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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000823-MR
AND
NO. 2011-CA-001094-MR

DERMOT HALPIN AND
HILLARY HALPIN

APPELLANTS

v. APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NOS. 03-CI-01249 AND 05-CI-03390

BILL HARDY, E. DAVID
MARSHALL, SUSAN HARDY,
AND CLAY AVENUE, LLC.

APPELLEES

AND

NO. 2011-CA-001326-MR

BILL HARDY

CROSS-APPELLANT

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NOS. 03-CI-01249 AND 05-CI-03390

DERMOT HALPIN AND
HILLARY HALPIN

CROSS-APPELLEES

OPINION AND ORDER
AFFIRMING IN PART, REVERSING IN PART,
DISMISSING IN PART, AND REMANDING

** ** *

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The Appellants and Cross-Appellees, Dermot and Hilary Halpin, appeal the June 14, 2011 order of the Fayette Circuit Court, dismissing their claims in this consumer protection action filed against Appellee and Cross-Appellant Bill Hardy, and Appellees Susan Hardy and Clay Avenue, LLC, and Appellee E. David Marshall, attorney for Appellees Bill and Susan Hardy. Bill Hardy, as Cross-Appellant, argues that the trial court erred in failing to require the Halpins to refund the amount paid to them by Bill Hardy on the first reversed judgment, with interest, and that the court's final judgment erroneously permitted the amount of the second judgment to be paid through a set-off against the amount previously paid by Bill Hardy. Appellees E. David Marshall and Susan Hardy have also filed motions to dismiss the Halpins' appeal as frivolous and for Kentucky Rules of Civil Procedure (CR) 11 sanctions against the Halpins. Upon review of the record, the arguments of the parties and the applicable law, we grant the motions to dismiss filed by Susan Hardy, Clay Avenue, LLC, and E. David Marshall with respect to the fraudulent conveyances action and affirm the June 14, 2011 order of the Fayette Circuit Court dismissing the Halpins' claims, and order sanctions as set forth herein. Concerning Hardy's argument that the court erred in failing to require the Halpins to refund the amount paid to them by Bill Hardy on

the first reversed judgment, we decline to alter this portion of the court's order, and we affirm.

This appeal consists of two distinct actions. The first was brought under the Kentucky Consumer Protection Act (KCPA), Kentucky Revised Statutes (KRS) 367.110, et. seq., against Bill Hardy, alleging unfair practices in the sale of a high definition television and entertainment system. The second case alleged fraudulent conveyances and was brought against Bill Hardy and his wife, Susan Hardy, and Clay Avenue, LLC, and later amended to name the Hardys' attorney, E. David Marshall, as a defendant.

This matter began as a consumer protection case in which the jury ultimately found Bill Hardy liable for engaging in false, misleading, and deceptive actions against the Halpins. Hardy formerly owned and managed a stereo shop in Lexington, known as Bill Hardy Stereo, which he operated from the first floor of the marital home he shares with his wife, Susan Hardy, located at 120 Clay Avenue, Lexington, Kentucky.¹ In 2002, the Halpins visited Hardy's shop seeking to buy a large screen plasma television and home theatre system with surround sound capability for installation in a theatre room in the Halpins' home. Hardy asserts that he was capable of providing the Halpins with a home entertainment

¹ According to the brief filed by Bill Hardy in this matter, Bill Hardy Stereo went out of business in 2006. The arrangement at the time this matter was initiated was such that the Hardys resided on the top floor of the 120 Clay Avenue property, and the bottom floor was divided into two separate units which were zoned for business use. One of those units was used by Bill Hardy Stereo, and the other was leased to an independent retail business for \$2,400 per month. The Halpins take issue with the fact that Hardy liquidated Bill Hardy Stereo after the judgment was entered, despite the restraining order prohibiting him from doing so, in addition to selling a Porsche that he owned.

system built by a number of manufacturers, but that because of the quality of the handmade systems manufactured by the German manufacturer, ReVox, he recommended that they purchase a ReVox system through its American subsidiary, ReVox, USA, Inc.

Hardy arranged for the Halpins to visit his showroom to view a 42-inch version of the E-650 plasma television and related home theater system manufactured by ReVox, which the Halpins did prior to purchasing a 50-inch version of the same television entertainment system through Bill Hardy Stereo. The United States representative for ReVox, Brian Tucker, travelled from Chicago to be present at Hardy's showroom for the presentation. According to Hardy, the Halpins ultimately purchased the ReVox home entertainment system in large part because the television component of the system had brushed aluminum as part of its design which matched the décor of the Halpins' theatre room.

Thereafter, Hardy arranged for an installer, David Powers, to install the home entertainment system in the Halpins' home and the system was thereafter installed. Hardy asserts that soon after the installation of the home entertainment system, Dr. Halpin began complaining about the quality of the picture on the television. Hardy and Tucker tried to resolve the Halpins' complaints on several occasions by visiting their home and installing new software and hardware. ReVox also offered to replace the television with a newer model that had been released at no additional cost to the Halpins. Dr. and Mrs. Halpin rejected that

offer unless they were also given an additional \$8,000. When that did not happen, the Halpins filed suit against Hardy, Powers, and ReVox.

In 2003, the Halpins filed suit against Hardy, Powers, and ReVox, alleging violations of KRS 367.110, et. seq. (the KCPA), in the sale and installation of the home entertainment system. The complaint alleged that the television was defective and not high definition.² The suit was filed in the Fayette Circuit Court and was docketed as Civil Action No. 03-CI-1249 (the “2003 Case”). Susan Hardy was not named as a party to that case. At the first trial of the 2003 case, the trial court refused to allow into evidence the fact that Hardy and ReVox had attempted to satisfy the Halpins by replacing the television set initially installed with a newer model, a ruling that was later reversed by this Court as discussed herein, *infra*.

