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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000304-MR

KENTUCKY CONCEALED CARRY
COALITION, INC. APPELLANT

APPEAL FROM BULLITT CIRCUIT COURT
v. HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 13-CI-00292

CITY OF HILLVIEW; JIM EADENS,
IN HIS OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF HILLVIEW;
AND CITY COUNCIL OF THE CITY
OF HILLVIEW APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, J. LAMBERT, AND THOMPSON, JUDGES.

ACREE, JUDGE: Kentucky Concealed Carry Coalition, Inc., appeals the Bullitt Circuit Court's July 22, 2014 order granting the Coalition summary judgment. The

circuit court agreed with the Coalition that the City of Hillview's concealed deadly weapons ordinance violated KRS[1] 65.870,[2] but refused to order the City to amend, repeal, or otherwise take action to bring the ordinance into compliance with KRS 65.870 and refused to award attorney's fees as required by that statute. Dissatisfied with the limited scope of the remedy granted by the circuit court, the Coalition appealed. We affirm in part, reverse in part, and remand for additional proceedings consistent with this Opinion.

The City of Hillview enacted an ordinance[3] in 1996 regulating the carrying of concealed deadly weapons. The ordinance prohibited, with limited exception,[4] any person from "carry[ing] a concealed firearm or other deadly weapon into or on any building or portion of a building owned, leased or controlled by the city." The ordinance broadly defined "building" to include "[a]ny structure, vehicle, water craft or air craft where city citizens are permitted to assemble for purposes of business, government, education, religion, entertainment, or public transportation."

[1] Kentucky Revised Statutes.

[2] Generally, KRS 65.870 provides that "[n]o existing or future city [or local government]. . . may occupy any part of the field of regulation of the . . . possession, carrying, storage, or transportation of firearms[.]" KRS 65.870(1).

[3] City of Hillview Ordinance 96-20, codified as City of Hillview Ordinances §§130.15-.19.

[4] The ordinance excepted certain buildings, as required by KRS 237.115(2), and certain law enforcement officers from its mandates.

In March 2013, the Coalition filed a declaratory rights action challenging the validity and enforceability of the ordinance, claiming it violated KRS 65.870, which prohibits cities from regulating firearms except in narrowly-defined circumstances. The Coalition argued that KRS 237.115(2)[5] gave the City authority to regulate firearms in city-owned "buildings," but not vehicles, water craft, or aircraft.

After defeating the City's initial motion to dismiss and pursuing limited discovery, the Coalition moved for summary declaratory judgment in May 2014. Affixed to its motion were six affidavits of Coalition members stating they had traveled and currently travel within the limits of the City, and that the City's ordinance adversely affected their right to bear arms.

By order entered July 22, 2014, the circuit court granted the Coalition summary declaratory judgment, finding the City's ordinance violated KRS 65.870(1). It reasoned that by defining "building" so broadly, the City exceeded its narrow authority to limit the carrying of firearms in buildings owned by the City. The circuit court explained:

> Section 4 [of KRS 65.870] authorizes an organization such as the [Coalition] who has been adversely affected by an ordinance to file suit. The [Coalition] filed affidavits from members who state that they have been

[5] KRS 237.115(2) provides, in relevant part: "[T]he legislative body of a state, city, county, or urban-county government may, by statute, administrative regulation, or ordinance, prohibit or limit the carrying of concealed deadly weapons by licensees in that portion of a building owned, leased, or controlled by that unit of government."

> on property owned by the City of Hillview. The Court finds the City of Hillview ordinance has a chilling effect on these members' ability to lawfully carry a concealed firearm.

(R. 117). The circuit court declared the ordinance "null, void, and unenforceable" and ordered that the City be "permanently enjoined from enforcing Hillview Ordinance 96-20." (R. 118).

