

RENDERED: July 10, 1998; 2:00 p.m.
TO BE PUBLISHED

NO. 97-CA-1496-MR

WANDA CHILDERS
and
DON A. PISACANO

APPELLANTS

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA H. ADAMS, JUDGE
ACTION NO. 94-CI-000826

KEN-RAY MOTORS

APPELLEE

OPINION
REVERSING AND REMANDING

* * *

BEFORE: ABRAMSON, GUIDUGLI, AND KNOX, JUDGES.

KNOX, JUDGE: This is an appeal from the Madison Circuit Court's judgment denying appellants' motion for pre-judgment attorney fees following a jury trial alleging fraud in violation of the Kentucky Consumer Protection Act. After reviewing the record, and in light of the absence of legal precedent providing guidance for the trial court, we reverse and remand the matter for further consideration in conformity with this opinion.

BACKGROUND

In May 1994, Wanda Childers (Childers) purchased a used vehicle from appellee, Ken-Ray Motors (Ken-Ray). Within the first hour following purchase, Childers commenced having what turned out to be a plethora of problems with the vehicle. Ultimately, in November 1994, Childers filed a complaint alleging, inter alia, fraudulent misrepresentation and violation of the Kentucky Consumer Protection Act (KCPA), KRS 367.010 et seq. A jury trial was held respecting these two issues on January 27, 1997. That trial resulted in a unanimous jury verdict awarding Childers \$6,748.89 in compensatory damages¹ and \$25,000.00 in punitive damages. The damages award was the result of the jury's finding that Ken-Ray had committed fraud upon Childers, had violated the KCPA, and had acted towards Childers with fraud, malice or oppression.

Following entry of this judgment, Ken-Ray moved the court: (1) for a new trial; (2) to set aside the judgment; (3) to stay the proceedings; and, (4) to refer matters to the Madison County grand jury.² Childers filed a motion for attorney fees as permitted under KRS 367.220(3) and, subsequently, filed further motions for additional attorney fees as would be generated from the post-judgment proceedings.

¹ This figure represents 100% of the actual damages claimed by Childers.

² The facts relating to appellee's motion to refer matters to the grand jury, which was ultimately denied by the trial court, have no relevance to this appeal.

After having taken all of Ken-Ray's motions under advisement and thoroughly considering each allegation, the trial court denied the motions for a new trial, to set aside the judgment, and to refer matters to the grand jury. The court further set aside its previous order staying the proceedings, and authorized Childers to execute the judgment.

On May 5, 1997, Childers filed her renewed motion for attorney fees and motion for additional attorney fees. Attached thereto was counsel's affidavit reflecting the sum of post-judgment fees and costs. That affidavit indicated that \$1,765.00³ in attorney fees had accumulated, as well as \$218.18 in costs. Those figures supplemented counsel's previous motion and supporting affidavit reflecting a total of \$23,996.00 in fees and \$969.23 in costs incurred in preparation for and during trial, or between August 31, 1995⁴ and January 28, 1997.

The trial court entered its order May 22, 1997, directing that Childers be awarded: (1) the costs necessary to prepare and bring her cause of action to trial; (2) \$128.60 in post-judgment costs; (3) nothing for attorney fees generated in preparation for trial, nor during the trial process itself; and,

³ Counsel's total fee amount was predicated on a regular hourly rate for himself of \$120.00, and that of other associates and support staff, the hourly rates of whom ranged between \$60.00 and \$120.00.

⁴ Childers' present attorney, and co-appellant, did not file an entry of appearance in this matter until September 1995. By agreed order in October 1995, current counsel was substituted and Childers' former representative was permitted to withdraw.

(4) \$600.00 in post-judgment attorney fees.⁵ The trial court further ordered that Childers not be awarded "any other (additional) costs or attorney fees, as movant has failed to persuade the Court that the additional fees and expenses claimed were necessary." It is from this order that Childers appeals.

CLAIMS

Childers argues that the trial court's ruling runs afoul of the legislature's intent to permit consumers to pursue judicial redress of unconscionable or dishonest business practices. Absent an attorney fee statutory provision, the KCPA would have no teeth in that members of the public, whom it is designed to protect, would be monetarily bootstrapped from hiring an attorney to represent their causes of action. Considering the excellent results generated from the litigation, Childers claims that an award of attorney fees is amply substantiated.