Following the first trial, the circuit court jury rendered a May 18, 2005 verdict finding that Hardy and certain other defendants had violated the KCPA. The jury awarded the Halpins \$43,161.69 in compensatory damages and \$5,000 in punitive damages against Hardy and certain of the other defendants. On July 12, 2005, the circuit court entered a judgment on the jury verdict against Hardy and the other defendants for compensatory and punitive damages as awarded by the jury, plus \$75,223.66 in attorney fees, \$7,727.30 in costs, and \$10,004.37 in prejudgment interest, for a total judgment of \$141,117.02. The trial court again

² Hardy asserts that in 2002, he explained to the Halpins that “high definition” televisions would not provide optimum viewing without a high definition signal, which required a high definition receiver. He claims that the Halpins were not interested in a high definition receiver, stating that they only intended to watch DVD movies on the ReVox television.

entered judgment against Hardy and the other defendants on September 30, 2005, in the same amount, this time awarding the Halpins judgment against all of the defendants jointly and severally. Nevertheless, according to Hardy, the Halpins focused their collection efforts on him.

On October 6, 2005, the circuit court overruled the defendants' motion for judgment notwithstanding the verdict and on October 27, 2005, the trial court entered another order correcting the October 6, 2005 order making the judgment final and appealable. Hardy filed a notice of appeal to this Court on November 9, 2005.

Hardy asserts that at that time he appealed he could not afford to pay the amount of the judgment, nor could he afford to post a supersedeas bond to stay collection of the judgment pending appeal. Accordingly, Susan Hardy, being aware of Bill Hardy's inability to pay, contacted E. David Marshall for legal advice concerning how to separate and protect her assets which she owned jointly with Bill from his creditors, including the Halpins.

Marshall advised the Hardys to place their marital home, which they jointly owned and which was located at 120 Clay Avenue, Lexington, Kentucky, into a limited liability company which they would own and further advised that Mrs. Hardy should purchase Mr. Hardy's interest in that limited liability company for fair market value consideration equal to Mr. Hardy's one-half interest in the equity in the home. The Hardys followed Marshall's advice and formed a limited liability company which they named Clay Avenue. They deeded the marital home

to Clay Avenue in June 2005, based upon Marshall's advice. At the same time that the house was deeded to Clay Avenue, Mrs. Hardy signed a promissory note payable to Mr. Hardy to purchase his interest in Clay Avenue in the amount of \$45,000 which represented fair market value for his one-half interest in the equity of the house. Marshall stated that in all of the years he served as a trustee and practiced in bankruptcy court, he had always used the tax assessment by the Fayette County Property Valuation Administrator for real estate valuation purposes, a practice he followed in his advice to the Hardys in valuing the house at the assessed value of \$350,000.

Prior to the May 2005 jury verdict in the 2003 case, Bill Hardy and a business partner, Joe Graviss, had formed a Kentucky limited liability company named Newpast, LLC. Hardy and Graviss each owned 50% of the equity interest in Newpast, which was established for the purpose of acquiring property on West Main Street in Lexington and developing it by building fourteen condominiums. They planned to sell the condominiums along with two existing buildings on the Main Street property. At the time of the May 2005 jury verdict in the 2003 case, Hardy had made \$22,000 in capital contributions to Newpast. At that time, the Main Street property remained undeveloped and encumbered by a mortgage securing a large bank loan.

In the summer of 2005, Newpast had not yet built any condominiums and the two existing buildings were in great need of repair. Marshall advised the Hardys to transfer Bill Hardy's interest in Newpast to Susan Hardy for the \$22,000

in capital contributions he had paid thus far. Accordingly, in June of 2005, Bill transferred his interest in Newpast to Susan, and Susan gave Bill a promissory note in the amount of \$22,000 for the purchase representing the fair valuation of Hardy's one-half equity interest in the Main Street property. The result of the two transfers of Hardy's interest in the marital home and his interest in the speculative real estate investment, Newpast, was to convert his interest in both to cash or a promissory note for cash.

Thereafter, on July 28, 2005, Susan Hardy caused Clay Avenue to refinance the marital home of the Hardys with First National Bank in Lexington. The excess proceeds were used to pay Hardy the \$45,000 owed to him under the June 2005 promissory note for his prior interest in Clay Avenue, and the \$22,000 owed to him under the separate promissory note for his prior interest in Newpast. In addition, Bill was paid \$5,193.79 for his one-half interest in a mutual fund jointly owned with Susan, which was then transferred to Susan. Other loans previously taken by Bill and Susan were paid off and consolidated into the mortgage for the home, now in the name of Clay Avenue, owned by Susan Hardy. The net result of these transactions was payment in full to Bill Hardy in cash for the promissory notes executed by Susan Hardy one month earlier, and protection of her assets from Bill's creditors, including the Halpins.

Following the verdict in the 2003 case, the Halpins filed a second lawsuit in Fayette Circuit Court against Bill Hardy, Susan Hardy, and Clay Avenue, alleging fraudulent conveyances, namely that the actions taken by the

Hardys upon Marshall's advice, violated the KCPA. This case was docketed as Case No. 05-CI-3390 (the "2005 case"). On or about November 3, 2005, the Halpins filed an amended complaint in the 2005 case in which Marshall was also named as a defendant. The amended complaint alleged violations of the KCPA and common law fraud. Marshall, acting through his son and attorney, David R. Marshall, and Susan Hardy immediately moved to dismiss the 2005 amended complaint naming them as defendants on the basis that they had never had any dealings with the Halpins, had never sold any goods to the Halpins, had no privity of contract with the Halpins, had no judgments rendered against them in favor of the Halpins, and had never made any misrepresentations to the Halpins.

Prior to the time that the motion to dismiss was heard the Halpins noticed and took the deposition of Susan Hardy, as well as the Hardy's banker, William Feltner. The Halpins then filed a second amended complaint, which included claims for fraudulent conveyance, preferential conveyance common law fraud, and civil recovery as a result of statutory violations. On or about January 10, 2006, Susan Hardy filed a motion to dismiss the second amended complaint. The court denied Susan's motion on March 27, 2006, but granted Marshall's motion to dismiss the second amended complaint against him. In so doing the court found that Marshall had no fiduciary responsibility to the Halpins, had made no false representations to them, had not committed common law fraud and that the remedy for fraudulent conveyance, even if proven, was to void the transfer

rather than an award of damages. Despite dismissing the claims against Marshall initially however, the court ultimately reinstated them in a June 6, 2006 order.

