275 P.3d 931 (Table)
Unpublished Disposition
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Court of Appeals of Kansas.

In the Matter of the MARRIAGE OF Pam L. SMITH, Appellant,
and
Jeffrey L. Smith, Appellee.

No. 105,365.
|
May 4, 2012.

Appeal from Johnson District Court; James F. Vano, Judge.

Attorneys and Law Firms

William Colvin, of Law Office of William Colvin, of Overland Park, for appellant.

Jonathan Laurans, of Kansas City, MO, for appellee.

Before BUSER, P.J., ARNOLD–BURGER, J., and BUKATY, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Pam and Jeffrey Smith were divorced on December 23, 1999. This appeal involves the rulings on two motions filed by Pam—one in 2009 and one in 2010—and a subsequent motion filed by Jeffrey for sanctions. Pam's first motion sought to "resolve" the decree. The district court ruled there was nothing to resolve because the judgment contained in the decree had become dormant and had not been revived. Pam then filed a motion to amend the journal entry that contained that ruling. The court denied that second motion. It then granted Jeffrey's motion for sanctions against both Pam and her current attorney, William Colvin, for misleading the court. Pam and Colvin appeal all of these rulings. Following oral argument, Jeffrey filed a motion in this court for his attorney fees on appeal.

We affirm the district court's determination that the judgment had become dormant and was never revived and that sanctions be assessed against both Pam and Colvin. We dismiss the appeal of the ruling on Pam's second motion as moot. We also grant Jeffrey's motion for attorney fees on appeal in the amount of $10,000.

Facts

On November 30, 1999, Pam and Jeffrey entered into a separation agreement. The district court entered a decree of divorce on December 23, 1999, incorporating the agreement in its entirety. The agreement provided in part for Pam to receive a $175,500 payment from Jeffrey and one-half of Jeffrey's 401(k) account "effective as of the date of the divorce."

On September 9, 2009, Colvin sent Jeffrey a letter demanding that he abide by the provisions of the separation agreement that he pay Pam $175,000 and half of the 401(k) account. As we will point out later, this was not the first "collection" effort Pam had made since the divorce in 1999.

On October 16, 2009, Pam filed a motion to resolve the decree of divorce, which is the first motion that is the subject of this appeal. She argued the decree was unenforceable because the incorporated separation agreement did not include a date that the $175,500 payment was due, nor did it contain an order for the creation of a Qualified Domestic Relations Order (QDRO) to disburse the 401(k) account funds owed. Pam asked the district court to exercise its authority under K.S.A. 60–260(a) to correct these "clerical errors." On October 23, 2009, Jeffrey sent Pam an email giving her the choice to take one-half of the current $65,000 in the 401(k) account or go to court.

The district court heard arguments on February 10, 2010, and denied the motion. In a journal entry of March 30, 2010, the court stated that the judgment against Jeffrey for $175,500 and one-half of his 401(k) account "was effective and due when the decree of divorce was filed in December 23, 1999," since no other due dates were specified in the agreement. The court also noted that "there has been no attempt to timely move, alter or amend the judgment and there have been no timely executions or proceedings in aid of execution on that judgment to avoid

dormancy or to revive the dormant judgment."

***2** On April, 12, 2010, Pam filed the second motion involved in this appeal. She moved to amend the above journal entry and attached a supporting affidavit. That affidavit again argued that a QDRO should have been contemplated and completed at the time of the divorce in order to transfer to her one-half of the 401(k) account. She also added a new wrinkle to her argument, namely, that both the 401(k) account and the $175,500 were intended to become due on Pam's demand. She further asserted that Colvin had made such a demand on her behalf in the September 9, 2009, letter to Jeffrey. She stated she had filed a separate lawsuit against Jeffrey for breach of the separation agreement alleging these facts and asking the district court to determine that they constituted the 1999 agreement between her and Jeffrey. She apparently filed the lawsuit on October 14, 2009, 2 days before she filed her first motion in this case. This second motion asked the court to withhold a ruling on her first motion as to when the payments were due until there had been a final adjudication of the issue in the breach of contract case.

The language in Pam's affidavit specifically stated: "Jeffrey and I did not agree that payment would be made at or before the date of divorce. My intent was that payment would become due and owing upon my demand." She also stated: "That on September 9, 2009, [Colvin] mailed written demand for payment of these debts to Jeffrey Smith at my direction."

