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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000646-MR

TENNESSEE CONSTRUCTION
COMPANY, INC., now known as
White Oak Mining & Construction, Inc. — APPELLANT

APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 96-CI-00429

KENNETH ROWE and LEVISA COAL, INC. — APPELLEES

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1999-CA-000683-MR

S & L COAL SALES, INC., BRANHAM &
BAKER COAL COMPANY, INC., QUAKER COAL
COMPANY, INC., and SCOTT KISCADEN — APPELLANTS

APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 96-CI-00429

KENNETH ROWE, LEVISA COAL, INC. and
TENNESSEE CONSTRUCTION COMPANY, INC.,
now known as White Oak Mining &
Construction, Inc. — APPELLEES

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1999-CA-000849-MR

KENNETH ROWE and LEVISA COAL, INC. — CROSS-APPELLANTS

CROSS-APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 96-CI-00429

S & L COAL SALES, INC., SCOTT KISCADEN, BRANHAM & BAKER COAL CO., INC., QUAKER COAL, INC. and TENNESSEE CONSTRUCTION COMPANY, INC., now known as White Oak Mining & Construction, Inc. — CROSS-APPELLEES

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1999-CA-002057-MR

THOMAS E. BULLEIT, JR. — APPELLANT

APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 96-CI-00429

GETTY, KEYSER & MAYO, L.L.P and S & L COAL SALES, INC. — APPELLEES

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1999-CA-002058-MR

BOWLES, RICE, McDAVID, GRAFF & LOVE, P.L.L.C. — APPELLANT

APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 96-CI-00429

GETTY, KEYSER, & MAYO, L.L.P. and S & L COAL SALES, INC. — APPELLEES

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1999-CA-002352-MR

GETTY, KEYSER & MAYO, L.L.P. — CROSS-APPELLANT

CROSS-APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 96-CI-00429

BOWLES, RICE, McDAVID, GRAFF & LOVE, P.L.L.C. CROSS-APPELLEE

OPINION

AFFIRMING IN PART,

REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: HUDDLESTON and BARBER, Judges; and MARY COREY, Special Judge.[1]

HUDDLESTON, Judge: Three of these consolidated appeals involve multiple oral and written contracts entered into by various parties involved in the extraction of coal from a mine in Pike County and the processing of that coal. The remaining three appeals stem from a dispute over attorneys' fees from the original litigation.

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In December 1992, Branham & Baker Coal Company (B & B) leased a tract of land located in Pike County to Kenneth Rowe, whose company was incorporated as Levisa Coal, Inc., upon which Rowe developed a mine and began production of coal. Apparently unsatisfied with the reject percentages of the coal mined at this site, Rowe moved his equipment, in March 1994, to another mine owned by B & B and operated it as a contract mine. Rowe received $17.00 per ton of coal produced. This venture, however, was not profitable, and Rowe began looking for a buyer for the coal from the mine leased from B & B.

[1] Senior Status Judge Mary Corey sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Rowe met with Ira J. Lewis, president of S & L Coal Sales, Inc., to discuss leasing the coal rights to S & L. S & L would, in turn, sell the coal to another buyer. Rowe and Lewis agreed that the coal produced at the site would have to be washed to remove any rock or reject from the coal. Rowe and Lewis, on behalf of their corporations, entered into a written contract on October 17, 1994. The contract was for a term of three years with a minimum production requirement of 20,000 tons per month. S & L had the obligation of obtaining a contract miner, a washing plant contract and a contract for the sale of the coal.

Prior to signing the contract, an agent of S & L contacted Scott Kiscaden[2] to negotiate an agreement to have the coal washed, preferably at Tennessee Construction Company, Inc. (TCC), which was owned by Todd Kiscaden, Scott's brother.[3] Allegedly, the agent for S & L reached an oral agreement with Kiscaden relating to the washing of the coal. Rowe also met with Kiscaden in order to confirm the washing contract and to get B & B's consent to sell the coal from the mine. Rowe testified that he personally spoke with Kiscaden to confirm that the latter had agreed to wash the coal after S & L bought the coal from Rowe. Testimony from Rowe and Kiscaden conflicted as to whether the agreement to wash the coal was conditioned on the reject content of the coal.

