

NOT DESIGNATED FOR PUBLICATION

No. 108,519

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

JAMES BENJAMIN FREEMAN, JR.,
Appellant,

and

BETTE JO FREEMAN,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ROBB W. RUMSEY, judge. Opinion filed August 9, 2013.
Judgment reversed, award of attorney fees vacated, and remanded with directions.

Kevin J. Zolotor and Charles A. O'Hara, of O'Hara & O'Hara L.L.C., of Wichita, for appellant.

Elaine Reddick, of Reddick Law Office, of Wichita, for appellee.

Before MALONE, C.J., LEBEN and ARNOLD-BURGER, JJ.

Per Curiam: This case involves the district court's rulings on a motion to set aside a judgment in a divorce case and nothing more. When James Freeman failed to appear at trial in his divorce action, his former spouse, Bette Jo Freeman, presented evidence, and the court issued its decree of divorce and divided the property (the original judgment). Shortly thereafter, James filed a motion to set aside the original judgment due to mistake, inadvertence, and excusable neglect and because the original judgment was not fair, just, and equitable. See K.S.A. 2012 Supp. 60-260(b). When the district court failed to rule on the motion, James filed another motion, renewing his previous one.

Almost 2 years after the entry of original judgment, the district court found that it had already ruled on James' first motion by agreeing that the parties would file a journal entry reflecting a settlement they had reached to amend certain parts of the original judgment. No such journal entry was ever filed, however. The court also denied James' second motion on the basis that it was untimely. Yet, the district court concluded the hearing by, in effect, denying the first motion altogether and affirming its original judgment as fair, just, and equitable. Because we find that the district court abused its discretion in ultimately denying James' motion to set aside the original judgment, we remand the case for a new hearing on the motion.

In addition, the court ordered James to pay Bette Jo's attorney fees of \$2,750. Given our ruling remanding the case for further consideration, we find the granting of attorney fees to Bette Jo is premature and, accordingly, vacate that order. Finally, we deny Bette Jo's request for attorney fees on appeal.

FACTUAL AND PROCEDURAL HISTORY

In late 2009, James filed a petition for divorce and Bette Jo filed a counter-petition for divorce after almost 20 years of marriage. The decision James now challenges resulted from a trial conducted by the district court on July 22, 2010. James' counsel had withdrawn 2 months earlier, and James failed to appear at the trial despite being served with notice. This meant the only evidence heard by the district court came from Bette Jo in support of her counter-petition. That evidence included Bette Jo's testimony that she needed \$908 in monthly maintenance, which the district court ultimately awarded upon finding it "appropriate in light of . . . the disparity of the parties' income, the age of the parties, the length of the marriage, [and] the current and future earning capacity of the parties." Bette Jo also presented the court with a spreadsheet that detailed her proposed division of the parties' assets and debts. She admitted this spreadsheet reflected only estimated figures in some respects but told the court this was because James had not

responded to her discovery requests for the current figures. The district court also had before it the parties' mandatory domestic relations affidavits filed under what was then Supreme Court Rule 164 (2009 Kan. Ct. R. Annot. 238) (now Supreme Court Rule 139 [2012 Kan. Ct. R. Annot. 242]), and the pretrial order, which also reflected the parties' income, debt, and asset information. Following the correction of an arithmetic error caught by the court, the court orally adopted and signed Bette Jo's spreadsheet upon finding it reflected a "fair, just, and equitable" division of the parties' assets and debts.

Notably, the district court did not actually divide any of the parties' debts, which consisted primarily of almost \$95,000 in credit card debt. In fact, it specifically refrained from doing so because Bette Jo indicated that she and James planned to have that debt discharged in bankruptcy but had been advised to wait until after their divorce was final to do so. Also at Bette Jo's request, the court retained jurisdiction over those debts in the event that they were not ultimately discharged in bankruptcy.

On September 13, 2010, the district court's original divorce judgment became effective upon the filing of a signed journal entry of judgment and divorce decree with the district court clerk. See K.S.A. 2012 Supp. 60-258 ("No judgment is effective unless and until a journal entry or judgment form is signed by the judge and filed with the clerk."). The court attached and incorporated Bette Jo's spreadsheet into that judgment.

James' first motion to set aside the original judgment resulted in a settlement that was never journalized.