Subsequently, on April 10, 2006, the Halpins filed a motion seeking leave to file a third amended complaint against Bill and Susan Hardy and Marshall to include, among other things, a claim pursuant to KRS 446.070 seeking an unspecified “civil remedy” for alleged violations by the defendants of the criminal statutes KRS 434.095, KRS 502.020, KRS 506.040, KRS 517.070, KRS 517.090, and KRS 506.080 (claims for consumer protection violations against Bill Hardy, common law fraudulent concealment, violation of KRS 446.070, tortious interference with a business and/or economic advantage, negligence per se and negligence, gross negligence, gross negligence per se, and punitive damages). This motion apparently also sought an order finding the Hardys and Marshall liable for criminal contempt.

At the same time they were seeking leave to file the third amended complaint in the 2005 case, the Halpins filed a motion for summary judgment asking the trial court to rule in their favor on all outstanding issues raised in the 2005 second amended complaint. On that same day, Bill Hardy filed a motion seeking the court’s guidance in establishing a judgment satisfaction amount due to what he states was a fear that the trial judge would facilitate the Halpins in seizing his home and business. In response to Hardy’s motion the Halpins filed a May 3, 2006 motion asking for supplemental damages in the amount of \$43,511.50 beyond those that had initially been awarded by the trial court in its October 2005

judgment. The Halpins asserted that this amount represented additional costs, attorney fees and interest. On May 2, 2006, the trial court entered an order sustaining the Halpins' motion to file the 2005 third amended complaint which alleged that the Hardys had committed criminal acts. The third amended complaint was then filed on May 12, 2006.

At approximately the same time, on May 5, 2006, Bill Hardy paid the Halpins \$154,897.82, representing the amount of the October 2005 judgment, plus post-judgment interest. Hardy asserts that he obtained the money by accepting a loan from his former business partner, Joe Graviss, and that he made the payment because of the continued expense and harassment of the litigious collection efforts by the Halpins and because of the threat of criminal sanctions against him, as well as the possible seizure and sale of his home and business.

Nevertheless, the Halpins continued with their enforcement efforts as noted by the court below, which stated, "The Notice of Satisfaction of Judgment was entered in May, 2006, after the Notice of Appeal was filed. The Court was hopeful that the matter would be resolved at that time but the Plaintiffs insisted on pursuing their enforcement efforts."³ After Hardy paid the judgment entered against him in the 2003 case, he, Susan and Marshall each filed renewed motions to dismiss the third amended complaint filed against them. The trial court ultimately entered a judgment on June 23, 2006, in which it memorialized its June 16, 2006 open court ruling dismissing all claims of the first, second, and third

³ June 14, 2011 Final Judgment of the Fayette Circuit Court.

amended complaints against all of the defendants. Nevertheless, the trial court entered a second order, also on June 23, 2006, indicating that it was granting the Halpins' motion to reconsider the court's ruling dismissing the third amended complaint and would enter an opinion reinstating the claims made therein.

Subsequently, on October 23, 2006, the Halpins moved for an additional award of attorney fees and costs in the amount of \$41,423.22. On November 2, 2006, Marshall filed an objection to that request. The court ultimately entered an opinion and order on November 16, 2006, awarding a supplemental judgment against Hardy arising from the additional effort of the fraudulent conveyances case but reserving ruling on the amount of the supplemental judgment. Thereafter, the Hardys and Marshall filed answers to the third amended complaint.

On April 6, 2007, this Court rendered an opinion reversing and remanding the judgment in the 2003 case. Therein this Court noted that "the trial committed various errors," and specifically found that the court below had erred in refusing to allow the jury to see certain contents of a letter sent to the Halpins by ReVox in November of 2002, offering to replace the television they complained of with a newer version. The jury had been permitted to see a portion of the letter but the court had ordered the following portion of the letter removed before presenting it to the jury:

We at ReVox hope that you will give us the opportunity to serve you and help realize your expectations of our

fine products by accepting our new High Definition model in exchange for the E-650 that you presently have.

This Court held that the entire letter should have been admissible to counter the Halpins' testimony during the 2003 case that "the Defendants never offered to resolve the dispute by providing a true HDTV set."

Three days after the release of the April 6, 2007 opinion of this Court reversing, Marshall moved the trial court to hold in abeyance any further action on the 2005 case until such time as the opinion that ultimately reversed the 2003 case became final on the assumption that the Halpins would seek discretionary review with the Kentucky Supreme Court. Additionally, on April 9, 2007, Bill Hardy moved the trial court to order the Halpins to repay him the amount of the judgment previously paid, namely \$154,897.52, plus post-judgment interest. The Halpins responded one week later by filing a motion to hold Susan and Bill Hardy and Marshall in contempt of court for taking the actions to protect Susan Hardy's assets from attachment in the summer of 2005. The Motion threatened both civil and criminal contempt. On June 7, 2007, the trial court overruled Hardy's motion for repayment of the money he had paid in satisfaction of the 2003 judgment. Between July 2007 and September 2008, matters in the trial court abated while the Kentucky Supreme Court considered the Halpins' then-pending motion for discretionary review of the opinion reversing.

On September 10, 2008, the Kentucky Supreme Court entered an order denying the Halpins' motion for discretionary review. Accordingly, on

September 12, 2008, Bill Hardy filed a second motion seeking repayment of the money previously paid to the Halpins in satisfaction of the reversed judgment. The Halpins objected to this second request for repayment and filed their own motion seeking to attach additional assets belonging to Bill Hardy, as well as renewing their motion to hold Bill Hardy, Susan Hardy, and Marshall in contempt of court.

Thereafter, on December 7, 2008, the Halpins filed another motion for summary judgment against Marshall in the 2005 case and on the same day filed motions for summary judgment against Bill and Susan Hardy. On December 16, 2008, Clay Avenue filed its motion for summary judgment and Susan Hardy filed her response to the motion for summary judgment against her, as well as her own motion for summary judgment. Marshall also filed a motion for summary judgment. On January 20, 2009, the circuit court entered an order overruling all outstanding motions for summary judgment and stating its opinion that the 2005 case was not affected by reversal of the judgment in the 2003 case. The court also granted the Halpins' motion for a contempt hearing as to Bill Hardy, Susan Hardy, and Marshall. The court scheduled a hearing for April 13, 2009, on the issue of contempt.

