

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000141-MR

VICKI CASTLE, MELVIN A. WEAVER, JR.,
MELODY A. LEHNIG, AND SUSAN L. JOHNSON

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 01-CI-00553

GUY E. MILLWARD, JR.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE, BUCKINGHAM AND PAISLEY, JUDGES.
BUCKINGHAM, JUDGE: Vicki Castle, Melvin A. Weaver, Jr., Melody
A. Lehnig, and Susan L. Johnson, hereinafter referred to
collectively as the "Powers heirs," appeal from a summary
judgment entered by the Knox Circuit Court in favor of Guy E.
Millward, Jr. The issue involves an attorney fee to be paid to
Millward. We conclude that the trial court properly awarded
summary judgment to Millward and thus affirm.

This case has a history that must be recited in order to properly understand the facts. There are two tracts of property in Harlan County in which the Croley heirs and the Dorothy K. Powers Trust each held a one-half undivided interest. The Croley heirs and the Powers trust each held a one-half undivided interest in the mineral rights to 315.8 acres in the first tract and a one-half undivided interest in the fee simple title to the 72.3-acre second tract.

In 1987 Terry Loving obtained title to both one-half undivided interests in the two tracts. He paid the Croley heirs \$17,500 for their interests, and he paid the same amount to Elsie Powers Weaver for the other one-half undivided interests. Weaver's interests were transferred by deed to Loving on March 27, 1987.

The Weaver interests were held by the Powers trust, a spendthrift trust which paid its income to Weaver. Following Weaver's death, the Powers heirs were to receive the trust. When Weaver conveyed her interest in the properties to Loving, she and Loving convinced the trustee to sign a quitclaim deed releasing any interest held by the trust.

Meanwhile, an action had been filed in the Harlan Circuit Court in 1986 challenging the mining being conducted by the surface owner of the first tract, Marcus Short. Based on Loving's acquired interest in the property, he intervened in

that action. Further, the trustee of the Powers trust filed a complaint in federal court against Loving and Weaver in an attempt to have that transfer of property set aside. The Croley heirs joined this action in an attempt to have their transaction with Loving set aside as well. It was alleged in that suit that Loving had grossly misrepresented the true value of the property to the parties and had fraudulently induced its sale.

Weaver contacted Millward to represent her in both the federal and state actions. Although Millward informed Weaver that the attorneys representing the trust would protect her interest, she insisted on her own attorney. In fact, she did not trust the trustee to protect her interests. Specifically, Weaver made it clear that she did not want any recovery from Loving being taken by the trust, leaving her with merely the income from said trust. Further, she did not want to pay or return any money to Loving from her own funds.

Millward and Weaver reached a contract for legal services agreement under which Millward was to receive "one-third (1/3) of the value of all funds or assets obtained for the Dorothy K. Powers Trust and paid to Elsie Powers Weaver as beneficiary of said trust or her heirs who become the alternate beneficiaries upon her death." This agreement made it clear that Millward was to represent Weaver in both the federal and state suits and that the objective was to obtain return of the

ownership of the property from Loving. The agreement was signed by Weaver and by the Powers heirs.

In December 1989 the dispute with Loving was resolved by a settlement agreement. In return for surrendering title to the property, Loving was to receive the \$17,500 he had paid to the Crowley heirs, the \$17,500 he had paid to Weaver¹, and a one-third share of the coal royalties earned from future mining on the property. As a part of the settlement, the Crowley heirs and Weaver and the Powers trust entered into a coal lease with Loving. As a result of the settlement, the parties also joined forces against the third party then conducting the mining operation on the property. This settlement led to the dismissal of the federal court case.

In 1995 the coal lease to Loving was modified to allow him to sublease the mining operation to Nally & Hamilton.² In addition, the agreement provided that the parties would dismiss all claims against Short, the surface owner. Further, Nally & Hamilton was required to pay a minimum coal royalty fee of \$5,000 per month in order to keep their sublease alive. Actual mining was set to begin sometime in 2001.

¹ The \$17,500 he paid to Weaver was to be paid back to him by the trust from the proceeds received from money being held in escrow due to the current mining being conducted on the property by the surface owner of the first tract.

² As Weaver had died in February 1993, the Powers heirs then stood in her place.

In January 2001 the Powers heirs hired an attorney and fired Millward. Millward acknowledged the notice of termination of his services, but he made it clear that his one-third interest in the monies being received by the Powers heirs had already been earned under the fee agreement and thus could not be terminated. At that point in time, Millward had received approximately \$47,000, and he agreed to place future fees into escrow pending the resolution of this dispute.

The Powers heirs subsequently filed a civil complaint in the Knox Circuit Court requesting that the court determine that no additional attorney fee was owing to Millward since he had been fired as attorney. Millward filed a counterclaim asking the court to set forth the rights of the parties and to direct that the fee continue to be paid. Shortly before the scheduled date of Millward's deposition, the court held a hearing on Millward's motion for summary judgment.

