

RENDERED: April 1, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000166-MR
and
NO. 2004-CA-000302-MR

ANTON STEWART and
CONNIE STEWART

APPELLANTS/CROSS-APPELLEES

v. APPEAL AND CROSS-APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
CIVIL ACTION NO. 03-CI-00212

BRENDA MURPHY, f/k/a
BRENDA SWIFT;
KRISTEN LOGSDON, a/k/a
KRISTEN MALONE; and
DANNY MURPHY

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
VACATING IN PART AND REMANDING

** ** * * *

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

HUDDLESTON, SENIOR JUDGE: In 2000, Anton and Connie Stewart purchased a home in the George Lockhart Subdivision in Logan County, Kentucky. The Stewarts' deed contained the following recital: "The above-described property is restricted as follows: **no single-wide mobile homes** . . . shall be located upon the above described property." (Emphasis supplied.)

In May 2003, Danny Murphy purchased a tract of land in the subdivision. Like the deeds to all the subdivision's lots, Murphy's deed contained the restriction prohibiting singlewide mobile homes. Despite this, Murphy placed a singlewide mobile home on his property. The Stewarts protested, but Murphy refused to remove the mobile home.

Toward the end of May, the Stewarts sued Murphy in Logan Circuit Court. After determining that Murphy did not own the mobile home, the Stewarts amended their complaint to add as parties to the suit Brenda Swift, Danny Murphy's fiancée, and Kristen Logsdon, Swift's daughter, the joint owners of the mobile home. The Stewarts claimed that Murphy and the Swifts (hereinafter collectively referred to as "the Murphys"), had violated the deed restriction when Murphy placed the mobile home on his property. The Stewarts sought removal of the mobile home, a fee for their attorney of record and recovery of court costs.

Following a bench trial, the circuit court found that the deed restriction was reasonable and enforceable against the Murphys and that Danny Murphy was aware of the restriction before buying property in the subdivision. However, the court noted that the Murphys had added three rooms to the rear of the mobile home, a half-length porch to the front of the mobile home, new siding and a new roof, and it found that this additional construction fully concealed the singlewide mobile home.

The court concluded that the Murphys' home remained a mobile home despite the additional construction. Nevertheless, it held that the mobile home did not violate the deed restriction since it was concealed. Even so, the trial court reasoned that the Stewarts had no choice but to file suit in order to protect their rights and thus awarded them their attorney's fee and costs.

Inasmuch as the trial court failed to order removal of the mobile home, the Stewarts appealed. And because the court awarded the Stewarts their attorney's fee and costs, the Murphys cross-appealed.

DEED RESTRICTION

The Stewarts argue that the circuit court abused its discretion when it failed to order the removal of the mobile

home since it violated the deed restriction. The Stewarts cite Anderson v. Henlee² and Meyer v. Stein³ for the proposition that if a deed restriction is reasonable it will be enforced. As an example, the Stewarts cite Chapman v. Bradshaw⁴ in which the Kentucky Supreme Court held that a house trailer violated a subdivision's restrictive covenant that required all buildings to have solid foundations.

The Stewarts argue that although the nature of the Murphys' home has been at least partially concealed, it remains a singlewide mobile home and thus subject to the deed restriction. Since the deed restriction is reasonable and it applies to the Murphys' home, the Stewarts contend that the circuit court was required to order removal.

In response, the Murphys insist that the court erred when it found that the structure on their lot was still a singlewide mobile home. They argue that, while their home may have begun as a singlewide mobile home, its character was completely changed by the addition of a front porch, rooms to the rear of the home, new siding and a new roof. Alternatively, the Murphys argue that the restriction did not limit building

² 226 Ky. 465, 11 S.W.2d 154 (1928).

³ 284 Ky. 497, 145 S.W.2d 105 (1940).

⁴ 536 S.W.2d 447, 448 (Ky. 1976).

materials, and the mobile home was merely a component used in building their home.

When considering a circuit court's interpretation of a deed restriction, we review it *de novo* as a question of law.⁵ According to McFarland v. Hanley,⁶ "where building restrictions are reasonable they are to be given the effect intended by the parties as gathered from the conveyance in the light of the surrounding circumstances."

