



BKP v. Killmer

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20CA1299 BKP v Killmer 01-06-2022 COLORADO COURT OF APPEALS Court of Appeals No. 20CA1299 City and County of Denver District Court No. 19CV31940 Honorable Robert L. McGahey, Jr., Judge BKP, Inc.; Ella Bliss Beauty Bar, L.L.C.; Ella Bliss Beauty Bar 2, L.L.C.; and Ella Bliss Beauty Bar 3, L.L.C., Plaintiffs-Appellants, v. Killmer, Lane & Newman, LLP ; Mari Newman; and Towards Justice, Defendants-Appellees. ORDER VACATED Division V Opinion by JUDGE DUNN Welling and Yun, JJ., concur NOT PUBLISHED PURSUANT TO C.A.R. 35(e) Announced January 6, 2022 Sherman & Howard LLC, Raymond M. Deeny, Heather Fox Vickles, Brooke A. Colaizzi, Denver, Colorado, for Plaintiffs-Appellants Treece Alfrey Musat P.C., Michael Hutchinson, Denver, Colorado; Killmer, Lane & Newman, LLP, Thomas Kelley, Denver, Colorado, for Defendants-Appellees Killmer, Lane & Newman, and Mari Newman The Law Office of Brian D. Gonzales, PLLC, Brian D. Gonzales, Fort Collins, Colorado; Harter Secrest & Emery LLP, Brian M. Feldman, Rochester, New York, for Defendant -Appellee Towards Justice ¶ 1 Plaintiffs, BKP, Inc.; Ella Bliss Beauty Bar, L.L.C.; Ella Bliss Beauty Bar 2, L.L.C.; and Ella Bliss Beauty Bar 3, L.L.C. (collectively, the employer), appeal the trial court’s order awarding attorney fees to defendants Kilmer, Lane & Newman, LLP; Mari Newman; and Towards Justice (collectively, the attorneys). Because another division of this court has reversed the merits judgment on which the fee award was based, we vacate the fee order . ¶ 2 In 2018, the attorneys filed a putative class action lawsuit against the employer , asserting various wage and employment claims . The same day they filed the lawsuit, the attorneys made statements about it at a press conference and in a press release . ¶ 3 Nearly a year later, the employer sued the attorneys, alleging that statements made at the press conference and in the press release were defamatory and interfered with the employer’s contractual relations . ¶ 4 The attorneys filed a motion to dismiss the employer’s claims under C.R.C.P. 12(b)(5), arguing that the statements were protected speech and not actionable. The trial court agreed and dismissed the employer’s claims . 2 ¶ 5 The attorneys then filed a motion for attorney fees under section 13- 17-201, C.R.S. 2021, which requires an attorney fee award when a court dismisses a tort action under Rule 12(b). The attorneys also filed an unopposed bill of costs . The trial court granted the motion and awarded the attorneys “most of their requested” fees and the unopposed costs. ¶ 6 The employer separately appealed the merits judgment and the order awarding fees, but it didn’t appeal the cost award. ¶ 7 Another division of this court considered the employer’s appeal of the order dismissing its claims . See BKP, Inc. v. Kilmer Lane & Newman, LLP , 2021 COA 144 (BKP I). That division concluded that not all of the attorneys’ statements were protected speech. Id. at ¶¶ 80 -81 . The division therefore “reverse[d] the trial court’s order dismissing ” the case and remanded “to the trial court to reinstate the c ase.” Id. at ¶¶ 81 -82. 1 1 A more detailed description of the facts and procedural history can be found in BKP I. See BKP, Inc. v. Kilmer Lane & Newman, LLP , 2021 COA 144. 3 ¶ 8 Given that result, we must reverse the order awarding fees under section 13- 17-201. 2 See



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Greear v. Mulvihill, 207 P.3d 918, 923 (Colo. App. 2009). While section 13- 17-201 requires the award of fees where a tort action is dismissed under Rule 12(b), that section “does not authorize recovery [of attorney fees] if a defendant obtains dismissal of some, but not all, of a plaintiff’s tort claims.” Colo. Special Dists. Prop. & Liab. Pool v. Lyons , 2012 COA 18, ¶ 60; accord Scott v. Scott , 2018 COA 25, ¶ 61. Thus, because BKP I reversed the order dismissing the employer’s complaint, the attorneys are not entitled to attorney fees under section 13- 17-201. See Scott , ¶ 61; see also Greear , 207 P.3d at 923. But because the employer did not appeal or challenge the cost order, we don ’ t consider that order here. ¶ 9 Finally, given the result in BKP I and the reversal of the fee award here, attorneys are not entitled to an award of appellate fees 2 On appeal, the employer largely challenges the reasonableness of the fee award . They do so assuming that “the trial court’s dismissal of [its] claims against [the attorneys] withstands appeal .” No one appears to dispute that, if the dismissal is reversed — as was the case here — the order awarding attorney fees must also be reversed. See Scott v. Scott , 2018 COA 25, ¶ 61; see also Greear v. Mulvihill , 207 P.3d 918, 923 (Colo. App. 2009). 4 and costs under section 13- 17-201. We therefore decline that request. ¶ 10 For these reasons, we vacate the trial court’s order awarding fees to the attorneys. JUDGE WELLING and JUDGE YUN concur.