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[2] All further references to "Kiscaden" are to Scott Kiscaden.

[3] Scott Kiscaden was the president of Branham & Baker Coal Company and Quaker Coal Company, Inc.

In the meantime, Lewis was negotiating the sale of the coal, after it was washed, from Lewis and S & L to American Metals & Coal International (AMCI). A representative of AMCI testified that either Lewis or Rowe indicated that a contract to wash the coal had been procured. By October 30, 1994, however, a contract had not been signed by Lewis or S & L with AMCI to purchase the coal, nor had a written agreement been reached with TCC or Kiscaden to wash the coal, nor had S & L reached an agreement with a mining company to actually extract the coal. Although S & L had breached the terms of the original contract, Rowe and Lewis agreed to extend the dates recited in the 1994 contract. Lewis testified that he did not believe the extension altered any of the provisions of the contract.

Although AMCI did subsequently enter into a contract with S & L to purchase the coal, the agreement to mine the coal was entered into between S & L and Levisa Coal, Inc., Rowe's mining company. A written agreement was signed in January 1995. The agreement required Rowe/Levisa to mine and produce 20,000 clean tons of coal per month and also provided that either party could terminate the agreement upon 120 days' written notice. Once mined, the coal would go to S & L, which had contracted to sell the coal to AMCI.

An agent of S & L contacted Kiscaden in February 1995 to ensure that TCC would be capable of washing shipments of coal that AMCI wanted delivered in early and mid-February. Kiscaden responded by stating that he was "blocked off" at TCC, that is, that coal to be washed could not be accepted. Rowe testified that

production of the coal began on February 23, 1995, and continued through February 24, 1995. Levisa mined approximately 2,950 tons of coal but was forced to cease mining when the stockpiles at the site had reached capacity because none of the coal was being shipped to the washing facility. Rowe contacted Kiscaden to inquire about TCC washing the coal. Testimony conflicted as to the reasons why Kiscaden refused to wash the coal. Rowe testified that Kiscaden stated that he was not going to do the deal unless Rowe got the "clowns (referring to the S & L agents) out of the picture." Kiscaden testified, however, that he refused to wash the coal because the percentage of reject in the coal had tested too high.

Because Kiscaden refused to wash the coal, S & L refused to purchase the coal because washing the coal was a condition precedent to its obligation to purchase the coal from Rowe/Levisa. In March 1995, Rowe and Kiscaden agreed that Kiscaden would purchase the 2,950 tons of coal that had been produced. Rowe paid to have the coal trucked to another coal washing facility. Rowe testified that, after washing, only 800 tons of coal remained, with 2,100 tons being reject. Subsequently, the purchase agreement between S & L and AMCI was terminated.

Lewis filed suit on behalf of S & L against B & B, Quaker, TCC and Kiscaden alleging, inter alia, a breach of an oral agreement to wash the coal, fraud, negligent misrepresentation and promissory estoppel. Rowe, doing business as R & M Mining Company (R & M) and Levisa intervened against S & L alleging breach of contract. Rowe and Levisa subsequently amended their complaint to

include a cause of action against Kiscaden, B & B, Quaker and TCC alleging that each had knowingly and intentionally interfered with Rowe/Levisa's contract with S & L by not accepting the coal for washing.

Before trial, Kiscaden, B & B, Quaker and TCC reached a confidential settlement with S & L. However, Rowe's claims against S & L, Kiscaden, B & B, Quaker and TCC proceeded to trial. A jury returned a verdict awarding Rowe d/b/a R & M Mining $878,500.00 against S & L, Kiscaden and TCC under a promissory estoppel theory.[4] The jury also awarded Levisa $2,065,000.00 against S & L for breach of contract and against Kiscaden and TCC under a promissory estoppel theory. Separately, the jury found that Kiscaden was at all times acting as the agent of TCC. On December 29, 1998, a judgment consistent with the jury verdict was entered. On March 1, 1999, an amended judgment containing supplemental findings and conclusions was entered. It is from this judgment that all parties appeal.

