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SUPREME COURT OF ARKANSAS

No. 12-89

TAMMYE HALL APPELLANT	**Opinion Delivered** November 15, 2012
V.	MOTION TO DISMISS CROSS-APPEAL
JUSTIN HALL APPELLEE	MOTION GRANTED.

PAUL E. DANIELSON, Associate Justice

Appellant Tammye Hall moves this court to dismiss appellee/cross-appellant Justin Hall's cross-appeal. Tammye's appeal began in the court of appeals; however, on April 19, 2012, we certified her motion to dismiss the cross-appeal to our court pursuant to Ark. Sup. Ct. R. 1-2(b)(1) (2012) as it raises an issue of first impression. We ultimately issued an order that the motion be taken as a case and gave the parties the opportunity to fully brief the issue in dispute. After review, we grant the motion.

The pertinent facts are these. This case began as a divorce action, and the circuit court ordered Justin to pay Tammye a judgment in the amount of $168,691.84. The court gave him thirty days from the October 18, 2011 order to pay Tammye $68,691.84 and ordered the remaining balance of $100,000 due by January 15, 2012. In compliance with that order, Justin paid Tammye $68,691.84 on November 13, 3011.

Tammye filed a notice of appeal on November 17, 2011, in order to advance an argument that the circuit court erred in refusing to award increased child support and the full

measure of her attorneys' fees. Justin filed a cross-appeal of the court's judgment. However, Tammye argues that his cross-appeal should be dismissed because Justin has already voluntarily paid approximately 40 percent of the total judgment entered against him, which, she contends, constitutes a waiver of the right to appeal the judgment. Justin avers that only a voluntary satisfaction of a judgment in full would equate to a waiver of his right to appeal, not his partial payment. We agree with Tammye and dismiss Justin's cross-appeal.

This is an issue of first impression in our state. We do have case law setting precedent that the voluntary satisfaction of a judgment constitutes a waiver to an appeal of that judgment. *See Sherman Waterproofing, Inc. v. Darragh Co.*, 81 Ark. App. 74, 98 S.W.3d 446 (2003); *DeHaven v. T&D Dev., Inc.*, 50 Ark. App. 193, 901 S.W.2d 30 (1995); *Lytle v. Citizens Bank of Batesville*, 4 Ark. App. 294, 630 S.W.2d 546 (1982). However, even that issue remains one over which state courts are divided depending on the circumstances of the case—mostly differing authority on whether payment had to have been voluntary for waiver and, if so, what qualifies as voluntary. *See Peoples Trust & Sav. Bank v. Sec. Sav. Bank*, 815 N.W.2d 744 (Iowa 2012).

Justin does not dispute that his payment was voluntary. Rather, Justin argues that the partial payment did not satisfy the judgment and, therefore, it did not waive his right to appeal. We recognize that under certain circumstances, a partial payment would not waive a debtor's right to appeal. However, the particular facts of the instant case do not provide the circumstances under which we would so hold.

One popular authority states that "partial performance of a judgment has the same effect in barring an appeal as complete performance, if it is of such a character as to constitute

acquiescence in the judgment." 4 C.J.S. *Appeal and Error* § 280 (2012). In *Liberty Mutual Insurance Co. v. Morgan*, 33 S.E.2d 336 (Ga. 1945), cited in C.J.S., an insurance carrier failed to appeal and made six months worth of payments in accordance with the judgment against it. The Supreme Court of Georgia held that by making payments, the insurance carrier ratified and confirmed the judgment and could not, therefore, later attack it. *See id*.

There are more recent cases in which partial payments were not found to have barred an appeal. This seems to be reflected in American Jurisprudence, Appellate Review, which states that "an appeal is not barred by a payment which does not fully satisfy the judgment." 5 Am. Jur. 2d *Appellate Review* § 583 (2012). However, those cases are factually distinguishable from the case at hand.

First, the Supreme Court of Iowa, in *Starke v. Horak*, 260 N.W.2d 406 (Iowa 1977), held that a partial payment of a judgment did not constitute a waiver of appellant's right to appeal. However, the appellant in that case had also specifically reserved appeal rights. In *Twenty-Seventh St., Inc. v. Johnson*, 716 P.2d 210 (Mont. 1986), the Supreme Court of Montana rejected the argument that an appeal was moot when the judgment had been partially paid after execution. However, the court's reasoning for not holding the appeal moot was because the payment was made under legal coercion and, therefore, had not been a voluntary payment. *See id*. The Missouri Court of Appeals accepted an appeal from a judgment that had been partially paid; however, there were several reasons in that case to support the holding that the payment had not satisfied the judgment. *See Rosenblum v. Jacks or Better of America West Inc.*, 745 S.W.2d 754 (Mo. Ct. App. 1988). First, the *Rosenblum* court noted that the appellee had not sought a dismissal, suggesting recognition that the payment

was not voluntary. *See id*. Furthermore, the documents on record clearly reflected that payment of the judgment was made in lieu of posting a supersedeas bond or submitting to execution, rather than a voluntary payment so as to end the matter. *See id*. In *May v. Strecker*, 453 N.W.2d 549 (Minn. Ct. App. 1990), the Minnesota Court of Appeals also allowed an appeal of a judgment partially paid to move forward. However, in doing so, the court recognized that the portion of the judgment satisfied had been paid by insurers that were not party to the lawsuit. *See id*. The parties remained liable for the remainder of the judgment, and the court believed it unfair to limit their right to appeal because their insurers sought to limit the insurers' liability. *See id*.

The various circumstances presented in the above cases in which a partial payment of a judgment did not bar an appeal do not accompany the partial payment in the instant case. Here, Justin personally made a substantial payment in accord with the judgment of the circuit court. Furthermore, he made absolutely no reservation of rights and never made an attempt to designate that his payment was going toward only one part of the judgment. Justin presumably could have posted a supersedeas bond, but failed to do so and never presented an argument that he was unable to do so. It appears that the only reason it was a partial payment was that the court gave him additional time to pay the remaining balance. For these reasons, we hold that Justin's payment was a voluntary acquiescence to the judgment against him. We, therefore, grant the motion to dismiss the cross-appeal.

Motion granted.

Cullen & Co., PLLC, by: *Tim J. Cullen*, for appellant.

James Law Firm, by: *William O. "Bill" James, Jr.*, and *Lee D. Short*, for appellee.