Rel: October 7, 2022

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2022-2023

2210386

Townsquare Media Tuscaloosa License, LLC

v.

Karen Kelly Moore

Appeal from Jefferson Circuit Court
(DR-04-574.01)

FRIDY, Judge.

Townsquare Media Tuscaloosa License, LLC ("Townsquare"), appeals from a judgment of garnishment that the Jefferson Circuit Court ("the trial court") entered ordering Townsquare to pay $25,000 plus costs to Karen Kelly Moore. We affirm.

Background

Moore and her former husband, Jeffrey Scott Moore ("the former husband"), divorced in September 2006. The former husband did not pay his child-support obligation to Moore as had been ordered, and on August 21, 2008, the trial court entered a judgment, based in part on Moore and the former husband's stipulations, finding that the former husband was in arrears on his child-support obligation in the amount of $21,750 plus $217.50 in interest. The trial court also found that the former husband owed Moore $537.81 for medical expenses that Moore had incurred on behalf of their child and $8,787 for past-due alimony. Overall, Moore's award totaled $31,292.31.

On October 22, 2020, Moore filed a process of garnishment naming Townsquare, the former husband's alleged employer, as the garnishee to recover the $31,292.31 awarded to her in the August 2008 judgment, interest on the amount owed of $45,373.85, and costs of $106, for a total of $76,772.16. Townsquare was served with the process of garnishment on October 23, 2020. Townsquare failed to file an answer, and on July 23, 2021, Moore filed a motion for a conditional judgment. See § 6-6-457, Ala. Code 1975 (providing that, if a garnishee fails to appear and answer,

a conditional judgment must be entered against it for the amount of the plaintiff's claim, as ascertained by the judgment). The trial court entered a conditional judgment against Townsquare on September 29, 2021. The trial court wrote in the conditional judgment that, at a hearing on September 21, 2021, Thomas "Tommy" Paradiso of Townsquare testified that he had turned the process of garnishment over to another Townsquare employee who had later instructed him to "disregard" the process of garnishment. A transcript of that September 21, 2021, hearing is not included in the record.

On October 18, 2021, Townsquare filed a motion to set aside the conditional judgment on the ground that it had not employed the former husband from the time it was served with the process of garnishment through October 18, 2021. It also filed its answer to the process of garnishment that same day. On October 27, 2021, the trial court conducted a hearing on the motion to set aside the conditional judgment. As with the September 21 hearing, a transcript of the October 27 hearing is not included in the record on appeal. After the hearing, the trial court entered an order giving the parties additional time to submit briefs on

their positions, particularly on the issue of the trial court's discretion, if any, to enter a final judgment against Townsquare.

Following the parties' submissions of briefs, the trial court entered a final judgment on December 30, 2021. In its judgment, the trial court noted that Townsquare did not answer the process of garnishment until nearly a year after it had been served. It also found that the human-resources operations manager of Townsquare Media Group in New York, Katie Maricle, had notified Audrey Hays, the accounting manager of Townsquare, by email to disregard the process of garnishment and that Hays had "opted" to do so. Recounting testimony from the October 2021 hearing, the trial court wrote that David Dubose, the "market president" of Townsquare, had testified that he knew the former husband, that he had signed all the checks and outside contracts for employees of Townsquare, that either he or Hays had handled all writs of garnishment that Townsquare's Tuscaloosa office had received, and that, in October 2020, when the process of garnishment was served in this matter, Townsquare had fewer than fifty employees. The trial court noted that, in August 2019, a conditional judgment had been entered against Townsquare in a different case in the trial court, following which

Townsquare had filed an answer within thirty days and the trial court had set aside that conditional judgment. Additionally, the trial court wrote that Dubose "could not explain why a garnishment in this pending matter for the significant sum of $76,772.16 was 'disregarded' when all the prior garnishments for less than $2,000 had been answered." It also noted that Dubose admitted that the process of garnishment Townsquare had received directed the recipient to complete and file an answer on an enclosed form within thirty days from service, notified the recipient that failure to answer could result in a judgment against the recipient, and included the warning: "YOU MUST ANSWER." (Capitalization in original.) The trial court then wrote:

