

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2003-SC-000780-DG

DATE 2-9-06 EWAGroup, P.C.

NANCY OLIVER ROBERTS

APPELLANT

V. ON REVIEW FROM COURT OF APPEALS, NO. 2002-CA-000055
WARREN CIRCUIT COURT, DIVISION III
NO. 97-CI-01371

JUDY ALENE CARDWELL and
KENNETH A. MEREDITH, II

APPELLEE

OPINION OF THE COURT BY JUSTICE SCOTT

REVERSING AND REMANDING

The Appellant, Nancy Oliver Roberts, appeals the ruling of the Warren Circuit Court and the Court of Appeals ordering her to pay \$1,153.83 to Appellee Judy Cardwell.¹ The Appellant now appeals the order to this Court. For the reasons set out herein, we reverse the Court of Appeals and vacate, in part, the judgment of the Warren Circuit Court and remand this matter to the trial court for proceedings consistent herewith.

The Appellant represented Ray Cardwell in the dissolution of marriage action between himself and his then wife, Judy Cardwell. During the pendency of the action, the couple's marital residence suffered minor hail damage for which their home insurer issued a check for damages in the amount of \$7904.17. The Cardwells were then ordered by the Circuit Court to apply the check to the past due mortgage payments that

¹ The procedural grounds on which the Appellant appeals this matter, as well as the procedural grounds on which the trial court based its order, are unclear as she was not a party to the original cause of action.

had not been paid. The parties applied approximately \$5046.51 to the first mortgage and the home equity loan and \$550.00 was given to Judy Cardwell for damages to personal property, leaving \$2307.66 in marital funds. The bank issued a check for the remaining money making it payable to Judy Cardwell, Ray Cardwell, and Trans Financial Bank. The Circuit Court, through the Domestic Relations Commissioner, ordered the check to be negotiated by the Cardwells and placed in the Appellant's escrow account pending division of the marital property by the court. The Appellant, however, did not comply with this order as the check was made payable to the Cardwells and Trans Financial Bank and would require the bank's endorsement to effectuate negotiation and was, thus, an impossibility. As such, the check remained in Ray Cardwell's file maintained by the Appellant.

The issues in contention today arise out of the \$2307.66 check and its ultimate existence (or non-existence) when the court issued its Findings of Facts, Conclusions of Law and Final Decree of Dissolution. The Appellant argues that both of the Cardwells negotiated the check by their endorsement and she then tendered the check to Trans Financial Bank, pursuant to subsequent agreement of the parties and all counsel, as an additional payment on their mortgage arrearages, as no other payments had been made subsequent to the approximately \$5046.51 payment four to five months earlier.

Appellee Cardwell denies endorsing the check and denies knowing where the check is and, that if the check was negotiated, for whatever purpose, her endorsement was a forgery. The co-Appellee, Kenneth Meredith, attorney for Judy Cardwell, also denies knowing the location and/or disposition of the check.

Among other motions, the Appellant filed, on her own behalf, a Motion to Alter, Amend or Vacate the Final Decree and, ultimately, provided the court with supporting

documentation to establish that the remaining proceeds from the hail damage check had been negotiated by the parties and Trans Financial Bank and then applied to their two outstanding mortgage loans in equal amounts of \$1153.83. The Appellant filed with the court an affidavit of the Trans Financial Bank employee, Brenda Hyatt, who was the individual alleged to have effected the two \$1153.83 payments. The Appellant's motion was overruled and she has sought discretionary review with this Court from the Court of Appeals and the trial court.

Ultimately, though this case causes us concern as to the actions of all of the parties involved, we must confine our discussion to the actions of the Warren Circuit Court. In doing this, we must first determine if the trial court had jurisdiction to bind the Appellant by court order in an action to which the Appellant was not a party, absent proceedings and findings, holding the Appellant in contempt of court for violation of a court order. Second, we must determine if the court's Findings of Facts were clearly erroneous and whether the trial court, after learning of the alleged inaccuracies in its Findings of Fact, abused its discretion by failing to vacate and/or modify the portion ordering the Appellant to pay Judy Cardwell \$1153.83.

With respect to the first issue, the trial court was without jurisdiction to order the Appellant to pay \$1153.83 to Judy Cardwell. The Appellant was not a party to the action according to the enumerated provisions of CR 4, or any of the Rules of Civil Procedure for that matter. There was no service of process or show cause orders issued on the Appellant that would confer personal jurisdiction over the Appellant. Service of process is the "fundamental prerequisite" to establishing the personal jurisdiction of a court over a party; without personal jurisdiction, a court is without authority to conduct proceedings involving a party, regardless that it may have

jurisdiction over the subject matter. E.g. Omni Capital Intern. v. Rudolf Wolff & Co., Ltd., 108 S.Ct. 404, 406, 484 U.S. 97, 98 L.Ed.2d 415 (1987) (A federal court cannot exercise personal jurisdiction over a defendant until he has been served a summons; it is by serving a summons that a court having venue and jurisdiction of the subject matter asserts its jurisdiction over the person of the individual served). The Appellant was denied use of all of the safeguards guaranteed by the Rules of Civil Procedure to all litigants in a civil action, effectively a denial of her constitutional right to “due process.”