It appears James quickly realized the effects of his failure to appear at trial because less than a month after the court entered its original judgment, James (now represented by counsel) timely filed a motion for relief from the spousal maintenance and property division portions of the judgment under the authority of K.S.A. 2010 Supp. 60-260(b), claiming "mistake; inadvertence; excusable neglect and for the reason that the judgment

is not fair, just and equitable." In support, James alleged he had suffered from depression, which he identified as the "mistake" and "inadvertence" needed to set aside the original judgment because it had precluded him from cooperating with or assisting his counsel to bring these matters to the court's attention any earlier. He further claimed that Bette Jo's spreadsheet attached to the journal entry of divorce was inaccurate and misstated the assets and liabilities and, as a result, it was unfair and inequitable. James also stated that in light of the court's award to Bette Jo of half of James' military retirement, which was his sole source of income, he lacked sufficient funds to pay child support and maintenance. He further complained he was paying all of the marital debts.

James' motion to set aside was set for a hearing on October 19, 2010. The parties advise, however, that there was no actual court hearing at that time, and no judge was available. The setting was simply an opportunity for the parties to meet and conference the case. There is no transcript of the conference in the record. The parties agree, however, that they reached a settlement agreement to resolve James' motion by asking the court to amend certain portions of the original judgment by way of a signed formalized settlement agreement and an amended journal entry. We have in the record before us only handwritten notes prepared and signed by the parties during the conference. Those notes reflect the parties' agreement to seek the court's modification of its original judgment as follows: (1) James would transfer the entire balance of a retirement account to Bette Jo, which was guaranteed to be at least \$35,000; (2) Bette Jo would waive maintenance; (3) James would pay \$1,000 per month in child support and, should that amount be reduced in the future, make up any difference up to \$1,000 by paying spousal maintenance; and (4) Bette Jo would accept 35% rather than 50% of James' military retirement.

The parties also agree that the district court never explicitly ruled on James' first motion to set aside the original judgment and never incorporated this settlement into a final judgment. Bette Jo's counsel did prepare an amended journal entry of judgment and decree of divorce incorporating the provisions of the settlement agreement. James,

however, refused to sign it. Instead, James' counsel withdrew from the case, and James obtained a new attorney who tried unsuccessfully to renegotiate the terms of the settlement with Bette Jo's counsel.

James' second motion to set aside ultimately resulted in the court reaffirming its original judgment and ordering James to pay Bette Jo's attorney fees.

On April 9, 2012—almost a year and a half after the conference between the parties resulted in the handwritten settlement agreement regarding James' first motion—James filed another motion to set aside the original September 2010 judgment. James characterized this second motion as a "renew[al]" of his first motion (which he attached along with his affidavit) and requested a trial on the issues of spousal maintenance and the division of their assets and debts, even though the court had not yet ruled on his first motion to set aside the judgment.

A month later, the same district court judge who had presided over the other proceedings conducted a nonevidentiary hearing on James' second motion. The primary focus of that hearing became the propriety of the court revisiting these issues.

James took the position that his challenge to the original judgment was still an open topic for two reasons. First, the court was obligated to divide the parties' assets and debts based upon *accurate* figures, which were not those reflected in the spreadsheet, particularly because he was still paying all of the debt. Second, the court had never scrutinized, approved, and incorporated the settlement reached on his first motion into a finalized amended journal entry and decree, so the matter remained open.

The district court found that James' second motion was out of time, because he was required to file it within 1 year of the original judgment. In support, the court stated that the "[p]rior motion was resolved and dismissed. It was taken care of. It was indicated

journal entry. You can't piggy-back it on that." It seems the court was probably referring to the docket sheet prepared for the October 19, 2010, hearing date and signed by the judge that simply noted, "C JE" and "E. Reddick [Bette Jo's attorney will] prepare a journal entry reflecting the court's action."

The district court also voiced concerns about revisiting these issues because it was primarily James' inactions that had gotten them to this point. For example, when James' counsel indicated the settlement of the first motion to set aside was no longer appropriate and continued to insist the court had to conduct an evidentiary hearing to hear evidence on the accurate figures, the court responded:

"I'm just shocked that he can fail to show up for court and then complain about the default and then come and actually have a modification done by agreement of the parties and complain about the modification done between the parties. That's what I'm struggling with. I mean, at some point, your client has an affirmative duty, as well. He wants to put it all on everybody else, but the reality is he has an affirmative duty to show up for court. He has an affirmative duty to make sure that the numbers are right when he enters into the agreement, the second one done that's on this yellow sheet and that was journalized in the document. At some [point] he has some duty of his own. I mean, this can't all be on everybody else."

As James' counsel continued to hold firm to his positions, the district court finally announced that it was denying James' second motion, invited James to appeal if he felt that was error, and granted Bette Jo's request that James pay \$2,750 for her attorney fees as a sanction for his filing.

