

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-002025-MR

CARA SWORD WHEELER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
ACTION NO. 96-CI-04099

GORDON LEE WHEELER AND  
MARTHA ROSENBERG

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Cara Sword Wheeler (hereinafter "Cara") has appealed from the portion of the Fayette Circuit Court's September 13, 2001, order denying her motion for a judgment against attorney Martha Rosenberg (hereinafter "Rosenberg") for interest and attorney fees. In an earlier appeal<sup>1</sup>, this Court reversed the circuit court's judgment ordering Cara to pay \$3637.50 in attorney fees to Rosenberg, who represented her ex-husband, Gordon Lee Wheeler (hereinafter "Cappy") in their

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<sup>1</sup>Appeal No. 1998-CA-002762-MR.

dissolution action. Having considered the parties' briefs, the record, and the applicable case law, we affirm.

The majority of the facts in this case were set out in the Court's previous opinion rendered April 27, 2001. Therefore, we shall set only forth those facts that are pertinent to this appeal. On November 3, 1998, the circuit court ordered Cara to pay Rosenberg \$3637.50 in attorney fees, which money was to be withheld from the \$30,000 Rosenberg was holding in her trust account on Cara's behalf. Cara then filed an appeal from that order, arguing that the circuit court abused its discretion in ordering her to pay attorney fees to Cappy's attorney. She did not file a supersedeas bond pursuant to CR 62.03 and CR 73.04 to stay the judgment as the money had already been paid to Rosenberg. This Court eventually reversed the circuit court's decision, determining that the circuit court abused its discretion in ordering Cara to pay attorney fees to Rosenberg. Once the opinion became final on May 27, 2001, counsel for Cara sent a letter to Rosenberg requesting that she reimburse her for the amount previously paid, as well as interest. After no check had been received, Cara filed a motion on June 8, 2001, for the circuit court to enter a judgment against Rosenberg requesting the original amount paid, interest on that amount, and attorney fees. Counsel for Cara then received a check from Rosenberg for the original amount of the fee paid and the \$125.00 filing fee ordered to be paid by this Court. The total amount of the check did not include any interest. Cara later filed an amended motion to enter a judgment requesting \$1303.37 in interest and a

reasonable attorney fee. Following a hearing, the circuit court denied Cara's motion for a judgment against Rosenberg on September 13, 2001. This appeal followed.

Cara argues that she is entitled to retroactive interest at a rate of 12% from November 3, 1998, until the date she received reimbursement because Rosenberg had the use of Cara's money during that time. Cara cites KRS 360.040 in support her argument, which provides that "[a] judgment shall bear twelve percent (12%) interest compounded annually from its date." On the other hand, Cappy and Rosenberg argue that Cara is not entitled to retroactive interest, but at most should be limited to interest from the date the opinion of the Court of Appeals became final until the date the reimbursement was made.

We believe that before KRS 360.040 may be applied, there must be a judgment in place. CR 54.01 defines a judgment as "a written order of a court adjudicating a claim or claims in an action or proceeding." Here, had Cara not previously paid the attorney fee and not been successful in her earlier appeal, she clearly would have had to pay Rosenberg interest on the judgment pursuant to the statute. However, she was successful on appeal, which rendered the judgment awarding the attorney fee a nullity. At that point there was no longer a judgment, and there certainly was no judgment against Rosenberg. Rosenberg merely had to reimburse Cara for the previously paid attorney fees, which she did. Because there is no judgment, KRS 360.040 does not apply and interest cannot accrue. The circuit court did not err in

denying Cara's motion for a judgment regarding her request for interest.

Cara also argues that she is entitled to reasonable attorney fees for the cost of bringing about the repayment of the reversed judgment. It is well settled that the award of costs and attorney fees is within the discretion of the circuit court. Glidewell v. Glidewell, Ky.App., 859 S.W.2d 675 (1993); Gentry v. Gentry, Ky., 798 S.W.2d 928 (1990); Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975). Here, we cannot say that the circuit court abused its discretion in denying the motion for attorney fees in light of the fact that Rosenberg timely reimbursed Cara and our holding that the circuit court properly denied her request for interest.

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bobby G. Wombles  
Lexington, KY

BRIEF FOR APPELLEE:

Martha A. Rosenberg  
Lexington, KY