

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2009-SC-000522-DG

LOWELL WORKMAN
AND PAUL F. FAURI

APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2008-CA-001767-MR
FRANKLIN CIRCUIT COURT NO. 07-CI-00110

J. P. HAMM, IN HIS OFFICIAL CAPACITY
AS THE APPOINTING AUTHORITY FOR
THE CABINET FOR HEALTH AND FAMILY
SERVICES AND KENTUCKY PERSONNEL
BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal concerns a Court of Appeals decision to reverse an order of the Franklin Circuit Court awarding Paul Fauri an attorney fee for post-judgment and appellate work performed on behalf of his client, Lowell Workman. The work involved defending the attorney fee awarded in a civil action brought by the Cabinet for Health and Family Services for review of a Personnel Board decision that favored Workman and filing a motion to request an additional fee for doing so.

The Court of Appeals held that the circuit court abused its discretion by awarding the additional fee because the Cabinet's appeal of the initial award

was dismissed for a jurisdictional defect and did not constitute a final adjudication in his favor on the merits, which KRS 18A.095(24)¹ and KRS 453.260 required for an attorney fee to be awarded. The court also determined that KRS 18A.095(24) did not allow an additional attorney fee to be awarded as an extension of the initial award.

We affirm the Court of Appeals' decision to reverse the award although our reasons differ. Regardless of whether the relevant statutes authorize an award for post-judgment and appellate work, the circuit court lacked jurisdiction to do so in this case.

Lowell Workman brought an action before the Personnel Board in which he challenged the Cabinet's failure to promote him to the position of Environmental Health Inspector in the Milk Safety Branch of the Division of Public Health and Safety. In a final order rendered and mailed on December 19, 2006 the Board rejected a hearing officer's recommendation to dismiss the appeal; found certain irregularities in the selection process; and found that the Cabinet failed to give appropriate consideration to the five criteria listed in 101 KAR 1:400 when selecting the other candidate for the position. Unable to determine from the record whether Workman would have been selected had the Cabinet conducted the process properly, the Board sustained his appeal to the extent of ordering the Cabinet to set aside its decision and redo the selection process in accordance with KRS 18A.0751(4)(f) and 101 KAR 1:400.

¹ Now KRS 18A.095(23).

The Cabinet filed a petition appealing the Board's decision to the Franklin Circuit Court on January 18, 2007.² The Cabinet then filed a motion requesting a stay with respect to the Board's order, which the court denied after a hearing on January 31, 2007. On February 1, 2007, the Cabinet filed a notice of dismissal in accordance with CR 41.01(1). Workman had not filed an answer to the petition at the time and failed to object.

On February 6, 2007 Workman requested the circuit court to award an attorney fee for the work that Fauri performed in defending the Board's decision. He based the request on KRS 18A.095(24), presently numbered KRS 18A.095(23), which states as follows:

If a final order of the board is appealed, a court shall award reasonable attorney fees to an employee who prevails by a final adjudication on the merits as provided by KRS 453.260. This award shall not include attorney fees attributable to the hearing before the Board.

The Cabinet objected to the motion, asserting that the statutes did not authorize an attorney fee because the voluntary dismissal of an appeal under Rule 41.01(1) is procedural and not an adjudication on the merits.³ The Cabinet also relied on *Martin v. Personnel Board*,⁴ in which the court determined that a final decision to reverse the procedural dismissal of Martin's

² KRS 18A.100 and KRS 453.260 operate together to permit a final decision of the Board to be appealed by filing a petition for review in circuit court within 30 days after the decision is mailed or delivered by personal service.

³ *Philpot v. Minton*, 370 S.W.2d 402, 403 (Ky. 1963); *Hays v. Sturgill*, 302 Ky. 31, 33, 193 S.W.2d 648, 649 (Ky. 1946).

⁴ 959 S.W.2d 779, 781 (Ky. App. 1997) (ordered published upon denial of discretionary review).

claim and to remand the claim to the Personnel Board for a hearing was not a final adjudication on the merits for the purpose of authorizing an attorney fee under KRS 18A.095(24) and KRS 453.260. The court reasoned that an adjudication of her claim that she was improperly dismissed had yet to occur.