> "This Court deems the behavior of the Garnishee, Townsquare, as intentional, unacceptable, and egregious. Counsel for the Garnishee, citing a Tennessee case, noted that a Conditional Judgment is a 'shot across the bow,' and 'a threat of a final judgment if a response is not forthcoming.' Smith v. Smith, 165 S.W.3d 285 (Tenn. Ct. App. 2004). It is this Court's opinion and finding that Townsquare had its 'shot across the bow' when a Conditional Judgment was entered against it by the Circuit Court of Jefferson County in Case Number SM-17-901494 on August 15, 2019, a little over one year from being served with a Process of Garnishment in this cause. The Garnishee, in the opinion of this Court, is not entitled to a 'shot across the bow' each and every time Townsquare is served with a Process of Garnishment. In the prior cause of action, the creditor agreed to the Conditional Judgment being set aside. However, in this cause, the

> Creditor, Karen Kelly Moore, demands the Conditional Judgment be made a Final Judgment. This Court further notes that the Defendant, Karen Kelly Moore, fully complied with the Laws of Alabama in this matter and spent considerable time and money attempting to collect on this Process of Garnishment.
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> "The language in a Process of Garnishment is written in plain English that is easily understood by the average citizen. The laws of the State of Alabama are to be honored and complied with by the Garnishee. The actions of the Garnishee, Townsquare, in this cause are cavalier, insulting to the sensibilities of this Court, contemptuous, intentional, fraught with conscious indifference and simply unacceptable based on the peculiar circumstances in this case. However, this Court deems that a judgment for the full amount of the Garnishment against the Garnishee would be Draconian."

Based on its findings, the trial court awarded Moore $25,000 plus costs against Townsquare. Townsquare filed a timely notice of appeal to this court.

Analysis

Townsquare argues that, pursuant to § 6-6-457, Ala. Code 1975, it was entitled to have the conditional judgment set aside because it answered the process of garnishment within thirty days of the entry of the conditional judgment. That statute provides:

> "If the garnishee fails to appear and answer, a conditional judgment must be entered against him for the amount of the plaintiff's claim, as ascertained by his judgment, to be made absolute unless he appears within 30

> days after notice of the conditional judgment issued by the clerk, to be served on him, as other process, by the sheriff. If he fails to appear within the time required by the notice served upon him or if two notices are returned 'not found' by the sheriff of the county in which the garnishment was executed, the judgment must be made absolute."

Townsquare argues that § 6-6-457 affords a trial court no discretion in applying that statute and requires a trial court to set aside a conditional judgment when the garnishee has properly appeared and answered within thirty days after service of notice of the conditional judgment. In support of its contention, Townsquare relies on Olson v. Field Enterprises Educational Corp., 45 Ala. App. 438, 441, 231 So. 2d 763, 765 (Civ. App. 1970), in which the Alabama Court of Civil Appeals held that the Tuscaloosa Circuit Court could not properly apply a local law requiring a garnishee to answer a process of garnishment within ten days of the filing of a conditional judgment when state garnishment statutes allowed a garnishee thirty days in which to answer. That holding, Townsquare argues, illustrates that trial courts cannot deviate from § 6-6-457.

In interpreting a statutory provision, "a court is required to ascertain the intent of the legislature as expressed and to effectuate that

intent." Tuscaloosa Cnty. Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa Cnty., 589 So. 2d 687, 689 (Ala. 1991).

> "Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."

IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992).

The plain language of § 6-6-457 mandates that a final judgment must be entered if a garnishee does not answer or appear within thirty days of the entry of a conditional judgment. Contrary to Townsquare's assertion, however, the inverse is not true; that is to say, no language in § 6-6-457 requires a trial court to set aside a conditional judgment simply because a garnishee has answered within the time allotted. Likewise, Olson requires that a trial court wait thirty days before making a conditional judgment final. However, Olson does not support the proposition that the trial court must set aside a conditional judgment once the garnishee timely answers.