The Coalition filed a timely CR[6] 59.05 motion to amend the judgment, not to alter the result, but to add two remedies. First, citing KRS 65.870(3), the Coalition asked the circuit court to order the City to "repeal, rescind, or amend" the ordinance to conform to KRS 65.870. And, second, citing KRS 65.870(4), as the prevailing party, it requested costs and $8,472.50 in attorney's fees. The Coalition attached copies of its legal billing records to its motion.

The circuit court denied both parts of the Coalition's motion.[7] The court held it lacked authority to order the City to take legislative action to repeal or rescind the ordinance. The circuit court reiterated that all appropriate relief is specifically designated in KRS 65.870(5) and it complied with that subsection by declaring the ordinance null and void, and permanently enjoining the City from enforcing the ordinance. It also denied the Coalition's request for attorney's fees. The circuit court declared the Coalition had failed to demonstrate its membership had been "adversely affected" by the ordinance and found the attorney's fees

[6] Kentucky Rules of Civil Procedure.

[7] The circuit court did grant the Coalition costs. That issue is not before us.

requested to be "far in excess of those which are reasonable and necessary for the pursuit of this action."

The Coalition appealed.

When a declaratory judgment has been entered "and no bench trial held, the standard of review for summary judgments is utilized." *Ladd v. Ladd*, 323 S.W.3d 772, 776 (Ky. App. 2010). The question before us is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). This case largely turns on statutory interpretation, which is a question of law that employs a *de novo* review standard. *Saint Joseph Hosp. v. Frye,* 415 S.W.3d 631, 632 (Ky. 2013).

The Coalition presents two argument to this Court. First, it asserts the circuit court erred by failing to direct the City to "repeal, rescind, or amend to conform" its concealed carry ordinance, as required by KRS 65.870(3). Second, the Coalition claims it is statutorily entitled to attorney's fees and the circuit court erred in ruling otherwise. We disagree with the former and agree with the latter.

The Coalition argues the circuit court ignored the plain language of KRS 65.870(3) which, according to the Coalition, required the City to "repeal, rescind, or amend to conform" its offensive concealed carry ordinance. Despite the circuit court's declaration that the ordinance was null and void, the Coalition contends it remains on the City's books and can be accessed by anyone seeking to

educate himself or herself regarding laws that might affect his or her right to carry a weapon. This, argues the Coalition, is precisely why the General Assembly included KRS 65.870(3) when it recently amended the statute: to ensure that all such ordinances violating the statute were repealed, rescinded, or amended to conform. We disagree.

The parties spend considerable time in their briefs debating whether the circuit court possessed the authority to order the City to "legislate" and whether such an order would violate the separation of powers doctrine. We need not address this issue. The language of the statute itself is dispositive.

"The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *Jefferson Cty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012) (quoting *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009)). We begin by examining the language employed by the legislature, "relying generally on the common meaning of the particular words chosen, which meaning is often determined by reference to dictionary definitions." *Id.* at 719. "When the statute is plain and unambiguous, the language of the statute is to be given full effect as written. . . . This Court should not resort to the task of deciphering legislative intent in order to interpret the language of a statute which is abundantly clear." *Mohammad v. Commonwealth,* 202 S.W.3d 589, 590 (Ky. 2006) (citations omitted).

KRS 65.870(1) seeks to preempt local jurisdictions by declaring that the General Assembly has occupied the entire field related to firearm regulation. KRS 65.870(2) reinforces this notion: "[a]ny existing or future ordinance, executive order, administrative regulation, policy, procedure, rule, or any other form of executive or legislative action in violation of this section or the spirit thereof is hereby declared null, void, and unenforceable." There are limited exceptions to the general preemption rule, however, such as KRS 237.115(2), which permits a city to prohibit or limit the carrying of concealed deadly weapons in city-owned buildings. *See* KRS 65.870(7) ("The provisions of this section shall not apply where a statute specifically authorizes or directs an agency or person specified in subsection (1) of this section to regulate a subject specified in subsection (1) of this section."); KRS 237.115(2) ("The provisions of this section shall not be deemed to be a violation of KRS 65.870 if the requirements of this section are followed.").

