Cite as 2013 Ark. App. 401

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-12-1042

TREENA CARROLL APPELLANT V. JOHN CARROLL APPELLEE	**Opinion Delivered** June 19, 2013 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTEENTH DIVISION [NO. DR 2008-704] HONORABLE ELLEN B. BRANTLEY, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Treena and John Carroll were divorced by a consent decree that incorporated a property settlement agreement signed by the parties. In this appeal, appellant Treena Carroll contends that the Pulaski County Circuit Court erred in denying her motion to set aside the property settlement agreement. We affirm the circuit court's order.

After six years of marriage, Treena and John Carroll were divorced on March 24, 2008. Although both parties had children from previous relationships, there were no children born of the marriage. During their marriage, on November 6, 2002, appellee was severely injured in an automobile accident for which he received a net settlement recovery of $686,889.21. Appellee's injuries from the accident required him to undergo eighteen surgeries, which eventually led to amputation of his right leg below the knee. He has been disabled and unable to work since the accident. The parties put $85,000 of the settlement

money in their joint checking account to spend and placed the remaining $600,000 into a joint account at Morgan Stanley with broker Lorie Brown, a friend of the parties from Sunday School. The parties held the account as joint tenants in common, and both Ms. Brown and appellee testified that the account statements were sent to the marital address and that appellant had equal access to the funds in the account. The parties invested $100,000 in a CD, $100,000 in an annuity, and $400,000 in bonds. All funds were held at Morgan Stanley except for the annuity, which was sent to and held by an insurance company, MetLife. The MetLife annuity was included on the parties' Morgan Stanley statements, which were regularly mailed to their home. During their marriage, the parties spent approximately $200,000 of the funds held at Morgan Stanley.

The parties began experiencing marital problems in October 2007 and decided to "amicably" divorce in January 2008. To that end, they agreed that appellant would receive $60,000 from the Morgan Stanley account. They met with Ms. Brown at Morgan Stanley on January 24, 2008, and told her they wanted to move the assets into appellee's name. Appellant received a check for $60,000, and the parties signed a document to move the bonds from the joint account into appellee's name. After the $60,000 withdrawal, the bond account's balance was approximately $246,870.

Ms. Brown testified that she did not realize before the meeting that the parties still held the annuity with MetLife and therefore she did not have the paperwork ready to transfer ownership of the annuity. She told the parties at the meeting that she would mail them a document to sign in order to accomplish this. When Ms. Brown next spoke with appellee,

she told him that she had not received the paperwork regarding the annuity, and he asked her to fax the form to him at a bank in Oklahoma City, where he had just moved and was opening a new account. Ms. Brown testified that she faxed the form and it was faxed back to her several minutes later with both parties' signatures. Ms. Brown mailed a note to appellant and attempted to call appellant several times to verify her signature, but appellant's phone was disconnected. Ms. Brown eventually spoke with appellant on March 3, 2008, and appellant said that she was never in Oklahoma City and did not sign the form. She asked Ms. Brown to mail the form to her and said she would sign it and return it. In several more phone conversations, appellant again told Ms. Brown that she would sign the form and return it. Finally, in July, appellant told Ms. Brown's assistant that she was not going to sign the form.

Appellee testified that in February 2008 the parties spoke about getting the divorce filed. He said that appellant told him that she did not want to get an attorney and asked appellee to "get it done." On February 25, 2008, the parties went to the law firm of Dodds, Kidd, and Ryan and signed a property settlement agreement, which included the following provision: "4. The Wife is awarded the $60,000 previously transferred to her from the Morgan Stanley account with the Husband retaining all funds remaining in said account. Wife agrees to execute any and all documents necessary to relinquish any interest she may have in said property to Husband." Appellant also signed a waiver of service. Appellee attended an uncontested divorce hearing in March, and the consent divorce decree incorporating the parties' property settlement agreement was filed on March 24, 2008.

On May 17, 2011, appellee filed a motion for contempt, alleging that appellant had failed to comply with paragraph 4 of the property settlement agreement by refusing to sign the appropriate paperwork to remove her name from the accounts at Morgan Stanley. Appellant denied being in contempt, claiming she had never been served a copy of the divorce decree. She affirmatively alleged that she was misled, that she had not known the amount of the parties' assets when she signed the property settlement agreement, and that appellee had actively concealed their assets. She alleged that she had been led to believe they had $125,000 in assets. Finally, in her response to appellee's motion for contempt, she alleged that approval of the property settlement agreement was procured by misrepresentation and was a fraud upon the court and asked that it be set aside pursuant to Rule 60(c)(4) of the Arkansas Rules of Civil Procedure.

