

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002385-MR

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 04-CI-03349

FRANCIS DORNBUSCH

APPELLEE

OPINION
REVERSING

** ** * ** * ** *

BEFORE: STUMBO, THOMPSON AND WINE, JUDGES.

THOMPSON, JUDGE: The Cabinet for Health and Family Services,
Commonwealth of Kentucky, appeals an order of the Kenton Circuit Court
awarding attorney fees to Francis Dornbusch after she successfully petitioned the
circuit court for review of the Cabinet's order denying Medicaid benefits. Because

we agree with the Cabinet that the award of fees is not authorized by statute or contract, we reverse.

In June 2003, Frances Dornbusch became a resident of the Villaspring Health Care Center, Inc., a nursing facility in Erlanger, Kentucky. In February 2004, Dornbusch sold her homestead property for \$100,000 and applied \$15,000 of the proceeds toward her care at Villaspring and used the remaining \$85,000 to purchase an annuity that paid her \$1,012.20 per month for seven years. Subsequently, she applied for Medicaid benefits.

The Department for Medicaid Services denied Dornbusch's application on the basis that the annuity was purchased only to qualify for Medicaid, and it considered the transfer of resources to be for less than the fair market value. After the decision was upheld, Dornbusch filed a petition for review in the circuit court.¹

During the pendency of the circuit court action, the Cabinet received additional clarification from the Center for Medicaid Services in regard to the treatment of the type of annuity Dornbusch purchased. With this clarification, the Cabinet indicated that it intended to redetermine Dornbusch's Medicaid eligibility. If Dornbusch were deemed Medicaid eligible, her benefits would be paid retroactively from the date of her original application. Upon the agreement of the parties, the circuit court remanded the matter to allow the Cabinet to complete the redetermination process. Dornbusch was ultimately awarded Medicaid benefits.

¹ The petition for review was filed pursuant to KRS 13B.140 and sought only review of the final order of the Cabinet. No independent violations of federal law were alleged.

While Dornbusch's eligibility determination was pending, Villaspring filed an action seeking payment owed for Dornbusch's care and Dornbusch was involuntarily removed from the facility. As a result, Dornbusch and her daughter incurred attorney fees defending the suit, which was later settled and dismissed.

After the present case was remanded, the case appeared on the circuit court's show cause docket. The circuit court scheduled a status hearing, and the Cabinet moved to dismiss the action as moot because Dornbusch received Medicaid benefits. The Cabinet also argued that the circuit court could not order it to pay Dornbusch's attorney fees because there was no contractual or statutory provision in existence to force it to pay the fees. Further, it contended that jurisdiction was exclusively vested in the Board of Claims.

On March 19, 2007, the circuit court denied the Cabinet's motion to dismiss and determined that an award of attorney fees was warranted. Specifically, the court stated:

If the Cabinet is not required to at least pay attorney fees in this instance, it will never be deterred from wrongfully denying Medicaid benefits to other citizens of the Commonwealth. If citizens and attorneys know that the Cabinet will never be made to be held responsible for the payment of attorney fees even in the most egregious of cases, the citizens of Kentucky will have no recourse.

At the conclusion of its order, the circuit court ordered Dornbusch to "submit a detailed listing of the attorney fees claimed as a measure of damages in this action."

Prior to the award of attorney fees, the Cabinet appealed the court's order. In an unpublished opinion, *Cabinet for Health and Family Services v. Dornbusch*, 2007-CA-000685-MR, we held that the order was not final and appealable as defined in CR 54.01 because it required further action by Dornbusch and dismissed the appeal. Subsequently, the Kenton Circuit Court held a hearing and awarded Dornbusch attorney fees of \$45,650. The Cabinet again appealed and now reiterates its arguments presented in its first appeal, adding that the amount awarded was excessive and included fees incurred defending the action filed by Villaspring.

The award of attorney fees of \$46,650 for the practice of an appeal from a decision of an administrative agency strikes this Court as excessive. A review of the invoice for legal services rendered submitted by Dornbusch's legal counsel reveals that the overwhelming majority of those fees were incurred in relation to the action filed by Villaspring to which the Cabinet was not a party. Clearly, any attorney fees incurred in the Villaspring action are not recoverable against the Cabinet, a nonparty to that action. *Kentucky v. Graham*, 473 U.S. 159, 167-168, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985). Thus, if attorney fees are recoverable against the Cabinet at all, the amount awarded would have to be reconsidered. However, for the following reasons, we hold that the circuit court was not authorized to award attorney fees against the Cabinet and reverse.

When deciding whether to award attorney fees to a prevailing party, this Commonwealth follows the general rule that "in the absence of contractual or

statutory liability, attorneys' fees are not recoverable as an item of damages.”

Lyon v. Whitsell, 245 S.W.2d 926 (Ky. 1952) (citing 15 *Am.Jur.*, *Damages*, Section 142). Moreover, the circuit court's authority to award attorney fees against the Commonwealth is controlled by constitutional and statutory principles.