Before the district court had ruled on the second motion, Pam was deposed in the breach of contract case on May 14, 2010. She reiterated her theory as stated in her affidavit that the statute of limitations for collection of the $175,500 and 401(k) account monies owed began to run when Colvin sent her first demand letter to Jeffrey on September 9, 2009. Jeffrey's counsel then confronted Pam with a letter sent to Jeffrey on August 31, 2001, by David Martin, Pam's attorney at that time. It stated in relevant part:

> "Apparently numerous provisions of the Separation Agreement and court ordered Decree of Divorce have not been complied with. The most notably significant items are the $175,000 payment and division of the 401(k) account.
>
> ....
>
> If 1 do not hear from you or an attorney on your behalf within 14 days, I will recommend to Pam that further action be taken in front of the court to enforce provisions of the Decree of Divorce and Separation Agreement."

Pam testified she had never seen the letter before.

Six days later, Jeffrey filed a motion under K.S.A. 60–211 for sanctions against both Pam and Colvin, alleging that (1) Pam's motion to amend journal entry drafted by Colvin misstated the record regarding the district court's factual findings; (2) the statements from Pam's deposition and affidavit that she sent her first demand letter to Jeffrey on September 9, 2009, were contradicted by the 2001 demand letter from Martin; and (3) Colvin and Pam had failed to conduct a reasonable investigation about prior demands on her behalf for payment and had prepared a perjured affidavit. Jeffrey sought dismissal, compensation for attorney fees, and any other relief deemed appropriate.

***3** Prior to a hearing on the sanctions motion, Jeffrey filed a supplement to it which included another letter Jeffrey had received from a second attorney hired by Pam, Jeffrey Kincaid. It bore a date of December 18, 2003, and demanded payment of the $175,500 including interest, and claiming "the sum due and owing is $234,924 .78." Kincaid warned Jeffrey that failure to contact his office within 30 days would result in further legal action to recover the amount owed.

At a September 1, 2010, evidentiary hearing on the sanctions motion, the district court heard the following evidence. Colvin acknowledged that the due date on demand theory was injected to support Pam's motion to amend journal entry. Martin and Kincaid each testified and authenticated the demand letters they sent on Pam's behalf. Pam and Colvin stipulated to the authenticity of the demand letters and the existence of an attorney-client relationship between Pam and the two lawyers. But Pam testified that she was not aware Martin and Kincaid had sent the letters to Jeffrey. She agreed that Jeffrey was in breach of the divorce agreement when Martin sent Jeffrey the August 31, 2001, letter. Pam acknowledged that she knew at the time of the divorce that she could recover half of the 401(k) account but "didn't know how to access it," and the separation agreement did not state that the debt was due on demand. Colvin declined to present any evidence. The court granted Jeffrey's motion for sanctions and denied Pam's motion to amend the journal entry.

On November 4, 2010, the district court entered its order concerning the amount of sanctions. It ordered that Pam and Colvin pay Jeffrey $2,500 for reasonable attorney fees and expenses for the violation of K.S.A. 60–211.

Pam appeals the denial of her two motions, and she and Colvin appeal the sanctions order. On the same day they

filed their notice of appeal, Pam filed a motion in the district court to dismiss her breach of contract lawsuit without prejudice, which the court granted.

The Motion to Resolve the Decree—Pam's First Motion

In her first issue on appeal, Pam argues, as she did below, that the judgment for the division of assets in the decree of divorce contained "fundamental flaws" because it did not render a final judgment nor did it provide an enforceable remedy for the resolution of the division of assets. More specifically, she argues in regard to her portion of Jeffrey's 401(k) that the judgment lacked any mention of a QDRO and that without such an order, she could not access her portion of those funds. She does not mention why she never drafted or asked the court to order the drafting of an appropriate QDRO.

As to the $175,000, she argues without citation to any authority that the decree did not provide whether the payment was to be made in installments or a lump sum or when the payments were due. She also argues without authority that because the award of the 401(k) was not final, somehow that alone rendered the award of the $175,000 "incorrect since both portions of the judgment are contingent upon the other."

***4** The relevant portion of the separation agreement which was incorporated in the divorce decree reads as follows:

> "1. **Wife's Property.** That Wife shall have as her sole and separate property, free and clear of any right, title or interest in Husband:
>
> ....
>
> d. $175,00 payment from Husband.
>
> f. One half of Husband's 401(k) account effective as of the date of divorce, with Wife to receive any appreciation/gain on her one-half from and after the date of divorce. If there are any taxes due on the transfer to Wife of one-half of Husband's 401(k) account, then Wife shall pay taxes on this transfer."

