IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2001 Term

FILED
November 29, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 29688

RELEASED
November 30, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

GRADY D. HAGER,
Plaintiff Below, Appellant

v.

PAULINE KAY HAGER,
Defendant Below, Appellee

Appeal from the Circuit Court of Boone County
Honorable E. Lee Schlaegel, Judge
Civil Action No. 89-C-367

REVERSED AND REMANDED

Submitted: November 7, 2001
Filed: November 29, 2001

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE DAVIS dissents, and reserves the right to file
a dissenting opinion.

SYLLABUS

"In reviewing an order denying a motion under Rule 60(b), W.Va.R.C.P., the function of the appellate court is limited to deciding whether the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner." Syllabus Point 4, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

Per Curiam:

This is an appeal by Grady D. Hager from an order of the Circuit Court of Boone County which denied a motion made by him under Rule 60(b) of the West Virginia Rules of Civil Procedure to alter a judgment in a divorce case on the ground that fraud was used to obtain the judgment.

I.
FACTS

The parties to this proceeding, Grady D. Hager and Pauline Kay Hager, were divorced by an order entered by the Circuit Court of Boone County on April 1, 1999. In granting the divorce, the circuit court adopted a family law master's recommendation that the appellant, Grady D. Hager, pay his former wife, Pauline Kay Hager, $800 per month alimony, that he provide her with medical insurance, and that he pay $10,000 of her attorney fees.

In the proceedings before the family law master, the appellee, Pauline Kay Hager, had taken the position that she had never been previously employed outside the house and that she was disabled and incapable of working. The last hearing was held before the family law master on June 10, 1996.

Based upon the representations made at the hearings, the family law master found that Pauline Hager had no income earning ability whatsoever, no training, no employment skills or working experience. As a consequence, the law master recommended that the appellant pay $800 per month

alimony and pay for Pauline Hager's health insurance and pay her attorney fees. The circuit court, after reviewing the case, adopted the family law master's recommendation.

Subsequent to entry of the court's judgment in the case, the appellant learned that Pauline Hager had actually been working and earning money, and as a consequence, he filed a motion for the court to modify that alimony award.[1] The circuit court conducted an evidentiary hearing on the motion on July 8, 1999. At that hearing, the appellant took the position that Pauline Hager had committed fraud on the family law master and the court when she took the position that she had never worked outside the home and that she was disabled and incapable of working. To support his position, he produced the testimony of five witnesses, pay checks and photographs of Pauline Hager performing manual labor.

At the conclusion of the hearing, the circuit court entered an order finding that the appellant had failed to meet the burden of proof required under Rule 60(b) of the West Virginia Rules of Civil Procedure and refused to modify the alimony award.

In the present appeal, the appellant contends that the circuit court erred in holding that he had failed to meet his burden of proof and in refusing to modify the alimony award. He also claims that the circuit court erred in failing to make any findings as to the facts upon which the court's ruling was based.

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[1]Although the motion was not initially designated as a motion under Rule 60(b) of the West Virginia Rules of Civil Procedure, the parties and the court later treated it as such a motion.

II.
STANDARD OF REVIEW

In Syllabus Point 4 of *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974), this Court stated:

> In reviewing an order denying a motion under Rule 60(b), W.Va.R.C.P., the function of the appellate court is limited to deciding whether the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner.

III.
DISCUSSION

As has been previously indicated, the appellant's principal claim in the present proceeding is that he made a sufficient showing to justify the setting aside of the court's alimony award.

Rule 60(b) of the West Virginia Rules of Civil Procedure provides that a court may, after entry of a final order, relieve a party from that order for fraud. The Rule provides, in relevant part:

> (b) *Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . .

The appellant's specific claim in the present case is that his former wife, Pauline Hager, represented to the family law master who handled the case that she had not worked when, in fact, she had

worked and that she was incapable of working when, in fact, she was capable of working. Pauline Hager, on the other hand, claims that the record shows that any work which she might have engaged in occurred after the last hearing before the family law master and that as a consequence, she in no way misled the family law master or the court.

The record shows that during the June 10, 1996 hearing, Pauline Hager specifically indicated that she had never been employed outside the home, that she had never received any work training or work education. She specifically stated that her sole income was $470 per month from an SSI check. She was asked: "Q. Do you have any sources of income other than that?" She responded, "A. No, I don't."

In the hearing after the appellant moved to set aside the alimony award, the appellant called as a witness Cathy Turley, who testified that Pauline Hager had worked for her mother and that her mother paid her for doing so. Another witness, Charles Burnside, who owned a club called the Riverview County Club, testified that Ms. Hager had worked for the country club serving people and bussing tables, and that she was able to do the required work. Additionally, Kimberly Lilly testified that she had observed Pauline Hager mowing her lawn and using a weed eater without difficulty, and she expressed the opinion that Ms. Hager was capable of doing manual work. She had also observed Ms. Hager lift and assist her mother.

Finally, the appellant called Pauline Hager herself as a witness. Ms. Hager, upon examination, testified that her mother paid her $5 per hour to do work, and that prior to working for her

mother, she had worked at the Riverview Country Club for $4.50 per hour. Her job at the club consisted of preparing and serving food and clearing tables. When asked when she had worked at the country club, she indicated 1995. She also indicated that she had worked in 1994. When asked why she had not notified the family law master about her work at the country club, she responded: "Nobody asked me."

In the present proceeding, the appellant takes the position that the testimony and other evidence adduced at the hearing on his motion to set aside the alimony award plainly shows that Pauline Hager did not testify truthfully before the family law master and that her testimony related to a material fact in the case, that is, her previous work history and her ability to work. The appellant argues that she, in effect, committed fraud on the court. The appellant also takes the position that in view of this, the trial court abused its discretion in not setting aside the portion of the April 1, 1999 order awarding her alimony. In the alternative, he requests that this Court remand the case with the instructions that his alimony obligation be recalculated based on the fact that Pauline Hager has the capacity to earn at least a minimum wage income.

In *Gerver v. Benavides*, 207 W. Va. 228, 530 S.E.2d 701 (1999), this Court indicated that a judgment may be set aside for fraud or misrepresentation discovered after entry of the judgment. The Court defined fraud as anything falsely said or done which injures the property rights of another.

In this Court's view, the record as developed rather plainly shows that Pauline Hager either testified falsely, or failed to testify fully, before the family law master relating to facts which are of relevance

to her entitlement to alimony. She, in effect, took the position that she had never worked and that she was disabled and incapable of working. At the subsequent hearing on the appellant's motion to set aside the judgment, substantial evidence was introduced, including the testimony of Pauline Hager herself, which showed that she had worked and was capable of working. The family law master's recommendation, and the judgment ultimately entered by the circuit court, awarded the appellee alimony based upon the finding that she was incapable of working.

This Court believes that Pauline Hager, in failing to testify fully and completely and honestly before the family law master, in effect, acted falsely and committed fraud within the meaning of *Gerver v. Benavides, id.*, and that the circuit court should have set aside the alimony award in this case and reconsidered it in light of the fact that, at the very least, Pauline Hager is capable of earning a minimum wage.

For the reasons stated, the judgment of the Circuit Court of Boone County is reversed, and this case is remanded with directions that the circuit court reconsider Pauline Hager's alimony award in light of the showing of her capacity to work.

Reversed and remanded.