

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001751-MR

DAMON G. DUNAWAY AND
WAVLEEN DUNAWAY

APPELLANTS

v. APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, SPECIAL JUDGE
ACTION NO. 12-CI-00200

SHERMAN WAYNE HARRISON
AND RUTH HARRISON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

JONES, JUDGE: Appellants, Damon G. Dunaway and Wavleen Dunaway, bring this appeal challenging the Estill Circuit Court's award of attorney's fees and costs to Appellees, Sherman Wayne Harrison and Ruth Harrison. After a review of the record, we AFFIRM the Estill Circuit Court's order.

I. BACKGROUND

The basis of this appeal stems out of a single walnut tree. In October of 2011, Damon G. Dunaway and his wife, Wavleen Dunaway, contracted with Jethro Sergent for the removal and sale of timber located on their property. Sergent fulfilled his obligations under the contract; however, in so doing he also removed a walnut tree from Sherman and Ruth Harrison's property, which shares a common boundary with the Dunaway property. Upon the discovery that their walnut tree had been removed, the Harrisons contacted the Dunaways seeking reimbursement for the loss of their tree. The Dunaways refused to do so, claiming that the land on which the tree grew belonged to them, not the Harrisons.

Unable to resolve the dispute informally, the Harrisons filed a Complaint and Petition for Declaratory Judgment Quieting Title to Real Property in the Estill Circuit Court, naming the Dunaways, Sergent, and two unnamed persons as defendants. The Harrisons requested that: title to the subject strip of land be quieted; the court divide the subject property in their favor; and all defendants be permanently enjoined from entering the subject property. The Harrisons sought actual and punitive damages, or, in the alternative, treble damages for trespass and timber removal under KRS¹ 364.130(1), and attorney's fees and costs as determined by the court. Following a bench trial, submission of trial memoranda from all parties, and a viewing of the subject property, Estill

¹ Kentucky Revised Statutes.

Circuit Court Judge Thomas P. Jones entered a detailed judgment on September 18, 2014.² The court found that the subject property did belong to the Harrisons, and that Sergent had destroyed the walnut tree, at the behest of the Dunaways, without color of title. The court apportioned fault at fifty percent between the Dunaways and Sergent. Pursuant to KRS 364.130(1), the court trebled the value of the walnut tree for a total of \$1,853.25 in damages, plus continuing interest. The court additionally ordered that the Harrisons be awarded any legal costs incurred.

Within the statutorily required period,³ the Harrisons filed a Bill of Costs, comprised of usual court costs, attorney's fees, and expert witness fees. The Bill of Costs was accompanied by an Attorney Fee Affidavit, which gave the Harrisons' attorney's hourly rate and an itemization of legal services rendered. The total amount of attorney's fees was \$20,100.00. The Dunaways filed an exception to the Bill of Costs on September 30, 2014, on the basis that while KRS 364.130(1) allows for the recovery of legal costs incurred by the timber owner, expert fees and attorney's fees are not recoverable as legal costs. On October 22, 2014, Sergent moved the court for an order setting "reasonable costs" in the action. Sergent gave no legal basis for his motion, but called attention to the fact that the

² Judge Thomas Jones is of no known relation to the author of this opinion, Judge Allison E. Jones.

³ The Harrisons filed the Bill of Costs on September 29, 2014. Under Kentucky Rules of Civil Procedure (CR) 52.02 a judgment becomes final ten days after the Court enters it – i.e., the Harrisons had ten days to serve the Bill of Costs before the court lost jurisdiction over the matter. Because the tenth day, September 28, 2014, fell on a Sunday, the period ran until the end of Monday, September 29, 2014. *See* KRS 446.030.

Bill of Costs requested over \$20,000 in attorney's fees for a case where the judgment was ultimately less than \$2,000.