On August 6, 2012, the circuit court entered an order denying both appellee's motion for contempt and appellant's motion to set aside the property settlement agreement. It found that appellee did mislead appellant during settlement negotiations. But the court determined that the broker was a friend of appellant's and that the accounts were in both parties' names; thus, it found that appellant's reliance was not reasonable or justifiable. Finally, the court found that the parties intended for the annuity held by Morgan Stanley to be included in the "Morgan Stanley account" referenced in the divorce decree. The court found that appellee was entitled to full ownership and possession of the annuity and any other funds remaining with Morgan Stanley, and it directed any entity with control of the funds to remove appellant from the accounts. The court also directed appellant to sign any forms necessary to

effectuate removal of her name.

A circuit court may set aside a judgment or order more than ninety days after the filing of the judgment or order for misrepresentation or fraud. Ark. R. Civ. P. 60(c)(4) (2012). It is within the discretion of the circuit court to determine whether it has jurisdiction under Rule 60 to set aside a judgment, and the question on appeal is whether there has been an abuse of that discretion. *Grand Valley Ridge, LLC v. Metro. Nat'l Bank*, 2012 Ark. 121, at 14, 388 S.W.3d 24, 33. To establish fraud, a plaintiff must prove the following elements: (1) a false representation of material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Knight v. Day*, 343 Ark. 402, 405, 36 S.W.3d 300, 302–03 (2001). The party seeking to set aside a judgment on the basis of fraud has the burden of proving fraud by clear, cogent, and convincing evidence, or, as our courts have sometimes said, clear, strong, and satisfactory proof. *Jewell v. Fletcher*, 2010 Ark. 195, at 11, 377 S.W.3d 176, 185. On review from a bench trial, we will not reverse the trial judge's findings of fact unless they were clearly erroneous or clearly against the preponderance of the evidence. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 361, 974 S.W.2d 464, 467 (1998). Disputed facts and determinations of credibility of witnesses are within the province of the fact-finder. *Id.*

On appeal, appellant contends that the circuit court erred in refusing to set aside the property settlement agreement. Specifically, she argues that the court's written order is

inconsistent with its oral findings, that the court erroneously applied the law to its oral finding of facts, and that the court's finding that the annuity was intended to be within the Morgan Stanley account is erroneous.

First, pursuant to Ark. Sup. Ct. Administrative Order No. 2(b)(2), an oral order announced from the bench does not become effective until reduced to writing and filed. *McGhee v. Ark. State Bd. of Collection Agencies*, 368 Ark. 60, 67, 243 S.W.3d 278, 284 (2006) (citing *Judkins v. Hoover*, 351 Ark. 552, 95 S.W.3d 768 (2003), *rev'd on other grounds*, *West v. Williams*, 355 Ark. 148, 133 S.W.3d 388 (2003)). This rule eliminates or reduces disputes between litigants over what a trial court's oral decision in open court entailed. *Id*. Until a trial court's ruling is reduced to writing and filed of record, it is free to alter its decision upon further consideration of the matter. *Id*.

In this case, the circuit court did pronounce from the bench that appellee actively misled appellant, and the court stated at one point that it had made a finding that appellee committed fraud. But the court also stated that it was not certain that there was a fraud on the court; that it did not find either party credible and believed only Ms. Brown; that the bank statements did not correlate with appellant's "self-serving" testimony about what appellant thought; and that while the court found that appellee actively misled appellant, it was bothered that she did not "trouble herself" with looking at the bank statements. The court stated that appellant "could have gone down there and found out what she owned." Although the court said it was "probably going to set this aside," it did not make a definitive finding from the bench. Indeed, the court asked the parties to submit posttrial briefs, which

the parties did. In any case, to the extent that the circuit court's bench findings conflict with its written order, which we are not certain that they do, the written order controls. *Stills v. Stills*, 2010 Ark. 132, at 12, 361 S.W.3d 823, 830.

Further, the court specifically stated in its written order that, although it found that appellee misled appellant during settlement negotiations, appellant's reliance on those misrepresentations was neither reasonable or justifiable. Justifiable reliance on the representation is an element of fraud. *Knight*, 343 Ark. at 405, 36 S.W.3d at 303. The court did not err in applying the law to its factual findings.

Finally, we hold that the circuit court's finding that the parties intended for the annuity to be included within "the Morgan Stanley account" is not clearly erroneous. Although the annuity was actually held at MetLife, Ms. Brown testified that the annuity was listed on the parties' Morgan Stanley statements. The parties purchased all of their investments—bonds, a CD, and the annuity—from their investment advisor at Morgan Stanley, Ms. Brown, who managed their money for them. Appellant agreed that Morgan Stanley was the only place that the parties put the settlement money and that the annuity was purchased through Morgan Stanley. Disputed facts and determinations of credibility of witnesses are within the province of the factfinder. *Ford Motor Credit Co.*, 334 Ark. at 361, 974 S.W.2d at 467. We hold that the court did not clearly err; therefore, we affirm the order of the circuit court.

Affirmed.

WALMSLEY and WHITEAKER, JJ., agree.

Raymond Harrill, by: *Raymond Harrill*, for appellant.

Dodds, Kidd & Ryan, by: *Lucas Rowan* and *Adrienne Griffis*, for appellee.