We disagree with the circuit court's conclusion that, since the mobile home was partially concealed, it did not violate the deed restriction. The restriction clearly prohibited singlewide mobile homes. When the mobile home was initially placed in the subdivision, it violated the restriction. Despite the fact the structure has subsequently been modified, it remains a singlewide mobile home; and it continues to violate the restriction. It is the nature of the construction of the edifice, not its appearance, which is determinative.⁷ Thus, regarding the interpretation of the deed restriction, we reverse the judgment and remand this case to Logan Circuit Court with directions to grant judgment to the Stewarts.

⁵ Colliver v. Stonewall Equestrian Estates Ass'n, Inc., 139 S.W.3d 521, 523 (Ky.App. 2003).

⁶ 258 S.W.2d 3, 4 (Ky. 1953).

⁷ Toavs v. Sayre, 934 P.2d 165, 168 (Mont. 1997).

ATTORNEY'S FEE

On cross-appeal, the Murphys argue that the circuit court erred as a matter of law when it awarded the Stewarts their attorney's fee since they were not the prevailing party in this case. The Murphys invoke the so-called "American Rule," which holds that even the prevailing party in a lawsuit is not ordinarily entitled to collect an attorney's fee from the losing party.⁸ To support this proposition, the Murphys cite Lewis v. Grange Mutual Casualty Co.⁹ in which the Supreme Court held that a plaintiff in a negligence action who obtained a liability verdict yet was not awarded damages was not the prevailing party and was not entitled to recover court costs. Based on the holding in Lewis, the Murphys contend, the Stewarts were not the prevailing party since they did not obtain the relief that they were seeking.

In response, the Stewarts point out that the circuit court has the equitable power to award an attorney's fee and that the exercise of such power is within the court's discretion.¹⁰

⁸ Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

⁹ 11 S.W.3d 591 (Ky.App. 2000).

¹⁰ Giacalone v. Giacalone, 876 S.W.2d 616 (Ky. 1994); A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., 998 S.W.2d 505 (Ky. 1990).

The Murphys are correct that the general rule is that an attorney's fee may not be awarded unless there is a contract or statute that expressly provides for it. However, as Kentucky's highest court said in Dorman v. Baumlisberger,¹¹ "in equity the award of costs and [attorney] fees is largely within the discretion of the court, depending on the facts and circumstances of each particular case."¹² And once a trial court has awarded an attorney's fee, its decision will not be disturbed on appeal absent an abuse of discretion.¹³ In this case, the Murphys have failed to show that the trial court abused its discretion when it awarded an attorney's fee to the Stewarts who, as a result of today's decision, are the prevailing parties. Thus, regarding the award of a fee to the Stewarts' attorney, we affirm the judgment.

COURT COSTS

The Murphys also argue that the circuit court erred when it awarded court costs because the requirements of Kentucky Rules of Civil Procedure (CR) 54.04 were not met. To recover costs, CR 54.04 requires that the prevailing party (*i.e.*, the

¹¹ 271 Ky. 806, 113 S.W.2d 432 (1938).

¹² Id., 271 Ky. at 809, 113 S.W.2d at 433. See also Batson v. Clark, 980 S.W.2d 566, 577 (Ky.App. 1998); Kentucky State Bank v. AG Services, Inc., 663 S.W.2d 754, 755 (Ky.App. 1984).

¹³ Giacalone, supra, n. 10, at 621.

Stewarts) serve the losing party (the Murphys) with an itemized bill of costs and give the losing party an opportunity to review the bill and to object thereto. Since the Stewarts never filed and served on the Murphys an itemized bill of costs, the requirements of CR 54.04 were not met. Thus, the Murphys insist, the Stewarts were not entitled to recover court costs.

While the Stewarts were entitled to recover court costs, we agree with the Murphys that the requirements of CR 54.04 were not met. Because the Stewarts did not serve the Murphys with an itemized bill of costs, the Murphys were never given an opportunity to review or to object to the Stewarts' claim for costs. The trial court prematurely awarded court costs since the Stewarts failed to comply with CR 54.04. Thus, we vacate the judgment as it relates to costs and remand for compliance with CR 54.04.

CONCLUSION

As to the deed restriction, we reverse the judgment and remand this case to Logan Circuit Court with directions to grant judgment to the Stewarts. As to the issue of the Stewarts' attorney's fee, we affirm the judgment. And, as to the issue of court costs, we vacate the judgment and remand for compliance with the requirements of CR 54.04.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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