The 2003 case proceeded to retrial before a second Fayette County jury in March of 2009. On March 25, 2009, the second jury rendered a verdict in favor of the Halpins and against Bill Hardy on the KCPA claim, again by answering the following interrogatory in the affirmative:

Are you satisfied from the evidence ... that Defendant used unfair, deceptive, misleading, or unfair business practices in his dealings with Plaintiffs regarding the ReVox TV and related entertainment system

The jury awarded compensatory damages in the amount of \$38,295.91, but refused to award punitive damages to the Halpins.

Approximately two weeks after the second jury verdict was rendered against Bill Hardy, he and Susan petitioned for bankruptcy relief under Chapter 7 of the Bankruptcy Code. At the request of the Halpins, the bankruptcy court lifted the automatic stay in August of 2009 in order to permit the 2003 case and the 2005 case to proceed in the Fayette Circuit Court.⁴

On or about March 27, 2009, Susan Hardy, Clay Avenue, and Marshall jointly filed an original action before this Court against the trial judge, Honorable Pamela Goodwine, seeking a writ prohibiting the circuit court from proceeding to hold contempt hearings and from allowing the Halpins to continue to attempt to collect a now reversed judgment. In arguing for the writ, the Hardys and Marshall asserted that the 2005 case was completely dependent upon the judgment in the 2003 case, now reversed. Having filed the petition for writ against the circuit judge, Marshall then moved the circuit court to hold the contempt hearing in abeyance pending resolution of the writ proceedings. The circuit court nevertheless proceeded with a two-day hearing in approximately April of 2010 on the motion to hold Susan and Bill Hardy and Marshall in contempt of court.

⁴ This Court has been advised that the Bankruptcy Court awaits the ruling of this Court before proceeding to either discharge the second judgment or conduct a trial on the Halpins' fraud charge.

Subsequently, on July 9, 2009, this Court issued an order denying the petition for writ determining that the trial court would be acting within its jurisdiction in holding the contempt hearings against the Hardys and Marshall. The Hardys and Marshall appealed this Court's order denying the writ to the Kentucky Supreme Court on or about August 6, 2009.⁵ While the appeal of the denial of the writ was pending before the Kentucky Supreme Court, the circuit court, upon motion by the Halpins, entered a default judgment against Susan Hardy in the 2005 case on or about November 19, 2009.

While the appeal of the denial of the writ was pending before the Kentucky Supreme Court, the Halpins continued to request that the circuit court hold a contempt hearing despite objections from the Hardys and Marshall. The court below ultimately decided to hold a contempt hearing and did so on April 27 and 28, 2010. Shortly after the contempt hearing, on May 11, 2010, the circuit court entered its judgment on the second jury verdict in the 2003 case wherein it awarded the Halpins \$38,495.91, the amount awarded by the second jury approximately fourteen months earlier.

Following entry of the court's May 11, 2010 judgment, the Halpins again sought to recover their attorney fees and costs. Two days later, the Halpins sought to supplement that request asking for an additional award making the total request more than \$305,000 in attorney fees, costs and interest.

⁵ The Kentucky Supreme Court docketed that case as Case No. 2009-SC-000495-MR.

Between July 2, 2010, and July 6, 2010, the Halpins again sought summary judgment against Marshall and Bill Hardy in the 2005 case. Following numerous motions and pleadings by the parties, the circuit court ultimately entered a “draft” judgment on August 9, 2010, in which it attempted to address all issues in both the 2003 case and the 2005 case. That judgment assessed damages against Bill Hardy in the 2003 case in the amount of \$160,467.88 and gave him credit for the \$154,897.82 previously paid, resulting in a net judgment for the Halpins of \$5,570.06 against Hardy. The draft judgment also overruled the motions to hold Susan Hardy and Marshall in contempt of court, but granted the motion to hold Bill Hardy in contempt of court and fined him \$15,000. The court further set aside the previous default judgment entered against Susan Hardy, denied the motion for summary judgment against Marshall and granted Marshall’s motion for summary judgment. Finally, the “draft” judgment granted in part and overruled in part the motion for summary judgment against Bill Hardy. The court found that the transfers of Bill Hardy’s interest in the marital home to Clay Avenue and his transfer of his interest in Newpast to Susan Hardy were justified to protect Susan’s interest and Graviss’s interests respectively.

After awarding the Halpins an additional \$57,748.69 in attorney fees in the 2005 case, the trial court’s “draft” judgment proposed to award the Halpins a total of \$78,318.75 against Hardy in addition to the amount he had previously paid the Halpins in satisfaction of the reversed judgment. Hardy moved the trial court to alter or amend the draft judgment, and the Halpins moved to make the judgment

final. Prior to the time that the court could rule on either motion, however, the Kentucky Supreme Court issued an opinion in *Marshall v. Goodwine*, 332 S.W.3d 51 (Ky. 2010)(hereinafter the “Writ Opinion). Therein, the Supreme Court found that this Court erred by not granting the writ of prohibition against the trial judge. After noting that the circuit court had ordered Bill and Susan Hardy and Marshall to show cause as to why they should not be held in contempt of court, the Supreme Court stated:

[Mrs. Hardy, Mr. Hardy, Clay Avenue, and Marshall] contend that the reversal on appeal of the 2005 judgment (in the 2003 case) rendered the enforcement issues moot and so abrogated the circuit court’s authority to order proceedings meant to vindicate the nullified judgment.

We agree and therefore reverse and remand to the Court of Appeals for issuance of a writ.

Marshall v. Goodwine, 332 S.W.3d at 53.

In the Writ Opinion, the Supreme Court also noted that the Hardys and Marshall had sought to have the 2005 case dismissed after reversal of the first judgment in the 2003 case, and that the Halpins countered by asking the trial court to hold all of the defendants in contempt of court. The Supreme Court held that the reversal of the first judgment in the 2003 case nullified that judgment and returned the parties to the positions they occupied before it was rendered. Furthermore, the court held that the Halpins’ 2005 case rested entirely on rights derived from the judgment in the 2003 case, and that the reversal of that judgment nullified those rights and mooted the Halpins’ claims based upon it. The Supreme Court went on

to note its opinion that, “the trial court’s invocation of potential contempt sanctions for Appellants’ alleged breach of those rights is a blatant attempt on the one hand to address moot questions and on the other to disregard, in a backdoor fashion, the effect of the Court of Appeals’ reversal of its 2005 judgment” in the 2003 case. *Id.* at 55. The Court thus concluded that the trial court had no jurisdiction to proceed with the 2005 case or the contempt proceedings. In addressing the costs incurred by the Halpins in pursuing the 2005 case, the Supreme Court noted, “While it may be unfortunate that the Halpins incurred costs in attempting to enforce the judgment, they were on notice that the judgment could be or had been appealed and was subject to reversal and so must be deemed to have proceeded at their own risk.” *Id.*

After the Supreme Court denied the Halpins’ request to reconsider the Writ Opinion and that opinion became final on March 24, 2011, this Court issued an order on April 29, 2011, directing the trial court to “vacate its order entered January 20, 2009, which directed the petitioners to show cause why they should not be held in contempt [and to] dismiss the Third Amended Complaint filed by the [Halpins].” On May 4, 2011, the circuit court complied with the directive of this Court, vacating the 2009 contempt order and dismissing the third amended complaint in the 2005 case.