S & L, B & B, Quaker and Kiscaden argue on appeal that: (1) a reference in opening statement by counsel for Levisa and R & M that a settlement had been reached between S & L and the other defendants was prejudicial; (2) a condition precedent to the October 1994 contract between S & L and Rowe and the oral modification of January 1994 was not satisfied, thereby warranting a directed verdict; (3) Lewis and Rowe agreed to a recission of the

[4] As part of the original settlement between S & L and Kiscaden, TCC, B & B and Quaker, S & L was to be indemnified by these parties for any damages awarded against S & L on the Rowe/Levisa/R & B claim.

October 1994 contract and the January 1995 agreement, thus entitling S & L to a directed verdict; (4) the jury instruction regarding promissory estoppel as between S & L and Rowe/R & M was defective; (5) the instructions were too voluminous, contained factual misrepresentations, and were inconsistent with the proof; (6) the jury's verdict was not supported by the evidence; (7) Rowe and R & M are precluded from recovery of damages under a promissory estoppel theory; (8) Rowe and Levisa failed to establish that the coal to be mined would have met the specifications of the AMCI purchase order; (9) Levisa's damages are limited to a 120 day period of performance, which was the length of the contract; and (10) the judgment against Kiscaden individually on the theory of promissory estoppel should be set aside.

TCC raises the following issues on appeal: (1) the judgment against TCC should be set aside as no evidence was presented to support a jury finding that Kiscaden had the apparent authority to bind TCC to the coal washing contract; (2) the jury instructions as to TCC were hopelessly confusing; and (3) the judgment should be set aside because counsel informed the jury of the settlement agreement between TCC and S & L.

Finally, Rowe, R & M and Levisa cross-appeal claiming that the court abused its discretion in failing to award them pre-judgment interest.

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These appeals revolve around the representation of the parties in the initial action and the division of attorneys' fees. The parties involved are attorney Thomas E. Bulleit, Jr. and the

law firms of Bowles, Rice, McDavid, Graff & Love, P.L.L.C. and Getty, Keyser & Mayo, L.L.P.

Apparently, Ira J. Lewis, president of S & L, contacted Bulleit, who had historically represented S & L and Lewis, to seek his assistance in bringing the breach of contract claim that initiated this litigation. In April 1996, Bulleit brought the case to Bowles Rice, which is where all attorneys involved were practicing.[5] Bowles Rice accepted the case and began to prepare for trial. An agreement was reached with S & L whereby Bowles Rice was to receive a 40% contingency fee. Richard Getty was designated as lead counsel, although other attorneys at Bowles Rice were involved in the preparation of the case for trial.

In March 1998, Getty left Bowles Rice and formed a new firm, Getty, Keyser & Mayo. Lewis made the decision to retain Getty as lead counsel.

The case was settled in August 1998, and the defendants agreed to pay damages totaling $1.4 million to S & L, Getty's client. Bulleit and Bowles Rice filed liens on the award, claiming that an oral agreement between all parties had been reached and that they were entitled to a portion of the fee. Getty filed a motion to avoid liens, and the case was tried. The circuit court entered a judgment containing findings of fact and conclusions of law on August 20, 1999, awarding Bowles Rice $68,256.75 for its expenses and hourly fees associated with the case. Bulleit was awarded nothing, and Getty was awarded the balance of the fee then

[5] Before Bulleit became associated with Bowles Rice in an "of counsel" capacity in April 1996 he was a member of the firm of Brown, Kinkead & Bulleit.

being held by the circuit court clerk and by Getty in a special escrow account.[6]

Bulleit claims to have reached an oral agreement with Getty and Bowles Rice that the fee would be divided three ways. The agreement was not reduced to writing, and Getty denied ever making such an agreement. Bulleit appeals claiming that the circuit court erred in failing to award him a reasonable fee for his efforts in bringing the case to Bowles Rice. Bulleit also argues on appeal that: (1) the division of fees upon the departure of attorneys from a firm should be treated as a division of assets on the dissolution of a business; (2) the division of fees between members of the same firm or attorneys disassociating from one another is not prohibited; and (3) the circuit court erred in presuming that Bowles Rice was terminated by S & L and Lewis "for cause."

