

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001817-MR

WMC CORPORATION

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 97-CI-01758

C & B, INC. (NOW M & H, INC.);
BOBBY MATTHEWS; AND CHARLES HUNTER

APPELLEES

OPINION
AFFIRMING PART,
REVERSING IN PART, AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. WMC Corporation (WMC) appeals the denial of additional attorney fees and costs for an additional cause of action raised in an amended complaint filed after a final judgment was entered, and attorney fees for appeals relating to a contract which authorized attorney fees to the successful party. Although we agree there was authority for the courts to award attorney fees, the request was too late for the additional

trial work and we affirm that part of the judgment. As to the appellate work, we agree that appellant is entitled to supplemental funds; hence, we reverse in part and remand to the trial court for a determination of reasonable attorney fees for the appellate work.

WMC was the prevailing party against M & H, Inc. in a breach of a real estate sales contract. The jury awarded WMC \$75,000.00 in damages and the judge subsequently awarded WMC \$30,000.00 in attorney fees by authority of the contractual provisions in the sales contract. The final judgment was for \$105,000.00. A panel of this Court affirmed the judgment and a motion for discretionary review was denied. Subsequently, WMC filed a claim against Bobby Matthews and Charles Hunter (shareholders and directors in M & H, Inc.) seeking to pierce the corporate veil of M & H, Inc. to collect the first judgment. (This was done by amending the complaint after judgment for a new cause of action.) The second claim was also successful and a final judgment was entered against Bobby Matthews and Charles Hunter for \$105,000.00. At this time, there was no supplemental request for additional attorney fees and the judgment was made final and appealable. A panel of this Court affirmed the trial court's final judgment in piercing the corporate veil and a motion for discretionary review was denied by our Supreme Court. On May 16, 2002, WMC filed a motion with the trial court for

additional attorney fees incurred since the original fee application (\$26,678.50). The request was denied and this appeal followed.

Costs are really not an issue¹ as CR 54.04(1) provides: "Costs shall be allowed as of course to the prevailing party unless the court otherwise directs" (emphasis added). Thus, under the rule, a prevailing party does not have to request costs but just "prepare and serve upon the party liable therefor a bill itemizing the costs" CR 54.04(2). If the losing party has a problem, it is that party's obligation to file exceptions and request the trial court resolve the matter by a supplemental judgment. See CR 54.04(2). Without the supplemental judgment, the prevailing party is entitled to recover all costs that are ordinarily recoverable by the successful party under the rule.

The supplemental attorney fee issue presents a quandary. If WMC is successful, would it not be entitled to file another request for supplemental attorney fees covering this appeal, and so on? It is like a child with a mirror in his hand facing another mirror. The reflections are endless. So too could be the request for attorney fees. Each success could produce another request, ad infinitum.

¹ The parties did not really devote time in their briefs to the costs but argued supplemental attorney fees.

As a practical matter, the issue is not that complicated. In the first trial, WMC was successful and after a jury verdict, requested the court (the judge) award attorney fees pursuant to the authority in the contract. We know that attorney fees are not generally allowable in the absence of statutory authority or a contract expressly providing therefore. Batson v. Clark, Ky. App., 980 S.W.2d 566 (1998). The real estate contract had such a clause and when the jury returned a verdict, attorney fees became allowable. On request, the judge allowed \$30,000.00 in attorney fees. Attorney fees from an unsuccessful party are an issue of law for the trial court. Inn-Group Management Services, Inc. v. Greer, Ky. App., 71 S.W.3d 125 (2002). The jury award of \$75,000.00, plus the attorney fee award of \$30,000.00, became part of the final judgment of \$105,000.00. On appeal, that final judgment was affirmed.

That brings us to attorney fees in the amended complaint filed after final judgment, wherein WMC requested that the court pierce the corporate veil and hold Bobby Matthews and Charles Hunter liable for M & H, Inc.'s contract. WMC was successful and the effect would be to place Bobby Matthews and Charles Hunter in the shoes of M & H, Inc. which would make them liable for all attorney fees per the contract. That ruling was appealed to a panel of this Court which affirmed piercing the

corporate veil, in an unpublished opinion, Case No. 2000-CA-001650-MR. In that opinion, the court added that under White v. Winchester Land Development Corp., Ky. App., 584 S.W.2d 56 (1979), where the corporate veil is pierced, the effect would be to "establish that M & H did not have a separate identity from Matthews and Hunter." That opinion is now final and the law of the case. Appalachian Stone Co. v. Pickard, 266 Ky. 565, 99 S.W.2d 472 (1936); Hogan v. Long, Ky., 922 S.W.2d 368, 370 (1995).

Under CR 54.02, when more than one claim for relief is presented in an action, the court may grant a final judgment on one or more claims so long as the proper language is inserted making the judgment final, and then it becomes the law of the case. Stevens v. Stevens, 300 Ky. 769, 190 S.W.2d 327 (1945). Here the request for attorney fees for trial work is part of one suit although with different causes of action. Since the successful party was requesting supplemental attorney fees, it was necessary to request those in a CR 59.05 motion to amend or alter the final judgment before the judgment became final. That way, if there is an appeal to the appellate court, the authority for, and the reasonableness of, the fee would already have been addressed by the trial court. We cannot now say that the issue of attorney fees was interlocutory because the trial court made the judgment (then before it) final. If this Court had seen a

motion before the trial court for supplemental fees before the trial court made the issue final, we could have treated it as an interlocutory judgment and waited until both causes of action were final to see what the attorney fees would be for the litigation before the trial court. See Kentucky Farm Bureau Ins. Co. v. Gearhart, Ky. App., 853 S.W.2d 907 (1993); City of Covington v. Peare, Ky. App., 769 S.W.2d 761 (1989); and Inn-Group Management, 71 S.W.3d 125. In the case sub judice, the appellant waited until discretionary review was denied in the second final judgment to request additional attorney fees from the trial court. We believe it was too late. As Justice Lukowsky once said, "They snoozed so they lose." McLean County v. Meuth Carpet Supply, Ky., 573 S.W.2d 340, 341 (1978).

Looking in the mirror, we see the next issue is whether attorney fees are recoverable for the successful appeals, and who approves them. The contract does not distinguish between trial court proceedings and appeals, so under the contract, WMC would be entitled to a reasonable attorney fee for defending and collecting its judgment. The real question is, who awards these supplemental or additional fees for defending the judgment in the appellate court(s)? In Moore v. Roberts By and Through Roberts, Ky., 684 S.W.2d 276, 278 (1982), our Supreme Court reviewed a case where there was a statutory authorization for reasonable attorney fees. The Court

recognized additional fees were due because of the appeal and held the trial court should decide the issue. In Lake Village Water Assn., Inc. v. Sorrell, Ky. App., 815 S.W.2d 418 (1991), a panel of our Court dealt with a bad faith appeal and directed the trial court to award a reasonable fee (affirmed but remanded for determination of attorney fee and costs). In Tanner v. Tanner, Ky., 442 S.W.2d 558 (1969), our highest Court reviewed an attorney's request for an additional \$1,500.00 fee for services rendered in the appeal. The Court held, "[t]he matter of fixing a fee for the services of the attorney on appeal is one which addresses itself in the circuit court." Id. at 562.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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