

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
NO. 2010-SC000227-D  
(2009-CA-000978-MR)

**FILED**  
JAN 18 2011  
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SUPREME COURT

THE DREAMERS, LLC  
WILLIE M. NEAL, JR., and  
GLENDA HOFFMAN

APPELLANTS

VS.

**BRIEF FOR APPELLEE**

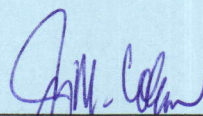
DON'S LUMBER & HARDWARE, INC.

APPELLEE

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by regular mail on the 13<sup>th</sup> day of January, 2011: **Hon. Robert C. Bishop**, P.O. Box 788, Elizabethtown, KY 42702-0788; **Hon. Charles C. Simms, III**, Special Judge, Nelson County Justice Center, 200 Nelson County Plaza, Bardstown, KY 40004-2100. The undersigned also certifies that the record on appeal has not been withdrawn from the Clerk's Office.



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## **I. INTRODUCTION**

This appeal is before the Supreme Court following a summary judgment against the Appellants in the Hardin Circuit Court and a dismissal of the appeal as moot in the Court of Appeals. The appeal was correctly dismissed, and the ruling of the Court of Appeals should be affirmed.

## **II. STATEMENT CONCERNING ORAL ARGUMENT**

The Appellee does not believe that oral argument is necessary in this case.

STATEMENT OF POINTS AND AUTHORITIES

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II. STATEMENT CONCERNING ORAL ARGUMENT ..... i

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    I. The Court of Appeals correctly dismissed the appeal, as the judgment had been satisfied and the Appellants did not reserve the right to continue prosecuting their appeal. 2

*Stairs v. Riley, Ky., 208 S.W.2d 961 (1948)* 2, 3, 4

*Oatts v. Hopkinsville, Ky., 406 S.W.2d 843 (1966)* 4

*Moss v. Smith, Ky., 361 S.W.2d 511 (1962)* 4

    II. The Court of Appeals did not violate the Appellants' Constitutional right to appeal. 5

*Stairs v. Riley, Ky., 208 S.W.2d 961 (1948)* 5

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*Stairs v. Riley, Ky., 208 S.W.2d 961 (1948)* 6

### III. COUNTERSTATEMENT OF THE CASE

At its core, this case is a very simple debt collection action. The Appellant, the Dreamers, LLC, is in the business of constructing and selling homes. The Dreamers, LLC, through its Vice President, Willie Neal, signed a business credit application and Willie Neal, as an individual, signed a personal guarantee with Appellee, Don's Lumber, on March 1, 2005. The Dreamers, LLC, used materials obtained from Don's Lumber to build a house for Glenda Hoffman, but failed to pay for the materials. Don's Lumber filed a Mechanic's Lien against the property owned by Glenda Hoffman. Don's Lumber filed suit seeking judgment for the indebtedness against The Dreamers, LLC and Willie Neal and also sought foreclosure on the Glenda Hoffman property by virtue of the Mechanic's Lien. The Hardin Circuit Court, through Special Judge Charles C. Simms, III, granted summary judgment in favor of Don's Lumber and ordered the property sold pursuant to the Mechanic's Lien.

Unable to post a supersedeas bond, which would have stayed the sale of the property, The Dreamers and Willie Neal simply filed an appeal to the Court of Appeals. The Dreamers and Willie Neal also brought a motion before the Hardin Circuit Court to stay the sale of the property pending the outcome of the appeal. However, the Hardin Circuit Court ruled that since there was no supersedeas bond posted, they could not stay the collection proceedings. Thus, the sale was still on and was scheduled for approximately November 19, 2009.

On the morning of the sale of the property, The Dreamers, LLC tendered the amount of \$48,309.95 to the Appellee in return for cancelling the sale of the property. Upon receipt of said sum, Appellee cancelled the sale with the

understanding that the judgment had now been satisfied and the case was over. Absolutely no reservation of Appellant's right to continue the appeal was made or even discussed. Believing the judgment to have been satisfied and the case resolved, the Appellee moved the Court of Appeals to dismiss the appeal as moot. On March 3, 2010, the Court of Appeals dismissed the appeal as moot.

#### IV. ARGUMENT

##### **I. THE COURT OF APPEALS CORRECTLY DISMISSED THE APPEAL, AS THE JUDGMENT HAD BEEN SATISFIED AND THE APPELLANTS DID NOT RESERVE THE RIGHT TO CONTINUE PROSECUTING THEIR APPEAL.**

The Appellants cite Stairs v. Riley, Ky., 208 S.W.2d 961 (1948) for the proposition that "the mere payment of the amount of a money judgment does not adversely affect the losing party's right of appeal." However, that language is dicta and is not the holding in the case. The Stairs case is similar to the case at bar. In Stairs, a plaintiff in a mortgage foreclosure proceeding obtained a judgment for \$3,400.00 and an order of sale. After the defendant filed an appeal, the plaintiff accepted \$2,500.00 in satisfaction of the judgment. The money was paid on the date of the sale, and the Court noted that the defendant/appellee "raised the sum of \$2,500 to stop the sale of the property under the judgment." Similarly, the Appellants herein argue that they "spoke in terms of cancelling the sale." The Stairs court held that the appellant waived his right to continue forward with the appeal:

The judgment...was for practical purposes extinguished. There was not only ample consideration for the agreement, but the relinquishment by appellee of her rights resulted in a material change of position beneficial to appellants.