On June 14, 2011, the trial court entered its final judgment in the consolidated 2003 case and the 2005 case. In the final judgment, the trial court set aside the previous finding of contempt against Bill Hardy set forth in the “draft”

judgment, and also set aside the previous attorney fee award of \$57,748.69 for work on the 2005 case. After setting off the amount of the judgment previously paid by Bill Hardy including the trial court's calculation of post-judgment interest, for a total of \$164,497.21, against the amount of the second judgment against Bill Hardy, plus attorney fees and costs awarded by the court, the net result was that a judgment in favor of Bill Hardy against the Halpins was entered in the amount of \$7,098.76.⁶

The Halpins appealed twice from the dismissal of the claims against Susan Hardy, Clay Avenue, and Marshall, resulting in the matters now presently before us on review. First, they filed a May 10, 2011 notice of appeal from the May 4, 2011 order dismissing the 2005 third amended complaint against Susan Hardy, Clay Avenue, and Marshall. Subsequently, on June 20, 2011, the Halpins filed a notice of appeal from the June 14, 2011 final judgment entered on all claims.⁷ By order entered on February 8, 2012, these two appeals were consolidated, and are now presently before us for review.

In summation, the Halpins argue on appeal that, "The precise issue on appeal is who should have to pay for the ancillary proceeding in a consumer protection case if the Defendant attempts to make himself judgment proof prior to

⁶ As the court's calculations in this respect have not been disputed by the parties, we accept them as accurate.

⁷ In their prehearing statements, filed on May 31, 2011, (concerning the first notice of appeal) and July 7, 2011, (concerning the second notice of appeal), the Halpins attempted to define the issues to be heard on appeal as "the propriety of dismissing the 2005 case," "the propriety of negating the contempt order [against Mr. Hardy]," and "the propriety and jurisdiction of the Supreme Court and Court of Appeals deciding an issue not before them."

the final judgment being rendered.”⁸ Thus, the Halpins argue that in a situation where a defendant fraudulently transfers his assets, the Court should look to the circumstances as a whole as well as the purpose of the Consumer Protection Act to do what is fair and equitable. The Halpins assert that the actions they took were necessary to prevent further fraud and to protect their rights, as opposed to waiting until the judgment was eventually reinstated and being hampered by statute of limitations or other collection issues.

As their first basis for appeal, the Halpins argue that the ancillary proceeding was a necessary element of the consumer protection case. They assert that at the time the judgment was initially entered in this matter, Hardy had ample liquid assets at his disposal which he could have applied toward payment of the judgment instead of intentionally disposing of those liquid assets by giving them to his wife without fair consideration, and by using them to prepay the premiums on a life insurance policy that he could later cash in at his discretion. *Sub judice*, the Halpins liken their situation to one in which a plaintiff has pursued a prejudgment attachment⁹ and assert that pursuant to KRS 367.220,¹⁰ parties who pursue actions under the Consumer Protection Act are authorized to seek reimbursement of attorney fees and costs in order to promote overall fairness when one party defrauds another.

⁸ Brief for Appellant, p. 12.

⁹ See KRS 435.301.

¹⁰ KRS 367.220(3) states, “In any action brought by a person under this section, the court may award, to the prevailing party, in addition to the relief provided in this section, reasonable attorney’s fees and costs.”

The Halpins argue that to deny them the attorney fees and costs initially awarded by the court below would be to cause them to bear the expense of being victims of fraud, which they assert is against the express purpose of the Consumer Protection Act. While acknowledging the opinion of the Supreme Court and the order of this Court ordering dismissal of the 2005 case, they assert that there was no determination which prohibited the trial court from considering fees for the actions taken by the Halpins which were reasonably necessary to protect their case from fraudulent transfers.

As their second basis for appeal, the Halpins argue that in addition to the consumer protection statutes, Kentucky law forbids transferring assets while a tort claim is pending. They argue that the actions taken to make Bill Hardy judgment proof were taken during the 2003 consumer protection case and prior to any appeal having been filed. Thus, they argue that the Hardys attempted to prohibit, hinder, and delay the Halpins from ever collecting while a tort claim was pending in violation of the law. In so arguing, they rely upon the holding of our Kentucky Supreme Court in *Griggs et. al. v. Crane's Trustee*, 179 Ky. 48, 200 S.W.2d 317 (1918), wherein, the Court held that:

When a transfer is made by one of his property, when there is pending an action against him for tort or other action for unliquidated damages, the fact that he makes such a transfer at such time is a badge of fraud, and is so, especially if it leaves him without any estate or greatly reduces his property.

Id. at 319. Accordingly, the Halpins argue that it is irrelevant whether the judgment was reversed, as they assert that the law provides that once a claim for

unliquidated damages has been filed against a defendant the law prevents him from transferring his assets.

As their third basis for appeal, the Halpins argue that Bill Hardy was found to have violated the restraining order issued against him in 2005. They note that after the Kentucky Supreme Court opinion issued on August 26, 2010, the circuit court believed that it could not consider any manner of contempt against Bill Hardy. The Halpins assert that this belief was in error, and argue that the Supreme Court opinion had no bearing on the basis for which Bill Hardy was held in contempt. Accordingly, they request this Court to reinstate the \$15,000 award for contempt issued when Bill Hardy was found to have violated the 2005 restraining order.

