

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002061-MR

HELEN H. MOORHEAD¹

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 96-CI-004389

MANNING EQUIPMENT COMPANY;
WILLIAM MANNING; HAZEL MANNING;
NATIONAL CITY BANK OF KENTUCKY

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: COMBS and DYCHE, Judges; JOHN POTTER, Special Judge.²

COMBS, JUDGE: Helen Moorhead appeals the August 2, 2001, order of the Jefferson Circuit Court which denied her post-judgment motion for attorneys=fees on appeal. We affirm.

On May 17, 1999, Moorhead was awarded the sum of \$248,417.69 after a jury found that the appellees, Manning Equipment

¹This is the correct spelling of the appellant's surname, which was erroneously designated as Moorehead in the notice of appeal.

²Senior Status Judge John Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Company and/or William Manning, had failed to act in good faith with respect to the terms of a lease/purchase agreement executed by the parties. The jury awarded Moorhead damages of \$135,017.00, the amount that it determined would put her in the same position that she would have enjoyed had the agreement been performed. The trial court awarded her the following additional sums: \$37,301.69 in pre-judgment interest; \$57,439.56 in attorneys=fees; and, \$18,659.00 in costs. The judgment was affirmed by this court on appeal.

After this court's opinion became final, Moorhead moved the trial court for an additional \$19,910.42 to reimburse her for services rendered by her attorneys in defending the judgment against post-judgment attacks in the circuit court and in this court on appeal. In denying her motion, the trial court reasoned that it had no authority to make such an award.

While a post-judgment award of [attorneys=] fees has been held permissible in domestic relations cases, such awards have been based upon considerations of financial disparity that have no bearing here [citations omitted]. Post-judgment awards have also been found to be permissible where frivolous appeals have been taken [citations omitted]. However, such [sic] as a procedural matter such awards have been made upon proper motion before the appellate court in question, see Lake Village Water Assn. v. Sorrell, Ky.App., 815 SW 2d 468 [sic] (1991). . . . While [Moorhead] criticizes [Manning Equipment Company] for citing to the procedure used in other states, she fails to cite any other authority for the relief which she seeks.

In her appeal, Moorhead argues that she is entitled to recover her attorneys' fees on appeal under the terms of the personal guaranty signed by the Mannings in conjunction with the lease/purchase agreement. The Mannings unconditionally and irrevocably guaranteed to pay Moorhead as follows:

(B) All fees, expenses, costs and charges of any nature whatsoever, including, without limitation, reasonable attorneys' fees of [Moorhead] required to be paid by [Moorhead] in enforcing any of [her] rights and remedies under said Agreement or under this Guaranty[.]

The issue before this Court is not whether this contractual provision should encompass the payment of attorneys' fees for services associated with an appeal. The issue before us is whether Moorhead asserted this claim in timely fashion. We must determine whether the trial court erred in holding that it was without legal authority or jurisdiction to make such an award when the issue had neither been raised nor litigated in the underlying action prior to the entry of a final judgment.

Moorhead argues that she could not have sought an award for post-judgment attorneys' fees prior to final judgment because she could not know whether an appeal would follow or if so, what fees might be incurred. She correctly points out that the Kentucky Rules of Civil Procedure pertaining to appeals do not provide any mechanism for her to have filed a motion in this court during the appeal in order to seek the attorneys' fees to which she was arguably entitled under her contract. Thus, she

contends that the only way she could enforce the pertinent provision of the Mannings=guaranty was to make a motion for supplemental fees in the trial court after the appeal became final or to file an original action in the trial court on the guaranty agreement.³

Moorhead is correct in arguing that she will not be made whole if she is required to pay her attorneys for defending her award on appeal. However, we agree that the trial court had no jurisdiction to modify the judgment on remand and to increase the amount owed by the appellees. This court's prior opinion affirmed the judgment in all respects and did not remand for any further proceedings. Thus, the trial court was reinvested with authority to enforce the judgment only as originally entered (see, Ellis v. Jasmin, Ky., 968 S.W.2d 669, 670 (1998)); but its jurisdiction was not enlarged to enable it to modify or enhance the award.

Unlike the fee-shifting statutes authorizing an award of attorneys=fees in civil rights and divorce litigation, the attorneys=fees awarded to Moorhead were not statutorily ancillary to the underlying rights that were the subject matter of the lawsuit. Moorhead was awarded her attorneys=fees as damages pursuant to the express terms of the lease/purchase

³Moorhead states in her brief that she has pursued this alternate route and has filed another action in the Jefferson Circuit Court to recover her attorneys=fees denied in the order from which this appeal has been taken. The status of that filing is not before us.

agreement and the accompanying guaranty. The parties' respective rights and liabilities arising from those agreements were finally determined in the judgment entered in May 1999. While Moorhead had not yet incurred additional attorneys' fees, it was highly conceivable that post-judgment proceedings including an appeal would follow the entry of that judgment.

Under these circumstances, Moorhead was required under settled principles of *res judicata* to assert all the relief to which she was entitled (or might become entitled in the contingency of an appeal) under the lease/purchase agreement including future attorneys' fees for services rendered on appeal prior to the entry of the final judgment. The law-of-the-case doctrine, a variation of *res judicata*, bars relitigation of issues raised in prior proceedings as well as issues which could have been raised.

Where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. . . .

Schrodt v. Schrodt, 189 Ky., 457, 225 S.W. 151, 152-53, (1920). See also, Williamson v. Commonwealth, Ky., 767 S.W.2d 323, 325-326 (1989) which holds:

For litigation to proceed in an orderly manner and finally settle the rights of parties, it is necessary for the parties to timely assert the rights they claim to a court with power to grant the relief sought.

We cannot say that Moorhead was negligent in failing to assert a claim for these fees as they were contingent and unascertainable. However, even if the entire amount of her attorneys' fees could not have been determined prior to a final judgment, Moorhead was required to timely assert the right so as to preserve her claim for additional attorneys' fees following appellate review. The circuit court lost jurisdiction over this extra item of damages and could not amend the final judgment so as to incorporate it after the fact.

Moorhead has sued on her guaranty agreement as an alternate remedy in seeking to obtain appellate attorneys' fees.

We do not address the merits of that separate cause of action nor do we hold that this decision should in any fashion influence the outcome of that case.

The judgment of the Jefferson Circuit Court is affirmed. The court reserved the issue of appellate attorneys' fees.

POTTER, SPECIAL JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

BRIEF AND ORAL ARGUMENT FOR
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