Id., at 962. The court further explained that once the judgment had been paid, the appellee relinquished his right to proceed with the sale of the property and the appellant relinquished his right to the money paid.

If appellant's position be correct and the judgment should be reversed, there would be nothing to try upon the return of the case to the circuit court, since the settlement would be a bar to the further prosecution of the action. A reversal would accomplish nothing; an affirmance would benefit nobody. The courts do not try academic questions where neither party will be affected by the result.

Id., at 962-963. Therefore, the Stairs case cited by the Appellants actually supports the Appellee's position that the appeal was correctly dismissed as moot.

The facts of this case are on all fours with the facts in Stairs. Here there was consideration given by Appellee to the Appellants whereby the sale of the property was cancelled. The property was not put up for sale and ownership stayed with Glenda Hoffman.<sup>1</sup> Cancellation of the sale was also a detriment to Appellee as Appellee was not able to obtain its money from the sale of the property and further has released the Mechanic's Lien since the indebtedness secured by the Mechanic's Lien has been paid.

It is the position of the Appellee that a binding contractual agreement was entered into between Appellee and Appellants concerning the cancellation of this sale and therefore, Appellee is entitled to keep the monies paid to it regardless of the outcome of this litigation as stated by the Court of Stairs, supra, "A reversal

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<sup>1</sup> Although this information is not in the current record, the Court will find it of interest that Glenda Hoffman later transferred ownership of that property to one of the Appellants, Willie Neal, who now owns said property.

would accomplish nothing; an affirmance would benefit nobody. The courts do not try academic questions where neither party will be affected by the result”.

The Appellants also cite Oatts v. Hopkinsville, Ky., 406 S.W.2d 843 (1966) and Moss v. Smith, Ky., 361 S.W.2d 511 (1962). Oatts involved a DUI conviction in “police court.” The defendant was convicted, paid his \$100.00 fine on the day of the conviction, and subsequently filed a timely appeal. A prior statute barred appeals from police court judgments that had been satisfied, but that statute was repealed and its provisions were not incorporated in a new statute or in the rules of criminal procedure. The court held that the satisfaction of the judgment not preclude an appeal.

Like Oatts, Moss v. Smith, *supra*, involved someone paying a judgment and later prosecuting an appeal. Oatts and Moss are factually distinguishable from the present case. In the present case, the judgment was satisfied after the appeal had been filed, and Moss and Oatts involved judgments that were satisfied prior to the appeal being filed. The case at bar is almost identical to Stairs v. Riley, *supra*, in which the appellant satisfied the judgment after the appeal in order to stop the sale of property. The appellant in that case waived his right to pursue the appeal further, as did the Dreamers, LLC. The undersigned counsel believes that the Appellants’ “walks like a duck, quacks like a duck” analogy has some merit. If a party appeals and then pays the entire judgment owed without reserving the right to continue prosecuting the appeal, the only reasonable conclusion is that the appeal is moot and must be dismissed.

## II. THE COURT OF APPEALS DID NOT VIOLATE THE APPELLANTS' CONSTITUTIONAL RIGHT TO APPEAL

The Appellants argue that the Court of Appeals violated their constitutional right to appeal by dismissing the appeal as moot. This is not accurate. The Appellants filed an appeal, filed two briefs accompanying that appeal, and raised numerous legal issues on appeal. However, in order to stop the judicial sale and resolve the legal dispute, they chose to pay the entire amount of the judgment along with interest and attorney's fees. The Appellants did not reserve the right to continue with their appeal after satisfying the judgment and settling the case. The Appellants cite case law to the effect that "the right to appeal is not waived except upon a clear and decisive ground." However, as the Court of Appeals held in Stairs v. Riley, *supra*, satisfying a judgment during the pendency of an appeal to stop a court ordered sale of property is sufficient to waive any right to proceed with the appeal. It is difficult to understand how paying a judgment in full without reserving the right to continue with the appeal could not be considered a clear and decisive waiver of the appeal.

The Appellants' argument that the Court of Appeals deprived them of a constitutional right is misguided. In reality, the Appellants waived their right to have the appeal decided on the merits when they knowingly and intentionally paid the judgment in full. It is well-settled law that a party may waive a constitutional right. (See Jackson v. Commonwealth, Ky., 113 S.W.3d 128 (2003), recognizing that a criminal defendant may waive his constitutional right to a trial by jury). The Court of Appeals did not violate any of the Appellants' rights. Rather, the Appellants

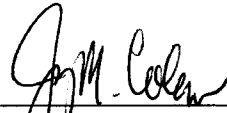


waived the right to continue prosecuting the appeal by acting in a manner that was clearly inconsistent with proceeding further.

**V. CONCLUSION**

The Court of Appeals correctly dismissed the Appellants' appeal as moot. As stated in Stairs v. Riley, *supra*, the courts do not try "academic questions" when the underlying dispute has already been settled and the judgment has been paid and no reservation of the right to continue the appeal has been made. This is especially true when parties materially change their positions by cancelling the sale of the property in return for the payoff of the judgment. It is respectfully submitted that the Supreme Court should affirm the Court of Appeals.

Respectfully submitted,



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