Bowles Rice appeals insisting that: (1) it was discharged without cause and is entitled to recover on its contingent fee contract less a deduction for the reasonable value of the services rendered by Getty Keyser; and (2) the fee award is not consistent with this Court's decision in LaBach v. Hampton.[7]

Finally, Getty cross-appeals claiming that the circuit court erred in awarding Bowles Rice the fee that was awarded.

Preservation of Error

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[6] The court held that the "reasonable cost of services of the Getty firm required to complete the contract was the 40% contingent fee less the actual time and expenses incurred by Bowles Rice." Forty percent of the $1.4 million settlement is $560,000.00.

[7] Ky. App., 585 S.W.2d 434 (1979).

S & L, B & B, Quaker and Kiscaden filed a jointly prepared brief and a reply brief as appellants in 1999-CA-000683. In the reply brief for 1999-CA-000683 and 1999-CA-000849, S & L, B & B, Quaker and Kiscaden also argue as appellees with respect to 1999-CA-000849. The brief filed for these parties in 1999-CA-000683 contains no references to the record showing whether any of the issues raised were properly preserved for appellate review and, if so, in what manner, as required by Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(iv).[8]

In the combined reply brief, in response to the argument raised by Rowe and Levisa that S & L, B & B, Quaker and Kiscaden failed to object to the jury instructions, we are referred to the

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[8] Amendments to the Kentucky Rules of Civil Procedure (CR) effective February 1, 2001 include the addition of a new section, 76.12(4)(c)(ii), entitled "STATEMENT CONCERNING ORAL ARGUMENT", so that CR 76.12(4)(c)(iv) is now CR 76.12(4)(c)(v). With regard to the preservation of errors for appellate review, CR 46 provides that:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

And with regard to the preservation of error in the giving of or refusal to give instructions, CR 51(3) provides that:

> No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

record where it is alleged objections to the jury instruction were raised. This is the only reference made by S & L, B & B, Quaker and Kiscaden to the record concerning whether any of the issues raised on appeal were properly preserved for review.

CR 76.12(4)(c)(iv) provides that a brief must contain:

> An "ARGUMENT" conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.[9]

We have in the past been disturbed by disregard of CR 76.12(4)(c)(iv).[10] CR 76.12(4)(c)(iv) "makes it mandatory that an attorney cite to the record where the claimed assignment of error was properly objected to or brought to the attention of the trial judge."[11] CR 76.12(4)(c)(iv) "is designed to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal."[12]

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[9] Emphasis supplied.

[10] See Elwell v. Stone, Ky. App., 799 S.W.2d 46 (1990).

[11] Id. at 47, quoting Bertelsman and Philipps, Kentucky Practice, CR 76.12(4)(c)(iv), Cmt. 4 (4th ed. 1989PP)[Emphasis supplied].

[12] Id. The record in this case consists of fourteen videotapes. We have neither the time nor the inclination to review all of them.

As this Court has said, pursuant to "CR 76.12(4)(c)(iv) [] an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner[.]"[13] However, if an appellant fails to comply with the requirements of CR 76.12(4)(c)(iv) in its initial brief, but does insert the necessary references in a reply brief to correct the omission, this Court may, in its discretion, consider the merits of an alleged error if it is properly preserved.[14]

S & L, B & B, Quaker and Kiscaden have failed to comply with CR 76.12(4)(c)(iv) with respect to all alleged errors except the one concerning the court's failure to adopt their proposed jury instructions. The only reason we may begin to consider this error for review is that references to the record showing whether the issue was properly preserved for review were supplied in the reply brief.[15] We are told in what manner this error was preserved, but only in the most general way. We are merely informed that objections were made and alternative instructions were tendered. S & L, B & B, Quaker and Kiscaden do not direct our attention to the particular objections they claim to have made, but we are referred to the alternative instructions tendered.

Jury Instructions

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[13] Massie v. Persson, Ky. App., 729 S.W.2d 448, 452 (1987)(citations omitted)[Emphasis supplied], overruled on other grounds by Conner v. George W. Whitesides Co., Ky., 834 S.W.2d 652 (1992).

