

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

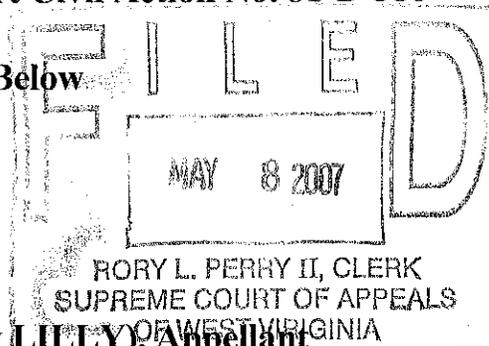
No. 33301

SANDRA LYNN FOSTER (now LILLY), Plaintiff Below,

v.

Circuit Court Civil Action No. 81-D-380

JAMES TYRONNE FOSTER, Defendant Below



SANDRA LYNN FOSTER (now LILLY), Appellant

**APPELLANT'S REPLY TO
APPELLEE'S BRIEF**

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INTRODUCTION

This is an appeal from an Order Granting Defendant's Petition for Recovery of Overpayment of Child Support entered by the Family Court of Raleigh County, West Virginia ("Family Court") on December 9, 2005 and affirmed by the Circuit Court of Raleigh County, West Virginia ("Circuit Court") on May 22, 2006. In its December 9 Order, the Family Court found that Mr. Foster had overpaid child support in the amount three thousand four hundred sixty-six dollars and sixty-five cents (\$3,466.65) as a result of the Family Court's prior application of the ten-year statute of limitations to bar the appellant, Sandra Lynn Lilly's attempts to collect unpaid child support installments that were due and owing from the appellee, James Tyrone Foster, all pursuant to this Court's holding in Robinson v. McKinney, 189 W.Va. 459, 432 S.E.2d 543 (1993).

In her petition for appeal, Mrs. Lilly asserts that Mr. Foster's petition to collect the claimed overpayment, which was filed more than three years after Mr. Foster became aware that the filing of a petition to collect the claimed overpayment would be necessary, is likewise barred by the statute of limitations. Although the Family Court initially agreed with Mrs. Lilly's statute of limitations defense and granted Mrs. Lilly's motion to dismiss Mr. Foster's petition, the Circuit Court overturned the Family Court's dismissal during an initial appeal and remanded the case to the Family Court for a determination of the amount of the overpayment. On remand and pursuant to the Circuit Court's instructions, the Family Court concluded that Mr. Foster had overpaid child support in the amount three thousand four hundred sixty-six dollars and sixty-five cents (\$3,466.65) and entered a judgment against Mrs. Lilly and the West Virginia Bureau for Child Support Enforcement in that amount.

In his response to Mrs. Lilly's appellate brief, Mr. Foster asserts that Mrs. Lilly's petition for appeal is untimely because Mrs. Lilly's motion to dismiss was initially granted by the Family Court and reversed (and remanded for further proceedings) after an appeal to the Circuit Court on July 27, 2005. Although Mrs. Lilly's appeal was filed within four months of the Circuit Court's decision to uphold the Family Court's Order granting Mr. Foster a judgment for the amount of the overpayment claimed by Mr. Foster, Mr. Foster claims that Mrs. Lilly had four months to file the appeal following the Circuit Court's reversal of the Family Court's Order granting Mrs. Lilly's motion to dismiss and her failure to file her appeal within those four months means that the appeal is now time barred. Assuming the appeal is timely, Mr. Foster further claims that the audit conducted by the West Virginia Bureau for Child Support Enforcement in April 2000 became a decretal judgment by operation of law when Mrs. Lilly failed to object to the audit's findings, meaning that such a judgment is now effective for a period of ten years. Neither of Mr. Foster's positions are supported by law.

DISCUSSION OF LAW

- 1. The Circuit Court's reversal of the Family Court's Order Dismissing Defendant's Petition for Recovery of Overpayment of Child Support was an interlocutory ruling and not finally appealable to this Court until the proceedings necessitated by the Circuit Court's remand were concluded.**