Indeed, Townsquare's reading of the statute conflicts directly with our supreme court's interpretation of a prior version of § 6-6-457 appearing in the Alabama Code of 1928, § 8075, in Thompson v. Hill Grocery Co., 236 Ala. 66, 68, 181 So. 272, 273 (1938). In Thompson, our supreme court held that, under § 8075, "a motion to set aside a conditional judgment against a garnishee, seasonably made, is addressed to the 'sound, enlightened discretion of the court to which it is addressed, … [and] not revisable' -- except, we take it, for abuse." 236 Ala. at 68, 181 So. at 273 (quoting Talladega Mercantile Co. v. McDonald, 97 Ala. 508, 511-12, 12 So. 34, 36 (1893)). The language used in § 8075 is virtually identical to that used in § 6-6-457, and we therefore are bound to conclude (see § 12-3-16, Ala. Code 1975,) that whether to set aside a conditional judgment against a garnishee after the garnishee has filed an answer is a question committed to a trial court's discretion and that the trial court is not, as Townsquare argues, required, as a matter of law, to set aside the conditional judgment. Townsquare has not argued to this court that the trial court abused its discretion in refusing to set aside the conditional judgment, and, with Townsquare having failed to make that argument, we cannot conclude that the trial court erred in refusing to set the

conditional judgment aside. See L.C. v. Jefferson Cnty. Dep't of Hum. Res., 330 So. 3d 849, 857 (Ala. Civ. App. 2021) ("It is well settled that arguments not raised in an appellate brief are deemed waived.").

Townsquare next contends that the trial court incorrectly awarded Moore $25,000 and costs because, it says, it had never employed the former husband. Citing Devan Lowe, Inc. v. Stephens, 842 So. 2d 703, 708 (Ala. Civ. App. 2002), Townsquare asserts that the amount the trial court could order it to pay to Moore in the garnishment action is limited to the amount that Townsquare is indebted to the former husband. Townsquare argues that, because it is not indebted to the former husband, it cannot be liable to Moore.

Alabama law is well settled that an "appellant has the burden of ensuring that the record contains sufficient evidence to warrant reversal." Newman v. State, 623 So. 2d 1171, 1172 (Ala. Civ. App. 1993). In addition, when a trial court's judgment is based on evidence that is not before the appellate court, we conclusively presume that the court's judgment is supported by the evidence. Id. As previously noted, the trial court held two evidentiary hearings -- one before entering the conditional judgment and the other before entering the final judgment. Also as

previously noted, transcripts of those hearings are not included in the record before us.

Because we do not have transcripts of the evidentiary hearings, we cannot determine whether there was evidence from which the trial court could have disbelieved Townsquare's assertion that it was not indebted to the former husband and therefore was not liable to Moore for $25,000 plus costs. Thus, Townsquare has failed to provide us with a basis for reversing the final judgment. See Quick v. Burton, 960 So. 2d 678, 680-81 (Ala. Civ. App. 2006).

Townsquare also argues that the trial court erred in awarding Moore "costs," without specifying those costs. It further contends that Alabama law does not provide for the award of costs to a garnisher or for the garnishee to pay an attorney fee to the garnisher.

A trial court may award costs to a successful garnisher. See Thompson v. Allen, 4 Stew. & P. 184, 190 (1833); Jenelle Mims Marsh, Alabama Law of Damages § 13:21 (6th ed. 2012). Regarding an award of costs, Rule 54(d), Ala. R. Civ. P., provides:

> "Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the state is a party plaintiff in

> civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security.
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> "Costs may be taxed by the clerk without notice. On motion served within five (5) days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court."

The taxation of costs rests in the discretion of the trial court, and its decision will not be reversed in the absence of a clear abuse of discretion. Miller v. Thompson, 844 So. 2d 1229, 1233 (Ala. Civ. App. 2002).

