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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD D. REUST,)
)
Appellant-Petitioner,)
)
vs.) No. 35A04-0602-CV-80
)
LEANN REUST,)
)
Appellee-Respondent.)

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jennifer E. Newton, Judge Pro Tem
Cause No. 35D01-0301-DR-3

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Richard Reust appeals the amount of the contempt judgment against his former wife, LeAnn Reust. Richard argues the trial court erred when it found he had assumed the risk of loss when he took possession of various assets and when it declined to award him attorney fees.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

Richard and LeAnn married in December 1999. In January 2003, Richard filed for dissolution of the marriage. The court approved a Property Settlement Agreement (“Agreement”) and incorporated it into the decree of dissolution. The Agreement gave LeAnn the house and the car. LeAnn was required to make payments on both, refinance both within ninety days of the decree, and remove Richard’s name from the mortgage and finance documents. Richard would then pay LeAnn \$5,000 to be used for remodeling the house.¹ The Agreement provided: “Each party agrees to indemnify and save and hold the other harmless from all damages, losses, expenses (including’ attorney’s fees), costs, and other fees incurred by reasons of the other’s violation or breach of any of the terms and conditions hereof.” (App. at 11.)

LeAnn did not make payments, refinance the house and car, finish the remodeling, or have Richard’s name removed from the documents. In July 2003, Richard asked the court to find LeAnn in contempt, “order the [house and car] to be sold to allow removal of husband’s name from the financial documents,” (*id.* at 15), and award Richard

¹ The couple had begun remodeling the house prior to the divorce.

attorney's fees. On October 6, 2003, LeAnn filed for bankruptcy. On October 17, 2003, the trial court awarded the house and car to Richard and made him responsible for the refinancing. Richard incurred costs in completing the remodeling and repairing damages to the house.²

In January 2005, the bankruptcy court determined LeAnn's debt to Richard under the Agreement could not be discharged in bankruptcy. The bankruptcy court authorized Richard "to proceed in the Huntington County, Indiana[,] Superior Court to have a determination made as to the amount of his claim." (*Id.* at 29.) Accordingly, Richard filed a "verified motion for contempt of court and to reduce obligations due under marital settlement agreement to judgment" in May 2005. (*Id.* at 30.) The trial court determined:

[LeAnn] agreed in a Property Settlement Agreement, and was ordered by this Court by an order dated March 12, 2003, to refinance the loan on the real estate and to hold harmless [Richard] from any costs associated therewith; [LeAnn] was further ordered to refinance the debt on the [car] and to hold harmless [Richard] from any costs and debts associated therewith. [Richard] was also ordered to pay [LeAnn] \$5,000 in cash toward remodeling costs once [LeAnn] refinanced or released [Richard] from liability on the real estate.

That in an Order dated October 17, 2003, the Court granted possession of the [car] to [Richard] if [LeAnn] did not file proof of refinancing the vehicle and also granted possession of the real estate to [Richard]. [LeAnn] did not refinance the vehicle and [Richard] took possession of both the vehicle and the real estate.

The Court finds that [LeAnn] has failed to comply with the Property Settlement Agreement and the court order and that [Richard] took possession of the real estate and vehicle at his own risk in order to try and preserve his credit and minimize his loss.

The Court finds that [Richard] incurred \$1771.33 for expenses that were incurred while [LeAnn] had possession of the vehicle.

² At the time of the divorce, one of the upstairs windows had been removed to facilitate gutting and remodeling the upstairs. Richard testified the roof began to leak as a result of the remodeling and had to be replaced.

The Court finds that the real estate was not worth the amount still owed on the mortgage when [LeAnn] had it in her possession but that additional damage occurred due to [LeAnn's] neglect of commencing the remodeling.

The Court finds that [Richard] was aware that the real estate was in need of remodeling when he took possession and that he would have had to pay [LeAnn] \$5,000 toward remodeling of the real estate if she would have refinanced the real estate. [Richard] assumed the risk of incurring costs for remodeling when he took possession of the property.

The Court finds that [Richard] remodeled and sold the real estate for \$20,000 less than what was owed to the bank. Some of the loss suffered was because [LeAnn] had not made payments on the real estate when she had it in her possession.

The Court finds that [Richard] incurred \$6254 due to a debt cancellation on the real estate that he would not have incurred had [LeAnn] complied with the property settlement agreement and order.