Millward argued to the court that the fee agreement was a valid contract, that the contingent fee was reasonable, and that he had completed the legal services for which Weaver had hired him. Noting that the attorneys representing the Crowley heirs had a similar one-third contingency fee agreement, Millward also maintained that the litigation against Loving was not guaranteed to be successful. In fact, had Loving prevailed in the litigation, Weaver would have received nothing. Had

litigation proceeded to trial and been successful on behalf of Weaver, she could have received her one-half undivided interest in the mineral rights as opposed to the one-third interest pursuant to the settlement agreement. Millward further noted to the court that the settlement agreement was reached in 1989, the modification and sublease were completed in 1995, and the Powers heirs had accepted the benefits of the agreement without complaint until just prior to the beginning of mining operations by Nally & Hamilton.

In response to Millward's summary judgment motion, the Powers heirs countered that, considering the factors set forth in SCR³ 3.130(1.5), the fee agreement did not provide for a reasonable fee. They attempted to bolster their position by noting that the case against Loving settled approximately six months after Millward and Weaver entered into the fee agreement and that Millward himself did little work in causing the settlement to be reached. In addition, the Powers heirs argued that the settlement with Loving was not a favorable resolution and that Millward's work was not complete. They argued that summary judgment was not appropriate because the reasonableness of the fee was at issue.

On January 2, 2002, the circuit court entered an order granting Millward's motion for summary judgment. The court

³ Rules of the Supreme Court.

found as a matter of law that the fee was reasonable considering the enumerated factors in SCR 3.130(1.5). Specifically, the court stressed that Millward had completed his services as set forth in the fee agreement. This appeal by the Powers heirs followed.

The question of when the reasonableness of an attorney's fee is an issue of fact or an issue of law was recently addressed by this court in Inn-Group Management Servs., Inc. v. Greer, 71 S.W.3d 125 (2002). Therein, the court stated that "[w]hat constitutes a reasonable attorney fee is an issue of fact when the action is between an attorney and client to collect or defend a fee for representation." Id. at 130. Therefore, the issue before the circuit court concerning Millward's fee and its reasonableness was an issue of fact. However, as we explain below, the issue of the reasonableness of the fee had no bearing in this case because the legal services under the contract had been completed and the validity of the contract was not challenged. Thus, the issue before this court "is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

The Powers heirs argue that they should not be bound by the fee agreement contract they signed and that they should

be granted a jury trial on the issue of whether the attorney fee to Millward was reasonable. They cite SCR 3.130(1.5) and the Inn-Group management case. We conclude that the trial court properly awarded summary judgment to Millward as there were no genuine issues of material fact to be resolved.

The case of Sharp v. Culton, 262 Ky. 84, 89 S.W.2d 869 (1936), is on point. In that case the court found that Sharp had employed Culton as his attorney to obtain insurance proceeds which he claimed was owed him from an insurance company. The amount of proceeds to be recovered was \$1,500, and Sharp agreed to pay Culton an amount "equal to whatever amount in excess of \$1,000.00 which might be collected from, or paid to him by said insurance company on said claim." Culton collected the \$1,500 in insurance proceeds, but Sharp refused to pay him the \$500 fee pursuant to their agreement. Because Culton apparently was not required to render a great deal of legal services on Sharp's behalf in order to collect the proceeds, Sharp objected to paying the fee on the ground that "the contract is so out of proportion to the alleged services rendered as to be unconscionable and amounts to constructive fraud."

In response to Sharp's argument, the appellate court held that "[t]his is equivalent to a request of the court to relieve him of his contract, which we are not authorized to do. Having agreed with Culton to pay him for collecting whatever he

might be paid on the policy in excess of \$1,000, Culton is entitled to recover as per the contract." 89 S.W.2d at 871. Further, the court held that "[t]he contract being thus definite and certain as to the amount, the rule for reasonable compensation for legal services has no application and the court properly declined to apply it instead of the criterion fixed by the contract of the parties." Id.

Contrary to the Powers heirs' argument, Millward's legal fee had already been earned in full. The lawsuits involving the recovery of the property and mineral rights on behalf of Weaver ended years ago, and no other legal services of Millward were required. Millward was merely receiving the coal royalties check and forwarding the money to the Powers heirs after deducting his fee. We conclude that there was no genuine issue of material fact concerning whether his legal services had been completed.

Where the legal services are completely performed before the employment of the attorney is terminated, the contract controls as to the amount of the fee. See Smith v. Graumann, Ky., 272 S.W.2d 649, 651 (1954). Pursuant to the principle set forth in the Sharp case, "the rule for reasonable compensation for legal services has no application." 89 S.W.2d

at 871. As in that case, we are not authorized to relieve the Powers heirs of their contract with Millward.⁴

The judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANTS:

Susan C. Lawson
Harlan, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Guy E. Millward, Jr.
Barbourville, Kentucky

⁴ The Powers heirs argue that the Sharp and Smith cases have been superceded by the requirement of SCR 3.130(1.5). We reject this argument because there was a rule for reasonable compensation for legal services under Kentucky case law at that time. See Hightower v. Trinity Church of Covington, Ky., 313 S.W.2d 858, 859 (1958).