

# Commonwealth Of Kentucky

## Court Of Appeals

No. 1997-CA-001457-MR

BEN B. HARDY and  
DURWARD W. MAYNARD

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS WINE, JUDGE  
ACTION NO. 95-CI-004695

FOSTER V. JONES, JR.;  
KATHERINE JONES;  
WILLIAM L. LANDERS;  
ANNE LANDERS;  
ROBERT L. LANDERS;  
ILEA MANNERING, EXECUTRIX OF  
THE ESTATE OF DANIEL RAY  
MANNERING;  
UNITED STATES OF AMERICA  
INTERNAL REVENUE SERVICE; and  
ATTORNEY GENERAL WASHINGTON,  
D.C., DEPARTMENT OF JUSTICE,  
TAX DIVISION

APPELLEES

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: BUCKINGHAM, GUIDUGLI and HUDDLESTON, Judges.

GUIDUGLI, JUDGE. Appellants, Ben B. Hardy (Hardy) and  
Durward W. Maynard (Maynard) (collectively Appellants) appeal  
from an order of the Jefferson Circuit Court entered on February

14, 1997, which held that Hardy's claims against the appellees were barred by the doctrine of res judicata and Maynard's by the statute of limitations. We affirm.

#### Background Information

Mary Mannering died testate on April 25, 1982, leaving three sons, William Landers (Bill), Robert Landers (Bob), and Danny Mannering (Danny). At the time of her death, Ms. Mannering owned some real estate along the banks of the Ohio River (the property). It appears that over the years Ms. Mannering leased portions of the property to various individuals who constructed homes on the leased lots. Under the terms of Ms. Mannering's will, the property was to be divided equally between Bill, Bob, and Danny.

Mary Lucas (Lucas) qualified as the Executrix of Ms. Mannering's estate on May 14, 1982. Sometime thereafter, Lucas sold one of the parcels of the property to Ralph and Violet Reidling (the Reidlings), who were leasing it. A dispute arose between Lucas and Bill, Bob, and Danny when she expressed her desire to sell the remaining 7.45 acres of the property to the remaining leaseholders and divide the proceeds.

Lucas filed a declaratory judgment action in the Jefferson Circuit Court arguing that Ms. Mannering's will empowered her to sell the property and divide the proceeds between Bill, Bob, and Danny. The Reidlings were not made a party to this action, and the trial court made no order pertaining to the validity of their deed.

According to Maynard's deposition, he began representing Danny and Bill in January 1983. Maynard testified that he associated Hardy as co-counsel in May 1983, and that he had permission to do so from Bill and Danny. Neither Maynard nor Hardy ever represented Bob. Both Maynard and Hardy admitted that there was no written contract of representation between them and Bill and Danny.

In an order entered by the Jefferson Circuit Court on June 20, 1986, Lucas was ordered to convey the property to Bill, Bob, and Danny. This Court affirmed the order of the Jefferson Circuit Court, and also affirmed the lower court's order to send the case back to the Jefferson District Court for final settlement of the estate. Lucas v. Mannering, Ky. App., 745 S.W.2d 654, 656-657 (1987). Lucas conveyed the property to Bill, Bob, and Danny by deed dated March 4, 1987.

On March 6, 1997, Appellants filed a "Notice of Action" against the property in the Jefferson County Clerk's Office. The document stated:

Notice is hereby given that DUWARD W. MAYNARD and BEN B. HARDY, attorneys representing defendants and counter-claimants in Jefferson Circuit Court Action No. 83CI-04978, styled Estate of Mary T. Mannering by Mary C. Lucas, Executrix vs. Danny Ray Mannering, Robert Lee Landers and William Landers have established a right to attorneys' liens involving or affecting the right, title, interest in, or claim to real property of DANNY RAY MANNERING, WILLIAM L. LANDERS and ROBERT LEE LANDERS in and to the following described property located in Jefferson County, Kentucky[.]

According to the date stamp, this document was filed at 1:08 p.m. The deed from Lucas to Bill, Bob, and Danny was filed two minutes later at 1:10 p.m. on the same day.