The Cabinet points out that the expenditure of government resources is solely within the control of the Kentucky legislature and, absent statutory authority, the courts are without authority to impose costs or attorney fees against the Commonwealth. On the same basis that the Cabinet now advocates, in *Cabinet For Health and Family Services v. G.W.F.*, 229 S.W.3d 596 (Ky.App. 2007), we reversed an order that required the Cabinet to pay for opiate hair follicle drug screen testing for parents of a child adjudged to be neglected. In doing so, we recited the pertinent constitutional and statutory provisions, all of which are equally relevant to our present discussion:

Kentucky Constitution § 27 states:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Kentucky Constitution § 28 states:

No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Kentucky Constitution § 230 states in part that:

No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law[.]

KRS 41.110 provides in part that:

No public money shall be withdrawn from the Treasury for any purpose other than that for which its withdrawal is proposed, nor unless it has been appropriated by the General Assembly or is a part of a revolving fund, and has been allotted as provided in KRS 48.010 to 48.800, and then only on the warrant of the Finance and Administration Cabinet.

KRS 41.130(2) provides that:

No warrant shall be issued unless the money to pay it has been appropriated by law. The Finance and Administration Cabinet may require any claimant to state on the face of his claim the law under which it is payable.

KRS 453.010 provides that:

No judgment for costs shall be rendered against the Commonwealth in any action prosecuted by or against the Commonwealth in its own right, unless specifically provided by statute; provided, however, that in any civil action filed in any court of competent jurisdiction by or against the Commonwealth of Kentucky, the costs may be paid by the Commonwealth when such costs are approved and allowed by the judge of the court in which the case was filed. Costs shall not exceed the fees allowed for similar services in other civil actions.

And finally, Kentucky Rules of Civil Procedure (CR) 54.04(1) provides that:

Costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the Commonwealth, its officers and agencies shall be imposed only to the extent permitted by law.

Id. at 597-598.

The purpose of Section 230 of the Kentucky Constitution, the statutes, and CR 54.04 is “to prevent the expenditure of the State's money without the consent of the Legislature.” *Ferguson v. Oates*, 314 S.W.2d 518, 521 (Ky. 1958) (citation and internal quotations omitted). It is a purpose consistent with the governmental separation of powers and reinforces the proper role of the judiciary. “The judiciary's reason for existence is to adjudicate.” *Bradshaw v. Ball*, 487 S.W.2d 294, 299 (Ky. 1972).

Dornbusch filed a petition for review from an administrative decision pursuant to KRS 13B.140 and KRS Chapter 205 *et seq.* yet failed to cite any statutory authority that would entitle her to an award of attorney fees. Our review reveals that KRS 205.237 is controlling. It provides that regulations governing attorney fees in an appeal of an order denying Medicaid benefits shall be “established by the secretary by administrative regulation.” Pursuant to the enabling statute, 907 KAR 1:563(13) states:

1) Pursuant to KRS 205.237, the maximum fee that an attorney may charge the applicant or recipient for the representation in all categories of Medicaid shall be:

(a) Seventy-five (75) dollars for preparation and appearance at a hearing before a hearing officer;

(b) \$175 for preparation and presentation, including a pleading and appearance in court, of an appeal to the circuit court;

(c) \$300 for preparatory work and briefs and all other matters incident to an appeal to the Court of Appeals.

(2) Enforcement of payment of the fee shall be a matter

entirely between the counsel or agent and the recipient. The fee shall not be deducted from a public assistance payment otherwise due and payable to the recipient.

The regulation explicitly states that the payment of the fee is a “matter entirely between the counsel or agent and the recipient” and does not authorize the court to award attorney fees against the Cabinet.

Dornbusch points out that there have been cases when the award of attorney fees has been held to be within the discretion of the trial court acting under the auspices of its equitable powers. *See Flag Drilling Co., Inc. v. Erco, Inc.*, 156 S.W.3d 762 (Ky.App. 2005). In limited circumstances, an award has been justified by the court’s exercise of its “inherent” power to do that which is reasonably necessary for the administration of justice within the scope of its jurisdiction. *Smothers v. Lewis*, 672 S.W.2d 62 (Ky. 1984).

Although we do not deny that such powers exist within the judiciary, the present facts do not warrant the exercise of any discretionary powers by the court. While the circuit court believed the award of attorney fees was justified on the basis of public policy, as a matter of constitutional and statutory law, the circuit court simply did not have authority to award attorney fees against the Cabinet. The circuit court was required to follow the dictates of KRS 205.237 and 907 KAR 1:563(13), which limit attorney fees to the amount specified and do not authorize the court to impose such fees against the Cabinet.

Based on the foregoing, the order of the Kenton Circuit Court is reversed.

ALL CONCUR.

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