On December 19, 2014, a Supplemental Judgment rendered by Judge Jones concerning the attorney's fee dispute was entered. While the court agreed with the Harrisons that they were entitled to attorney's fees under KRS 364.130(1), it took issue with the fact that these fees had been requested via a Bill of Costs rather than by a separate motion for fees. Specifically, the court felt that without the separate motion for attorney's fees, it lacked jurisdiction to rule on the matter. The court therefore ordered the Harrisons to file a CR 60.02 motion to amend the September 18, 2014, judgment to include attorney's fees. The court further noted that, had it had jurisdiction to rule on attorney's fees, it would have reduced the attorney fee award to \$10,000, as it felt the requested fee "seemed too high under the circumstances." R. at 228. On December 29, 2014, the Harrisons served the requested CR 60.02 motion. By the same document, the Harrisons alternatively made a Motion for Attorney's fees; a CR 59.05 motion to alter or amend both the Judgment of September 18, 2014, and the Supplemental Judgment of December 19, 2014; and a motion under CR 52.02 for new or amended findings of fact regarding the reasonableness of attorney's fees.

While the Harrisons' motions were pending, Judge Jones's term ended. He was succeeded on the bench by Judge Michael Dean, previous trial counsel for the Dunaways. Judge Dean recused himself from the case under KRS

26A.015(2) on February 13, 2014. On March 24, 2015, Special Judge Shepherd was assigned to the case. Following briefing by all parties, on August 21, 2015, Judge Shepherd entered an order by which he granted the Harrisons' CR 60.02, CR 52.02, and CR 59 motions to the extent that the Bill of Costs should be considered as a motion for attorney's fees as legal costs under KRS 364.130(1). Additionally, the order overruled all defendants' exceptions to the Bill of Costs, and mandated that the total amount of attorney's fees as stated in the Bill of Costs be paid to the Harrisons. While Sergent resolved and paid his claims, the Dunaway defendants moved to alter, amend, or vacate the August 21, 2015 Order on August 31, 2015. This motion was overruled by order on October 16, 2015.

This appeal followed.

II. STANDARD OF REVIEW

On appeal, the Dunaways raise procedural issues – the trial court's alleged lack of jurisdiction to rule on the Harrisons' motions and the untimeliness of those motions – as well as the unreasonableness of the attorney's fees awarded to the Harrisons. As the procedural issues are issues of law, we review them *de novo*, in that we owe no deference to the lower court. *See Com. v. Pridham*, 394 S.W.3d 867, 875 (Ky. 2012); *Appalachian Reg'l Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 54 (Ky. 2007). On issues regarding the reasonableness of attorney's fees, the standard of review is for abuse of discretion. *Giacalone v. Giacalone*, 876 S.W.2d 616, 620-21 (Ky. App. 1994).

III. ANALYSIS

There is no dispute that the Harrisons are statutorily entitled to receive attorney's fees and costs. KRS 364.130(1) states that one who cuts down, or causes to be cut down, timber on the land of another without color of title "shall pay to the rightful owner of the timber . . . any legal costs incurred by the owner of the timber." *Id.* In *King v. Grecco*, a panel of this court found that "[a]ttorney's fees are mandated by [KRS 364.130(1)]'s use of the term 'shall' as opposed to the permissive 'may.'" 111 S.W.3d 877, 883 (Ky. App. 2002) *superseded by statute on other grounds*, KRS 364.130(1), *as recognized in Meece v. Feldman Lumber Co.*, 290 S.W.3d 631 (Ky. 2009). Once a court determines that a defendant has violated KRS 364.130(1), "the court [is] required as a matter of law to award the [plaintiff] attorney's fee." *Id.* While acknowledging that the Harrisons' have a valid claim for attorney's fees, the Dunaways continue to argue that the Harrisons' use of the Bill of Costs was improper; that the Harrisons' subsequent motion for attorney's fees and the motions under CR 52.02 and CR 59 to amend the Supplemental Judgment were untimely; that the Harrisons' CR 60.02 motion was improper; and that, as a result of the foregoing, the trial court lacked jurisdiction to rule on the issue of attorney's fees in its August 21, 2015 Order.