On one hand, it appears Childers appeals from the portions of this judgment denying any award of attorney fees incurred either pre-trial or during the course of trial. On the other hand, Childers argues that an abuse of discretion occurred when the trial judge failed to award the "full" amount of attorney fees. Regardless of the specific claim, the process under which judicial discretion may be exercised pursuant to the KCPA requires some analysis and application of guidelines.

⁵ The trial court made no findings as to: 1) how it calculated an award of \$128.60 in post-judgment costs; 2) how it ascertained that no attorney fees were warranted either in preparation for, or the actual trial process itself; nor, 3) how it calculated an award of \$600.00 in post-judgment attorney fees.

Ken-Ray makes two arguments. First raised is that the determination of an award of attorney fees is a matter left totally within the discretion of the trial court. This determination will not be disturbed on appeal absent a clear abuse of such discretion. Although we agree with the premise of this argument, we believe the absence of any legal precedent regarding the calculation of attorney fees under KCPA operated to hinder the trial judge's application of such discretion, requiring reversal.

Second, it is maintained that Childers is precluded from asserting any claim for attorney fees for failure to: (1) submit the issue at trial and before the jury; (2) present the issue of reasonableness of such fees before the jury; (3) provide a jury instruction on the award of reasonable attorney fees; and, (4) submit evidence in the record as to the financial arrangement between Childers and her attorney. On these points we disagree.

KRS 367.220(3) affords that "[i]n any action brought by a person under this section, the court may award, **to the prevailing party**, in addition to the relief provided in this section, reasonable attorney's fees and costs." (Emphasis added). The strict statutory language directs the trial court to exercise its discretion post-facto, in that an award may be made to the "prevailing party." It remains simple logic that if one party has prevailed, the trial has concluded. The matter is then left to the sole discretion of the trial judge, not the jury. KRS 367.220(3). See Browning v. Browning, Ky. App., 551 S.W.2d 823,

825 (1977). Of course, had counsel desired to submit the issue of attorney fees to the jury he was so entitled, but by no means was this a mandatory method of recovery. Rather,

[i]t should never be overlooked that any award of an attorney fee is subject to a determination of reasonableness by the trial court. . . . The trial judge is generally in the best position to consider all relevant factors and require proof of reasonableness from parties moving for allowance of attorney fees. In exercising its discretion, a trial court should require parties seeking attorney fees to demonstrate that the amount sought is not excessive and accurately reflects the reasonable value of bona fide legal expenses incurred.

Capitol Cadillac Olds, Inc. v. Roberts, Ky., 813 S.W.2d 287, 293 (1991).

With respect to appellee's argument that appellant is precluded from asserting any claim for attorney fees for failure to submit evidence in the record regarding the financial arrangement between Childers and her attorney, we note the case Meyers v. Chapman Printing Co., Ky., 840 S.W.2d 814 (1992). In Meyers, the Court observed that, earlier, the trial court had addressed a claim from plaintiff's attorney for a "fee enhancement" because the client was represented on a contingent fee basis. Affirming the circuit court's decision, in that a "contingency enhancement" is inappropriate in such cases, and quoting Judge Barker's trial court opinion, the Kentucky Supreme Court said:⁶

⁶ Our Supreme Court commented that Judge Barker had rendered his decision prior to the United States Supreme Court reaching the identical conclusion in City of Burlington v. Dague, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

[A]n enhancement for that reason constitutes an unfair penalty upon the defendant and would have a tendency to encourage meritless litigation. Most lawyers are familiar with non-compensated hours and the market rate takes this into account.

Meyers, 840 S.W.2d at 826 (1992) (alteration in original). In light of the language in Meyers, we are of the opinion that contingent fee arrangements are not to be considered by the court in arriving at a reasonable attorney fee. On the other hand, an arrangement based on an hourly rate may be relevant in determining a reasonable hourly rate in setting a "lodestar" figure, as explained hereinafter. In any event, we find nothing in Kentucky law which mandates production of evidence regarding any such hourly arrangement as a predicate for recovering her attorney fees.

The parties are correct in that there exists no Kentucky precedent providing guidelines for the exercise of judicial discretion in the awarding of attorney fees under the Kentucky Consumer Protection Act. We perceive the KCPA is analogous to other statutory provisions which permit the trial court to discern whether an award of attorney fees is merited. Likewise, we deem it advisable to look to other corners of Kentucky law for direction on what type of additional factors should be employed by the trial court in making such a determination.

