

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001613-MR

THE HELM COMPANY, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 10-CI-006391

HUMANA INSURANCE COMPANY
OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: DIXON, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: This is an appeal from a judgment of the Jefferson Circuit Court permitting a prevailing party, appellee Humana Insurance Company of Kentucky (Humana), to recover \$5,961.45 in fees associated with depositions as an element of its costs from appellant, The Helm Company, LLC (Helm). Kentucky Revised Statutes (KRS) 453.040(1)(a) states that “[t]he successful party in any

action shall recover his costs,” but the statute makes no provision for the recovery of deposition fees. However, Kentucky Rules of Civil Procedure (CR) 54.04(2) lists the permissible types of taxable costs and the criteria for ascertaining them:

[I]ncluding 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. . . .

Here, with only one exception, the fees associated with depositions that the trial court considered properly chargeable as “costs” under the purview of CR 54.04 related to Humana’s procuring of *copies* of depositions, not *originals*, directly from the private court reporting services that transcribed the depositions in question.

Contrary to the trial court’s holding, nothing in CR 54.04 permits the recovery of costs associated with procuring *copies* of a deposition. Indeed this court has held, albeit in an unpublished case we find persuasive on this point, that fees associated with procuring copies of depositions are not recoverable as “costs” under the purview of CR 54.04, because (1) allowing them as such an item would conflict with the unambiguous language of the rule; and (2) “[i]n this Commonwealth, allowable costs are generally more circumscribed than that allowed in other jurisdictions.” *See Test v. Expressbill, LLC*, Nos. 2008-CA-000088-MR, 2008-CA-000210-MR, 2009 WL 3321009 at *5(Ky. App. Oct. 16,

2009) (citing 7 Kurt A. Philipps, Jr. & David V. Kramer, *Kentucky Practice-Rules of Civil Procedure Annotated* § 54.04 (6th ed. 2005)).¹

Humana argues that its expenses in procuring copies of depositions should nevertheless be compensable. In this regard, its first argument is that these expenses fit under what CR 54.04 describes as “such other costs as are ordinarily recoverable by the successful party.” However, Humana cites no Kentucky authority interpreting that phrase to include this type of expense. Instead, Humana merely cites Kentucky cases that explain that recovery of *any* costs under CR 54.04 is permissive (*see, e.g., Lang v. Sapp*, 71 S.W.3d 133, 136 (Ky. App. 2002)); and, that litigants may recover certain expenses not encompassed in CR 54.04 provided a statute or judicial precedent otherwise allows for it. *See, e.g., Brooks v. Lexington-Fayette Urban County Housing Authority*, 332 S.W.3d 85, 90 (Ky. App. 2009) (emphasizing that “attorney’s fees” are not recoverable under CR 54.04, but may be recoverable pursuant to statutory or precedential authority).

Incidentally, one case not only illustrates this general rule, but also dealt with the issue of recovering, as an item of costs, expenses for procuring copies of depositions. In *Cook v. Christopher Family, LLC*, Nos. 2003-CA-001116-MR, 2003-CA-001180-MR, 2005 WL 3078578 at *11 (Ky. App. Nov. 18, 2005), which we also cite as persuasive authority on this point of per CR 76.28(4)(c), a panel of this Court explained:

¹ For this proposition of law, we find *Test* is persuasive authority and proper to cite as it fulfills the criteria of CR 76.28(4)(c).

We also are not persuaded by Cook's contention that the trial court erred by awarding certain costs not allowed by CR 54.04, including the costs of copies of depositions. Again, there is no merit to the argument that the costs should be reduced because appellees did not prevail in all respects. Moreover, although CR 54.04(2) permits only the recovery of "costs of the originals of any depositions ... and such other costs as are ordinarily recoverable by the successful party," KRS 364.130 permits a broader recovery of costs in timber cutting cases to include "*any* legal costs incurred by the owner of the timber." (Emphasis added.) Such language clearly authorizes the trial court's award.

Next, Humana argues that the circuit court could have invoked its equitable authority to require Helm to pay these expenses as an item of its recoverable costs. Whether this is true or not is irrelevant, however, because the sole authority the trial court cited in support of its award of costs to Humana was CR 54.04.

Lastly, Humana contends that several jurisdictions outside of Kentucky have adopted rules of procedure that would allow for these types of costs, and that the purpose behind only allowing reimbursement for the costs of the originals of any depositions is "outdated and inapplicable in the modern litigation context." However, procedural rules from jurisdictions outside of Kentucky are not relevant to this appeal. Moreover, to the extent that Humana believes CR 54.04 is unfair, it is the prerogative of the Supreme Court of Kentucky, not this Court, to change it.

With that said, we will now address the final issue raised in this appeal. Helm does not contest that one item Humana included with its bill of costs

involved an expense that could have been considered an item of costs under CR 54.04, namely, its costs in procuring an original deposition from an individual named John LeMastus. However, Helm contends that Humana failed to properly itemize its costs in this regard. Helm points out that the bill Humana submitted in relation to this cost reflects that it paid an “expedited rate” of \$561.60 for this deposition; nothing in CR 54.04 considers an “expedited rate” to be considered a proper item of costs; and Humana submitted no evidence demonstrating what the cost of the deposition would have been absent the expedited rate. Thus, Helm argues it should not be responsible for the LeMastus deposition cost because Humana failed to demonstrate what that cost was, to the extent that CR 54.04 would have allowed for it.

Upon review, nothing indicates that the “expedited rate” Humana paid relates to any kind of “extraordinary services ordered to be paid by the court” per CR 54.04; we agree that the plain language of the rule otherwise does not allow for such an expense; and, because Humana failed to produce evidence demonstrating what the cost of the LeMastus deposition would have been absent the expedited rate, we agree that this item was likewise unrecoverable.

In sum, we REVERSE the Jefferson Circuit Court and direct it to enter a new order denying Humana’s request for any part of its \$5,961.45 in fees associated with depositions.

ALL CONCUR.

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