

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000741-MR

HIRAM GIBSON, JR.

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS WALLER, JUDGE
ACTION NO. 98-CI-00334

PAUL B. TAYLOR

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON AND SCHRODER, JUDGES.

DYCHE, JUDGE. This appeal presents two questions: whether the trial court had jurisdiction to award "delay damages" to appellee, Paul B. Taylor; and, if so, whether the amount awarded by the trial court was correct. We answer both questions in the affirmative, and affirm the trial court.

The trial court entered a money judgment against Hiram Gibson, Jr., on September 21, 1999. Gibson partially superceded that judgment by the posting of a bond. This court affirmed

that judgment on January 17, 2001, and denied Gibson's petition for rehearing on March 23, 2001. The Supreme Court of Kentucky denied discretionary review on February 13, 2002. On February 19, 2002, Taylor, who prevailed below, filed a motion for delay damages pursuant to KRS 26A.300 and CR 76.20(9)(a). The trial court granted that motion, and this appeal followed.

CR 76.20(9)(a) provides, in part,

If the motion [for discretionary review] is denied the decision shall stand affirmed, and if a supersedeas bond has been executed, damages for delay shall be recoverable pursuant to KRS Chapter 26A.

KRS 26A.300 reads, in part,

- (1) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure, there shall be no damages assessed on the first appeal as a matter of right contemplated by Section 115 of the Constitution of Kentucky.
- (2) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure pending any other appeal, damages of ten percent (10%) on the amount stayed shall be imposed against the appellant in the event the judgment is affirmed or the appeal is dismissed after being docketed in an appellate court.
- (3) Similar damages of ten percent (10%) shall be imposed when a petition for writ of certiorari, petition for rehearing, or other petition which stays the collection of a judgment for

the payment of money is denied by an appellate court under circumstances not constituting a first appeal under subsection (1) of this section.

Taylor argues that this court is the proper forum for the determination and imposition of such damages, citing Fred Clements Heating and Air Conditioning Co. v. Janes, Ky. App., 576 S.W.2d 280, 281 (1979), which states that

the correct procedure is that the imposition of such damages will be stated in the mandate of the appropriate court. Where the Supreme Court denies a motion for discretionary review, the mandate will issue from this Court.

As of July 1, 1981, mandates are no longer issued by the appellate courts of this commonwealth. CR 76.30(2)(f). There is, therefore, no opportunity for the appellate court to make a determination of delay damages in its mandate. That being so, the above language is inapplicable, and it must necessarily fall to the trial court, that entity best suited for such a task, to determine and impose delay damages. That is what the trial court did herein, properly exercising its jurisdiction.

Gibson next complains of the computation of the damages, claiming that Taylor is attempting to collect damages on the entire judgment, and not just the part that was superceded, and therefore not collected by him. Such an argument is, at best, disingenuous, and, at worst, demonstrates

a lack of candor with the tribunal, as the damages sought, and the damages awarded, were 10% of the amount superceded, only. No attempt was made by Taylor to collect damages on the entire amount of the judgment, or interest on that amount. Counsel is admonished to make arguments based on facts in the record and to not misrepresent the record to this, or any other, court.

The order of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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