As their fourth basis for appeal, the Halpins argue that they are entitled to prejudgment interest in the amount of \$24,543.52. They assert that Bill Hardy defrauded them out of \$38,495.91, which was awarded by the second jury. They state that this amount represents the amount that the Halpins paid to Bill Hardy, less \$5,000. They assert that this sum is a liquidated sum entitling the Halpins to prejudgment interest at the rate of 8% per annum. They assert that *sub judice*, their damages were calculable and that, accordingly, that prejudgment interest should be awarded as a matter of course.

As their fifth basis for appeal, the Halpins argue that the court below erred in granting Marshall's motion for summary judgment and in dismissing him from this matter. They argue that by granting summary judgment to Marshall, the

court was making a finding that, as a matter of law, a defendant is permitted to transfer and conceal assets during the pendency of a case and ignore court orders without any liability as long as there is a temporary reversal that occurs in the case that requires it to be retried. Moreover, the Halpins argue that as a policy matter courts should not encourage attorneys to assist their clients in committing a “fraud.”

As their sixth basis for appeal, the Halpins argue that the court below erred in dismissing Susan Hardy from this matter. They argue that the “fraud” at issue could not have been committed without Susan taking affirmative steps to assist Bill in transferring the assets, actions which the court below found to be fraudulent. The Halpins assert that if the judgment below had not been temporarily negated by the appellate reversal, Susan would have been liable as a joint tortfeasor who assisted in the transfer of assets during the pendency of the case to delay the Halpins from collecting on their judgment.

In addressing the arguments of the Halpins on appeal, we turn first to the motions filed by E. David Marshall, Susan Hardy, and Clay Avenue, LLC to dismiss the Halpins’ appeal from the fraudulent conveyances action. Concerning the issue of whether the court below correctly dismissed the claims set forth against E. David Marshall, Susan Hardy, and Clay Avenue, LLC, we find that the opinion of the Kentucky Supreme Court in *Marshall v. Goodwine*, 332 S.W.3d 51, and other applicable law, is controlling. This Court is of the opinion that the opinion issued by the Supreme Court and the subsequent mandate issued by this

Court to dismiss the case against Marshall, Susan Hardy, and Clay Avenue, LLC is the law of the case. As the court below notes, the Halpins' claims set forth in the 2005 fraudulent conveyances case were rendered moot when the judgment upon which they were based was reversed. The law of the case doctrine is an iron rule, universally recognized, that an opinion or decision of an appellate court in the same case is the law of the case for a subsequent trial or appeal, however erroneous the opinion or decision may have been. *Brooks v. Lexington Fayette Urban County Housing Authority*, 244 S.W.3d 747 (Ky. App. 2007), citing *Union Light, Heat, & Power Co. v. Blackwells Administrator*, 291 S.W.2d 539, 542 (Ky. App. 1956). Accordingly, the motion to dismiss the appeal insofar as those parties are considered is granted.

Having so found, we now turn to the remaining arguments on appeal. In so doing, we note that the majority of the Halpins' brief is devoted to the argument that they are entitled to reimbursement of their attorney fees and costs for pursuing the fraudulent conveyances action. Indeed, they have stated, "The precise issue on appeal is who should have to pay for the ancillary proceeding (fraudulent conveyances action) in a consumer protection case if the Defendant attempts to make himself judgment proof prior to the final judgment being rendered."¹¹ In response to the arguments made by the Halpins concerning whether they are entitled to reimbursement of attorney fees and costs for their attempt to enforce the

¹¹ See Appellants' Brief, p. 12. (Clarification added).

2005 judgment, we again direct the attention of the parties to the clear holding of our Kentucky Supreme Court in *Marshall v. Goodwine*, wherein the court stated:

The Halpins' 2005 complaint rests entirely on rights derived from the 2005 judgment. The reversal of that judgment nullified those rights, rendered them as though they had never been, and thus mooted the Halpins' claims based on them. The trial court's invocation of potential contempt sanctions for Appellants' alleged breach of those rights is a blatant attempt on the one hand to address moot questions and on the other to disregard, in a backdoor fashion, the effect of the Court of Appeals' reversal of its 2005 judgment. Considered in either light, the trial court is proceeding outside its jurisdiction. *Commonwealth v. Hughes*, 873 S.W.2d 828 (Ky. 1994) (mootness typically arises from a change in circumstance that vitiates the action, and when it does it abrogates the court's jurisdiction to address the action); *Buckley v. Wilson*, 177 S.W.3d 778 (Ky. 2005) (trial court must give effect to appellate court rulings). Stated simply, the trial court has no authority to “vindicate” a judgment that has been reversed and thus rendered nonexistent. The Court of Appeals erred by ruling otherwise. *While it may be unfortunate that the Halpins incurred costs attempting to enforce the 2005 judgment, they were on notice that the judgment could be or had been appealed and was subject to reversal, and so must be deemed to have proceeded at their own risk.*

Id. at 55. (Emphasis added). Clearly, our Kentucky Supreme Court has already addressed this very issue. The language of the Court’s opinion makes it clear that the Halpins were deemed to have proceeded at their own risk by incurring costs in attempting to enforce a judgment that was on appeal and subject to reversal. The language of the Court’s opinion makes clear that the Halpins proceeded at their own risk by incurring costs in attempting to enforce a judgment that was on appeal

and subject to reversal. Upon remand from the Kentucky Supreme Court in the Writ case, this Court entered its mandate on April 29, 2011, stating as follows:

Pursuant to the directive rendered by the Supreme Court of Kentucky on remand, it is ordered that the petition for writs of prohibition and mandamus be granted. The respondent Fayette Circuit Court is ordered to vacate its order entered on January 20, 2009, which directed the petitioners to show cause why they should not be held in contempt. The Fayette Circuit Court is further ordered to dismiss the Third Amended Complaint filed by the real parties in interest.

Marshall v. Goodwine, 2009-CA-000574-OA, April 29, 2011.

