

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA07-1205

SOUTHERN STATES COOPERATIVE,
INC.

APPELLANT

V.

GEORGE STOKES

APPELLEE

Opinion Delivered November 19, 2008

APPEAL FROM THE DESHA
COUNTY CIRCUIT COURT,
[NO. E97-181-2]

HONORABLE ROBERT C.
VITTITOW, JUDGE

AFFIRMED ON DIRECT APPEAL;
AFFIRMED ON CROSS-APPEAL

JOSEPHINE LINKER HART, Judge

Judgment was entered on a jury verdict awarding appellee George Stokes \$29,761.26 for conversion of a wheat crop. Appellant Southern States Cooperative, Inc. (Southern), brings this appeal, asserting that the Desha County Circuit Court made two rulings that prevented it from establishing its interest in the crop and that Stokes was not entitled to prejudgment interest. Stokes cross-appeals, contending that he was entitled to attorney's fees from Southern.¹ We affirm on both direct appeal and on cross-appeal.

This is the third time this case has been before our court.² In March 1999, Stokes

¹Stokes originally filed his cross-appeal challenging rulings that pertained to his claims against Farmers Grain Terminal, Inc. At oral argument, counsel advised us that the issues between Stokes and Farmers Grain had been settled, and, therefore, we need not further address those issues.

²See *Stokes v. Farmers Grain Terminal, Inc.*, No. CA04-142 (Ark. App. Sept. 29, 2004) (*Stokes I*), and *Stokes v. Farmers Grain Terminal, Inc.*, No. CA05-763 (Ark. App. Oct. 11, 2006)

entered into an agricultural agreement with David Patton Roberts and P&K Farms (collectively, Roberts). Under the terms of the agreement, Roberts leased farmland from Stokes and agreed to plant crops in accordance with an attached, handwritten planting plan. As rent, Roberts agreed to pay Stokes a share of the crops he produced. Roberts applied for and received crop financing from two related entities, Southern and Statesman Financial Corporation (Statesman). In making their loans, Statesman and Southern each obtained security interests in Roberts's soybean, cotton, and rice crops and farm equipment. Southern also obtained a guaranty of the crop loan from Stokes.

In the fall of 1999, Roberts planted wheat on a portion of the rented land. The agricultural agreement called for the planting of wheat, but the handwritten planting plan did not. The agricultural agreement excepted the wheat crop from a provision that any crop not harvested became Stokes's property on December 31, 1999, the termination date of the agreement.

In April 2000, Roberts granted Southern a security interest in the wheat crop. Three weeks later, in May 2000, Southern notified Roberts that his loan was delinquent and threatened to sue if the unpaid balance was not paid within fifteen days. In the month following this notice, the wheat crop matured and Stokes harvested and delivered it to Farmers Grain. Farmers Grain issued a check for a portion of the wheat made payable to Stokes, Roberts, and Southern, along with another claimant. Stokes protested the refusal to make payment to him alone, but Farmers Grain maintained its position. It did not issue a

(Stokes II).

check for the remaining portion of the wheat.

Southern made demand upon Stokes pursuant to the guaranty, asserting that Roberts's loan was in default. Stokes did not make payment on the guaranty. In June 2000, Southern filed an action seeking to recover from Stokes on his guaranty and alleging that Roberts's loan was unpaid in the amount of \$249,854.03. Stokes admitted executing a guaranty but denied liability under it.

In March 2002, Stokes filed an action against Farmers Grain, asserting that it had breached its contract with him; that it had been unjustly enriched; and that it had converted the wheat he delivered to it. He also named Southern and Roberts as defendants so that the priority issues between them could be determined. Roberts counterclaimed for conversion of the wheat. Southern counterclaimed for amounts due on the guaranty and cross-claimed against other defendants, asserting priority in the proceeds of the check.