As an initial matter, we find the Dunaways' argument regarding the use of the Bill of Costs unpersuasive. CR 54.04(2) provides that a party may file a Bill of Costs to recover:

[C]osts incurred by [the party] in the action, including filing fees, fees incident to service of process and summoning of witnesses, jury fees, warning order attorney, and guardian ad litem fees, costs of the originals of any depositions . . . fees for extraordinary services ordered to be paid to the court, *and such other costs as are ordinarily recoverable by the successful party.*

(Emphasis added). To support their argument, the Dunaways point to the fact that attorney's fees are not expressly mentioned in CR 54.04(2). Additionally, they direct our attention to *Harris v. Camp Taylor Fire Prot. Dist.*, 303 S.W.3d 479 (Ky. App. 2009), in which a panel of this court noted that, "attorney's fees and witness fees are not included in the list of costs 'ordinarily recoverable by the successful party.'" *Id.* at 481.

The Dunaways' reliance on *Harris* is misplaced, as the present case is both factually and legally distinguishable from *Harris*. In *Harris*, the plaintiff prevailed in her whistleblower action under KRS 61.102, *et seq.* Almost a month after the court entered a final and appealable order, the plaintiff served her motion for attorney's fees. When the court denied Harris's motion for being untimely, she *then* argued that the court retained jurisdiction to award her attorney's fees as costs under CR 54.04 because the rule does not contain a time limit. *Id.* at 481. On appeal, this court noted that while KRS 61.990(4) gives trial courts *discretion* to award the complainant in a whistleblower action "costs of litigation, including reasonable attorney fees and witness fees," it does not *require* any such award to be included in the final judgment. The court further noted that the final judgment,

which Harris had prepared and tendered to the court, did not mention attorney's fees or costs and contained finality language. *Id.* at 482. It was based on the foregoing observations that this court affirmed the trial court's order denying Harris attorney's fees based on lack of jurisdiction.

The rationale for denying attorney's fees in *Harris* is not present here. The Harrisons filed the Bill of Costs and Attorney Fee Affidavit with the circuit court before the expiry of time for amendment of the court's September 18, 2014, order. Further, the award of attorney's fees as "legal costs" is mandatory under KRS 364.130(1) and *King*. In the September 18, 2014, order Judge Jones acknowledged that the Harrisons were entitled to receive "all legal costs." The Supplemental Judgment agreed that under *King*, attorney's fees were included in legal costs. However, Judge Jones ultimately agreed with the Dunaways that the court lacked jurisdiction to award those fees, as the Harrisons had not made a specific motion for them. *R.* at 225 ("The Court would point out that no one can reasonably argue that the Plaintiffs are not entitled to an award of attorney's fees, but the Court left the attorney's fees out of its Judgment because as it states in the *King* case at page 883, 'When the Greccos moved for attorney's fees, their counsel provided an itemization of his time and efforts . . .").

While we are unaware of any authority dictating whether a prevailing plaintiff under KRS 364.130(1) is required to file a separate motion for attorney's fees, we find that Judge Jones's claim of lack of jurisdiction to award those fees in

this case to be in error. To begin with, as *King* has held that attorney's fees are included in legal costs under KRS 364.130(1), the Harrisons were acting in conformity with that interpretation of the law by requesting their attorney's fees via the Bill of Costs. Even assuming that a separate motion was required, the Bill of Costs and Attorney Fee Affidavit tendered by the Harrisons were sufficient to put all parties on notice, and achieved the same result as if the document had used the word "motion" in the heading. "To draw a distinction on the hypertechnical basis that the corrective step took the form of a motion rather than a pleading would simply exalt form over substance and would not be in keeping with the fundamental philosophy of the Civil Rules." *Adams v. Preece*, 616 S.W.2d 36, 27 (Ky. 1981) (Palmore, C.J., concurring).

