RENDERED: JULY 5, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001026-MR

EUGENE WALTERS;
JEFF WALTERS; AND
KATHY WALTERS — APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE RODERICK MESSER,[1] JUDGE
ACTION NO. 98-CI-00610

DAVID O. SMITH;
EDITH LANHAM;
MICHAEL SANTOS; AND
DEBORAH SANTOS — APPELLEES

OPINION AND ORDER
VACATING AND REMANDING
WITH INSTRUCTIONS

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND MOORE, JUDGES.

[1] The orders appealed from in this matter have the name Judge Paul E. Braden typed under the signature line. However, due to Judge Braden's illness, Judge Messer served as special judge, and he signed the orders.

ACREE, CHIEF JUDGE: The appellants, Eugene Walters, Jeff Walters, and Kathy Walters, appeal the Whitley Circuit Court's March 30, 2011 order that they pay to appellees, Edith Lanham, Michael Santos, and Deborah Santos, the sum of $5,000.00 in attorney's fees for previously having filed a frivolous appeal of that court's October 13, 2008 judgment. In lieu of filing a supersedeas bond, the appellants paid the attorney's fees to the appellees.[2] We reverse and remand with instructions.

As indicated, this is the second appeal in this action, the first being *Walters v. Lanham*, 2010 WL 4296630 (Ky. App. 2010)(2008-CA-002130-MR). No factual exposition of that appeal or the underlying case is necessary. The only necessary information regarding the prior appeal is that:

(1) the first appeal was brought as a matter of right pursuant to KRS[3] 22A.020(1);

(2) the appellants and appellees are the same in this appeal as they were in the first appeal;

(3) in the first appeal, the appellees moved this Court to dismiss, but not on grounds that the appeal was frivolous, neither did they ask this Court to "award just damages and single or double costs to the appellee" as authorized by CR[4] 73.04;

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[2] There is no documentation in the record regarding this payment. However, the appellees have not contested that the payment took place.

[3] Kentucky Revised Statutes.

[4] Kentucky Rules of Civil Procedure.

(4) in the first appeal, we affirmed the circuit court in an opinion rendered October 29, 2010 – the case was not remanded to the circuit court; and

(5) the prior opinion became final on January 18, 2011.

The genesis of this second appeal was the appellees' motion in the circuit court "for an award of a $5,000.00 attorney fee for the frivolous appeal which they claimed was 'devoid of any merit and baseless as to the law.'" (Appellees' brief, p. 16). That motion was filed in the circuit court on December 2, 2010, *after* this Court's opinion in the first appeal was rendered, but *before* the opinion became final. The motion was granted and the order was entered on March 30, 2011, *after* the opinion became final.

The circuit court's order must be vacated as void *ab initio*, the circuit court having lacked jurisdiction and authority to so rule, and the appellees having waived the right to have the first appeal determined by this Court to be frivolous.

The circuit court lost jurisdiction of the case ten days from the date the original judgment was finally entered,[5] *Yocum v. Oney*, 532 S.W.2d 15, 16 (Ky. 1975), and that would have been October 23, 2010. On November 12, 2008, when the appellants filed their notice of appeal in the first appeal, this Court's jurisdiction was invoked. *Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617, 626 (Ky. 2011) ("[T]he notice of appeal is the means by which an appellant invokes the appellate court's jurisdiction." Citation and quotations omitted); CR 73.03.

[5] That is to say, ten days after entry of the order denying appellants' timely CR 59 motion seeking alteration, amendment, or vacation of the judgment.

The jurisdiction which this Court acquired on November 12, 2008, remained exclusive and continuous until the opinion it rendered became final. "An appellate court retains full jurisdiction over a case if the opinion or order disposing of the appeal has not yet become final. Prior to finality, the appellate court may take such action with respect to the case as it deems appropriate . . . ." *Jones v. Conner*, 915 S.W.2d 756, 757 (Ky. App. 1996). Therefore, until January 18, 2011, as a *jurisdictional* matter, this Court alone had the authority to declare the appeal before it frivolous and to award just damages. CR 73.02(4) ("If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent."). The appellees' December 2, 2010 motion could have been, and should have been filed, if at all, in *this* Court for consideration, but it was not.

