

RENDERED: SEPTEMBER 5, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001934-MR

THE FLOORING GALLERY, LLC

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 05-CI-006863

MOREL CONSTRUCTION COMPANY, INC.

APPELLEE

OPINION  
REVERSING

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BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

CLAYTON, JUDGE: The Flooring Gallery, Inc., a bidder for a subcontract, appeals from the portion of the Jefferson Circuit Court's decision that awarded attorney fees to Morel Construction Company, Inc. (Morel), a general contractor.

The issue is whether a trial court may award the prevailing party its attorney fees and costs under the general rubric of equity, absent a basis in statute or contract.

For the reasons set forth, we reverse.

## **Background**

In 2003, the Commonwealth of Kentucky sought bids for the renovation of the South Wing of the Kentucky Fair and Exposition Center. Morel was selected to become the general contractor for the project. When it prepared its bid, Morel sought subcontracting bids from various contractors for different parts of the project, including the flooring and carpeting work. Flooring Gallery submitted a bid of \$125,169 for the flooring and carpeting work. Morel relied on Flooring Gallery's bid in preparing its bid and used the quoted price as part of its bid to attain the general contractor contract for the project.

Morel learned on October 6, 2003, that it had been selected as the general contractor on the project. Subsequently, Morel sent a letter to Flooring Gallery confirming its selection as a subcontractor on the project. During work on the project, Flooring Gallery was routinely kept up-to-date on Morel's progress. In addition, Flooring Gallery officials attended a progress meeting on the project. Over a year later, in November 2004, however, Flooring Gallery, without reason, informed Morel that it was not going to perform the work it had agreed to do. Morel sent a letter dated December 9, 2004, notifying Flooring Gallery that because Flooring Gallery was not going to honor its agreement, Morel was going to hire another subcontractor. In this letter, Morel also informed Flooring Gallery that it would be seeking attorney fees if Flooring Gallery failed to complete the work it was obligated to do. Since Flooring Gallery refused to do the work, Morel conducted a second round of bids, received several bids, and ultimately selected

the lowest bidder in the second round (K&I Lumber) to complete the flooring work. Their lowest bid was for \$159,974, which was \$34,805 more than Flooring Gallery's bid.

Pursuant to *Meade Construction Co., Inc., v. Mansfield Commercial Electric, Inc.*, 579 S.W.2d 105 (Ky. 1979), which substantiates Flooring Gallery's liability for its refusal to perform, the trial court granted partial summary judgment on the issue of liability in its order entered February 7, 2007. The grant of summary judgment on Morel's behalf was on the grounds of promissory estoppel, holding that Morel reasonably relied on Flooring Gallery's bid in submitting its proposal, and that this reliance estopped the Flooring Gallery from abandoning the project. In the same order, the trial court recognized that Morel bore the burden of proving that the work, for which it paid the substitute contractor, was the same work that Flooring Gallery bid on.

A bench trial took place on May 18, 2007, on the amount of damages to be awarded to Morel for Flooring Gallery's breach of its agreement to perform flooring work for the renovation of Kentucky Fair and Exposition Center's South Wing. Thereupon, in its Opinion and Order dated July 27, 2007, the trial court granted Morel a judgment to cover its cost (\$34,805), plus pre-judgment and post-judgment interest, and attorney fees to be calculated by separate motion. After this motion, the trial court awarded Morel attorney fees of \$25,000, which it had incurred while seeking the judgment. The trial court reasoned that attorney fees could be shifted under equitable principles. Specifically, the trial court held "[t]he

facts and circumstances of this case dictate an award of attorneys' fees to Morel as an equitable remedy.”

### **Standard of Review**

While Flooring Gallery states that the standard of review is *de novo*, we disagree. Because we are reviewing the trial court's exercise of its discretion, rather than its application of the law, the standard of review is whether or not the trial court abused its discretion. We will not reverse unless the exercise of that discretion is arbitrary, capricious, or otherwise abusive. As stated in *Dorman v. Baumlisberger*, 271 Ky. 806, 809, 113 S.W.2d 432-33 (Ky. App. 1938), “[i]n equity the award of costs and [an attorney's] fees is largely within the discretion of the court, depending on the facts and circumstances of each particular case.” And once an attorney's fees have been awarded, the award will not be disturbed on appeal absent an abuse of discretion. *Giacalone v. Giacalone*, 876 S.W.2d 616, 621 (Ky. 1994).

### **Analysis**

We observe that attorney fees are generally not recoverable without a specific contractual provision or a fee-shifting statute. *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415, 420 (Ky. 2006). In fact, Kentucky has long followed the “American Rule,” that in the absence of statute or contract expressly providing, attorney fees are not allowable as costs, nor recoverable as an

item of damages. *Dulworth & Burress Tobacco Warehouse Co. v. Burress*, 369 S.W.2d 129 (Ky. 1963); *Holsclaw v. Stephens*, 507 S.W.2d 462 (Ky. 1973), *disapproved on other grounds by Jacobs v. Lexington-Fayette Urban County Government*, 560 S.W.2d 10 (Ky. 1977); *Craig v. Keene*, 32 S.W.3d 90 (Ky. App. 2000).