Regardless, the trial court only loses jurisdiction ten days after a final judgment. While the trial court's September 18, 2014, order did contain finality language, "[m]erely adding finality recitations from CR 54.02 will have no effect on an Order that 'did not finally fix the rights of any of the parties, as to even one claim.'" *Tax Ease Lien Invs. 1, LLC v. Brown*, 340 S.W.3d 99, 101 (Ky. App. 2011) (quoting *Hale v. Beaton*, 528 S.W.2d 719, 722 (Ky. 1975)). In *Francis v. Crouse Corp.*, 98 S.W.3d 62 (Ky. App. 2002), this Court found that if attorney's fees were not resolved in a judgment and were a part of the claim, rather than collateral to the merits of the action, the judgment was not final and appealable. The court in *Francis* noted that the plaintiff's claim for attorney's fees was a part

of his statutory claim as set forth in his complaint, and that the applicable statute required the final judgment to include a reasonable attorney fee. *Id.* at 66. The *Francis* court thus concluded that the trial court's order would remain interlocutory until it entered its order setting the amount of the attorney fee. *Id.* at 67. The same factors are present in the case *sub judice* – attorney's fees are a mandatory part of the Harrisons' claim under KRS 364.130(1), as was pled by the Harrisons in their complaint. R. at 5. As such, we find that the trial court did have jurisdiction to award the Harrisons attorney's fees in its August 21, 2015 order.

The Dunaways next argue that, should we find the trial court retained jurisdiction to award attorney's fees to the Harrisons, the amount awarded was unreasonable. "Where an attorney fee is authorized by statute, the reasonableness of the claimed fee is for the trial court to determine, subject only to abuse of discretion." *Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 368 (Ky. App. 2007) (citing *Dingus v. FADA Serv. Co., Inc.*, 856 S.W.2d 45, 50 (Ky. App. 1993); *Woodall v. Grange Mut. Cas. Co.*, 648 S.W.2d 871 (Ky. 1983)). As discussed above, KRS 364.130(1) mandates the award of a reasonable attorney fee. *See King*, 111 S.W.3d at 883.

The Dunaways have not argued that the Harrisons' counsel did not work the hours claimed or that his hourly rate is unreasonable. Rather, their argument is based on their belief that "[t]he idea that a single walnut tree can lead to over \$20,000.00 in attorneys' fee is fundamentally unfair and unreasonable."

Further, the Dunaways argue that the present case is two separate actions – one for tree piracy and one to quiet title – and as such, fees should have only been awarded for the portion of the case dealing with tree piracy.

We do not find that the circuit court’s award of \$21,100.00 was an abuse of discretion. When the Harrisons tendered their Bill of Costs, counsel provided an itemization of the time spent on the case, which, when multiplied by his hourly rate, came to a total of \$21,100.00. Neither Judge Jones nor Judge Shepherd found that the Harrisons’ counsel had inflated the number of hours he worked or violated any rule regarding the amount of his hourly fee. As such, we do not find that the trial court’s attorney fee award was unreasonable.

We also disagree with the Dunaways’ claim that the attorney’s fees should be apportioned between the two claims.

Generally, attorney’s fees must be apportioned between claims for which there is statutory authority for an award of attorney’s fees and those for which there is not. But where all of plaintiff’s claims arise from the same nucleus of operative facts and each claim [is] ‘inextricably interwoven’ with the other claims, apportionment of fees is unnecessary.

Young, 243 S.W.3d at 368 (citations omitted). This rule is applicable here. When the Harrisons confronted the Dunaways about the theft of their walnut tree, the Dunaways asserted ownership of the land as a defense. But for this assertion, the Harrisons would not have needed to bring the quiet title action. Conversely, the Harrisons would have been unable to prove their claim of timber piracy without

quieting title to the land on which the walnut tree formerly grew. Accordingly, there was no error in finding that the fees need not be apportioned.

IV. CONCLUSION

Based on the foregoing analysis, we affirm the Estill Circuit Court's order.

D. LAMBERT, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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