

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001313-MR

JAMES R. BOONE AND HIS
WIFE, RONNA S. BOONE

APPELLANTS

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 05-CI-00082

TIMOTHY BLANTON AND HIS
WIFE, ERICA BLANTON; AND
HON. HARLAN E. JUDD, JR.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: NICKELL AND THOMPSON, JUDGES; ISAAC,¹ SENIOR JUDGE.

NICKELL, JUDGE: James R. Boone and his wife, Ronna S. Boone (collectively “Boone”), have appealed from the Cumberland Circuit Court’s June 15, 2009,

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

order establishing the location of the boundary line of their property and that of Timothy Blanton and his wife, Erica Blanton (collectively “Blanton”). They contend the trial court’s award of attorney’s fees to Blanton was without statutory authority and violated the agreement entered into between the parties. We reverse and remand.

Boone and Blanton own neighboring parcels of land in Cumberland County. A dispute arose over the location of the boundary line between the two tracts after Boone constructed a pond, patio, retaining walls and a septic system across what Blanton believed to be the boundary. On July 28, 2005, Blanton filed a petition seeking a declaration of rights in and to the subject property. Blanton also sought an award of damages resulting from the offending improvements, the cost of their removal, the wrongful harvesting of trees from the property, the cost of a survey, and their costs and attorney’s fees incurred in prosecuting the action. Following extensive discovery, the parties executed an agreed order which was entered on July 19, 2007. The agreement stated, in pertinent part,

[t]he parties having entered into settlement discussions, it was agreed by and between the parties that the Court would appoint an independent surveyor to survey the line dividing the property of Timothy Blanton and his wife, Erica Blanton, and the property of James R. Boone and his wife, Ronna S. Boone, the subject of this litigation. That the independent surveyor will locate the proper location of the line between the parties; that if the independent surveyor does not locate an overlap but can

locate the property line, the parties do by this order agree that the line be determined to be the proper division line between the parties and that a judgment locating the same shall be entered. That the cost of the survey shall be taxed as court costs and that each party does agree to the above procedure by signing their names below.

The independent survey, completed on September 23, 2008, located the line between the parties and found that Boone's patio, retaining walls, septic system, and pond encroached upon Blanton's land. This finding was consistent with Blanton's position throughout the litigation. A docket order entered on December 11, 2008, directed Boone to remove the encroachments from Blanton's land, awarded costs to Blanton incurred for the removal, and awarded fees to Blanton's attorney. On December 19, 2008, Blanton's attorney filed a bill of costs requesting a fee of \$4,000.00 for his services. On May 28, 2009, the trial court awarded Blanton's counsel a fee of \$4,500.00 and directed that the encroachments be removed no later than June 15, 2009. A subsequent order entered on June 15, 2009, amended the fee to \$4,000.00 and the removal date to July 1, 2009.

Blanton filed a motion for post-judgment relief pursuant to CR² 60.02 seeking, *inter alia*, payment of \$2,000.00 for Boone's illegal harvesting of trees from their land and for an award of their surveyor's fees. The trial court entered an order on July 6, 2009, finding no statutory authority existed for granting the requested surveyor's fees, denying entitlement to payment for the illegally harvested trees as no proof on the matter had been produced, and confirming the award of attorney's fees. Three days later, the Court authorized Blanton to remove

² Kentucky Rules of Civil Procedure.

the offending structures at Boone's expense. The encroachments remain on Blanton's property. Boone filed an appeal from the trial court's order entered on June 15, 2009, challenging only the part of the order awarding attorney's fees to Blanton's counsel.

The sole issue presented in this appeal is whether the trial court erred in awarding attorney's fees in the absence of statutory authority. Boone contends the only statutory provision potentially applicable to this case which allows an award of attorney's fees is KRS 364.130.³ As no liability was established under that statute, Boone alleges the trial court's award is infirm. Further, Boone contends CR 54.04, which allows the trial court to award costs to the prevailing party, contains no provision for awarding attorney's fees. Thus, Boone urges reversal. Conversely, Blanton argues that even in the absence of statutory authority, trial courts are vested with the equitable power and discretion to award attorney's fees in appropriate cases, citing *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754 (Ky. App. 1984), and *Lake Village Water Association, Inc. v. Sorrell*, 815 S.W.2d 418 (Ky. App. 1991).⁴

In *AG Services, Inc.*, a panel of this Court concisely addressed the issue facing us today.

³ KRS 364.130 sets forth the liability and measure of damages for the unlawful harvesting of timber from the lands of another. The legal costs incurred by the owner of the timber are specifically included within the mandatory award of damages upon a finding of liability.

⁴ Blanton also relies upon an unpublished opinion of this Court.

Under our law, attorney's fees are not allowable as costs in absence of statute or contract expressly providing therefore. *See Holsclaw v. Stephens*, Ky., 507 S.W.2d 462 (1973), and *Dulworth & Burress Tobacco Warehouse Company, Inc. v. Burress*, Ky., 369 S.W.2d 129 (1963). However, this rule does not, we believe, 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. *See Dorman v. Baumlisberger*, 271 Ky. 806, 113 S.W.2d 432 (1938).

AG Services, Inc., 663 S.W.2d at 755. Thus, it is clear that both parties are technically correct in their relative positions.

While we agree with Blanton that trial courts have the equitable authority to award attorney's fees in appropriate circumstances, nothing in the record before us indicates the trial court was exercising such authority or discretion. The trial court failed to indicate at any point in the record its reasoning for awarding fees to Blanton's attorney. Further, the facts of this case do not rise to the egregious nature of the activities set forth in the cases Blanton cites in support of their position. In *Sorrell*, attorney's fees were awarded as a sanction for pursuing an obviously frivolous appeal. In the unpublished decision Blanton relies upon, fees were awarded as a sanction for the losing party's bad faith and egregious conduct. We discern nothing from the record in the instant case reasonably similar to either of these fact patterns. "Moreover, we are constrained to believe that no equitable doctrine supports the award of attorney's fees in this situation. Both parties appeared with counsel contesting superiority of their respective claims." *AG Services, Inc.*, 663 S.W.2d at 755.

As correctly noted by Boone, no statutory authority exists which is applicable to this case apart from KRS 364.130. The trial court specifically denied relief under that statutory provision, thereby making an award of legal fees inappropriate as such fees are awarded only to successful parties. Additionally, it is not alleged that any contractual provision exists allowing for the recovery of attorney's fees in this case, and the agreed order executed by the parties contained no agreement as to the payment of the prevailing party's legal fees. Thus, as no statutory authority or contractual provision exists expressly allowing for such a recovery, we hold such fees were not allowable and the award therefor was improper.

Therefore, for the foregoing reasons, that portion of the judgment of the Cumberland Circuit Court which awarded attorney's fees is reversed and the case is remanded for entry of an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gordon T. Germain
Monticello, Kentucky

BRIEF FOR APPELLEE:

Lanna Martin Kilgore
Bowling Green, Kentucky

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