Because West Virginia's Court system is headed by a single Appellate Court that generally has jurisdiction to consider actions by nearly all of West Virginia's trial or circuit courts, Mrs. Lilly was unable to find any decision from this Court that considered the issue raised by the appellee. Inasmuch as the current family court system has created an intermediate level of appeal to the circuit courts, this Court's role as a secondary or higher appellate court now means that the issue will have greater relevance. While no definitive

answer to the question raised by the appellee can be found within this Court's decisions, i.e. whether the reversal and remand of a family court order granting a motion to dismiss by a circuit court on appeal must immediately appealed directly to this Court or whether such appeal must follow the final resolution of all issues raised by the action during the remand, this Court has generally favored a policy of resolving appellate issues in a single instance following the final resolution of the underlying action. See Syl. pt. 3, Riffe v. Armstrong, 197 W.Va. 626, 477 S.E.2d 535 (1996)(“Upon the appeal of a final order dismissing fewer than all of the parties or fewer than all the claims in a civil action, this Court, on the motion of any party or *sua sponte*, may elect to defer consideration of the appeal until an appeal is taken from the order terminating the entire action or the time for the appeal of the terminating order expires.”) Such a policy is consistent with the approach taken within our federal courts, which have a multi-layered appellate process, in which a policy of discouraging interlocutory appeals and promoting appeals from a “final resolution” only is prevalent. See e.g. 28 U.S.C. § 1291 (1982); Abney v. United States, 431 U.S. 651, 657, 97 S.Ct. 2034, 2039, 52 L.Ed.2d 651, 657 (1977).

Such a policy promotes judicial economy in that it encourages the resolution of all appellate issues in a single proceeding. Such a policy is consistent with requiring, in this case, that Mrs. Lilly allow the issues raised during the remand of this case following the Circuit Court's reversal of the Family Court's decision to grant Mrs. Lilly's motion to dismiss to be finally litigated prior to an appeal to this Court. While the statute of limitations defense asserted by Mrs. Lilly is the only issue raised by Mrs. Lilly in this appeal, there were additional issues that were considered by the Family Court (on remand) and the Circuit Court (on appeal following the remand) that would have been subject to this

Court's review during this appeal if those issues had been raised by the parties, including the calculation of the claimed overpayment and the award of attorneys' fees among the parties. Given that the consideration of a motion to dismiss by a trial court is interlocutory and given that there is no case law in this State that would require the appeal the denial of a motion to dismiss prior to the litigation of the underlying action, Mrs. Lilly's appeal of the denial of her motion to dismiss following the final resolution of all issues raised by Mr. Foster's petition for recovery of overpayment of child support was appropriate and timely.

2. **The May 28, 1998 Memorandum ruling issued by the Family Court indicated an intention to grant Mrs. Lilly a decretal judgment for unpaid child support and medical support, and did not indicate an intention to grant Mr. Foster a decretal judgment for a claimed overpayment of child support that would not occur until sixteen months after the issuance of the Memorandum ruling.**

Turning to the merits of Mrs. Lilly's appeal, Mr. Foster next claims that the effect of the audit that was conducted following the resolution of Mr. Foster's own statute of limitations defense against Mrs. Lilly's attempt to recover unpaid child support, pursuant to a memorandum ruling issued by the Family Court on May 28, 1998, was to grant a decretal judgment to Mr. Foster for the amount of child support that he had overpaid when the audit was completed. According to Mr. Foster, the audit, which was completed on or about April 18, 2000, resolved all outstanding support issues, including the application of the ten-year statute of limitations on the collection of decretal judgments for unpaid child support, disputed child support payments and all other payment matters. When the audit was sent to the parties, Mr. Foster claims that Mrs. Lilly's failure to file any objection to the results of the audit, which showed an overpayment by Mr. Foster, operated to confer upon Mr. Foster a decretal judgment against Mrs. Lilly for the amount of the overpayment reflected in the audit.

While Mr. Foster fails to cite any legal authority to support his position, he claims that such a result was mandated by "prior procedures of the Court," but no Order was entered to reduce such a judgment to writing because of "realignment of the Family Court case distribution or otherwise." Mr. Foster's position that he relied on his belief is directly contrary to his own testimony during the proceedings below in which he acknowledged that he was told by case workers from the West Virginia Bureau for Child Support Enforcement that he would have to file an additional action to collect the overpayment reflected in the audit no later than June 2000. After receiving the information that additional legal filings would be required, Mr. Foster waited over three years to file his petition for recovery of overpayment of child support.

The only legal authority cited by Mr. Foster in support of his assertion that he was somehow entitled to a decretal judgment is West Virginia Code § 48-11-107 (2001), which provides for the collection of child support that was overpaid as the result of a retroactive ruling on a petition to modify child support and states the following:

"In any proceeding filed after the first day of January, two thousand one, where a petition to modify child support is granted which results in a reduction of child support owed so that the obligor has overpaid child support, the court shall grant a decretal judgment to the obligor for the amount of the overpayment. The court shall inquire as to whether a support arrearage was owed by the obligor for support due prior to the filing of the petition for modification. If an arrearage exists, the court shall order an offset of the overpayment against the child support arrearages. If no prior arrearage exists or if the arrearage is not sufficient to offset the overpayment, then the court may direct the bureau for child support enforcement to collect the overpayment through income withholding, if the person has, in the court's opinion, sufficient income other than the child support received. The income withholding shall be in all respects as provided for in part 14-401, et seq., except that in no circumstances may the amount withheld exceed thirty-five percent of the disposable earnings for the period, regardless of the length of time that the overpayment has been owed."