In 2012, the General Assembly amended KRS 65.870 to add additional enforcement provisions.[8] Notably, subsections three through five provide:

> (3) Any person or organization specified in subsection (1) of this section shall repeal, rescind, or amend to conform, any ordinance, administrative regulation, executive order, policy, procedure, rule, or other form of executive or legislative action in violation of this section

[8] The General Assembly also added subsections 2 and 7 as part of the 2012 amendment package.

or the spirit thereof within six (6) months after July 12, 2012.

(4) Pursuant to Section 231 of the Constitution of Kentucky, insofar as any person or organization specified in subsection (1) of this section is considered an agent of the Commonwealth, it is the intent of the General Assembly to exempt them from any immunity provided in Section 231 of the Constitution of Kentucky to the extent provided in this section. A person or an organization whose membership is adversely affected by any ordinance, administrative regulation, executive order, policy, procedure, rule, or any other form of executive or legislative action promulgated or caused to be enforced in violation of this section or the spirit thereof may file suit against any person or organization specified in subsection (1) of this section in any court of this state having jurisdiction over any defendant to the suit for declaratory and injunctive relief. A court shall award the prevailing party in any such suit:

(a) Reasonable attorney's fees and costs in accordance with the laws of this state; and

(b) Expert witness fees and expenses.

(5) If any person or organization specified in subsection (1) of this section violates this section or the spirit thereof, the court shall declare the improper ordinance, administrative regulation, executive order, policy, procedure, rule, or other form of executive or legislative action specified in subsection (1) of this section null, void, and unenforceable, and issue a permanent injunction against the person or organization specified in subsection (1) of this section prohibiting the enforcement of such ordinance, administrative regulation, executive order, policy, procedure, rule, or any other form of executive or legislative action specified in subsection (1) of this section.

KRS 65.870(3)-(5).

The Coalition points to KRS 65.870(3), which utilizes the mandatory phrase "shall," as the statutory authority requiring the circuit court, upon finding the City's ordinance improper, to order the City to "repeal, rescind, or amend" the ordinance. Reviewing this subsection in context of the statute as a whole reveals the fallacy of the Coalition's argument.

The legislature enacted subsection (3) to afford cities and other local governments a grace period – until January 12, 2012 (six months after the effective date of the statutory amendments) – to examine their own ordinances and regulations and bring offending provisions into compliance. *See* KRS 65.870(3) (A city "shall repeal, rescind, or amend to conform, any ordinance . . . in violation of this section or the spirit thereof within six (6) months after July 12, 2012"). If a city failed to fix or repeal an improper ordinance within the grace period, any person or organization whose membership was adversely affected by an offending ordinance or regulation was free to file suit. KRS 65.870(4). If the trial court should then find an ordinance or regulation violated KRS 65.870, it was granted the authority, by KRS 65.870(5), to declare the improper ordinance "null, void, and unenforceable, and issue a permanent injunction . . . prohibiting the enforcement" of the improper ordinance. *Id.*

In this case, the City failed to repeal, rescind, or amend its offending ordinance within six months after July 12, 2012, and the Coalition properly filed suit. Upon finding the City's concealed carry ordinance improper, the circuit court

declared the ordinance "null, void, and enforceable" and permanently enjoined the City from enforcing the ordinance. The circuit court fully complied with KRS 65.870. That statutory language is clear and operates seamlessly when viewed not in isolation, but as a whole. In fact, by declaring the ordinance null, void, and unenforceable, there is nothing left for the City to repeal or rescind. The ordinance no longer exists and cannot be implemented or enforced. Paraphrasing our Supreme Court:

> [t]he general rule is that an unconstitutional [ordinance], . . . though having the form and name of law, is in reality no law but is wholly void and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void *ab initio.*

Legislative Research Com'n v. Fischer, 366 S.W.3d 905, 917 (Ky. 2012) (footnote omitted).

