

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000046-MR

RIVENDELL BEHAVIORAL HEALTH
SERVICES OF KENTUCKY (ASSUMED
NAME FOR UHS OF BOWLING GREEN, LLC)

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 15-CI-01039

KATHERINE TURNER AND
STEPHEN CARTER

APPELLEES

AND

NO. 2018-CA-000047-MR

KATHERINE TURNER

CROSS-APPELLANT

v. CROSS-APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 15-CI-01039

RIVENDELL BEHAVIORAL HEALTH
SERVICES OF KENTUCKY (ASSUMED

NAME FOR UHS OF BOWLING GREEN, LLC);
AND STEPHEN CARTER, INDIVIDUALLY
AND AS AGENT REPRESENTATIVE OR
EMPLOYEE OF RIVENDELL BEHAVIORAL
HEALTH SERVICES OF KENTUCKY

CROSS-APPELLEES

OPINION
REVERSING

** ** * ** * ** *

BEFORE: COMBS, DIXON AND GOODWINE, JUDGES.

DIXON, JUDGE: Rivendell Behavioral Health Services of Kentucky (assumed name for UHS of Bowling Green, LLC) (“Rivendell”) appeals, and Katherine Turner cross-appeals the Warren Circuit Court’s order entered December 1, 2017, denying Rivendell’s motion to set aside or vacate its October 23, 2017, order requiring that Rivendell pay Turner’s bill of costs following resolution of all claims by agreement of the parties. After careful review of the record, briefs, and applicable law, we reverse as there is no judgment contemplated by either CR¹ 54.04 or KRS² 453.040 from which to award costs.

The facts are not in dispute. In October 2014, Stephen Carter—who was employed as a nurse at Rivendell at the time—engaged in inappropriate sexual behavior with Turner while she was a patient at Rivendell, and a minor. In

¹ Kentucky Rules of Civil Procedure.

² Kentucky Revised Statutes.

September 2015, Turner³ initiated this underlying lawsuit against Carter and Rivendell, alleging direct and vicarious medical negligence claims. Rivendell refused to defend Carter on grounds that his conduct was outside the scope of his employment. As a result, Turner and Carter reached an agreement under which Turner agreed not to pursue her claims against Carter in exchange for an agreed judgment against him. In the summer of 2017, Turner and Rivendell each moved for summary judgment against the other. The trial court denied both motions because neither party had met the required burden of proof to warrant summary judgment.

On August 25, 2017, the trial court ordered that all parties attend a settlement conference. In light of the prior agreed judgment against Carter, Turner's only remaining claims were against Rivendell. At the court-ordered settlement conference, Turner and Rivendell resolved all remaining issues without assigning fault, liability, or costs. At the end of the conference, the trial court "informally" advised the parties that each would bear its own costs. A few days later, however, the trial court called and emailed counsel to advise that Turner would be allowed to recover her costs. Turner then filed her bill of costs, to which Rivendell objected, stating there was no basis for the award. A hearing on

³ This matter was originally brought by Turner's mother on Turner's behalf; however, upon reaching the age of majority, Turner replaced her mother as the named Plaintiff in this litigation.

Rivendell’s objection to the bill of costs was held on October 11, 2017. On October 23, 2017, the trial court memorialized its ruling awarding costs—except for the fees for Carter’s guardian ad litem (“GAL”)⁴—to Turner in a formal order.

In this order the trial court stated:

The defendant complains that [CR 54.04] is under the section of the civil rules regarding judgments, and that this case was not resolved by judgment, but by settlement. This Court, however, finds that [Rivendell] is drawing a distinction without a difference: [Turner], though receiving a settlement for contested liability, has certainly prevailed in [her] attempt to make a recovery on [her] claims. And though the matter has been settled, that settlement certainly could and would be reduced to judgment should the parties need that to occur.

Rivendell moved to set aside or vacate this order. The trial court denied Rivendell’s motion, stating it “considers Turner to be the prevailing and successful party in this case.” An agreed order of dismissal was entered by the trial court on December 22, 2017. This appeal and cross-appeal followed.

On appeal, Rivendell argues that costs should not be awarded because there was no judgment against it as contemplated by CR 54.04. On cross-appeal, Turner argues that—while she believes the trial court acted within its authority to award her most of her allowable costs—the trial court erred by requiring her, rather than Rivendell, to pay Carter’s GAL fees.

⁴ Carter was incarcerated after being convicted of charges for his behavior toward Turner at issue in this case; therefore, appointment of a GAL was necessary.

The trial court found that Turner was the prevailing party to justify its award of costs, citing CR 54.04(1) and KRS 453.040. CR 54.04(1) states:

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.

KRS 453.040(1)(a) provides:

The successful party in any action shall recover his costs, unless otherwise provided by law. If the plaintiff succeeds against part of the defendants, and not against others, he shall recover his costs from the former, and the latter shall recover their costs from the plaintiff.

We are now faced with the question of whether the trial court properly characterized Turner as a prevailing party under CR 54.04 or KRS 453.040. We begin by noting that no judgment has been entered establishing Rivendell's liability or awarding Turner damages; rather, Rivendell agreed to pay Turner a sum of money in exchange for dismissing her lawsuit.

Another panel of this Court previously addressed the reverse scenario which posed 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*, 11 S.W.3d 591, 594 (Ky. App. 2000). *Lewis* addressed the underlying question of what constitutes

a prevailing party for purposes of CR 54.04.⁵ In *Lewis*, we 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.* (emphasis added). In the instant case, Turner failed to obtain a liability verdict or judgment against Rivendell and was not awarded damages, but rather, she reached a settlement whereby she agreed to accept an undisclosed sum of money in exchange for dismissing her lawsuit. As such, Turner has not prevailed for the purposes of awarding costs.

Another panel of our court was faced with a similar question in *Kirk v. Newsome*, No. 2003-CA-002214-MR, 2004 WL 2260479, at *1-2 (Ky. App. Oct. 8, 2004).⁶ The action in *Newsome* was also terminated by way of an agreed order of dismissal, no judgment was rendered, and no award made. In *Newsome*, the court observed that both parties may believe themselves to be the prevailing party as one was successful in extracting \$25,000 from an insurer while the other was a defendant in a negligence action against whom no judgment was rendered and no damages awarded. *Id.* at *2. Ultimately, the *Newsome* court determined it did not need to reach the issue of who was a “prevailing party” as that case failed to reach

⁵ Although KRS 453.040 was in effect at the time this opinion was rendered, no mention or analysis of its applicability was discussed.

⁶ This unpublished opinion is cited pursuant to CR 76.28(4)(c) as illustrative of the issue before us and not as binding authority.

the *Lewis* threshold of a judgment and award of damages. Similarly, in the case at hand, there is no judgment of liability or award of damages.

Therefore, pursuant to *Lewis* and the reasoning contained therein, we hold that an action terminated by an order of dismissal does not create a prevailing party for purposes of CR 54.04 or KRS 453.040. Accordingly, Turner is not entitled to recover costs. Likewise, as Turner is not entitled to recover costs, Turner's argument that Rivendell should pay Carter's GAL fees also fails.

In conclusion, for the foregoing reasons, the order of the Warren Circuit Court is REVERSED.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
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(ASSUMED NAME FOR UHS OF
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Sean Ragland
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Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT, KATHERINE
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