

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002214-MR

JOYCE KIRK

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE THOMAS R. LEWIS, JUDGE  
ACTION NO. 02-CI-00774

JOY NEWSOME AND  
KENTUCKY FARM BUREAU  
MUTUAL INSURANCE COMPANY

APPELLEES

OPINION  
REVERSING

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BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: Joyce Kirk appeals from an order of the Warren Circuit Court awarding court costs to Joy Newsome in Newsome's action to recover damages sustained in an automobile accident. The trial court awarded court costs after the parties settled the action. As there is no "prevailing party" pursuant to CR 54.04, we reverse the order awarding costs.

The facts are not in dispute. On October 5, 2001, Kirk and Newsome were involved in an automobile accident in Warren County, Kentucky. On May 20, 2002, Newsome filed a

complaint in Warren Circuit Court seeking recovery for damages sustained in the accident. The complaint was amended on March 13, 2003 to include as a party defendant Kentucky Farm Bureau Mutual Insurance Company ("Farm Bureau").

The parties entered into settlement talks, and on April 11, 2003, Kirk tendered an offer of judgment. Following settlement negotiations but prior to entry of an order, Newsome made an oral motion for Kirk to pay the costs incurred by Newsome. The trial court rendered an order on May 20, 2003, assessing against Kirk court costs of \$4,326.12. Thereafter, on May 30, 2003, Kirk filed a motion to vacate the April 11, 2003, order. The motion to vacate was sustained by order rendered on August 7, 2003.

Newsome countered with a motion to alter, amend or vacate the August 7, 2003, order vacating the award of court costs. Kirk filed a timely response. An agreed order of dismissal was rendered on August 18, 2003, which operated to dismiss as settled and satisfied all claims that were brought or could have been brought in the complaint and amended complaint.

Lastly, on September 22, 2003, the trial court rendered an order which forms the basis of the instant appeal. It reversed the order which stated that Newsome was not entitled to court costs, and ordered Kirk to pay the costs in the amount of \$4,326.12. This appeal followed.

Kirk now argues that the trial court committed reversible error in rendering the award of court costs in favor of Newsome. She maintains that no costs should be awarded because there has been no judgment as contemplated by CR 54.04. She also argues that Newsome is precluded from recovering costs incurred after the April 11, 2003, offer of judgment, that any costs should be split pro-rata with Farm Bureau, and that certain costs should be excluded because they were not contemplated as compensable by the civil rules. She argues the circuit court's order should be reversed and the matter remanded with directions to enter a judgment in her favor.

CR 54.05 states:

(1) 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. In the event of a partial judgment or a judgment in which neither party prevails entirely against the other, costs shall be borne as directed by the trial court.

(2) A party entitled to recover costs shall prepare and serve upon the party liable therefore a bill itemizing the costs incurred by him in the action, including filing fees, fees incident to service of process and summoning of witnesses, jury fees, warning order attorney, and guardian ad litem fees, costs of the originals of any depositions (whether taken stenographically or by other than stenographic means), fees for extraordinary services ordered to be

paid by the court, and such other costs as are ordinarily recoverable by the successful party. If within five days after such service no exceptions to the bill are served on the prevailing party, the clerk shall endorse on the face of the judgment the total amount of costs recoverable as a part of the judgment. Exceptions shall be heard and resolved by the trial court in the form of a supplemental judgment.

Costs are awarded, if at all, to the prevailing party.

Id. The dispositive question, then, is whether Newsome is properly characterized as a prevailing party for purposes of CR 54.04. We conclude that she is not.

A panel of this Court previously addressed the question of whether "a plaintiff who obtains a verdict finding a defendant liable but fails to obtain a verdict awarding damages is the successful or prevailing party." Lewis v. Grange Mutual Casualty Company, Ky. App., 11 S.W.3d 591 (2000). While this question differs somewhat from the issue at bar, Lewis addressed the underlying question of what constitutes a prevailing party for purposes of CR 54.04.

In Lewis, we found that a majority of jurisdictions have concluded that a prevailing party, for the purpose of awarding costs, is one who is successful with regard to the main issue in the action. See generally, Cooper v. Carlson, 511 P.2d 1305 (Alaska 1973). Furthermore, while some states have determined that a judgment on liability alone is enough to

confer prevailing party status, others require that the party recover monetary damages in order to prevail. Lewis, 511 S.W.3d at 594.

The common factor throughout is that there must be either a judgment of liability, or a judgment of liability coupled with an award of damages in order to make a successful claim for costs. That is to say, in order to recover costs the complaining party must, at a minimum, be awarded a judgment establishing that his or her complaint was meritorious. In Lewis, we ultimately agreed with those jurisdiction which concluded that "a plaintiff in a negligence action who succeeds in obtaining a liability verdict against a defendant but is not awarded damages has not prevailed for the purposes of awarding costs." Id.

In the matter at bar, the action terminated by way of an agreed order of dismissal. No judgment was rendered, and no award made. Newsome may believe herself to be the prevailing party as she was successful in extracting \$25,000 from an insurer. Conversely, Kirk may reasonably argue that she prevailed as she was a defendant in a negligence action against whom no judgment was rendered and no damages awarded. Ultimately, though, we need not reach this issue as the instant action failed to reach the Lewis threshold of a judgment and award of damages.

Pursuant to Lewis and the reasoning contained therein, we believe that an action terminated by an order of dismissal does not create a prevailing party for purposes of CR 54.04. Accordingly, neither party to a dismissed action is entitled to recover costs unless by agreement of the parties. Having disposed of Kirk's claim of error, we hold as moot her subsidiary arguments relating to the offer of judgment, pro rata splitting of costs, and the exclusion of costs not tendered to the court in conformity with CR 54.04.

For the reasons stated herein, we reverse the order of the Warren Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Clarence Terrell Miller  
Bowling Green, KY

BRIEF FOR APPELLEE, JOY  
NEWSOME:

Steven O. Thornton  
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