Workman argued that the dismissal of the Cabinet's appeal, though voluntary, was equivalent to a dismissal with prejudice and had the effect of a final adjudication on the merits. He reasoned that the Cabinet took action on its petition for review by placing the motion for a stay before the court, which required him to incur legal expenses. He argued that the subsequent dismissal operated to render the Board's decision a final adjudication on the merits because it occurred after the period for taking an appeal had expired and denied the Cabinet the relief that it sought on appeal. The circuit court agreed and awarded Fauri an attorney fee of \$472.50 on March 15, 2007.

The Cabinet appealed the award to the Court of Appeals, but Workman moved to dismiss on the ground that the Cabinet's notice of appeal failed to join Fauri as a party. The court passed the motion to a consideration of the merits, after which the parties submitted briefs. An opinion and order entered on June 20, 2008 granted Workman's motion and dismissed the appeal, holding that Fauri was an indispensable party because the appeal concerned his fee⁵ and the fee was awarded directly to him rather than to Workman.⁶

⁵ *Knott v. Crown Colony Farm, Inc.*, 865 S.W.2d 326 (Ky. 1993); *Braden v. Republic-Vanguard Life Insurance Company*, 657 S.W.2d 241, 243 (Ky. 1983) (court must examine to whom an attorney fee was awarded and the authority for the award before dismissing an appeal concerning the fee for failure to name the attorney as a party).

This appeal concerns the ruling on Workman's July 7, 2008 motion requesting the circuit court to award the fees and costs incurred for post-judgment and appellate legal representation. A circuit court order entered on August 11, 2008 granted the motion over the Cabinet's objection and awarded a fee in the amount of \$1,706.25. The order noted that the Cabinet's action in appealing the award required Workman to obtain further legal representation and that the Court of Appeals did not dismiss the case until after it was submitted on briefs. The Cabinet appealed following the entry of a subsequent circuit court order that denied its motion to alter, amend or vacate the award.

The Court of Appeals reversed, holding that the circuit court abused its discretion by awarding the additional attorney fee. The court reasoned that its earlier decision to dismiss the Cabinet's appeal based on a jurisdictional defect did not constitute a "final adjudication on the merits" as required by KRS 18A.095(24) and KRS 453.260.⁷ The court also rejected Workman's argument that the statutes allowed the award because he prevailed by an adjudication on the merits before the Board and the fees incurred for defending the appeal represented an extension of the initial award. He appeals.

Workman asserts that the Court of Appeals erred by construing KRS 18A.095(24) and KRS 453.260 to preclude an award of additional attorney fees because it determined incorrectly that the statutes required "a final ruling on

⁶ The court noted that the circuit court erred under KRS 18A.095(24) by awarding the fee directly to Fauri rather than Workman but that the Cabinet failed to bring the error to its attention.

⁷ *Martin*, 959 S.W.2d at 781.

the merits at the Court of Appeals for attorney fees to be awarded.” He asserts that when the procedural dismissal of the Cabinet’s appeal occurred at the Court of Appeals “there had already been a final ruling on the merits from the final order of the Personnel Board,” which resulted in the initial attorney fee award of March 2007.

Workman argues that the circuit court awarded the March 2007 attorney fee after he prevailed by a final adjudication on the merits, which occurred at the Personnel Board. He reasons that the Cabinet dismissed its appeal of the Board’s decision to circuit court, which rendered the Board’s decision in his favor final. He reasons that the March 2007 attorney fee award became final and enforceable when the Court of Appeals dismissed the Cabinet’s appeal of the award for failure to name a necessary party. Workman supports his argument that the additional fee is simply an extension of the initial fee by relying on *Moorhead v. Dodd*⁸ for the proposition that a party who appeals an attorney fee award is liable for the further costs and attorney fees incurred in defending the award successfully. He interprets *Moorhead* too broadly.

