

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000700-MR

HELEN H. MOORHEAD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 01-CI-006454

J. WILLIAM MANNING AND
HAZEL MANNING

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

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

SCHRODER, JUDGE: This appeal addresses the issue of attorney fees for appellate work where there are contractual obligations for "attorney fees". We agree with the trial court that a subsequent action is not the proper procedure. Hence, we affirm.

A Jefferson Circuit Court awarded Helen H. Moorhead the sum of \$248,417.69 against Manning Equipment Company and/or William Manning for a breach of a lease/purchase agreement. The award included damages for the breach, prejudgment interest,

costs, and \$57,439.56 for attorney fees as authorized by the contractual terms of the guaranty signed in conjunction with the lease/purchase agreement. A panel of this Court affirmed the judgment.

Subsequently, Moorhead went back to the trial court with a motion for additional attorney fees for post-judgment attacks and the appeal. The trial court denied the additional fees, and again, a panel of this Court reviewed the matter. That panel, in an unpublished case,¹ decided the issue was "not whether this contractual provision should encompass the payment of attorney's fees for services associated with an appeal. The issue . . . is whether Moorhead asserted this claim in timely fashion." Moorhead argued that she could not have sought an award for attorney fees for the appeal because she did not know if there would be an appeal, or the amount of the fee if appealed. Moorhead then suggested two ways to seek appellate fees: by going back to the trial court after the appeal is final; or by filing a separate action in circuit court on the contractual authority of the personal guaranty. The panel discussed why the trial court was without jurisdiction to amend or to supplement the final judgment and declined to discuss the separate action.

¹ 2001-CA-002061-MR, rendered February 21, 2003.

The case before this panel is the separate action on the contractual authority of the personal guaranty. The question was first presented to the trial court in an original action to recover attorney fees arising from the post-judgment litigation. The trial court held that under Hays v. Sturgill, 302 Ky. 31, 193 S.W.2d 648 (1946), and Whittaker v. Cecil, 69 S.W.3d 69 (Ky. 2002), the doctrine of *res judicata* bars a subsequent action where in the exercise of reasonable diligence, an issue might have been brought forward in the earlier suit. The trial court reasoned that Moorhead could have reserved on the issue of future attorney fees and obtained an appealable judgment, with the opportunity to come back before the trial court for the attorney fees for the appeal.

Moorhead presents a number of issues on appeal. First, Moorhead contends Manning is contractually obligated to pay Moorhead's attorney fees for the appeal. This is a nonissue. Manning does not contest the contractual liability but whether recovery could be obtained in a separate action. Also, in the previous appeal (2001-CA-002061-MR), a panel of this Court recognized the contractual provisions of the guaranty encompassed "attorneys' fees for services associated with an appeal." That decision became the law of the case and under Hogan v. Long, 922 S.W.2d 368, 370 (Ky. 1995), that question is

binding upon the parties, the trial court, and the Court of Appeals.

Next, Moorhead contends Manning is barred by *res judicata* from challenging his liability for appellate attorney fees. We agree for the reasons set forth in the previous argument.

Moorhead also asserts that the earlier panel of this Court (2001-CA-002061-MR) explicitly prohibited the application of the earlier judgment as a bar to this action, citing the Court's language, "We do not address the merits of that separate cause of action nor do we hold that this decision should in any fashion influence the outcome of that case." Moorhead misunderstands the Court's ruling. First, the Court recognized liability for attorney fees for the appeal, and that became the law of the case. Secondly, the Court recognized Moorhead's two theories for collection, a motion before the original court, or a subsequent action. The Court ruled on the error in moving the original court for post-judgment attorney fees. That Court then declined to address the merits of filing a subsequent action. Thus, the Court of Appeals reference to "this decision" clearly meant only that the Court of Appeals decision should not affect the outcome of a separate action, not that the trial court's earlier judgment would not have any bearing on a separate action.

