

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001096-MR

JEANETTE L. VARGHESE (NOW AUMON)

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 10-CI-00542

SABU VARGHESE

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Jeanette L. Varghese (now Aumon) appeals the Findings of Fact, Conclusions of Law, and Order entered by the Shelby Family Court on May 22, 2012. Because no Kentucky Rules of Civil Procedure (CR) 59.07 motion had been made to authorize a new order, this order has no effect. Further, in the underlying case, CR 59.05 motions had been made to the original Findings of Fact, Conclusions of Law, and Order, and therefore, the original order is interlocutory. Therefore, this Court lacks jurisdiction to consider it, and we dismiss the appeal.

FACTS

Sabu Varghese and Jeanette were married on July 19, 1987, in India.

During the marriage, they had two children who were emancipated at the time of the dissolution action. Over the course of the twenty-four-year marriage, Jeannette primarily was a homemaker although she briefly worked outside the home on two separate occasions. In addition, she handled the business matters for Sabu's business endeavor. At the time of the trial, Jeanette was a student and planned ultimately to obtain a nursing degree, and Sabu was a computer consultant whose net income in the years 2006 to 2009 ranged from \$271,058 to \$720,713.

This action commenced when Jeanette filed a petition for dissolution in Shelby County on July 15, 2010. Judge John David Myles held a hearing on the matter and entered findings of fact, conclusions of law, and an order on November 16, 2011. Subsequently, on November 22, 2011, both parties filed post-trial motions. Pursuant to CR 59.05, Sabu filed a motion to alter, amend, or vacate, and pursuant to CR 52.02 and 52.04, he filed a motion for additional findings of fact. And, pursuant to CR 59.05, Jeannette filed a motion to alter, amend, and reconsider. Then, on November 23, 2011, Sabu moved to supplement his November 22, 2011 motions.

The next significant event occurred on February 15, 2012, when, during motion hour, the judge made comments to Sabu's counsel, which caused Sabu's counsel to question the judge's impartiality and ultimately to request a special judge pursuant to Kentucky Revised Statutes (KRS) 26A.020. While no

order of recusal by Judge Myles appears in the record, on February 29, 2012, the Chief Senior Judge appointed Senior Status Judge Martin F. McDonald as a Special Judge of the Shelby Family Court with specific jurisdictional authority over this case.

On April 4, 2012, Judge McDonald entered an amended decree of dissolution. Further, the judge ordered that the parties file proposed altered findings of facts, conclusions of law, and judgment. Both parties submitted proposed findings. On May 22, 2012, the judge entered verbatim Sabu's proposed findings of fact, conclusions of law, and order. It is from this order that Jeanette now appeals.

ANALYSIS

We begin our review by observing the unusual nature of this case, in that a trial and order had already been rendered prior to the appointment of a new judge. After the appointment of a new judge, he entered an entirely new order. In the findings, the judge held that the court was not bound by the November 16, 2011 order. To support this position, the following language from *Carpenter v. Evans*, 363 S.W.2d 108 (Ky. 1962), was cited:

Appellant suggests that the first findings, conclusions and judgment are res judicata of the issues between the parties. Obviously this argument is without merit for the reason that, under the motion filed, the trial court, still retaining complete control over the case, was empowered to pursue the very course it followed.

Id. at 110.

The difference between *Carpenter* and this case, however, is that a motion under CR 59.07 was proffered in the former case. CR 59.07 states:

On motion for a new trial in an action tried without a jury, the court may grant a new trial or it may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

Here, neither party made a motion under CR 59.07 and, thus, no authority existed for the trial court to issue entirely new findings of fact, conclusions of law or order.

Rather, the outstanding motions in this case had been made under CR 52.02, 52.04 and 59.05. Outstanding motions under CR 59.05 are interlocutory, that is, non-final and non-appealable. *See Tax Ease Lien Investments I, LLC v. Brown*, 340 S.W.3d 99, 103 (Ky. App. 2011). Further, in *Personnel Board v. Heck*, 725 S.W.2d 13, 18 (Ky. App. 1986), the Court stated that “[a] motion pursuant to CR 59, however, converts a final judgment to an interlocutory judgment. CR 73.02(1)(e).” Moreover, a judgment which is dispositive of the issues raised in the CR 59 motion readjudicates all prior interlocutory orders and judgments determining claims which are not specifically disposed of in the latter judgment. *Id.*; CR 54.02(2); CR 73.02(1)(e).

Generally, an appellate court's sole function is to review errors made by trial courts. Thus, if the trial court did not decide an issue, there can be no potential error for appellate review. *Regional Jail Authority v. Tackett*, 770 S.W.2d 225 (Ky. 1989). Since the issues highlighted by the parties in their

respective post-trial motions are still to be determined by the Shelby Family Court, we are without jurisdiction to decide the case. Therefore, we dismiss the appeal as interlocutory.

CONCLUSION

For the foregoing reasons, the above-styled is ORDERED
DISMISSED as interlocutory.

ALL CONCUR.

ENTERED: _____

JUDGE, COURT OF APPEALS

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