In *Moorhead* a business owned by J. William and Hazel Manning entered into a lease/purchase agreement with Moorhead for certain real property. The Mannings entered into a separate but related agreement in which they personally guaranteed the prompt payment of all amounts due Moorhead

⁸ 265 S.W.3d 201 (Ky. 2008) (res judicata doctrine and rule against splitting causes of action did not preclude post-judgment and appellate attorney fees from being awarded in action under guaranty agreement because circuit court had not addressed the issue when awarding fees for services performed up to and including the date of judgment in related contract action and because the fees at issue accrued after the judgment).

under the contract as well as “all costs and charges of any nature whatsoever, including without limitation, reasonable attorney’s fees” that Moorhead was required to pay in order to enforce her rights under the lease/purchase agreement. Moorhead brought a civil action for breach of contract when the sale fell through and received a judgment awarding damages that included the attorney fees and costs related to bringing the action.

Mr. Manning appealed the judgment, causing Moorhead to incur additional costs and attorney fees. She filed a motion to recover them, but the circuit court determined that its jurisdiction to alter or amend the judgment had expired. A divided Court of Appeals affirmed the decision.

Moorhead then filed a separate circuit court action under the guaranty agreement, seeking post-judgment and appellate attorney fees. The circuit court determined that the doctrine of res judicata barred the action. A divided Court of Appeals agreed and affirmed.

We reversed. Noting Moorhead’s clear entitlement to attorney fees under the guaranty agreement, we held that neither the doctrine of res judicata nor the prohibition against splitting a cause of action imposed a procedural bar to their recovery. We reasoned that Moorhead's present claim related to attorney fees incurred after entry of the judgment in the underlying contract action and sought in "a distinct and separate cause of action" from the action in which she had been awarded attorney fees previously.⁹ We found no policy reason to bar a recovery, noting that the present action arose from Manning's own conduct in

⁹ 265 S.W.3d at 204.

appealing the trial court's judgment despite his clear obligation to pay Moorhead's legal expenses. We also declined to impose a duty to reserve in a circuit court action the issue of post-judgment and appellate fees and costs, noting that a party could request an appellate court to remand a case for that purpose upon rendering its decision, thereby reviving the circuit court's jurisdiction.¹⁰

We disagree with Workman's argument that the circuit court had jurisdiction to award an additional fee in this case and that the fee was simply a continuation of the initial attorney fee, his entitlement to which was final and enforceable. *Moorhead* did not alter the fact that a circuit court must not only have jurisdiction to award an attorney fee (*i.e.*, subject matter jurisdiction) but must also have jurisdiction to award an attorney fee in the particular case in which the fee is sought.¹¹

Unlike *Moorhead* this case involved but one civil action, the Cabinet's appeal to circuit court. Although the circuit court had jurisdiction to award an attorney fee, its jurisdiction over the civil action had expired when the court awarded the additional fee. We find it unnecessary under the circumstances to consider the remaining issues.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

¹⁰ *Id.*

¹¹ See *Nordike v. Nordike*, 231 S.W.3d 733, 738 (Ky. 2007). See also *Whaley v. Whitaker Bank, Inc.*, 254 S.W.3d 825, 829 (Ky. App. 2008).

COUNSEL FOR APPELLANTS,
LOWELL WORKMAN
AND PAUL F. FAURI:

Paul F. Fauri
232 St. Clair Street
P.O. Box 1304
Frankfort, KY 40602

COUNSEL FOR APPELLEE,
J. P. HAMM, IN HIS OFFICIAL CAPACITY
AS THE APPOINTING AUTHORITY FOR
THE CABINET FOR HEALTH AND FAMILY
SERVICES:

Alea Amber Arnett
Cabinet for Health and Family Services
Office of Legal Services
275 East Main Street, 5W-B
Frankfort, KY 40621

COUNSEL FOR APPELLEE,
KENTUCKY PERSONNEL
BOARD:

Mark A. Sipek
Personnel Board
28 Fountain Place
Frankfort, KY 40601