Yet, this well-settled rule does not abolish the equitable principle that a trial court may rely on its equitable powers to award attorney fees even in the absence of statutory or contractual obligation depending on the circumstances of each case. For instance, as we stated in *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754-55 (Ky. App. 1984), “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.” Moreover, this Court previously found no abuse of discretion in a trial court’s award of attorney fees, absent statutory or enforceable contractual authority, based on the bad faith conduct of one of the parties. *See Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998). The policy reasons behind such an exception to the rule are to deter illegitimate behavior in the courtroom, and sometimes outside it.

Flooring Gallery argues that the power to assign attorney fees on the basis of equity is not as broad or discretionary as the trial court believed. Instead, Flooring Gallery asserts that the equitable power to award attorney fees is limited to cases where the “common fund doctrine” applies and where a litigant’s efforts have conferred a benefit on another. Flooring Gallery cites *Kentucky State Bank*,

in support of this proposition. A review of the case, however, reveals that while the Court discusses the power to award attorney fees under the “common fund” doctrine statute, it also distinguishes a trial court’s equitable powers as separate and distinct. Similarly, in *Cummings v. Covey*, 229 S.W.3d 59, 62 (Ky. App. 2007), the Court reviewed an award of attorney fees under Kentucky Revised Statutes (KRS) 412.070, the “common fund” doctrine. Despite stating that the “common fund” doctrine might be inapplicable in this particular situation, the Court then added that the trial court has discretion to award attorney fees in equity. *Id.*

And Flooring Gallery provides no other Kentucky case that limits the court’s discretion in equity only to cases involving a “common fund.” As a matter of fact, a trial court’s equitable award of attorney fees has been upheld in cases where the “common fund” was not at issue. *See Batson*, 908 S.W.2d at 566. Therefore, although the Kentucky Supreme Court and its predecessor have recognized that cases involving the common fund may provide an equitable basis for a reallocation of attorney fees, neither has expressly limited a Kentucky court’s equitable powers to this particular type case.

Furthermore, a reading of both *Batson* (bad faith element case) and also *Kentucky State Bank* (affected any benefit case/common fund) cannot mean, as argued by Flooring Gallery, that only the “affected any benefit” element is mandatory, or both elements are mandatory, to justify an award of attorney fees. Because *Batson* affirmed the award of attorney fees in the absence of the “affected

any benefit” element, the notion of *Kentucky State Bank* that “affected any benefit” is “an indispensable element” of an award of attorney fees based on equitable reasons is strongly discounted. These two cases, as well as *Dorman*, highlight for us that there are no set elements required in an equitable award of attorney fees.

One recent case, discussed by both parties, *Flag Drilling Co, Inc. v. Erco, Inc.*, 156 S.W.3d 762 (Ky. App. 2005), suggests that equity does permit the reallocation of fees. While the actual award of attorney fees in this case was based on KRS 134.420(1), entitled “Lien for taxes,” the court states therein:

Although attorney’s fees may be awarded in equity, these awards are ‘largely within the discretion of the court’ and are dependent upon ‘the facts and circumstances of each particular case.’

*Id.* at 766 quoting *Dorman*, 113 S.W.2d at 433. Here, the Court clearly opined that a trial court has the power to award equitable attorney fees.

Because the trial court believed that the facts and circumstances of this case dictated an award of attorney fees to Morel as an equitable remedy, it ordered attorney fees of \$25,000 based on Flooring Gallery’s bad faith and delay. Apparently, the trial court believed that Flooring Gallery throughout the pendency of this case behaved in ways that forced Morel to incur additional expenses. The trial court’s opinion explains its reasons for an award of attorney fees:

Flooring Gallery was aware of its obligation to Morel when its bid was accepted on October 7, 2003; when it refused to perform thereunder in November, 2004; when it was served with notice of the lawsuit on August 11, 2005; when its Motion to Dismiss was denied on

September 29, 2005; and when Summary Judgment as to liability was granted to Morel.

Based on this conduct, the trial court held that “the facts and circumstances of this case dictate an award of attorneys’ fees to Morel as an equitable remedy.”

In this analysis, we have highlighted that, with regards to an award of attorney fees, Kentucky courts are guided by the American Rule, and therefore, each party in litigation will bear its own attorney fees unless a contract or statute allows otherwise. And we observed that certain cases in the Commonwealth have expressed, in dicta, and in one case held that a trial judge has the discretion to award attorney fees where there is bad faith. But in this case, the trial court has merely provided incidents that occur with regularity in all lawsuits as support for its award of attorney fees. And while certain trial actions may be vexatious and frustrating, they do not rise to the level of bad faith. Consequently, we believe that the trial court abused its discretion in awarding Morel attorney fees. Based on the foregoing, the Jefferson Circuit Court’s order of July 27, 2007, as it relates to an order of attorney fees is reversed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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ORAL ARGUMENT FOR  
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