We reject the Coalition's argument that the circuit court was under a statutory duty to order the City to repeal, rescind, or amend its offending concealed carry ordinance. The circuit court strictly followed the clear mandates of KRS 65.870. We see no need to disturb the circuit court's judgment in this regard.

The Coalition argues it is statutorily entitled, as the prevailing party, to attorney's fees, and the circuit court erred in refusing to award such. It further

argues the circuit court erred in holding that its requested fees were unreasonable and excessive.

"[A]n award of attorney fees is within the sound discretion of the trial court, and its decision will not be disturbed absent a finding of abuse of discretion." *Golden Foods, Inc. v. Louisville & Jefferson County Metro. Sewer Dist.,* 240 S.W.3d 679, 683 (Ky. App. 2007). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky. 2000).

This Commonwealth adheres to the "American Rule" which provides that "attorney's fees are not recoverable in the absence of a statutory or contractual provision to the contrary, or with certain equitable exceptions." *Gibson v. Kentucky Farm Bureau Mutual Ins. Co.,* 328 S.W.3d 195, 204 (Ky. App. 2010). Recognizing this, to justify a fee award, the Coalition relies on KRS 65.870(4), which again provides, in relevant part: "***[A]n organization whose membership is adversely affected by any ordinance*** . . . may file suit against [the appropriate city or government] in any court of this state having jurisdiction over any defendant to the suit for declaratory and injunctive relief. ***A court shall award the prevailing party in any such suit: (a) Reasonable attorney's fees and costs in accordance with the laws of this state***[.]" (emphasis added).

The circuit court declined the Coalition's request for fees on grounds that its members were not "adversely affected" by the City's improper ordinance. We agree with the Coalition that the circuit court misinterpreted KRS 65.870(4). The "adversely affected" language in KRS 65.870(4) refers to an organization's standing to sue under this statute.[9] It has no bearing on whether to award attorney's fees. In that regard, the statutory language is clear: the prevailing party "shall" be awarded reasonable attorney's fees. *Id.* Attorney's fees are mandated by the statute's use of the term "shall" rather than the permissive "may." *King v. Grecco*, 111 S.W.3d 877, 883 (Ky. App. 2002) (where a statute mandates attorney's fees upon a finding of liability, the court has to award fees to the prevailing party).

There is no dispute in this case that the Coalition is the prevailing party. The circuit court awarded it summary judgment and the City has not challenged that decision. The circuit court abused its discretion in declining to award the Coalition reasonable attorney's fees.

While the circuit court has no discretion under KRS 65.870 to deny the prevailing party attorney's fees, it has discretion to ascertain the amount allowed. The statute requires that any award of attorney fees must be reasonable. KRS 65.870(4)(a). "Where an attorney fee is authorized by statute, the reasonableness

[9] It is also worth noting that, in its July 22, 2014 order granting the Coalition summary judgment, the circuit court specifically found that Coalition members had been adversely affected by the City's offending ordinance.

of the claimed fee is for the trial court to determine, subject only to an abuse of discretion." *Young v. Vista Homes, Inc.,* 243 S.W.3d 352, 367 (Ky. App. 2007). In determining the amount to award, the court should give special heed to the time and labor involved, the tasks assigned, and the degree of difficulty for the services provided under the circumstances. *See Dingus v. FADA Service Co., Inc.*, 856 S.W.2d 45, 50 (Ky. App. 1993).

The circuit court in this case perfunctorily declared the fees requested by the Coalition unreasonable and excessive. While the circuit court retains the authority to measure the reasonableness of the fees owed, it may not decline to award any fees where statutorily mandated to do so.

Accordingly, we reverse the circuit court's order declining to award the Coalition attorney's fees and remand for additional proceedings. On remand, we direct the circuit court to examine the fee amount requested by the Coalition and to ascertain a reasonable fee award. In all other respects, the circuit court's July 22, 2014 judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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