Still undeterred, James' counsel then asked the court how to proceed because the court still had not fulfilled its obligation to scrutinize, approve, and incorporate the settlement of his first motion into an amended journal entry and decree of divorce. The district court ultimately ruled that it could "do better than that"; noted that it had already

found the property division in its original judgment fair, just, and equitable; and announced that the original judgment "is the one that stands." James appeals these decisions.

ANALYSIS

We review the denial of a motion to set aside a judgment for an abuse of discretion.

First, and perhaps foremost, it should be stressed that this court's task here is not to review the district court's original judgment. Rather, this court's role is limited to reviewing whether the court erred in denying James' motion to set aside that judgment under K.S.A. 2012 Supp. 60-260(b).

Appellate review of the denial of a motion to set aside a judgment under K.S.A. 2012 Supp. 60-260(b) can vary depending on the relief sought. See *In re Adoption of A.A.T.*, 287 Kan. 590, 598-99, 196 P.3d 1180 (2008). Where, as here, the motion is based on mistake, inadvertence, or excusable neglect under K.S.A. 2012 Supp. 60-260(b)(1), this court reviews the decision on the motion for an abuse of discretion. See *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 172-73, 61 P.3d 687 (2003). Our Supreme Court has clarified the standard for determining whether a district court abused its discretion as follows:

"Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

The district court abused its discretion in denying James' motion to set aside the original judgment.

For the reasons discussed below, we find the district court abused its discretion in denying James' motion to set aside the original judgment because the district court abused its discretion in each of the ways outlined in *Ward*, *i.e.*, it committed both an error of fact and an error of law and acted arbitrarily.

Error of fact

The court's factual error stems from how it characterized its ruling on James' first motion. The district court found that it had already denied James' first motion to set aside the judgment, and, accordingly the court deemed his second motion untimely. This was a mistake of fact. Nothing in the record indicates that the court has ever specifically denied James' first motion. See K.S.A. 2012 Supp. 60-258 (judgment not effective unless and until journal entry signed by the judge and filed with clerk). In fact, even if we assume, as did the district court, that the notation on the court's docket sheet meant that the case was continued for a journal entry reflecting the parties' settlement, the court would have in effect been granting James' first motion to set aside because it would have been entering a new journal entry of judgment as agreed to by the parties, as opposed to reaffirming or continuing the original judgment.

Error of law

The court's error of law stems from its denial of James' second motion to set aside as untimely. There is no dispute that James' first motion to set aside was timely filed. See K.S.A. 2012 Supp. 60-260(c)(1) (motions filed for mistake or inadvertence must be filed within 1 year of judgment). Though James' second motion was filed over a year after the original judgment, it was not technically a new motion. Rather, it essentially mirrored his

first motion and was filed as a means to get the matter raised by that motion, which has never been resolved, back before the court. Even if James had never filed a second motion, the district court was required to enter a final judgment on the first motion at some point. It has never done so, so it was error to dismiss James' second motion on timeliness grounds. It was timely as to all issues raised in the first motion.

Arbitrary

Finally, we find the court's resolution of James' first motion to set aside after his counsel inquired about the status of the settlement journal entry was arbitrary. After the court erroneously suggested that it had finally resolved James' first motion and ruled his second was untimely, the following exchange took place:

"[James' Counsel]: What I was asking for is now with that signed agreement, which is a settlement agreement, how—how do we go forward with that? Is that incorporated in the journal entry, or?"

"The Court: It's been incorporated in the journal entry and sent out to both counsel at this point."

This set in motion a seemingly heated debate about the status of the proposed journal entry and the fact that it was never signed by James or filed with the court. The court questioned James' counsel regarding how Bette Jo's counsel was supposed to file the settlement agreement and amended journal entry without James' or his attorney's signature, leading to the following discussion.

"The Court: Without [James' original counsel's] signature? How was [Bette Jo's counsel] supposed to file [the amended journal entry]? She prepared it. How was she supposed to file it?"

"[James' Counsel]: To the pro se party, and if he didn't appear, it becomes an order of the court.

"The Court: You mean file it Rule—

"[James' Counsel]: Rule 170.

"The Court: Right.

"[James' Counsel]: She was ordered—

"The Court: She wasn't ordered to file a Rule 170.

"[James' Counsel]: No, no. To draft the journal entry.

"The Court: She did draft the journal entry.

"[James' Counsel]: It just never was filed.