By dismissing the “draft judgment” in the June 14, 2011 final judgment, the court below revoked the award of fees and costs to the Halpins for pursuing the 2005 case, and in so doing was carrying out the mandate of this Court on remand from the Kentucky Supreme Court. The ruling of the Kentucky Supreme Court was determinative of who should bear the cost for the ancillary proceeding. After the Kentucky Supreme Court rendered its decision in *Marshall v. Goodwine*, the Halpins filed a request for reconsideration, which was denied. As the highest court in the Commonwealth has spoken clearly on this issue, this Court is without authority to find otherwise, and we affirm. *See Williamson v.*

Commonwealth, 767 S.W.2d 323, 325 (Ky. 1989).¹²

In affirming, and upon review of the record and the clear, direct opinion of the Supreme Court, there is simply no question that the Court clearly

¹² Wherein, our Kentucky Supreme Court held that a final decision of that Court, whether right or wrong, is the law of the case and conclusive of the questions therein resolved, and binding upon the parties, the trial court, and the Court of Appeals.

addressed the issue of whether the trial court had jurisdiction to hear the fraudulent conveyance action, and determined that it did not. It is the plain law of this Commonwealth that this Court is bound to follow the mandate of the Supreme Court. Indeed, upon consideration of the record, and the actions taken by the Appellees, we cannot conclude that they could have believed an appeal from such an order was merited, or that it was made in good faith.

Certainly, where an appeal is frivolous this Court may award just damages and single or double costs to the non-offending party pursuant to CR 73.02(4). Furthermore, we note that it is not just the offending party that is exposed to penalty. Indeed, CR 11 imposes a burden upon counsel to make reasonable inquiry into the basis of an action, both legally and factually, and forbids the filing of an action for an improper purpose like delay or harassment. Rule 11 provides this Court with authority to assess violators with the expenses incurred by their opponents, including attorney's fees. Accordingly, we believe that sanctions, pursuant to CR 73.02, are warranted. *Sub judice*, the Appellees have requested that the Appellants pay “just damages” as well as double costs. We believe such sanctions to be appropriate and, accordingly, order that sanctions be awarded to Appellees in the amount of \$5,000.00.

In so finding, we briefly address the argument made by the Halpins that they are entitled to recover the \$15,000 fine initially levied against Bill Hardy for contempt of court. In reviewing this issue, we note that on August 5, 2005, the trial court issued a restraining order prohibiting Bill Hardy from making any

further transfers of his assets. Bill Hardy nevertheless continued to sell or dissipate his assets, as clearly found by the trial court. Accordingly, a \$15,000 fine for contempt was assessed against him. For the reasons previously set forth herein, and having found that the Supreme Court was clear that the trial court was without jurisdiction to consider contempt charges, we believe that the court below appropriately set aside the fine; and we affirm.

Having so found, we now turn to the issue of whether the Halpins are entitled to prejudgment interest on the judgment from the second jury verdict. As our courts have clearly held, prejudgment interest is to be awarded on a liquidated sum. *Faulkner Drilling Co. v. Gross*, 943 S.W.2d 634, 638 (Ky. App. 1997). In order to be liquidated, there must be certainty as to the amount of damages. *Id.* Below, the trial court did not award prejudgment interest on the compensatory damages awarded by the second jury because it determined that the amount awarded by the jury in compensatory damages was not a fixed or certain sum. Having reviewed the record and applicable law, we find that the trial court was within its discretion to make this finding, and we decline to find otherwise herein.

Finally, we turn to the issues raised by Bill Hardy on cross-appeal, namely, whether the trial court erred in failing to require the Halpins to refund the amount paid to them by Bill Hardy on the first reversed judgment, with interest in order to make full restitution, and whether the court's final judgment erroneously permitted the amount of the second judgment to be paid through a set-off against the amount previously paid by Bill Hardy.

First, Hardy asserts that the trial court erred in failing to require the Halpins to refund the amount paid to them by Hardy on the reversed judgment, with interest, in order to make full restitution.

Hardy states that on April 9, 2007, the same date that the trial court clerk docketed the opinion of this Court reversing the first judgment, he filed a motion seeking the trial court to order the Halpins to refund him the amount of money paid by him in compliance with the first judgment, with interest. The trial court overruled that motion in an order entered on June 7, 2007. Two days later, the Kentucky Supreme Court denied discretionary review of the decision of this Court reversing the final judgment. Hardy again moved the trial court to order the Halpins to repay the amount paid to them on the first judgment, with interest.

The Halpins responded to Hardy's motion by filing a motion for attachment, seeking a pretrial attachment of the money previously paid by Bill Hardy in satisfaction of the now reversed judgment pursuant to KRS 425.307. Hardy objected, asserting that he was no longer indebted to the Halpins, as the judgment had been reversed. Nevertheless, the trial court entered an order of attachment on January 23, 2009, appointing the Halpins as "special bailees" of the money paid by Mr. Hardy in satisfaction of the reversed judgment. The court ordered the Halpins to post a bond in the amount of \$2,500. Hardy asserts that before any order of attachment was entered, the bond should have been set by the trial court in an amount not less than double the amount of the plaintiff's claim, pursuant to KRS 425.309(1). Thus, Hardy asserts that the order failed to comply

with the mandatory requirements of KRS 425.309, and it should be reversed by this Court.

Hardy further argues that the Halpins should be ordered to disgorge the amount paid to them by Hardy with interest. Hardy asserts that restitution is required, and asserts that pursuant to the law of this Commonwealth as set forth in *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408 (Ky. 2005)(discussed herein, *infra*), the return of a paid judgment is required after reversal of that judgment. Accordingly, Hardy argues that the full amount which he paid, along with interest from the date of payment, must be restored to Hardy by this Court.

Additionally, Hardy argues that in the final June 2011 judgment the trial court erroneously calculated interest due to Hardy. Though it did not require the Halpins to make restitution to Hardy, the court did calculate a set-off from the amount already paid by Hardy against the amount of the second jury verdict rendered in the Halpins favor, plus attorney fees and costs. Hardy asserts that in giving him credit for interest on the amount paid on the reversed judgment, the trial court only calculated interest from the date the Kentucky Supreme Court denied discretionary review of this Court's September 2008 opinion reversing the first judgment. Hardy now argues that the trial court erred by not calculating interest from May 5, 2006, the date that the first judgment was paid by Hardy in May of 2006. He therefore requests that this Court reverse that portion of the final

judgment and remand to the trial court with instructions to calculate interest from the date of the payment of the first judgment.