Moorhead's final and best argument is that *res judicata* does not bar the subsequent action for attorney fees for the appeal because it is a separate action based on events arising after the original judgment was obtained, akin to Hays, 193 S.W.2d 648. When there is an identity of parties and identity of causes of action, the doctrine of *res judicata* precludes further litigation of issues that were decided on the merits in a final judgment. Newman v. Newman, 451 S.W.2d 417, 419 (Ky. 1970). The Court in Hays adjudged that an earlier action to construe a deed did not bar a subsequent action to have the deed annulled on grounds of mental incapacity and undue influence. In so holding, the Court stated the law on *res judicata* in Kentucky as follows:

"The rule is elementary that, when a matter is in litigation, parties are required to bring forward their whole case; and the plea of *res judicata* applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Hays, 193 S.W.2d at 650 (quoting Combs v. Prestonsburg Water Co., 260 Ky. 169, 84 S.W.2d 15, 18 (1935)) (internal quotations omitted).

In a more recent case, our Supreme Court relied on the above language in Hays in ruling that a party in a workers'

compensation proceeding was required to raise an issue of interpretation of law at the time of the initial workers' compensation proceeding, despite the fact that the Supreme Court had not yet decided the case changing the law on the issue as of the date of the decision in the original proceeding. Whittaker v. Cecil, 69 S.W.3d 69 (Ky. 2002). The Whittaker Court held that *res judicata* barred the employer from bringing a subsequent motion for reapportionment after the award was final, even though the law on apportionment had not changed until after the award was final. Id. at 72-73. The Court reasoned that with the exercise of due diligence, the employer should have argued its desired interpretation of the law in the original proceeding. Id. at 73.

In the instant case, we agree with the lower court that the subsequent action for appellate attorney fees was likewise barred by *res judicata*. In the subsequent action, the parties are the same and the underlying cause of action is the same. We believe that the claim for appellate attorney fees was properly a subject of the original litigation and that, with the exercise of due diligence, should have been foreseen by Moorhead as a real possibility in the case. Accordingly, we believe that the proper way to preserve the lower court's jurisdiction of the matter would have been to reserve the issue of post-judgment attorney fees.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

HENRY, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I must dissent in this case involving a matter which is now before the Court of Appeals for the third time.

Despite a guaranty agreement clearly entitling Moorhead to be compensated for **all** costs and fees incurred in enforcing her rights and remedies with respect to Manning, she has never been able to collect the attorney's fees resulting from the appeals. Manning paid the original judgment within two weeks of its entry and then proceeded to pursue a post-judgment motion and an unsuccessful appeal to overturn it.

The second appeal to this Court affirmed a determination by the trial court that it had lost jurisdiction to award attorney's fees for an appeal after the fact. We agreed that the guaranty agreement entitled Moorhead to an award of attorney's fees for the appeal. However, we specifically declined to comment on the separate action filed under the guaranty agreement to recover those appellate fees.

Before us in this third appeal is the issue of how to recover procedurally fees that have been determined

substantively to be due and owing to Moorhead as a matter of right under the contract. Her entitlement to the fees is the law of the case pursuant to our opinion in the second appeal. Since we refrained from commenting on the merits of this separate action which was then pending, we impliedly recognized that action as the **only** means of enforcing the entitlement to the fees as we agreed that a motion before the trial court was precluded. The issue of appellate attorney's fees had never been presented before the trial court and now has arisen as a related but conceptually separate matter flowing from a different coverage issue under the guaranty agreement. While the doctrine of *res judicata* requires parties to bring forward their whole case, it should not require prescience (as distinguished from due diligence) on their part to anticipate extraordinary fees flowing from a meritless appeal bordering on having been brought in bad faith. The majority opinion announces that most frustrating and unpalatable of legal anomalies: that there is indeed a substantive right acknowledged by the court but that the attainable remedy will be barred by an unnecessary construction of a procedural doctrine.

This case may now stand as a chilling caveat to attorneys to file a perfunctory, automatic reservation of the issue of post-judgment attorney's fees. However, such a reservation should only be necessary in the absence of the kind

of guaranty that exists in this case to provide a legitimate predicate for a subsequent action to enforce collection of these fees.

Accordingly, I would recognize Moorhead's right to maintain this action and would hold that it is not barred by *res judicata*.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

John H. Dwyer, Jr.
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BRIEF AND ORAL ARGUMENT FOR
APPELLEES:

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