"The Court: Because your client and his counsel didn't sign it. Okay? If your client signs it and you sign it, she will file it right now.

"[James' Counsel]: How does anything get documented, Your Honor, then, if no one finalizes the matter for what we are here?

"The Court: Here is—

"[James' Counsel]: I mean, it puts the court in a tough situation, because nothing is done."

At this point, the district judge apparently determined that James' counsel was not going to abandon his position, so the judge proceeded to explain why he believed that

Supreme Court Rule 170 (2012 Kan. Ct. R. Annot. 267) would not apply. Then, in a clear moment of frustration, the court concluded the hearing as follows:

"The Court: . . . Yeah, I marked journal entry, because I was told that it was journalized. I asked her to prepare it. She did prepare it, and counsel for Mr. Freeman didn't sign it.

"[James' Counsel]: And subsequent to that, settlement agreement was filed and it needed to be affirmed by the court under the *Kirk* standard.

"The Court: I will tell you what, I can do better than that.

"[James' Counsel]: Uh-huh.

"The Court: I did find that the original journal entry was fair, just, and equitable. I did find after reviewing all of the exhibits that were submitted to me that it was appropriate. That journal entry is the one that stands.

"[James' Counsel]: Thank you, Your Honor."

With that, the court took away what it had seemingly already granted, *i.e.*, its acceptance of the parties settlement of James' first motion. We find this decision by the district court to be arbitrary and unreasonable. Counsel was merely trying to determine if his client was bound by the amended journal entry and settlement agreement. Instead of answering the question, the court arbitrarily and without explanation denied all requested relief.

Accordingly, we reverse the district court's order and remand the case for a new hearing to narrowly determine if the original journal entry should be set aside for the reasons alleged in James' first motion.

Because of our order remanding this case for further consideration, Bette Jo's attorney fees were awarded prematurely.

James' remaining argument on appeal challenges the district court's order that he pay \$2,750 of Bette Jo's attorney fees. Because we are remanding this case for consideration of James' motion to set aside, any award of attorney fees is premature. Accordingly, the award is vacated. But we pause to note the standard to be used on remand.

"A court may not award attorney fees absent statutory authority or an agreement by the parties. Without such authority, a trial court's equitable powers do not extend to the awarding of attorney fees." *Unruh v. Purina Mills*, 289 Kan. 1185, 1200, 221 P.3d 1130 (2009).

Bette Jo generally motioned the court to award her attorney fees as sanctions against James under K.S.A. 2012 Supp. 60-211. But it is difficult to discern under which statutory bases Bette Jo moved, and the court sanctioned James. In her motion, she simply details the procedural history of the case all the way back to pretrial proceedings and then summarily argues she

"should be granted all attorney fees, costs and sanctions for the expense she has [incurred] to address these issues on numerous occasions, to include preparation for and attendance at the Evidentiary Hearing, the two (2) motion hearings as well as the constant settlement negotiations with counsel and lack of response from [James]."

Furthermore, the district court's oral ruling does nothing to help clear up the precise bases for its sanctions against James. After summarily denying James' second motion to set aside, the court simply asked Bette Jo's counsel, "[W]hat are your attorney's fees for the two days of motions?" The court was apparently referring to the day of the

hearing on the second motion over which it presided and 1 day in the week prior when the parties had apparently met at the courthouse in an unsuccessful attempt to resolve the attorney fee issue. Bette Jo's counsel responded that she was seeking her fees for just her court time for these 2 days, which, at 5 hours per day, amounted to \$2,750 in attorney fees. The court simply responded, "Okay," and then summarily indicated in its judgment that Bette Jo's motion for sanctions and attorney fees was granted in the amount of \$2,750.

Accordingly, if either counsel requests attorney fees on remand, the specific statutory basis must be set out in the motion and fully considered by the court.

Bette Jo's request for attorney fees on appeal is denied.

After oral argument, Bette Jo moved this court to award her attorney fees on appeal. See Supreme Court Rule 7.07(b) (2012 Kan. Ct. R. Annot. 66) (discussing appellate court's authority to award attorney fees). We may award such fees when "the district court had authority to award" them. Supreme Court Rule 7.07(b) (2012 Kan. Ct. R. Annot. 66). Because we find that the district court's award was premature and, even if the court had the authority to award attorney fees, we are unclear upon what bases attorney fees were awarded, Bette Jo's motion for fees on this appeal are denied.

Reversed and remanded for a new hearing on James' motion to set aside the original judgment. The district court's order that James pay Bette Jo's attorney fees was premature and is vacated.