THE KENTUCKY CONSUMER PROTECTION ACT

As a general rule, statutory authority is required in order to allocate attorney fees and costs. Shelter Mut. Ins. Co.

v. McCarthy, Ky. App., 896 S.W.2d 17, 19 (1995). Enacted in 1972 the KCPA was intended to promote the Kentucky General Assembly's findings:

that the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services; toward this end, [agencies] are hereby created for the purpose of aiding in the development of preventive and remedial consumer protection programs and enforcing consumer protection statutes.

KRS 367.120 (1). As plainly stated in the above-quoted statute, the legislative scheme/purpose of the KCPA was development of programs protecting the public from unethical sellers by way of preventative programs and designated remedies. One such remedy is found in KRS 367.220 (3) which authorizes the court to award the prevailing party reasonable attorney fees and costs incurred as a result of the wrongdoer's conduct.

We believe the intent of this remedial provision is analogous to KRS 344.450⁷ which provides for the allowance of attorney fees and costs arising from a successful prosecution for a violation of the Kentucky Civil Rights Act, KRS 344.010 et seq. In this regard, Meyers v. Chapman Printing Co., Inc., Ky., 840

⁷ KRS 344.450 provides:

Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter.

S.W.2d 814 (1992) remains the seminal case regarding the calculation of reasonable attorney fees as permitted by KRS 344.450.

In Meyers the plaintiff alleged two separate causes of action, one for sexual harassment and a second for gender based discrimination. Plaintiff prevailed on the first cause and failed on the second. Following a hotly contested debate over the award of attorney fees, the trial court granted plaintiff \$150,662.85 for same, an amount substantially greater than plaintiff's total recovery of \$101,316.24. However, as the trial judge, George E. Barker, explained, and the Kentucky Supreme Court affirmed, the purpose of a fee award statute is:

to insure "effective access to the judicial process" for persons with civil rights grievances who would not otherwise have the funds to employ an attorney, and if restricted by the size of the claim (albeit that is a factor to consider) there would be no incentive to pursue many worthwhile cases.

Meyers, 840 S.W.2d at 825 (quoting Judge Barker's opinion). Our Supreme Court further quoted the trial court in stating that "the court should not undertake to adopt some arbitrary proportionate relationship between the amount of attorney fees awarded and the amount of damages awarded." Meyers, 840 S.W.2d at 825-26. We believe identical reasoning is applicable under the KCPA.

With respect to civil rights grievances, the accepted method of calculating attorney fees is that set forth in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), as adopted by the Meyers Court. The Hensley/Meyers analysis

provides that attorney fees should be ascertained by multiplying counsel's reasonable hours by a reasonable hourly rate to produce a "lodestar" figure. This lodestar figure may then be adjusted to account for any special factors particular to the individual litigation. Meyers, 840 S.W.2d at 826.

Special factors the court will want to consider in making any adjustment to the lodestar figure include: (1) amount and character of services rendered; (2) labor, time and trouble involved; (3) nature and importance of the litigation in which the services were rendered; (4) responsibility imposed; (5) the amount of money or value of the property affected by the controversy, or involved in the employment; (6) skill and professional character and standing of the attorneys; and, (8) the results secured. Boden v. Boden, Ky., 268 S.W.2d 632, 633 (1954) (citing Axton v. Vance, 207 Ky. 580, 269 S.W. 534 (1925)). These factors have long been regarded as applicable through the decisional law of Kentucky. Commonwealth v. Lavit, Ky., 882 S.W.2d 678, 680 (1994) (calculation of fees for private attorney who acted as public defender); Daniels v. May, Ky., 467 S.W.2d 372, 374 (1971) (attorney fees allowed for services rendered in civil litigation extending over four years); Itschner v. Itschner, Ky., 455 S.W.2d 54, 56 (1970) (award of attorney fees in dissolution action); Stubblefield v. Stubblefield, Ky., 327 S.W.2d 24, 26 (1959) (same); Brown v. Fulton, Hubbard & Hubbard, Ky. App., 817 S.W.2d 899, 901 (1991) (attorney fee charged for defending client against criminal charges); Citizens Fidelity

Bank & Trust Co. v. Harvin, Ky. App., 550 S.W.2d 569, 570 (1977)
(award of attorney fee for sale of real estate that was subject
of action for specific performance).

Authorizing a prevailing party to recover compensatory
and punitive damages is consistent with and promotes the
underlying remedial purpose of the Kentucky Consumer Protection
Act. See KRS 367.120 (1). Permitting an additional recovery of
attorney fees and litigation costs is intended to compensate a
prevailing party for the expense of bringing an action under the
statute. A further aim is to provide attorneys with incentive
for representing litigants who assert claims which serve an
ultimate public purpose (i.e. a deterrent to conduct resulting in
unfair trade practices which perpetrate fraud and deception upon
the public).