Ultimately, Farmers Grain interpleaded the remaining wheat proceeds and moved for summary judgment on all claims against it. Southern also moved for summary judgment, claiming entitlement to the proceeds in their entirety. On August 29, 2003, the circuit court issued an extensive letter ruling in which it made the following pertinent rulings: (1) declared that Southern had a valid interest in the crops grown by Roberts on Stokes's land and, therefore, awarded Southern the proceeds from Farmers Grain's wheat sale; (2) declared that its ruling that Southern was entitled to the wheat proceeds rendered moot Stokes's claim against Farmers Grain; (3) dismissed Roberts's cross-claim against Stokes for conversion and his cross-claim for damage to and accounting for equipment; (4) awarded Stokes judgment

against Roberts for sums due under various agreements and for the amount of any judgment obtained against Stokes by Southern; and (5) declared that an IRS lien was inferior to Stokes's lien. The court then entered orders granting Farmers Grain's and Southern's motions for summary judgment, both of which incorporated the rulings in the August 29 letter. Stokes attempted to appeal from those orders, but this court dismissed the appeal in *Stokes I*.

After the dismissal of the appeal in *Stokes I*, Southern filed a renewed motion for summary judgment, asserting that there was no factual dispute as to the execution, liability, and amount of the guaranty executed by Stokes. Stokes also filed a renewed motion for summary judgment, asserting that he had not guaranteed Roberts's debt to Statesman and that Southern took payments addressed to it and applied them to the debt owed to Statesman. On February 11, 2005, the circuit court issued a letter opinion finding that the guaranty signed by Stokes was valid and, therefore, granted Southern's motion for summary judgment. However, the court also found that, because Southern applied payments intended for it to debts owed to Statesman, the guaranty had been satisfied. Orders were entered granting the respective motions. The circuit court denied motions for attorney's fees filed by both Southern and Stokes, holding that, in light of all of the consolidated cases, neither party prevailed.

In *Stokes II*, this court reversed the grant of summary judgment to Southern, holding that there were issues for trial, including whether Roberts had authority to grow the wheat at issue, which determined the validity of Southern's security interest in the wheat proceeds, and the amount of Stokes's landlord lien. We also reversed the summary judgment in favor

of Farmers Grain because it was dependent upon the circuit court's determination that the summary judgment in favor of Southern mooted Stokes's conversion claim against Farmers Grain. Finally, we instructed the circuit court to reconsider the request for attorney's fees in each of the individual cases, rather than determine which party ultimately prevailed in the entire consolidated case.

On remand, Stokes dismissed his breach-of-contract and unjust-enrichment claims against Farmers Grain. The case was submitted to the jury on interrogatories. The jury determined that Roberts was not authorized to plant the 1999-2000 wheat crop on Stokes's land, that Farmers Grain converted the wheat crop on June 19, 2003, and that Stokes was entitled to damages of \$29,761.26. Judgment was entered on the jury's verdict. The judgment reserved the issues of prejudgment and post-judgment interest on the jury's verdict, as well as claims for attorney's fees.

Stokes filed a motion seeking fees from Southern, alleging that he had prevailed in the action determining the party entitled to the proceeds of the wheat crop. After a hearing, the circuit court did not award Stokes or Southern fees against each other, finding that, because Stokes had dismissed his breach-of-contract claim, there was no statutory authority for fees in the action to determine who was entitled to the proceeds. The court also determined that neither party prevailed against the other in Southern's action on the guaranty because each party prevailed in part. The court found that Southern was liable for prejudgment interest from the date of the interpleader until judgment was entered and for post-judgment interest of ten percent. Southern was entitled to credit for interest earned. This appeal and cross-

appeal followed.

Southern argues three points for reversal: (1) that the circuit court erred in taking judicial notice of a prior summary judgment dismissing Roberts's claim for conversion against Stokes, (2) that the circuit court erred in not allowing Southern to introduce or discuss the notes executed by Roberts, and (3) that the circuit court erred in awarding Stokes prejudgment interest because his claim was not subject to precise calculation and not reasonably ascertainable. On cross-appeal, Stokes argues that the circuit court erred in not awarding him his attorney's fees against Southern in both the case to determine who was entitled to the proceeds of the crop and in the guaranty case.