The trial court’s only avenue by which it could compel this appellant to undertake a specific action, absent a “suit” and service of process, is through its contempt power which would require, upon disobedience of the court’s order (and certain other grounds), the issuance of a show cause order for contempt and an evidentiary hearing. E.g. International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 827, 114 S.Ct. 2552, 2557, 129 L.Ed.2d 642 (1994) (“ . . . civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding **upon notice and an opportunity to be heard**).

The Appellant was not issued a show cause order to which she might reply. She was not given a hearing at which she might present evidence to establish actions in conformity with the court’s orders and counsels’ agreements. She was, however, arbitrarily ordered to pay only one half of the money she was alleged to have in her possession to only one of the parties to the action. We believe the trial court’s order regarding the division of the \$2307.66 check was “unsupported by sound legal principle” and was thus an abuse of its discretion. Miller v. Eldridge, 146 S.W.3d 909, 914 (Ky. 2004).

With respect to the Appellant's Motion to Alter, Amend, or Vacate, CR 52.01 establishes that findings of facts in domestic relations cases shall not be set aside unless clearly erroneous. See Dull v. George, 982 S.W.2d 227 (Ky.App.1998). If we find the trial court to be clearly erroneous, then we must further determine if its failure to correct itself constitutes an abuse of its discretion, or if its ". . . decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Miller v. Eldridge, 146 S.W.3d 909, 914 (Ky. 2004).

The record before us, and before the trial court, consists of numerous documents contended to support the Appellant's assertion that the \$2307.66 check had been negotiated by both of the Cardwells and had been applied equally to their two outstanding loans acquired during the parties' marriage. Through her affidavits, Brenda Hyatt, the bank employee who effected the payments, stated under oath that, because the bank was also a payee on the check, it could only be negotiated as payment on the mortgage loans and that both Cardwell signatures were genuine (though she did not see Judy Cardwell sign the check). She further stated in her affidavits that she provided the Appellant with a handwritten receipt upon the Appellant's request and that she observed the Appellant provide Appellee Meredith, attorney for Judy Cardwell, with a copy of the receipt.

Additionally, the bank ostensibly provided computer print-outs from the date in question, December 4, 1998, showing that the bank engaged in a transaction for exactly \$2307.66 (also bearing check number 506308, the check number assigned the \$2307.66 check). They apparently also provided further documentation to show a December 4, 1998 payment of \$1153.83 applied to what appears to be the first mortgage as well as a payment to a separate loan number in the amount of \$1153.83

on December 4, 1998 (apparently the home equity loan). Both documents contained loan numbers associated with the Cardwells' mortgage and home equity loan.

The Appellant provided her sworn affidavit wherein she sets out her version of events. She further provided copies of numerous instances of correspondence between herself and Appellee Meredith, including a correspondence dated December 3, 1998, wherein they discuss negotiating the \$2307.66 check and applying the amount to the arrearages on the mortgage and home equity loan. (This option was agreed to during a hearing with the Domestic Relations Commissioner, yet, for whatever reason, did not become ratified as an order of the court.)

The court was also privy to multiple samples of Judy Cardwell's handwriting to which it could compare the endorsement on the check. The Appellee had signed numerous court documents and mortgage agreements that were in the record. But in any event, a document examiner could testify as to this matter.

The record suggests that Appellee Meredith tendered the Findings of Facts, Conclusions of Law, and Final Decree of Dissolution to the court without the Appellant "having seen" and agreed that the content was consistent with the trial court's ruling. It further appears that the trial court incorrectly assumed that the check was still in existence and in the Appellant's escrow account at the time of the entry of the Final Decree. This, however, is not the court's error. The error arises when the Appellant, however ineptly, drew the court's attention to the error (providing substantial evidence to support her assertion) and the court overruled the motion to correct the inaccuracy. The court's Findings of Facts, tendered by Appellee Meredith, were clearly erroneous and the court's failure to remedy the error, on motion by the Appellant, is an abuse of discretion.

We believe there was sufficient evidence to find that Judy Cardwell did, in fact, endorse the check and the check was applied to the marital debt per counsels' agreement; to the benefit of both parties. However, this is not our job and we have no powers to make such findings. It does appear that Judy Cardwell received the credit for her \$1153.83 and, if so, she should not realize a windfall. Nor does the Appellant deserve to be punished unless she violated court orders or counsels' agreement.

Because we believe the trial court abused its discretion in ordering payment be made by the Appellant to Judy Cardwell when the Appellant was not a party, as well as when it overruled the Appellant's motion to Alter, Amend, or Vacate, we hereby reverse and vacate the judgment of the trial court, in as much as it pertains to the disposition of the remaining insurance proceeds. This matter is remanded to the Warren Circuit Court for such proceedings consistent herewith as are necessary to ascertain the truth of what did occur and such other proceedings thereafter as the court deems necessary, according to law.²

Lambert, C.J.; Cooper and Graves, JJ., concur. Johnstone, Roach and Wintersheimer, JJ., dissents.

² We decline to address the Appellant's claim for attorney's fees as the Warren Circuit Court has not had the opportunity to make a ruling on the issue.

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