In many, if not most, consumer protection cases, the
monetary value is typically low. Should the court focus strictly
on the dollar value of the ultimate award when considering
attorney fees and costs, the intended remedial goal of the
statute would be thwarted, if not entirely defeated. Simply put,
if, in these cases, attorney fees and costs awards do not provide
a reasonable return, it will be economically impossible for
attorneys to represent likely litigants. Thus, practically
speaking, the door to the courthouse will be closed to all
potential parties excepting those with either a strong
probability of substantial damages, or those with sufficient
economic resources to personally afford financing the expense of

litigation. Such a situation would indeed be ironic, since it is precisely those with ordinary consumer complaints, who cannot afford to pay attorney fees, for whom these remedial acts are designed.

It is our opinion that, considering all the proper factors, the services rendered by appellant attorney warrant, and the results realized from said services, require reconsideration of the trial court's total award of attorney fees. Viewed from the perspective of both the United States and Kentucky Supreme Courts, the trial court's judgment in failing to allow any fee for time spent actually litigating the case and all hourly services leading up thereto is inconsistent with the finding that:

[t]he jury's award of both compensatory and punitive damages is supported by the evidence, and is not the result of the jury's prejudice or passion. Furthermore, the amount of compensatory damages are [sic] not excessive and are [sic] within the confines of the instructions; said amounts do not exceed the amounts requested by plaintiff and which were sufficiently supported by her proffered evidence. Nor is the amount of punitive damages excessive.

Trial court's April 29, 1997 order overruling motion for new trial, motion to set aside judgment, and order setting aside stay of proceedings, at 5.

Moreover, we believe, given the lack of legal precedent, the trial court was uncertain as to the applicable standard to be employed in deciding whether to award attorney fees under KRS 367.220 (3). In her May 22, 1997 order regarding costs and legal fees, the trial judge held, "[t]hat Petitioner

shall not be awarded any other (additional) costs or attorney's fees, as movant has failed to persuade the Court that the additional fees and expenses claimed were necessary." The direct statutory language, however, provides that the court may exercise discretion in awarding the prevailing party, in addition to the other applicable statutory relief, "reasonable attorney's fees and costs." KRS 367.220 (3) (emphasis added). Hence, the operable standard in ascertaining an award of attorney fees and costs under KRS 367.220 (3) is a test of "reasonableness" not "necessity."

As previously stated, the jury determined that Childers was entitled to 100% of her actual damages sustained (\$6,748.89), in addition to sanctioning defendant \$25,000.00 in punitive damages for its wrongful conduct through the course of the transaction. As such, this case clearly constitutes an "unfair" trade practice, unlawful under the KCPA, KRS 367.170, and the prevailing party is entitled to the court's consideration of a "reasonable" attorney fee award. KRS 367.220 (3). By this holding, we do not mean to suggest that, in a consumer protection case, the court must award the full amount of plaintiff's request. Rather, we hold that after considering all the usual factors in computing a lodestar figure, the court must further weigh the special circumstances presented in the particular action in ascertaining the fee award.⁸

⁸ It is worth noting that under the trial court's order, Childers would be required to pay \$25,250.58, out of pocket, in attorney fees and costs, not inclusive of any further expense

We readily recognize that the fixing of fees in matters of this type is a difficult and delicate task for the court. Although it is nearly impossible to set such fees with any mathematical certainty, the undertaking "should be done with a view to common sense realism, that is to say, it should pose an amount that public standards will approve for the work done, time consumed and the skill required." Citizens Fidelity Bank & Trust Co. v. Harvin, Ky. App., 550 S.W.2d 569, 570 (1977).

Our review of the record indicates that the trial judge lacked sufficient legal guidance on the standard and method to be employed in the exercise of her discretionary authority granted in KRS 367.220 (3). We have determined that the case should be remanded to the trial judge to allow her to make a discretionary decision concerning attorney fees and litigation costs consistent with the standard and method set forth in this opinion.

The judgment of the trial court is reversed and the case remanded for determination concerning attorney fees and litigation costs as discussed above.

ALL CONCUR.

generated in pursuing this appeal. As such, not only will Childers be effectively stripped of all the punitive damages award but will be required to pay a 1% fee for the privilege of pursuing this litigation for more than three years.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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