The Court finds that \$6254 is a reasonable amount owed by [LeAnn] to [Richard] due to her noncompliance with the property settlement agreement and order on the real estate.

The Court finds that [Richard] is responsible for debts associated with the vehicle and real estate while he had each in his possession.

The Court finds that [Richard] had an opportunity to request attorney fees associated with the prior contempt hearing and is barred from collecting those in this proceeding.

The Court orders [LeAnn] to pay [Richard] the sum of \$8,025.33 and reduces the order to a judgment.

(*Id.* at 4-5.)

DISCUSSION AND DECISION

Because the trial court entered findings, we must determine whether the evidence supports the trial court's findings and whether the findings support the judgment. *Infinity Products, Inc. v. Quandt*, 810 N.E.2d 1028, 1031 (Ind. 2004), *reh'g denied*. Typically, we will not disturb the trial court's findings or judgment unless they are clearly erroneous. *Id.* However, LeAnn did not submit an appellee's brief. In such a situation, we do not undertake the burden of developing arguments for the appellee. Applying a

less stringent standard of review with respect to showings of reversible error, we may reverse the lower court if the appellant can establish *prima facie* error. *AmRhein v. Eden*, 779 N.E.2d 1197, 1205 (Ind. Ct. App. 2002). *Prima facie* is defined in this context as “at first sight, on first appearance, or on the face of it.” *Id.* at 1205-06. The purpose of this rule is not to benefit the appellant. Rather, it is intended to relieve this court of the burden of controverting the arguments advanced for reversal where that burden rests with the appellee. *Id.* at 1206. Where an appellant is unable to meet that burden, we will affirm. *Id.*

Richard challenges the trial court’s finding he “took possession of the real estate and vehicle at his own risk in order to try and preserve his credit and minimize his loss.” (App. at 4.) He asserts the indemnification clause in the property settlement agreement controls and therefore LeAnn contractually assumed the risk of loss due to her breach of the agreement.

The indemnification clause in the agreement provides: “Each party agrees to indemnify and save and hold the other harmless from all damages, losses, expenses (including attorney’s fees), costs, and other fees incurred by reasons of the other’s violation or breach of any of the terms and conditions hereof.” (*Id.* at 11.) The trial court found LeAnn “failed to comply” with the agreement. (*Id.* at 4.)³ It determined the house was damaged because LeAnn had failed to complete the remodeling, and additional costs resulted from LeAnn’s failure to make payments on the mortgage. Under the terms of the

³ The bankruptcy court also found LeAnn had failed to comply with the agreement and her failure constituted a breach of the agreement. (*See* App. at 27.)

indemnification clause, LeAnn's breach would make her liable to Richard for any damages resulting from that breach.

Richard also challenges the denial of attorney fees. The trial court determined Richard "had an opportunity to request attorney fees associated with the prior contempt hearing and is barred from collecting those in this proceeding." (*Id.* at 5.) This finding suggests Richard had not previously requested attorney fees and had thus waived his right to attorney fees. *See Ind. Dept. of Pub. Welfare v. Chair Lance Serv.*, 523 N.E.2d 1373, 1379 (Ind. 1988) (failing to include attorney fees as a measure of damages in principal suit waives the issue in subsequent proceedings) and *Stepp v. Duffy*, 654 N.E.2d 767, 775 (Ind. Ct. App. 1995) (no waiver of claim when timely request was made for fees), *reh'g denied, trans. denied* 698 N.E.2d 1188 (Ind. 1998).

However, the "petition for citation" Richard filed in July 2003, includes a request for attorney fees:

Comes now Richard D. Reust who, after being first duly sworn, deposes and says as follows:

* * * * *

5. That Richard D. Reust does not have sufficient funds for the payment of his attorney for the services in the preparation and prosecution of this petition, and respectfully requests an order be made directing the said Leann [sic] Reust to pay to Richard D. Reust reasonable attorney fees for the prosecution of this cause.

* * * * *

WHEREFORE, [Richard] moves the Court that a proper order be given for the payment of reasonable attorney fees for Richard D. Reust's attorney[.]

(App. at 15, 16.) The trial court erred in finding Richard had not requested attorney fees.

Richard has demonstrated *prima facie* error regarding both the trial court's assignment of loss to Richard and its denial of attorney's fees. Therefore, we reverse and remand.

Reversed and remanded.

RILEY, J., and BAILEY, J., concur.