Pam asks us to remand the case to the district court for an evidentiary hearing to determine the issues she claims should have been addressed in the decree that would make the decree a final and enforceable judgment.

As we previously noted, the district court rejected Pam's argument and ruled that the judgment in the decree was a final judgment and there had been no timely attempts to alter or amend it, nor had there been any timely executions or proceedings in aid of execution. As a result, the court ruled it had become dormant and had never been revived.

Our resolution of Pam's first issue requires an interpretation of the agreement of the parties that was incorporated into the decree and also an interpretation of K.S.A. 60–254(a), the definition of a judgment, and K.S.A, 60–2403, the dormancy of a judgment. These are questions of law which we review de novo. *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 263–66, 225 P.3d 707 (2010) (interpretation of an agreement); *Unruh v. Purina Mills*, 289 Kan. 1185, 1193, 221 P.3d 1130 (2009) (interpretation of a statute).

To begin with, Pam has cited no direct valid authority for the proposition that a QDRO is required before a judgment which divides a retirement account becomes final or enforceable. Nor are we aware of such. Under K.S.A. 60–254(a), a judgment is defined as the "final determination of the rights of the parties in an action." The decree here awarded to Pam one-half of Jeffrey's 401(k) account. That amounted to a final determination of her rights in that account. A QDRO is merely the ministerial avenue through which she must travel in order to obtain what she was awarded. It would not provide her any more than what the decree awarded her. While a QDRO may have been required for a Pam to actually access the portion of Jeffrey's account that she was awarded, that has nothing to do with whether the judgment that awarded her a portion of the account was final and enforceable.

Pam cites *Hawkins v. C.I.R.*, 86 F.3d 982 (10th Cir.1996), for the proposition that under the Employment Retirement Income Security Act of 1974 (ERISA), her judgment was unenforceable as a matter of law. She urges that under *Hawkins* and ERISA, benefits in a qualifying pension plan may not be assigned or alienated and the only exception to that is provided for in the Retirement Equity Act of 1984(REA), which allows a QDRO to divide the pension plan. From that proposition, Pam essentially asks us, again without citation to any case authority on point, to leap to the conclusion that because the decree here did not mention a QDRO, it did not adequately apportion the 401(k) and was, therefore, not final or enforceable. The leap in logic is too great, and we decline to do so. While *Hawkins* stated that a qualified pension plan may not be alienated without a QDRO, it says nothing about whether an apportionment of a pension plan in a divorce decree is a final judgment without a QDRO. The case affords Pam no support.

***5** We agree that the district court had the obligation to enter a QDRO in order to enforce the judgment had one been timely requested. The problem for Pam, however, is that she waited until the judgment had become dormant to request it. Again, all she needed to do if she desired to enforce the judgment before it became dormant was first to procure from the court an order requiring Jeffrey to cooperate in providing the information about the 401(k) account that was necessary in a QDRO. She then had only to obtain the court's signature on a QDRO that would divide the plan according to the decree and submit it to the administrator of Jeffrey's 401(k) account. But once the dormancy exceeded the time within which it could be revived, she had nothing to enforce.

Again, as to her judgment for the $175,000 payment due from Jeffrey, Pam offers no authority for her bald statement that that portion of the judgment was not final because it did not specify when the payment was due or whether it was due in a lump sum or installments. An issue not briefed by the appellant is deemed waived and abandoned. *National Bank of Andover*, 290 Kan. at 281. Also, a point raised incidentally in a brief and not argued there is deemed abandoned. *Cooke v. Gillespie*, 285 Kan. 748, 758, 176 P.3d 144 (2008).

Other than arguing that the decree was not a final judgment, Pam offers no additional argument on the issue of whether the district court properly ruled that the judgment had become dormant. Clearly, it had in this case. The judgment became effective on December 23, 1999, the date of the filing of the decree of divorce. See K.S.A 60–258. Pam has never argued that she took any action as provided for under K.S.A. 60–2403 that would extend the life of the judgment beyond 5 years from that filing date. Accordingly, it became dormant on December 23, 2004. Then under K.S.A. 60–2404, she had 2 years from that date to revive the judgment. Again, she offers no argument or evidence that she took such action. After, December 23, 2006, it then became "the duty of the judge to release the judgment of record when requested to do so." K.S.A. 60–2403.