W.Va. Code § 48-11-107 (2001).

Mr. Foster's response brief, which quotes portions of West Virginia Code § 48-11-107, omits several important parts of that section. First, according to its explicit language, West Virginia Code § 48-11-107 applies prospectively to only those actions that were filed after January 1, 2001. The effective date is over seven months the conduct of the audit that showed Mr. Foster's claimed overpayment. Second, the provisions of West Virginia Code § 48-11-107 that allow for the family court to award a decretal judgment to one of the parties specifically applies only to those cases where there is a retroactive reduction in child support as the result of the granting of a petition for modification of child support. West Virginia Code § 48-11-107 is wholly inapplicable to the issues raised in this proceeding.

Finally, the factual absurdity of Mr. Foster's claim that the Family Court's memorandum ruling, in May 1998, requiring an accounting of child support payments was intended to grant a decretal judgment to Mr. Foster for claimed overpayments of child support must be addressed. According to Mr. Foster's own evidence during the proceedings below, he did not overpay any child support until October 1999 (a full sixteen months after Family Law Master Staton issued her Memorandum). (See Def. Exh. 2.) Mr. Foster's position is further undermined when one considers that the Family Court entered a temporary order on November 20, 1998 (five months after her Memorandum was issued) in which she directed continued withholding from Mr. Foster's income to offset child support arrearages and ordered that the withholdings be directly paid to Mrs. Lilly. The Family Court then recommended that Mrs. Lilly (and not Mr. Foster) be granted a decretal judgment for unpaid support on September 27, 1999 (fifteen months after her Memorandum was issued). The May 28, 1998 Memorandum is evidence of nothing other than the state of the case at the time the memorandum was issued, and Mr. Foster's assertion that the May

1998 ruling somehow intended to grant him a judgment for child support that would later be overpaid cannot be supported by the facts of this case.

CONCLUSION

In the appellee's brief, Mr. Foster attempts to divert the Court's attention from the issue raised by Mrs. Lilly's appeal (whether the petition for recovery of overpayment of child support is barred by the statute of limitations) by suggesting that Mrs. Lilly's appeal is untimely and by suggesting that it was the lower court's intention to grant him a decretal judgment, which would have been legally effective for ten years. In the appellee's brief, Mr. Foster does not cite a single statute, regulation or Court decision to support his assertions. A close look at the issues raised in the appellee's brief shows that they find no support under West Virginia law.

Mrs. Lilly has asserted throughout these proceedings that this action was governed by the general two-year statute of limitation contained in West Virginia Code § 55-2-12 because there is no other specific period of limitation that would otherwise govern the proceedings. The action was filed over three years after Mr. Foster admittedly became aware of both his right to bring the action and the necessity that he do so to collect his claimed overpayment. Throughout these proceedings, which have now stretched on for nearly four years, Mr. Foster has never suggested that some other, longer period of limitation should apply, except to argue, without supporting authority, that he was somehow granted a decretal judgment as a matter of law when the accounting performed by the West Virginia Bureau for Child Support Enforcement indicated such an overpayment and Mrs. Lilly did not file some formal objection thereto. Throughout these proceedings, Mr. Foster has never asserted that there is some flaw in the logic employed by Mrs. Lilly to support her

assertion that the general two-year statute of limitation is the appropriate period of limitation to govern this action. Accordingly, unless the Court finds merit in the two issues raised in the appellee's brief, Mrs. Lilly's petition for appeal should be granted and she should be awarded all of the relief prayed for therein. This Court should grant the petitioner's petition for appeal and overturn the Family Court's Order Granting Defendant's Petition for Recovery of Overpayment of Child Support, with instructions for the entry of an Order dismissing Mr. Foster's petition based upon the statute of limitations.

SANDRA LYNN LILLY
By Counsel

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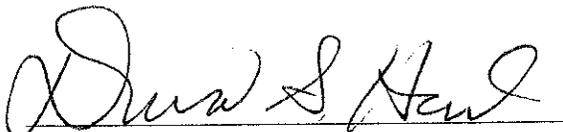
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CERTIFICATE OF SERVICE

I, David S. Hart, hereby certify that I have served a true and correct copy of the foregoing Appellant's Reply to Appellee's Brief upon the following parties or their counsel by United States mail, first-class, postage prepaid, on the 7th day of May, 2007 to the following:

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