On June 10, 1988, Danny and Bill filed an action in the Jefferson Circuit Court seeking to void the Reidlings' deed. Maynard testified that his representation of Bill and Danny ended on November 3, 1989, due to a conflict of interest with the Reidlings. Hardy continued his representation of Bill and Danny. The lower court dismissed the action, holding that the claims were barred by the doctrine of res judicata and collateral estoppel on the ground that any question regarding the Reidlings' deed should have been resolved in Lucas' declaratory judgment action. This Court affirmed the court's order. Mannering v. Reidling, 89-CA-833-S, rendered December 15, 1989.

The final settlement of Ms. Mannering's estate was filed with the Jefferson District Court on July 11, 1988. Hardy filed exceptions to the final settlement on behalf of Bill and Danny. A hearing on the exceptions was held before Judge Howard Bowles (Judge Bowles) of the Jefferson District Court on September 14, 1989.

A review of the hearing transcript shows that Hardy attempted to argue that either Lucas or the estate should be ordered to pay Bob and Danny's attorneys' fees. Judge Bowles disallowed Bob and Danny's fees as an exception because they were not listed in the final settlement. Judge Bowles told Hardy that he would have to file a separate motion before the trial court

showing that his representation of Bill and Danny benefitted the estate. Hardy then argued that the attorneys' fees paid by the estate to the attorneys who represented Lucas in the two previous actions were unreasonable.

In an order entered August 1, 1990, Judge Bowles held that the attorneys' fees paid by the estate to Lucas' attorneys were fair and reasonable. The order did not, however, award any fees to Hardy and Maynard. Hardy appealed Judge Bowles' order to the Jefferson Circuit Court. In an order entered June 19, 1992, Judge William Knopf held:

The ruling by Judge Bowles concerning attorney's fees is well reasoned, and this Court finds no reason to reverse it. The Appellants have not conclusively proven that services rendered by the various attorneys were not for the estate. Farber's Ex'r v. Farber, Ky., 148 S.W.2d 732 (1940). However, the Court finds that [Bob], in addition to Lucas, caused a delay in the settlement of the estate. Accordingly, pursuant to KRS 412.070, [Bob] should be responsible for one-third of the Appellant's attorney's fees. KRS 412.070 allows a court to assess attorney's fees from an estate, before distribution of that estate, if the Court finds that one or more beneficiaries have prosecuted for the benefit of other beneficiaries. Although distribution has already occurred, this Court finds that [Bob] is responsible for one-third of the attorney's fees.

The grounds for Judge Knopf's decision to hold Bob responsible for one-third of Bill and Danny's attorneys' fees is not clear from the record before us. While it appears from the record that Appellants filed motions for attorneys' fees with the probate court, they apparently did not prevail in obtaining an award of

attorneys' fees from the probate court. This was the first time that a statement of services rendered was sent to Bill and Danny.

On September 15, 1994, Lucas filed a lawsuit against Bill, Danny and Hardy alleging abuse of civil proceedings. At some point in time Bill retained appellee Foster Jones (Jones) to represent him and, to the best of our knowledge, terminated his relationship with Hardy. Hardy alleges that he continued representing Danny until Danny's death in May 1995. To further complicate matters, Bill and his wife executed a quit-claim deed on September 19, 1994, transferring an undivided one-sixth interest in the property to Jones.

As near as we can tell, Bill filed a cross-claim against Hardy in the suit brought by Lucas. In his answer to Bill's cross-claim, Hardy included a counter-claim against Bill alone for \$59,299.95 for legal services, plus various charges for interest. Hardy testified as follows regarding the status of his counter-claim:

Q And isn't it true that you were not successful in that cross-claim in this case in obtaining a judgment in that amount against Mr. Landers?

A The process for that purpose was never completed in that action.

Q That case is over with isn't it, as far as the Circuit Court is concerned?

A No, that was still there before the Circuit Court after the appeal was filed.

Q My question to you was, Isn't--

A As a matter of fact, there were hearings on it after the appeal was filed.

Q Isn't it true that you were not successful in obtaining a judgment on that cross-claim for legal fees, against my client, which are the same legal fees involved in this action?

A It was never concluded in any form. The Court, after a hearing, indicated that it was willing to bring the necessary extra parties in for the purpose and to hold a hearing to establish the amount and liability for the fees if we chose to take the steps to go through that process, and it has never been followed up on.

Q You filed a cross-claim in that action for legal fees, which are the same legal fees that you're alleging in this action; correct?

A That's part of them, yes.

Q Against my client, William Landers?

A It's part of it, it's not the complete-

Q \$59,000 worth?