Finally, Hardy argues that the trial court's final judgment erroneously permitted the amount of the second judgment to be paid through a set-off against the amount previously paid by Hardy. Hardy notes that shortly after the second jury verdict, and before judgment was entered on that jury verdict by the trial court, he filed for relief under Chapter 7 in the United States Bankruptcy Court for the Eastern District of Kentucky. He states that though the bankruptcy court lifted the automatic stay to allow this case to proceed to final judgment, the Order lifting the automatic stay very clearly states that, "The automatic stay pursuant to 11 U.S.C. §362 shall otherwise remain in effect during the pendency of the bankruptcy case, prohibiting enforcement or collection of any judgments rendered against the Debtors ..."¹³ Hardy asserts that the trial court's final judgment did exactly what the bankruptcy court's order prohibited by allowing enforcement and collection of the second judgment. Hardy asserts that to allow the trial court's action to stand would effectively render any discharge of the judgment in Bankruptcy Court ineffective. Accordingly, Hardy ultimately requests this Court to remand this case to the trial court with instructions to order that restitution be paid by the Halpins to Hardy in the full amount of the first judgment which he paid, along with prejudgment interest on said amount from the date paid through

¹³ RA Vol. 18, p. 2622.

April 6, 2007, and with post-judgment interest on the combined sum from April 6, 2007, through the date of payment.

In response to the arguments made by Hardy, the Halpins assert that the trial court was correct in offsetting the amount of the second judgment against what had previously been paid on the reversed first judgment and allowing the Halpins to keep the money paid to them by Hardy. They assert that the court awarded judgment based upon many different aspects of the case and offsets were calculated and totaled appropriately against either party. Moreover, they argue that it was to Hardy's advantage to have the offset, as the Court awarded him 12% interest during the entire litigation, causing what they assert was a windfall for Hardy. Conversely, the Halpins assert that they were not given prejudgment interest on the funds they paid to Hardy dating back to the original transaction. They thus argue that the court should have either allowed both parties to get credit for interest, or decline to give it to either party.

In addressing the argument made by Hardy that KRS 425.309 requires that the attachment bond be in an amount of double the amount of the plaintiff's claim, we note that while this is in fact required by statute, KRS 425.309, in conjunction with KRS 425.121, also requires that if an objection is not made to the surety within ten days of its issuance, the objection is waived. Accordingly, we find Hardy's claims to double recovery and or a return of the funds at that time to be without merit.

Concerning Hardy's argument that the Halpins should be ordered to disgorge the amount paid to them by Hardy with interest in order to assure that full restitution is made, Hardy relies upon *Elkhorn* for the assertion that:

[T]he party who executes on a judgment during the pendency of an appeal does so at his or her own risk because, if the judgment is reversed, any benefits obtained by virtue of the execution must be restored to the adverse party.

Elkhorn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408 at 420.

Further, the Court provided that, "Restitution restores the party who has satisfied a judgment that was erroneously entered to the position which the party would have occupied but for the entry of the erroneous judgment." In addressing the issue of restitution, the *Elkhorn* Court was clear that interest be calculated not from the date of reversal of the judgment, but from the date of payment.¹⁴ *Elkhorn* at 184.

Sub judice, the court calculated a set-off from the amount paid by Hardy against the amount of the second jury rendered in the Halpins' favor, plus fees and costs. However, in giving Hardy credit for interest on the amount paid on the first judgment, the court only calculated interest beginning from the date the Kentucky Supreme Court denied discretionary review, and not from the May 5,

¹⁴ Therein, the Court struck down a statute requiring a 10% penalty paid on a damages award if a motion for discretionary review of that damages award is unsuccessful. After the Supreme Court's decision, *Elkhorn* sought repayment of \$950,000 previously paid as a penalty under the statute, with interest. The trial court awarded interest from the date of the Supreme Court's decision declaring the statute unconstitutional; *Elkhorn* argued that it was entitled to an additional four years of interest, from the date it paid the penalty. The Court of Appeals agreed with *Elkhorn* and the Supreme Court affirmed, requiring that the interest be calculated from the date of payment, not from the date of reversal of the judgment.

2006 date on which Hardy paid the first judgment. We believe that based on the clear holding in *Elkhorn*, the court should have calculated interest from the May 5, 2006 date on which Hardy paid the first judgment and, accordingly, we reverse that portion of the final judgment and remand with instructions for the court to calculate interest accordingly.

Finally, we address Hardy's argument that the trial court's final judgment erroneously permitted the amount of the second judgment to be paid through a set-off against the amount previously paid by Hardy. With this latter contention, we are also compelled to agree. While the Halpins argue that because they prevailed following the second jury trial, the court was correct in offsetting the amount of the second judgment against the first reversed judgment, it is clear that Hardy filed for relief under Chapter 7 of the United States Bankruptcy Code prior to the time the second judgment was rendered. While the Bankruptcy Court did lift the automatic stay to allow this case to proceed to final judgment, the order lifting the automatic stay clearly stated that, "The automatic stay pursuant to 11 U.S.C. §362 shall otherwise remain in effect during the pendency of the bankruptcy case, prohibiting enforcement or collection of any judgment against the Debtors ..."

Upon review of the record, this Court is in agreement with Appellees that the trial court's final judgment, in offsetting the amount awarded in the second judgment against the amount paid in the first, effectively allowed enforcement and collection of the second judgment. Collection of any judgment was expressly

prohibited by the order of the Bankruptcy Court and, in effect, renders discharge of the judgment in Bankruptcy Court ineffective. Accordingly, we believe reversal is necessary and that remand is appropriate for the issuance of an order that restitution be paid by Appellants to Bill Hardy in the full amount of the first judgment which he paid along with prejudgment interest on that amount from the date paid through April 6, 2007, and with post-judgment interest on the sum from April 6, 2007, through the date of payment.

Wherefore, for the foregoing reasons, we hereby grant the motions to dismiss filed by Susan Hardy, Clay Avenue, LLC, and E. David Marshall with respect to the fraudulent conveyances action, affirm the June 14, 2011 order of the Fayette Circuit Court dismissing the Halpins' claims, and order sanctions as set forth herein. Further, we remand this matter for the issuance of an order that restitution be paid by Appellants to Bill Hardy in the full amount of the first judgment which he paid, along with prejudgment interest on that amount from the date paid through April 6, 2007, and with post-judgment interest on the sum from April 6, 2007, through the date of payment.

ALL CONCUR.

DATE: September 19, 2014

c/Michael O. Caperton

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