

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000821-MR

ERIC D. WILSON

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
CIVIL ACTION NO. 01-CI-00375

LAWHORN FORD SALES, INC.

APPELLEE

OPINION AND ORDER
REVERSING AND REMANDING, IN PART,
AND DISMISSING, IN PART

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; HUDDLESTON, SENIOR
JUDGE.¹

MINTON, JUDGE: Eric Wilson appeals a circuit court order
awarding him only a portion of the attorney's fees and costs he
sought after a jury returned a verdict in his favor in an

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 Kentucky Revised Statutes (KRS) 21.580.

odometer fraud case against Lawhorn Ford Sales, Inc. We agree with Wilson that the circuit court erred when it failed to award all recoverable costs, but we dismiss the attorney's fees claim because Wilson failed to name the attorneys as parties to this appeal.

Although this case has a large trial record, its facts pertinent to this appeal are simple. Wilson sued Lawhorn Ford Sales, Inc., alleging that Lawhorn Ford defrauded him by selling him a used vehicle that had more actual miles than showed on the odometer. Matthew Leveridge was Wilson's first attorney in the case. When the case first came on for trial, the trial court let Leveridge withdraw due to a conflict of interest; and the trial was postponed. Wilson then retained the firm of Yunker & Associates to represent him. The trial court later granted Wilson's motion to amend his complaint to allege odometer fraud, in violation of KRS 190.300, et seq. When the case finally came on for trial, the jury found for Wilson on all counts. The resulting judgment awarded Wilson \$7,500.00 in damages; his costs under KRS 190.310 and Kentucky Rules of Civil Procedure (CR) 54.04; and the right to collect reasonable attorney's fees from Lawhorn Ford, as allowed under KRS 190.310.

Both Leveridge and Yunker filed post-trial petitions for attorney's fees and costs. Leveridge sought \$9,987.50 in fees and \$187.50 in deposition costs; and Yunker sought

\$25,300.50 in fees and \$1,773.01 in costs. The trial court found that some of Yunker's charges were unreasonable and that some of the costs claimed were not recoverable. So the trial court ordered

that Matthew Leveridge be awarded \$9,987.50 in attorney fee's [sic], that Yunker & Associates be awarded \$9,712.50 in attorney fee's [sic] less \$2,000.00 advanced by their client and the \$7,500.00 they will receive under their representation contract for a total to be paid by the Defendant, Lawhorn Ford in the amount of \$212.50[] plus cost[s] of \$562.00.

After Lawhorn Ford paid the required amount to the circuit clerk, the trial court ordered the clerk to "release and pay over to the Plaintiff Eric Wilson and his attorneys [Yunker] the sum of \$8,314.98[,] which satisfies the Judgment of the Plaintiff against the Defendant." The trial court also denied Wilson's motion to alter, amend, or vacate the award of fees and costs. Wilson appealed. Wilson was the only appellant named in the notice of appeal.

Wilson argues that the trial court erred, both in its award of attorney's fees and its award of costs. Lawhorn Ford concedes error in the trial court's failure to award certain costs to Wilson but contends that we may not examine the merits of the attorney fee issue because Yunker is not a party to this appeal. We agree with Lawhorn on both of these points.

CR 54.04(2) sets forth the types of costs a prevailing party may recover. Filing fees are among them. So the trial court clearly erred in not awarding Wilson his \$161.00 filing fee. But we reject Wilson's argument that the trial court erred in failing to permit him to recover costs for items such as extra copies of depositions and copying expenses.

Wilson concedes that extra copies of depositions and other copying expenses are not ordinarily recoverable under CR 54.04. But he contends that those costs are recoverable in this case because KRS 190.310 allows a broader array of costs to be recoverable in odometer fraud cases. This is an issue of first impression in Kentucky.