A That's the part that had already been billed, it's not the part that has not yet been billed.

Q But the \$59,000 in that action are the same legal fees that are in this action; is that correct?

A That is correct.

Q What is the status of that claim that was filed in February of '94?

A It is still sitting undetermined and awaiting with the Court indicating it would entertain the question and make determination of the question if and when all necessary parties were added to the action for the purpose, which has not been done.

Q You have not done that?

A No, I have not.

Q Do you intend to do that?

A No, I don't, not with this action for the purpose.

#### The Present Appeal

Appellants filed this action against Bill, Bob, and Danny's estate on August 22, 1995. The complaint alleged that Maynard was entitled to \$18,867.41 for his representation and that Hardy was entitled to a total of \$59,507.30. The complaint also alleged that Bob was responsible for one-third of the amount owed by Bill and Danny's estate under the terms of Judge Knopf's order of June 19, 1992. Hardy and Maynard sought to hold Bill and Danny's estate jointly and severally liable for the full amount sought plus interest and further sought to hold Bill liable for one-third of the judgment. In addition, Appellants requested that (1) the trial court find that they have an attorneys' lien on the property; (2) that the property be sold to satisfy the lien; and (3) that the proceeds from the sale be used pay Hardy's back taxes owed to the IRS. In an order entered February 14, 1997, the trial court dismissed the case, finding that Hardy's claims were barred by the doctrine of res judicata and Maynard's by the statute of limitations.

On appeal, Appellants contend that the trial court erred in dismissing their claims, and maintain that appellees' liability for the attorneys' fees is "established by law relating

to attorney charging liens, by actual knowledge, acquiescence, continued attorney-client representation and by circuit court final order." We disagree.

#### Dismissal of Maynard's Claim

Appellants contend that the trial court erred in holding that Maynard's claim was barred by the statute of limitations. In support of their argument, Appellants claim that the trial court misinterpreted Maynard's deposition testimony that his representation ended on November 3, 1989.

First, we find no misinterpretation of Maynard's statement. Second, the five year statute of limitations provided by Kentucky Revised Statutes 413.120 applies. Varney's Ex'r v. Staton, Ky., 220 S.W.2d 855, 858 (1949). As Maynard's representation ended on November 3, 1989, and the complaint was not filed until August 22, 1995, the trial court did not err in finding Maynard's claim to be untimely.

#### Dismissal of Hardy's Claim

In Sedley v. City of West Buechel, Ky., 461 S.W.2d 556 (1970), the Court adopted the doctrine of issue preclusion, which provides that "a person who was not a party to the former action may assert res judicata against a party to that action, so as to preclude the re-litigation of an issue determined in the prior action." Sedley, 461 S.W.2d at 559. For issue preclusion to apply, it must be shown that the party against whom issue preclusion is sought had a "realistically full and fair opportunity to present his case." Id.

As previously shown, Hardy's counter-claim against Bill in the action filed by Lucas attempted to recover the same fees sought in this case. Hardy admitted in his deposition that the \$59,299.95 sought in the counter-claim was the same amount he was seeking in this action. Hardy further stated that the court in the Lucas action told him that it would not address the issue of attorneys' fees until all necessary parties were joined, that he had never taken steps to join the necessary parties, and that he did not intend to do so. The Lucas action was decided by a jury and has since become final.

We agree with the trial court's finding that Hardy had a full and fair opportunity to argue his claim for attorneys' fees in the Lucas action. The fact that the issue of attorneys' fees was not ultimately ruled upon in the Lucas action does not preclude application of issue preclusion in this case. Hardy raised the issue in the Lucas action and the only reason it was never ruled upon was because Hardy refused to join the necessary parties. As Hardy's own admitted failure to join the necessary parties in the prior action resulted in the trial court not ruling on the issue of attorneys' fees before the judgment rendered in the underlying case became final, application of issue preclusion was proper.

Because Hardy's claims are barred by the doctrine of res judicata, the other arguments presented in Appellants' brief are moot.

The opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ben B. Hardy  
Louisville, KY

BRIEF FOR APPELLEES, JONES AND  
LANDERS:

Foster V. Jones, Jr.  
Louisville, KY

BRIEF FOR APPELLEE, ESTATE OF  
DANIEL MANNERING:

Galen L. Clark  
Louisville, KY