

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002624-MR

RICHARD SPOOR

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 97-CI-04417

DAVID L. MEADE, D.V.M.

APPELLEE

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: DYCHE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from the Fayette Circuit Court's order dismissing appellee, David L. Meade, D.V.M., from an action to recover attorney fees. We reverse and remand, as appellant falls under an exception to the rule that, in the absence of statute or contract, such fees are generally not allowable as costs nor recoverable as damages.

The facts of the case are as follows. Herbert Moelis (Moelis) owned a thoroughbred colt (the colt), foaled in 1997. The colt was entered in the November 1997 Keeneland Breeding Stock Sale. Moelis hired Bluegrass Thoroughbred Services, Inc. (Bluegrass) to act as his agent in the sale of the colt.

Richard Spoor (Spoor), was interested in the colt, and engaged the services of David L. Meade, D.V.M. (Dr. Meade), to conduct a pre-purchase examination of the colt. The colt was to be auctioned in the afternoon of November 12, 1997. Dr. Meade examined the colt that morning, and advised Spoor that the colt had no defects. After receiving Dr. Meade's positive assessment of the colt, Spoor approached John Stuart (Stuart), a purchasing agent employed by Bluegrass, to see if a purchase agreement could be negotiated with Moelis before the colt was to be auctioned later that afternoon. Spoor, Moelis, and Stuart negotiated an agreement whereby Spoor was to pay \$100,000 for the colt, or, if the colt brought more than \$100,000 at auction, Spoor and Moelis would equally divide the amount the colt brought more than \$100,000. Spoor, Moelis, and Stuart signed the Purchase Agreement.

Later that day, following the signing of the Purchase Agreement but prior to the auction, Dr. Meade advised Spoor that he had discovered that the colt suffered from two serious medical defects which he had not detected in his earlier examination. Spoor then went to Moelis and attempted to set aside the Purchase Agreement, but Moelis refused to do so. The colt was entered into the auction as scheduled that afternoon, and purchased by Spoor for \$100,000.

The next morning, on November 13, 1997, the colt was lame. Spoor had the colt examined again, by Clara Fenger, D.V.M. (Dr. Fenger) who took blood and urine samples from the colt. The samples revealed that the colt had been administered

phenylbutazone (bute) sometime prior to the previous day's examination. Bute is an anti-inflammatory drug which is commonly used in horses as a painkiller. Dr. Fenger diagnosed the colt as having both "Wobblers Syndrome" and osteochondrosis (OCD). Wobblers Syndrome results from a compression of the spinal cord which causes a lack of coordination rendering a horse unfit for racing. OCD, which was found in the colt's ankle, is a serious condition which can significantly affect a horse's ability to race. Independent veterinarians concurred in Dr. Fenger's findings that the colt suffered from Wobbler's Syndrome and OCD.

Upon learning of the colt's defective physical condition, Spoor refused to pay Moelis for the colt. Moelis then filed suit against Spoor in Fayette Circuit Court to enforce the Purchase Agreement. Spoor filed a counterclaim alleging that Moelis had fraudulently misrepresented the colt's physical health by administering bute to the colt to hide its lameness. Moelis filed a motion for summary judgment on March 9, 1998, which was overruled.

On February 9, 1998, Spoor filed a motion to join Bluegrass, Stuart, and Dr. Meade as third-party defendants. The court granted this motion on March 18, 1998, and on March 25, 1998, Spoor filed third-party complaints against Bluegrass, Stuart, and Dr. Meade.

Spoor's complaint against Dr. Meade alleged that Dr. Meade was negligent in his initial examination of the colt in that he failed to diagnose the colt's OCD and Wobbler's Syndrome. Spoor stated that he relied on Dr. Meade's statement that the

colt had no defects in signing the Purchase Agreement. Spoor demanded: (1) money damages (2) indemnification for any amounts due Moelis because of a judgment adverse to Spoor, (3) his attorney fees and (4) his costs and expenses incurred in defending against Moelis's lawsuit.

On April 20, 1998, Dr. Meade filed a cross-claim against Stuart and Bluegrass alleging that they fraudulently misrepresented the colt's condition by drugging the colt, which made it impossible for him to detect the colt's medical problems. Dr. Meade subsequently moved to dismiss his claims against Stuart and Bluegrass, and this motion was granted by the court on August 11, 1998. Moelis moved to dismiss his breach of contract claim against Spoor, and this motion was granted by the court on August 13, 1998.

On August 28, 1998, Dr. Meade filed a motion to dismiss Spoor's third-party complaint against him. In an order entered September 25, 1998, the court granted this motion, dismissing Spoor's third-party complaint against Dr. Meade, and dismissing Dr. Meade as a party to this action. In dismissing Spoor's complaint against Dr. Meade, the court noted that the damages Spoor was now seeking from Dr. Meade were attorney fees, and applied the general rule that, in the absence of statute or contract, such fees are not recoverable. Although the expenses Spoor was seeking from Dr. Meade were attorney fees and costs incurred defending against Moelis's suit, the court stated that Kentucky law did not recognize an exception to the general rule in third-party litigation cases. Spoor subsequently filed a

motion to alter, vacate, or amend judgement. The court denied the motion on October 2, 1998, and this appeal followed.

On appeal, Spoor argues that he expended approximately \$13,106.58 in litigation fees and expenses in defending Moelis's suit against him to enforce the Purchase Agreement. Spoor further argues that this \$13,106.58 should not be characterized as attorney fees, but rather as compensable damages caused by Dr. Meade's negligence. Spoor alleges that, but for Dr. Meade's negligent failure to diagnose the defects in the colt, he would never have signed the Purchase Agreement for the colt, would never have become involved in the litigation with Moelis, and therefore would never have incurred the \$13,106.58 in litigation expenses defending against Moelis's suit.

The general rule in Kentucky is that in the absence of a statute or a contract expressly providing therefor, attorney fees are not allowable as costs nor recoverable as damages. Dulworth & Burress Tobacco Warehouse Co. v. Burress, Ky., 369 S.W.2d 129, 133 (1963); Holsclaw v. Stephens, Ky., 507 S.W.2d 462 (1973). We agree that there is no statute which would authorize such fees in this case, nor was there a contract providing therefor between Spoor and Dr. Meade.

However, Kentucky's highest court adopted an exception to the general rule in Indiana National Life Insurance Co. v. Butler, 186 Ky. 81, 215 S.W. 949 (1919), where it held that expenses incurred in bringing or defending litigation resulting from the wrongful act of another are recoverable from the wrongdoer if the injured party litigated its claim in good faith.

See also, Nilson-Newey and Co. v. Ballou, 839 F.2d. 1171, 1177 (6th Cir. 1988). In the instant case, Spoor argues that the \$13,106.58 in litigation expenses he incurred defending against Moelis resulted from the negligence of Dr. Meade. Accordingly, we believe that Spoor's claim falls under the aforementioned exception to the general rule. Therefore, we adjudge that the trial court erred in dismissing Spoor's complaint against Dr. Meade and dismissing Dr. Meade as a party to this action.

For the aforementioned reasons, the decision of the Fayette Circuit Court is reversed and the matter remanded for further action.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

GUIDUGLI, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Henry E. Davis
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BRIEF FOR APPELLEE:

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