We cannot reach the merits of Southern's first and second points because they were not preserved for appeal. Southern did not object when either issue was raised below. Southern never objected to the introduction of the summary judgment, stating twice that it did not object. While Southern asserts that the circuit court erroneously precluded admission of the notes, it did not object until after all parties had rested. Moreover, we do not see the ruling complained of as prejudicial to Southern because the circuit court merely precluded Stokes from showing that the notes had been paid. In any event, Southern was able to place before the jury evidence that it had an interest in the crop in the form of the security agreement.

An issue must be presented to the circuit court at the earliest opportunity in order to preserve it for appeal. *Foundation Telecomms. v. Moe Studio*, 341 Ark. 231, 16 S.W.3d 531 (2000). It is well settled that this court does not consider arguments raised for the first time

on appeal. *Yant v. Woods*, 353 Ark. 786, 120 S.W.3d 574 (2003); *Short v. Westark Community College*, 347 Ark. 497, 65 S.W.3d 440 (2002). Where nothing appears in the record reflecting that a particular argument was formulated before the circuit court, or that any ruling was given, the appellant has waived review of that issue. See *Hickman v. Trust of Heath, House & Boyles*, 310 Ark. 333, 835 S.W.2d 880 (1992).³

Southern argues for its third point that Stokes was not entitled to prejudgment interest. Southern's argument is that the amount of the wheat was not ascertainable at the time of the conversion and, therefore, prejudgment interest is not available. See *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992). Here, there was a method for determining the value of the wheat crop because Farmers Grain had sold the wheat and was holding the money. The dispute arose because both Stokes and Southern asserted interests in the proceeds and Farmers Grain would not issue a check solely to Stokes. The circuit court determined that the prejudgment interest would run from the date Farmers Grain deposited the money into the court's registry until the date judgment was entered. Even though litigation was required and Stokes recovered less than he sought in his complaint, the test for prejudgment interest has been met. See *Wilson v. Lester Hurst Nursery*, 269 Ark. 19, 598 S.W.2d 407 (1980).

On cross-appeal, Stokes argues that he was entitled to attorney's fees from Southern in both the case to determine the party entitled to the proceeds of the wheat crop and in the

³ We likewise do not consider Southern's argument that the circuit court's ruling also constituted an impermissible comment upon the evidence, in violation of Article 7, section 23 of the Arkansas Constitution because it is being made for the first time in Southern's reply brief. See *Coleman v. Regions Bank*, 364 Ark. 59, 216 S.W.3d 569 (2005).

case on the guaranty. We disagree.

Stokes's reliance on this court's holding in *Nef v. AG Services of America, Inc.*, 79 Ark. App. 100, 86 S.W.3d 4 (2002), is misplaced because, although Stokes held a security interest in the crop in the form of a landlord's lien, he dismissed his breach-of-contract claim prior to trial. *Nef* held that a security interest was a sufficient contract to entitle a prevailing party to attorney's fees under Ark. Code Ann. § 16-22-308 (Repl. 1999). Where a contract claim was nonsuited, there is no "prevailing party" entitled to attorney's fees under section 16-22-308. *Boatmen's Trust Co. v. Buchbinder*, 343 Ark. 1, 32 S.W.3d 466 (2000). As for Stokes's contention that he "prevailed" in the action on the guaranty, we need not decide that question because, even if he did prevail, the circuit court still had the discretion not to award him his attorney's fees. *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000). Stokes's argument is nothing more than an assertion that he is automatically entitled to attorney's fees because he prevailed. However, the circuit court considered the circumstances of the guaranty action and Stokes has not shown that the circuit court abused its discretion.

Affirmed on direct appeal, affirmed on cross-appeal.

PITTMAN, C.J., and GRIFFEN, J., agree.