement proceeds. In addition to a share of the settlement proceeds, Sandy sought an order restraining Karen from dissipating the one-half share of the proceeds Sandy claimed. On September 24, 2010, the court issued the requested restraining order. However, neither the complaint, nor the restraining order were

served on Karen until mid-October 2010. By then, Karen had dissipated essentially all of the settlement proceeds.

We note that, according to an accounting Karen filed with the court, as of September 23, 2010, \$66,898.60 of the settlement proceeds remained in Karen's account. However, by October 19, 2010, only \$2,963.73 remained. The largest single transaction in that twenty-six day period took place on September 28, 2010, when Karen paid \$44,000 to "Calvin to pay bills."¹

During the course of the litigation, Karen argued that she was not required to share any portion of the settlement proceeds with Sandy. In support of her argument, Karen stated that, during Billy's illness, Sandy had volunteered to donate a kidney to him. However, according to Karen, testing revealed that Sandy was not an appropriate match, which led Karen to the belief that Sandy was not Billy's biological daughter. Furthermore, Karen argued that her attorney in the wrongful death action knew about Sandy, but did not advise Karen that she was required to share a portion of the settlement proceeds with Sandy. Additionally, her attorney did not issue a check payable to Sandy.

On the other hand, Sandy argued that she is Billy's biological daughter and is thus entitled to half of the settlement proceeds. In support of this argument, Sandy offered her affidavit, in which she noted that Billy had acknowledged her as his daughter. Furthermore, Sandy offered Kathleen's affidavit, which states that: Billy is Sandy's biological father; the decree dissolving her marriage to Billy and

¹ It is unclear from the record what Karen's relationship to Calvin is.

Sandy's birth certificate state that Billy is Sandy's father; Billy never denied paternity; and Billy paid child support on behalf of Sandy.

On December 3, 2010, Sandy filed a motion for summary judgment, setting forth the above arguments and attaching her and Kathleen's affidavits. In her response, Karen made the arguments set forth above and offered her affidavit regarding the testing performed to determine if Sandy could donate a kidney to Billy. We note that Karen did not offer any medical opinions or file any medical records to support her belief that Billy was not Sandy's biological father.

On January 27, 2011, the court issued an opinion and order in which it found that it did not have jurisdiction to determine the paternity issue. Furthermore, the court determined that Karen acted with "blatant contempt" of its orders. Finally, the court stated that:

Sandy Amanor's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that the Defendant, Karen Glass, deposit fifty three thousand five hundred three dollars and nine cents (\$53,503.09) (half the proceeds from the Billy Glass wrongful death settlement) plus nine hundred forty-nine dollars and eighty-six cents (\$949.86) (twelve percent interest from December 3rd 2010 - the day Karen Glass violated this Court's November 22, 2010 Order) with the Franklin Circuit Court Clerk within seven (7) days of entry of this Order.

Plaintiff's counsel may submit an affidavit for the amount of attorneys' fees. **VIOLATION OF THIS ORDER COULD RESULT IN INCARCERATION.**

Karen filed a motion to alter, amend, or vacate, arguing that the court had jurisdiction over the paternity issue because this action arose under the wrongful death statute, not under the Uniform Paternity Act. Furthermore, Karen argued that the court's award of attorney fees and costs was not appropriate, because she did not have notice of the complaint or restraining order until October 18, 2010. By that time, essentially all of the settlement proceeds had been expended. Finally, Karen argued that the court should have deducted Billy's funeral expenses before dividing the settlement proceeds.

On April 12, 2011, Sandy filed a motion for final judgment, essentially seeking a ruling on Karen's motion to alter, amend, or vacate. Sandy attached to her motion a "receipt and final settlement" that she received from the wrongful death attorney. That document, which is signed "Karen Glass," reads as follows: "I understand that the settlement proceeds I am receiving are to be distributed in accordance with Kentucky's Wrongful Death Statute, which requires 50% of the settlement proceeds go to the surviving spouse, and 50% to the decedent's children in equal shares." Sandy also filed a letter from the wrongful death attorney indicating that he explained to Karen that she had an obligation to share the proceeds with any of Billy's children. In response, Karen denied that she had signed the receipt and final settlement document. She also reiterated her argument that she had not been advised to share the settlement proceeds with Sandy. The court denied Karen's motion to alter, amend, or vacate "having found

that none of [Karen's] arguments constitutes grounds for altering our *Opinion and Order* pursuant to CR 59 or CR 60." It is from this order that Karen now appeals.