KRS 190.310 provides, in relevant part, as follows:

- (1) Any person who, with intent to defraud, violates any requirement imposed under KRS 190.270 to 190.320 shall be liable to the transferee in an amount equal to the sum of:
 - (a) Three (3) times the amount of actual damages sustained or fifteen hundred dollars (\$1,500), whichever is the greater; and
 - (b) In the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

According to Wilson, the phrase, "the costs of the action[,]" as used in KRS 190.310, has a broader scope than the provision in

CR 54.04 that “[c]osts shall be allowed as of course to the prevailing party” and the provision in KRS 453.040(1)(a) that “[t]he successful party in any action shall recover his costs[.]” Wilson provides for us no authority to support his contention, and we perceive no material difference between the successful party under KRS 190.310(b) who may recover “the costs of the action” and the successful party under KRS 453.040(1)(a) who may recover “his costs[.]”

A trial court has discretion to award reasonable costs; and, on appeal, we may only disturb a trial court’s decision regarding the awarding of costs if we find that the award is an abuse of discretion.² In this case, we do not believe that the trial court abused its discretion by failing to award the costs Wilson wants in this appeal, except for the filing fee. So we affirm the trial court’s decision regarding costs as to all costs sought except for the filing fee. As all parties agree, the trial court must award the \$161.00 filing fee to Wilson on remand.

We now turn to Wilson’s claim that the trial court erred by reducing the attorney’s fees claimed by Yunker. Lawhorn Ford has filed a motion to dismiss this portion of

² Barth v. Citizens Fidelity Bank & Trust Co., 368 S.W.2d 339, 343 (Ky. 1963).

Wilson's appeal because Wilson did not make Yunker a party to the appeal.

Under our settled jurisprudence, an attorney should be named as a party on appeal only if the attorney is awarded fees directly in his or her own favor.³ Looking at the case before us, the trial court's order states that "it is the Order of this Court that . . . Yunker & Associates be awarded \$9,712.50 in attorney fee's [sic]" And the order requires the circuit clerk to release the money paid into court by Lawhorn Ford directly to Wilson and Yunker. Thus, it appears clear that the trial court's intent was to award the attorney's fees directly to Yunker, not to Wilson. Accordingly, Yunker is an indispensable party to this appeal since "the allowance [of fees] to an attorney directly makes [the attorney] a party in interest to the litigation, and if [the attorney] has been allowed a fee to be taxed as cost, such part of the judgment cannot be vacated or modified unless [the attorney] be treated as a party and on appeal to this court be expressly made so."⁴ This is in accord with the general rule that an appellate court has jurisdiction over only the parties named in a notice of

³ Knott v. Crown Colony Farm, Inc., 865 S.W.2d 326, 331 (Ky. 1993) ("[a]bsent an award of fees to an attorney by judgment in his or her favor (thus allowing the attorney enforcement of the award by execution), there is no reason for requiring the attorney to be named on appeal as a necessary party.").

⁴ Hutchinson v. Hutchinson, 293 Ky. 270, 168 S.W.2d 738, 739 (1943).

appeal, which means that an appellant's failure to include an indispensable party in the notice of appeal generally results in the dismissal of the appeal.⁵ Therefore, since Yunker is an indispensable party, who was not named as an appellant in the notice of appeal, we must grant Lawhorn Ford's motion to dismiss the portion of the appeal dealing with attorney's fees.

For the foregoing reasons, the Russell Circuit Court's order awarding costs to Wilson is reversed for the failure to award the filing fee and remanded to the trial court for entry of an order consistent with this opinion. Otherwise, the order is affirmed in all other respects. Furthermore, we dismiss Wilson's claim that the trial court erred in not awarding Yunker additional attorney's fees for failure to name an indispensable party.

ALL CONCUR.

ENTERED: June 9, 2006

/s/ John D. Minton
JUDGE, COURT OF APPEALS

⁵ See City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990) (holding that appellate court acquires jurisdiction over only parties named in notice of appeal, denying appellant's request to file a belated notice of appeal to add additional parties inadvertently left out of notice of appeal, and dismissing appeal for failure to name indispensable parties); Commonwealth v. Blincoe, 34 S.W.3d 822, 824 (Ky.App. 2000) ("[i]f a party fails to name an indispensable party in the notice of appeal, the appeal must be dismissed.").

BRIEFS FOR APPELLANT:

Katherine S. Sanford
Katherine K. Yunker
Lexington, Kentucky

BRIEF FOR APPELLEE:

Robert L. Bertram
Jamestown, Kentucky