

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002508-MR

GARY SHANKS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 02-CI-04628

STEPHEN E. WALTRIP AND
ACCURATE LAND TITLE, INC.

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: This matter is before the Court on Gary Shanks' appeal of the circuit court's order denying his motion for a hearing on the issue of attorney's fees and granting the motion to dismiss filed by Stephen E. Waltrip and Accurate Land Title, Inc., (hereinafter "Appellees"). Having determined that Shanks is entitled to a hearing, we vacate and remand.

The facts in this case are essentially undisputed. On July 3, 2002, Shanks closed on a piece of real property. Waltrip handled the closing on behalf of Accurate. Following the closing, and for reasons that are unclear from the record, the Appellees waited until October 28, 2002, to file the Shanks' deed. In the meantime, on October 18, 2002, Ralph Combs filed a lien on the property in the amount of \$72,000. When Shanks discovered the lien, he filed a legal malpractice claim against Waltrip, Accurate, and Allstar Loan Company,¹ Shanks' mortgage company. While Shanks did not name Combs as a defendant, the circuit court later joined Combs as a necessary party on motion of the Appellees.

On March 2, 2004, the Appellees filed motions for default judgment and adjudication as to the Combs lien, the mortgage, and the title to the property in question. On that same date, the circuit court entered an order releasing and setting aside the Combs lien, giving Shanks' mortgage company first priority, and declaring Shanks fee simple owner of the property.

The Appellees filed a motion to dismiss on September 7, 2005, citing as grounds Shanks' failure to prosecute the legal malpractice action and the resolution of the lien issue. Shanks filed a response requesting, in pertinent part, a hearing on the issue of his entitlement to attorney's fees. The circuit court granted the Appellees' motion to

¹ Allstar was not named as a party to this appeal. Allstar was joined as a defendant based on the mortgage executed by Shanks at closing. On March 2, 2004, the circuit court entered an order giving Shanks' mortgage holder first priority. Therefore, Allstar has no interest in this litigation and was not a necessary party to this appeal. *See Land v. Salem Bank*, 279 Ky. 449, 130 S.W.2d 818 (1939).

dismiss and denied Shanks' motion for attorney's fees. It is from this order that Shanks appeals.

In support of his appeal, Shanks states that there are two different circumstances under which a claimant may obtain attorney's fees from his opponent. The first is for fees related to the direct action, in this case, the legal malpractice claim. Shanks concedes that he is not entitled to an award of attorney's fees for having brought the malpractice claim; therefore, we will not address his entitlement to any such fee.

The second circumstance, and the one Shanks argues is applicable, arises when a litigant undertakes remedial action during the course of litigation and that remedial action results in the resolution of the underlying claim. According to Shanks, his attorney expended time and effort cooperating with the Appellees' attorneys in order to obtain the release of the Combs lien. Shanks seeks compensation for the fees incurred by him in order to obtain the release of that lien.

In comments following the hearing on the Appellees' motion to dismiss and Shanks' motion for a hearing, the circuit court indicated that it was denying Shanks' motion for a hearing based on the general rule of law in Kentucky that an award of attorney's fees is not appropriate absent a statutory or contractual provision. The circuit court did not conduct a hearing regarding Shanks' request for attorney's fees or make any findings of fact. Therefore, the issue before this Court is one of law and the standard of review is *de novo*, requiring no deference to the circuit court. *See First Commonwealth*

Bank of Prestonsburg v. West, 55 S.W.3d 829 (Ky.App. 2000), and *Hahn v. University of Louisville*, 80 S.W.3d 771 (Ky.App. 2001).

The general rule of law in Kentucky is that “attorney's fees are not allowable as costs in absence of statute or contract expressly providing therefore.” *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky.App. 1998), citing *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754, 755 (Ky.App. 1984). However, as noted by this Court in *Batson*, that general rule “does not . . . abolish the equitable rule that an award of counsel fees is within the discretion of the court depending on the circumstances of each particular case.” *Batson* at 577, citing *Kentucky State Bank* at 755. One factor for the Court to consider in determining whether to award attorney's fees is whether the actions of the party seeking fees “affected any benefit” to the party opposing the award of such fees. *Kentucky State Bank*, at 755. Another factor that the Court must consider is whether, as in *Batson*, the actions of the party assessed attorney's fees constituted bad faith.

Shanks argues before this Court, and argued before the circuit court, that he did provide a benefit to the Appellees by cooperating with them in obtaining a release of the lien. However, because the circuit court did not conduct a hearing on that issue, neither the circuit court nor this Court can determine whether Shanks took any part in obtaining a release of the lien. Furthermore, this Court cannot determine whether the actions of the Appellees rose to the level that would justify an award of attorney's fees as set forth in *Batson*. Therefore, we must vacate the circuit court's order and remand this

matter, with directions that the circuit court hold the requested hearing. In doing so, we make no ruling on the appropriateness of attorney's fees, nor are we instructing the circuit court to make such a finding. This Court is merely ordering the circuit court to hold the hearing requested by Shanks. Following that hearing, the circuit court shall make findings of fact sufficient to support either a denial or an award of attorney's fees to Shanks based on his claim that he provided assistance to the Appellees in obtaining a release of the Combs lien or that the actions of the Appellees rose to the level set forth in *Batson*.