The district court properly found that the 1999 judgment had become dormant. It then correctly ruled that there was nothing to resolve about the judgment and Pam's motion to resolve the decree should be denied.

The Motion to Amend the Journal Entry—Pam's Second Motion

In her second issue, Pam claims the district court erred by not granting the relief sought in her first motion and it should amend the journal entry denying the same. She argues "the motion requested that the court refrain from making any decision at all regarding when the judgment became effective and due," because "the court's legal presumption that the debts at issue became due at divorce cannot stand while the due date has become an issue of fact in the pending breach of contract claim." Pam is referring, of course, to the breach of contract lawsuit she filed against Jeffrey 2 days before she filed her first motion.

***6** As we stated, Pam has since caused the separate breach of contract action to be dismissed. Obviously, the issue of when the 401(k) and the $175,000 were due and payable is no longer pending in any other litigation besides this case. The reason that Pam requested the court in this divorce case to refrain from ruling on the issues then no longer exists. That renders this issue on appeal moot. See *McAlister v. City of Fairway*, 289 Kan. 391, 400, 212 P.3d 184 (2009) ("An appeal will not be dismissed for mootness, unless it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights.").

Also, as a general rule, an appellate court does not decide moot questions or render advisory opinions.

> "The mootness doctrine is one of court policy which recognizes that it is the function of a judicial tribunal to determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case properly brought before it and to adjudicate those rights in such manner that the determination will be operative, final, and conclusive.' " *State v. Bennett*, 288 Kan. 86, 89, 200 P.3d 455 (2009) (quoting *Board of Johnson County Comm'rs v. Duffy*, 259 Kan. 500, 504, 912 P.2d 716 [1996]).
>
> Pam's second issue on appeal is dismissed as moot.

Sanctions

Pam and Colvin also argue the district court erred in granting Jeffrey's motion for sanctions. In reviewing such a ruling, we must determine whether substantial competent evidence supports the court's findings of fact that the statutory requirements for sanctions are present. *Evenson Trucking Co. v. Aranda*, 280 Kan. 821, 835, 127 P.3d 292 (2006). Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009); see also, *U.S.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 320, 64 P.3d 372 (2003) (During the

review of the record to determine whether the district court's findings are supported by substantial competent evidence, we do not weigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact. We also accept as true all inferences to be drawn from the evidence which support or tend to support the district court's findings.).

K.S.A. 60–211 provides that by presenting a motion and later advocating for it, an attorney certifies that, among other things: (1) the document is not being presented for any improper purpose; (2) the subject matter of the document is warranted by existing law or not frivolous; (3) the factual contentions will likely have evidentiary support; and (4) the denials of factual contentions are warranted by evidence or reasonably based on lack of information. K .S.A. 60–21 l(b)(l)-(4). Then if the district court finds an attorney and/or the client has violated this section, it may impose sanctions which include an order to pay the other party's attorney fees.

***7** Here, the district court found Colvin and Pam had violated the section. It ruled that the purpose of Pam's second motion was to persuade the court to amend its journal entry by deleting the ruling about the effective dates of the property judgment and withhold a ruling on the issue until that same issue had been determined in Pam's separate law suit for breach of contract. Accordingly, it felt the demand letters sent by Martin and Kincaid on Pam's behalf to Jeffrey were highly relevant since Pam was essentially claiming the judgment became final "on her demand". The district court found that Pam's affidavit was "misleading by omission" because it referenced the September 9, 2009, demand letter sent by Colvin to Jeffrey but did not include the demand letters sent by Martin and Kincaid several years earlier. It further determined that it was not credible that Pam had not received or authorized the letters sent by Martin and Kincaid, and Colvin not only had a duty to investigate but also a duty to correct the motion to amend journal entry once he became aware of the Martin and Kincaid letters.

The district court then assessed a sanction of $2,500 in attorney fees and expenses because Pam's "assertions had no basis in fact or support in the evidence and were filed in violation of K.S.A. 60–211 ." The court's written order then reiterated its bench findings that (1) the Martin and Kincaid letters were authentic and authorized by Pam; (2) Pam and Colvin continued to maintain their position that the September 2009 letter sent by Colvin was the first demand by Pam for payment despite seeing the Martin and Kincaid letters; and (3) right up to the date of the sanctions hearing, Pam and Colvin "persisted in contesting and denying" both the authenticity of the Martin and Kincaid letters and that Pam had authorized them despite being shown them.