And it makes no difference that the circuit court did not rule on that motion until March 30, 2011, after our opinion in the first appeal was final. We did not remand the case to the circuit court, despite the appellees' representation to the contrary. (Appellees' brief, p. 16). Yet, even if we had, the circuit court's authority to carry out our mandate would have been strictly limited. The "mandate rule . . . provides that on remand from a higher court a lower court must obey and give effect to the higher court's express or necessarily implied holdings and instructions." *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010). Nothing whatsoever in this Court's opinion, expressly or by necessary implication, authorized the circuit court to award attorney's fees as a sanction for filing a

frivolous appeal. The fact that our opinion did *not* declare the appeal frivolous was a good indication, by necessary implication, that we did not consider the appeal frivolous or we would not have wasted judicial resources considering the merits.

Furthermore, every issue raised before this Court, and every issue that could have been raised, was either ruled upon or waived. *Id.* Kentucky's doctrine "barring issues not raised in a prior appeal is . . . a type of waiver. This is so because the extension hinges . . . on the party's inaction in failing to raise the issue in a manner consistent with the court's general policy against piecemeal appeals." *Id.* at 610-11. "For litigation to proceed in an orderly manner and finally settle the rights of the parties, it is necessary for parties to timely assert the rights they claim to a court with power to grant the relief sought." *Williamson v. Commonwealth*, 767 S.W.2d 323, 325-26 (Ky. 1989). The power to grant relief from frivolous appeals *to this Court* lies *with this Court* and not with the circuit court. CR 73.02(4). Appellees did not seek relief from this Court when such relief was available to them. The right to do so thereafter was therefore waived.

In summary, the Whitley Circuit Court's March 30, 2011 order must be vacated because: (1) the circuit court lacked jurisdiction to enter the order, having lost jurisdiction ten days after it entered the judgment from which the first appeal was taken; (2) the circuit court lacked the authority to sanction parties for frivolous appeals, CR 73.02(4) having granted that authority exclusively to the appellate court which, in that first appeal, was the Court of Appeals; and (3) the appellees waived the right to assert that the first appeal was frivolous when they

failed to make a proper motion pursuant to CR 76.34, in this Court, in the first appeal, for the relief provided by CR 73.02(4).

Because the appellants have paid the judgment of $5,000.00 to the appellees, we remand this case to the Whitley Circuit Court with instructions that it enter a judgment in favor of the appellants, against the appellees, in the amount of $5,000.00.[6] Because the amount is liquidated, the judgment shall bear prejudgment interest at the rate of 8% from the date appellants paid appellees until the date the judgment is entered, and post-judgment interest thereafter at the rate of 12% until paid.

ALL CONCUR.

ENTERED: July 5, 2013

/s/ Glenn E. Acree
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANTS:

Larry E. Conley
Corbin, Kentucky

BRIEF FOR APPELLEES:

Marcia A. Smith
David O. Smith
Corbin, Kentucky

[6] Appellants argue that the filing of the motion in circuit court under CR 73.02(4) violated CR 11, but acknowledge they did not move for sanctions in that court. Having failed to preserve any claim of error on this point, we decline to address its substance otherwise than in this footnote. As the appellants note, "the determination of whether a motion violates Rule 11 lies within the jurisdiction of the Court in which it is filed[.]" We have no more authority to address the propriety of the circuit court filing, *as an initial ruling*, than the circuit court had to rule on the propriety of the appeal filed in this Court. Nor, as it seems to be the appellant's argument, is the vehicle of a Rule 11 sanction necessary for this Court to order the relief sought.