For the foregoing reasons, the order of the circuit court denying Shanks' request for a hearing on the issue of attorney's fees and dismissing Shanks' claim is vacated and this matter is remanded to the circuit court for further proceedings in accordance with this opinion.

DIXON, JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: I respectfully dissent from the opinion of the majority. In proper circumstances, it is true, a trial court may rely on its equitable powers to award attorney fees even in the absence of statutory authority or contractual obligation. However, I do not interpret *Batson v. Clark*, 980 S.W.2d 566 (Ky.App. 1998) as requiring the trial court to conduct an evidentiary hearing, prior to exercising its equitable powers, in order to determine either that Shanks “affected any benefit” to Appellees or that Appellees' actions constituted bad faith.

Read together, *Batson* (the “bad faith” element case) and *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754 (Ky.App. 1984) (the “affected any benefit” case) cannot mean that both these elements must be present in order to justify an award of attorney fees. In *Batson*, Clark did not affect any benefit to *Batson*; in *Kentucky State Bank*, there was no bad faith.² Furthermore, because *Batson* affirmed the award of attorney fees in the absence of the “affected any benefit” element, we must strongly discount the suggestion in *Kentucky State Bank* that affecting a benefit to the other party is “an indispensable element” of an award of attorney fees based on equitable authority.

Our reading of *Batson* and *Kentucky State Bank*, as well as *Dorman v. Baumlisberger*, 271 Ky. 806, 113 S.W.2d 432 (Ky. 1938)(cited in *Kentucky State Bank*), should tell us that there are no set elements requiring an equitable award of attorney fees. “Although attorney's fees may be awarded in equity, these awards are 'largely within the discretion of the court' and are dependent upon 'the facts and circumstances of each particular case.’” *Flag Drilling Co., Inc. v. Erco, Inc.*, 156 S.W.2d 762, 766 (Ky.App. 2005) quoting *Dorman*, 113 S.W.2d at 433.

Additionally, as the majority notes, the trial court did have the opportunity to hear Shanks' argument that his attorney “affected a[] benefit” to Appellees, and that he was thereby entitled to an award of attorney fees on equitable grounds. The court simply ruled against him. I believe the trial court was justified in doing so inasmuch as the malpractice action was dismissed with prejudice. Shanks did not appeal that dismissal.

²In fact, neither was any party found to have “affected any benefit” to another party. Consequently, attorney fees were denied. *Kentucky State Bank*, 663 S.W.2d at 755.

The expungement of the \$72,000 lien, therefore, inured only to Shanks' benefit at that point, and not to Appellees.

True, the trial court could have fashioned a clearer order. The order could have specifically indicated the court's consideration and rejection of Shanks' argument that his attorney "affected a[] benefit" to Appellees. I consider this a minor failing if a failing at all. Yet it appears to be my point of departure from the majority. I prefer to read the order broadly as doing just that. The order is a global solution to all the matters before the trial court at that time. Included in the order is its decision declining to exercise its equitable powers. The majority, seeing no such specific ruling and preferring one, has chosen to compel the trial court to grant Shanks' request for a hearing on this issue. My fear is that, hereafter, every case in which attorney fees are not authorized by statute or contract will include a demand for a hearing to address equitable grounds for such awards.

From the appellate perspective, there is also an important distinction between the case before us and *Batson, Kentucky State Bank, Dorman*, and both cases relied upon by Shanks.³ Each of the cases cited was an appellate review of an award of attorney fees based on the trial court's exercise of its equitable authority. What we have before us is the opposite circumstance. Here, we have the denial of attorney fees despite Shanks' urging that the trial court exercise that same equitable authority.

³*Nilson-Newey & Co. v. Ballou*, 839 F.2d 1171 (6th Cir. 1988) and *Indiana National Life Insurance Co. v. Butler*, 186 Ky. 81, 215 S.W. 949 (Ky. 1919).

The common element in all the cited cases is that they are reviews of the exercise of the trial court's discretion. “‘Discretion’ of court is a liberty or privilege allowed to a judge, within the confines of right and justice, to decide and act in accordance with what is fair, equitable, and wholesome, as determined by the peculiar circumstances of the case” *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994)(citations omitted). “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Id.*

While the majority sees the standard of review as *de novo*, I disagree. We are not reviewing the trial court's application of law, but the application of its discretion. When this Court reviews a trial court's exercise of discretion, we will not reverse unless that exercise is arbitrary or capricious or is otherwise abused. *See, e.g., Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957)(Discretion under CR 60.02); *Scruggs v. Commonwealth*, 566 S.W.2d 405, 410 (Ky. 1978)(Discretion to exclude jurors); *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000)(Discretion in evidentiary rulings); *Lexington Herald-Leader Co., inc. v. Meigs*, 660 S.W.2d 658, 665 (Ky. 1983)(Discretion to deny press access to trial). Because I see no abuse of discretion in the trial court's disposition of this case, I would affirm the trial court.

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