On appeal, Pam continues to argue that her affidavit "was not intended to be an exhaustive statement of all the evidence relevant to Pam's position on the breach of contract action" and that the omission of the Martin and Kincaid demand letters in her motion to the amend journal entry was "immaterial to the relief requested." This argument is, at best, disingenuous.

Pam's motion to amend the journal entry (prepared by Colvin) stated that "[Pam] incorporates the Affidavit of Pam Smith in this motion *as evidence of the due date relative to the debts at issue*." (Emphasis added.) The motion went on to argue that the debts were intended to become due on demand, noting that "had [Jeffrey] expressed the intent and ability to pay at divorce, [Pam] would certainly have made demand at divorce. Instead, [Pam] *made demand for payment in a letter dated September 9, 2009*, which became effective upon receipt by [Jeffrey]." (Emphasis added.) The motion concluded that "*the only facts currently before this Court relative to the due dates of the debts in question are the facts asserted by Petitioner in the Affidavit of Pam Smith.*" (Emphasis added.) Clearly, the Martin and Kincaid letters had very significant relevance to Pam's argument about when the payments were due her under the decree. Even more clearly, the statements in the motion and Pam's affidavit were not a fair and accurate description of the material facts relevant to the breach of contract claim in the separate lawsuit.

***8** Even if we were to entertain the notion that Pam forgot having authorized the Martin and Kincaid demand letters and did not notify Colvin of their existence, Colvin at the very least became aware of the Martin letter during Pam's deposition on May 14, 2010, and the Kincaid letter on July 14, 2010, when Jeffrey included it with the supplemental motion for sanctions. Colvin had ample time to either withdraw or amend the motion before the district court conducted the September 1, 2010 hearing. In short, Colvin failed to take reasonable remedial measures to fulfill his responsibility to be candid towards the district court in advancing the merits of Pam's motion to amend journal entry so as to not undermine the integrity of the adjudicative process and cause unnecessary delay and expense. See Kansas Rules of Professional Conduct, Rule 3.3 (2011 Kan. Ct. R. Annot. 559).

Although the district court did not specifically state which subsection of K.S.A. 60–211 Pam and Colvin had violated, the court found that the assertions and factual contentions in the motion and affidavit lacked evidentiary

support. This constitutes a violation of K.S.A. 60–211(b)(3).

Pam and Colvin's actions were inexcusable and caused unnecessary delay and attorney fees. The record contains substantial competent evidence to support the district court's imposition of sanctions because they attempted to mislead the court about the date Pam first made demand for payment of the judgment awarded her in the decree.

Attorney Fees

Finally, since the conclusion of oral argument, Jeffrey has filed a motion for attorney fees and Pam has filed a response. We have thoroughly reviewed both documents. We conclude that fees should be awarded under Supreme Court Rule 7.07(b) (2011 Kan. Ct. R. Annot. 64) which allows us to do so "in any case in which the trial court had authority to award attorney fees." K.S.A. 60–1610(b)(4) allows the district court to award fees as justice and equity require in a divorce case.

We also conclude that fees should be awarded under Supreme Court Rule 7.07(c) for a frivolous appeal. Pam and her attorney have filed a voluminous brief, a reply brief, a lengthy letter of additional authority following oral argument, and a lengthy response to Jeffrey's motion for attorney fees. The briefs cite many cases and statutes she claims support her position that the judgment in the decree was not final and, therefore, not dormant. In arguing that the judgment was not final, she provides no direct case authority, and our research has revealed none. She then changes direction and argues the judgment was "due on demand." In light of the demand letters sent by two former attorneys on Pam's behalf in 2001 and 2003, the judgment would still be dormant even if it did not become due until Pam made a demand. More significantly, Pam and Colvin continue to argue in this court about the affect of the two demand letters on the issue of sanctions. After arguing at one point in the district court that Pam had not authorized the letters, they now argue the letters were not material to the issues raised in her second motion. As we stated, this is disingenuous at best in light of other statements in the motion.

***9** As to the amount of attorney fees, we note that Pam and her attorney do not contest the amount requested, and we further determine that the requested amount is reasonable for the costs of this appeal. Jeffrey's motion is granted and he is awarded $10,000 for his attorney fees which are assessed against Colvin and Pam jointly and severally.

Affirmed in part, dismissed in part, and appellee's motion for attorney fees is granted.

All Citations

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