Under Alabama law, costs do not include attorney fees. Ex parte Habeb, 100 So. 3d 1086, 1089 (Ala. Civ. App. 2012); Atkinson v. Long, 559 So. 2d 55, 58 (Ala. Civ. App. 1990). In Guardian Builders, LLC v. Uselton, 154 So. 3d 964, 973 (Ala. 2014), our supreme court wrote:

> "[C]ourt costs are distinguishable from attorney fees. See White Springs Agric. Chems., Inc. v. Glawson Invs. Corp., 660 F.3d 1277, 1282 (11th Cir. 2011) (recognizing that a general demand for costs does not encompass a request for attorney fees). The American rule applied in Alabama generally prohibits a losing party from being ordered to pay the attorney fees incurred by the prevailing party, but the American rule does not prohibit an award of court costs to the prevailing party. In practice, such awards are commonplace and specifically authorized by Rule 54(d), Ala. R. Civ. P., which provides that, '[e]xcept when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.'"

Although Townsquare argues that Moore is not entitled to an award of an attorney fee, the trial court does not appear to have awarded Moore an attorney fee in the final judgment, and the record fails to disclose a legal basis for such an award. We cannot reverse the trial court's final judgment based on an award it did not make.

This court provided examples of the kinds of costs recoverable by a successful litigant under Rule 54(d) in Ennis v. Kittle, 770 So. 2d 1090, 1092 (Ala. Civ. App. 1999):

> "[W]e note that the [Alabama] Code allows for, among other things, the taxation of witness fees (§§ 12-19-131 and 12-19-134, Ala. Code 1975) and the costs of any deposition introduced into evidence at the trial by the party taking it (§ 12-21-144, Ala. Code 1975). However, various appellate opinions have held that certain other expenses are taxable as costs at the conclusion of an action. See, e.g., Ex parte Strickland, 401 So. 2d 33, 34-35 (Ala. 1981) (approving taxation of costs of depositions not used at trial); Lewis, Wilson, Lewis & Jones, Ltd. v. First Nat'l Bank, 435 So. 2d 20, 23 (Ala. 1983) (travel expenses, copying costs, and filing fees are expenses and cost items appropriate for reimbursement); Smith v. Smith, 482 So. 2d 1172, 1175 (Ala. 1985) (survey costs properly taxed); cf. Lawyers Surety Corp. v. Whitehead, 719 So. 2d 824, 832 (Ala. Civ. App. 1997) (guardian-ad-litem fees taxable), aff'd in pertinent part, 719 So. 2d 833 (Ala. 1998); but see Atkinson [v. Long], 559 So. 2d [55,] 58 [(Ala. Civ. App. 1990)] (attorney fees are not taxable costs)."

In Rutledge v. Conradi, 448 So. 2d 366 (Ala. Civ. App. 1984), this court described the procedure to be followed in objecting to costs awarded in a judgment, writing:

> "It is clear to this court that the objection of the plaintiff is the clerk's action in failing to include in the cost bill certain costs. Rule 54(d), Alabama Rules of Civil Procedure, provides, in this instance, the proper procedure to follow in objecting to the circuit clerk's taxing of costs.
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> "Rule 54(d), [Ala.] R. Civ. P., in pertinent part provides as follows: 'Costs may be taxed by the clerk without notice. On motion served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.'
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> "This rule without question provides that once the circuit clerk taxes costs a party desiring to review or question those costs should within five days upon the receipt of the notice of taxation of costs file a motion in the circuit court. The motion will then be considered by the circuit court and action taken thereon."

448 So. 2d at 367.

Based on the record before us, we cannot discern whether Moore has submitted a cost bill to the circuit clerk's office, nor does it appear that the circuit clerk, to this point, has taxed any costs against Townsquare. To the extent that the circuit clerk does tax any items against Townsquare that Townsquare believes are not properly taxable

to it, its remedy, at that time, will be to seek review of those items by the trial court pursuant to Rule 54(d).

Conclusion

Townsquare has failed to present this court with an argument that merits reversal of the trial court's December 30, 2021, judgment. Therefore, that judgment is affirmed.

AFFIRMED.

Thompson, P.J., and Hanson, J., concur.

Moore and Edwards, JJ., concur in the result, without opinions.