

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000530-MR

PHILLIP FERRELL AND
CAROLYN FERRELL

APPELLANTS

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
ACTION NO. 00-CI-00615

C. A. RUDD, JR., INDIVIDUALLY,
AND RUDD INSURANCE, INC.

APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND HENRY, JUDGES.

DYCHE, JUDGE: In December 1996, Phillip Ferrell obtained general liability coverage for two vacant lots he owned in Hopkins County, Kentucky. Ferrell requested the policy from Rudd Insurance, Inc. (Rudd), who obtained coverage from State Auto Insurance Company. There is dispute as to whether Ferrell requested a site specific policy.

On April 25, 1998, Ferrell accidentally shot Robert Major while they were hunting together. They were not on

Ferrell's property at the time of the accident. Major sued Ferrell in state court for his injuries. State Auto sought a declaratory judgment in federal court that it did not owe coverage for the accident. Ferrell defended this action at his own expense and also had the location of the accident resurveyed. The federal court found that State Auto did not owe coverage.

The personal injury action was eventually settled and the loss was paid entirely by insurance policies that Ferrell had obtained from other companies. Ferrell then brought suit against Rudd in Hopkins Circuit Court seeking damages incurred as result of having to defend the declaratory judgment action in federal court against State Auto and the personal injury action. This suit was premised on the allegation that Rudd negligently failed to obtain a policy that was not premises specific. The trial court granted summary judgment to Rudd. This appeal follows.

First, Ferrell argues that the trial court erred by finding that there were no recoverable damages as result of Rudd's alleged negligence. Ferrell cites Grisby v. Mount Valley Insurance Agency, 795 S.W.2d 372 (Ky. 1990), which held an insurance agent liable for failing to provide requested coverage that resulted in an uninsured loss.

In this case, however, there was no uninsured loss. The attorney's fees and the judgment owed under the personal injury action were borne entirely by Ferrell's other insurance providers. His claim that the expense of defending the declaratory judgment action constitutes an uninsured loss is not accurate. The issue of attorney's fees falls within the general rule that these amounts are not recoverable absent contractual or statutory authority. Craig v. Keene, 32 S.W.3d 90, 91 (Ky.App. 2000). This rule holds true even when a party is successful in litigation necessitated by the negligence of a fiduciary. Lyon V. Whitsell, 245 S.W.2d 926 (Ky. 1952).

Next, Ferrell argues that there was a genuine issue of material fact as to whether the expense of hiring a surveyor for the declaratory judgment action constituted recoverable damages. As with attorney's fees, the costs of retaining an expert witness are not recoverable absent statutory or contractual authority. Brookshire v. Lavigne, 713 S.W.2d 481 (Ky.App. 1986). These claims are not recoverable in this context.

Finally, Ferrell argues that the trial court erred by granting costs to Rudd without a specific finding. There is a distinction in Kentucky between costs and attorney's fees with costs representing the actual expenses of litigation. Porter v. Citizens Fidelity Bank & Trust, 554 S.W.2d 397 (Ky.App. 1977). Costs are allowed as a matter of course to the prevailing party

by CR 54.04. CR 54.04(2) requires the prevailing party to serve the party liable for costs with an itemized accounting of the expenses incurred in the action. The party liable for costs is also required to be given an opportunity to review and object to the bill of costs. The award of costs was premature in this case because the procedural requirements of CR 54.04 were not complied with. Therefore, we vacate the portion of the judgment relating to costs and remand the matter for compliance with CR 54.04.

The judgment of Hopkins Circuit Court is affirmed in part, vacated in part, and remanded.

ALL CONCUR.

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