Kentucky Rule of Civil Procedure (CR) 54.02 provides that:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Pursuant to CR 54.02, the court's summary judgment is not final for three reasons. First, it did not dispose of all of Sandy's claims. In fact, the summary judgment did not dispose of Sandy's major claim - entitlement to half of the settlement proceeds. The court's judgment provided that Karen should pay out half of those proceeds; however, the judgment found that said payment should be to the court clerk, not to Sandy. The court's judgment did not state when, or even if, Sandy would be paid. Second, the court's judgment did not address Karen's claim that Billy's funeral expenses should be deducted from the settlement proceeds prior to distribution. Finally, because the court's summary judgment did not dispose of all of the parties' claims, CR 54.02 requires certain language, *i.e.*, that "there is no

just reason for delay." Neither the court's opinion and order nor its order denying Karen's motion to alter, amend, or vacate contain that language. Therefore, the court's judgment is not final and appealable. For these reasons, we ORDER Karen's appeal DISMISSED as premature.

TAYLOR, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

ENTERED: November 2, 2012

JUDGE, COURT OF APPEALS

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I believe the order appealed from was final and appealable and this case should be decided on its merits.

The majority states that the trial court's order was not final and appealable, in part, because the court's order directed that Karen pay one-half the settlement amount to the court clerk. It overlooks that the circuit court granted summary judgment in Sandy's favor and, although the proceeds are not payable directly to Sandy, the court clerk will hold the funds in escrow on her behalf.

The second reason advanced for dismissing the appeal is that the court's judgment did not address Karen's claim that Billy's funeral expenses should be deducted from the settlement proceeds and did not include the finality language required in CR 54.02. The rule states that it is applicable "[w]hen more

than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved[.]” Karen’s request for a credit in the amount paid for Billy’s funeral expenses against the settlement proceeds was presented in her motion to alter, amend or vacate, which the circuit court denied in its entirety, including her request for a credit. “There was nothing more for the Court to adjudicate, therefore, the judgment put an end to the controversy between the parties.” *Cerwin v. Taub*, 552 S.W.2d 675, 678 (Ky.App. 1977). Because this was not a case where there were multiple claims or parties were involved, the finality language required in CR 54.02 was not required. As stated in *Security Federal Sav. & Loan Ass'n of Mayfield v. Nesler*, 697 S.W.2d 136, 138-139 (Ky. 1985):

CR 54.01 defines a final and appealable order as one which adjudicates the rights of all of the parties. CR 54.02 applies only where there are multiple claims and the court grants a final judgment upon one or more but less than all of the claims at issue.

I believe that Karen appealed from a final and appealable order and the majority’s holding to the contrary perpetuates an injustice. Dismissal in this instance only benefits Karen who filed this frivolous appeal to once again deprive Sandy of her rightful portion of the settlement proceeds. Karen has repeatedly defied court orders and has dissipated the settlement proceeds. Her disingenuous argument that Sandy is not Billy’s daughter is simply a tactic to avoid paying Sandy her rightful portion of the wrongful death settlement proceeds. Under Kentucky law, Sandy is presumed to be Billy’s daughter and, pursuant to the

dissolution decree, Billy paid child support. However, in response to Sandy's motion for summary judgment, Karen did not present any evidence to rebut this presumption.

This frivolous appeal is an additional delay tactic and, by dismissing this appeal, this Court has aided Kathy by further delaying payment to Sandy. As a practical matter, during the time that Karen has refused to comply with court orders, Karen has misappropriated Sandy's portion of the settlement proceeds. With further delays, Sandy may be unable to recover the amount to which she is entitled and her only remaining relief may be the pursuit of criminal charges. Accordingly, this Court should decide this appeal on the merits and allow the court's civil judgment to be enforced. I would decide this case on its merits.

BRIEFS FOR APPELLANT:

Preston Scott Cecil
Frankfort, Kentucky

BRIEF FOR APPELLEE:

John H. Gray
Frankfort, Kentucky