[14] See Hollingsworth v. Hollingsworth, Ky. App., 798 S.W.2d 145 (1990).

[15] Id.

S & L argues that the instructions contain erroneous assumptions of fact, thereby warranting the grant of a new trial. Although S & L contends that this common error was present in several of the instructions tendered to the jury, S & L only directs this Court's attentions to Instruction No. 1, wherein the jury was instructed to find for Levisa on its claim of breach of contract against S & L if it was satisfied that Levisa and S & L

> orally agreed [that] . . .
>
> 1.) Levisa would . . . open up, prepare, and be ready to produce, 20,000 tons of clean coal per month from the R & M properties . . . sufficient to ship, after washing, on the A.M.C.I. coal sales agreement; and
>
> 2.) For which the Plaintiffs, LEVISA, was to be paid Fifteen ($15.00) Dollars for each ton of washed coal produced by LEVISA from said properties;
>
> 3.) On the condition that S & L could secure an agreement for a washing plant to wash and process the coal to be mined therefrom.

S & L alleges that the agreement was, in fact, not oral, but rather was memorialized in a written agreement. Further, S & L contends that the written agreement was contingent on whether S & L was successful in securing "an executed and valid contract agreement," not, as the instructions to the jury recited, whether S & L was successful in securing "an agreement for washing coal."

First and foremost, a review of S & L's citation to the point in the record where this particular error was preserved does not support its claim of error. Although S & L did tender proposed

jury instructions, its tendered instruction regarding the agreement between S & L and Rowe/Levisa makes no distinction as to whether the contract was oral or written. S & L's tendered instruction simply refers to the "contract." Further, a review of the videotaped objections to the jury instructions does not reveal that the issue of whether the contract was oral or written was ever raised. In short, the trial court was never given an opportunity to rule on this issue. Although we are aware that under CR 51(3) a specific objection is not necessary in order to preserve the right to appeal a jury instruction, the tender of proposed instructions is not enough if they do not clearly present a party's position.[16] S & L's tendered instruction does not support the argument that S & L makes on appeal, nor did S & L raise a specific objection at trial.

Even if the error had been properly preserved, whether the contract was oral or written is of no significance in this case. In the absence of a statutory requirement, such as contained in the Statute of Frauds,[17] a contract need not be in writing.[18] No party has raised the Statute of Frauds as a defense, and there is no other statutory requirement that the contract be in writing. Even if the instruction was erroneous in referring to an "oral

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[16] See Surber v. Wallace, Ky. App., 831 S.W.2d 918, 920 (1992); see also Cobb v. Hoskins, Ky. App., 554 S.W.2d 886, 888 (1977); Fields v. Rutledge, Ky., 284 S.W.2d 659, 662 (1955).

[17] KRS 371.010.

[18] See Skaggs v. Wood Mosaic Corp., Ky., 428 S.W.2d 617 (1968).

agreement" rather than a "written agreement," the error, under the facts of this case, was harmless and must be disregarded.[19]

Next, S & L argues that the jury instructions were so voluminous that they confused the jury and they contained factual misrepresentations. Although S & L directs us to specific examples of such misrepresentations and confusion, S & L does not tell us where in the record it specifically preserved this error for review. Again, we call attention to the rule that the tendering of jury instructions is not enough if the proposed instructions do not clearly present a party's position.[20] Although S & L's tendered instructions were shorter than those given by the court, that alone is not sufficient to have raised S & L's concerns regarding the voluminous nature of the instructions. Inasmuch as S & L did not object to the voluminous nature of the jury instructions or to possible misrepresentations of fact, the circuit court was not afforded an opportunity to consider the merits of this argument. A trial court must first be given the opportunity to rule on objections to instructions before they are submitted for appellate review.[21] This issue was not properly preserved for appellate review.

Finally, S & L contends that it was given inadequate time to review the court's instructions, as if to explain why so few specific objections were made. S & L fails to explain why more time was not given or whether it objected and asked for additional

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[19] Ky. R. Civ. P. (CR) 61.01.

[20] See Surber, supra, n. 16, at 920.

[21] See Massey, supra, n. 13, at 452.

time to consider the instructions the court proposed to give. In the absence of adequate references to the record, we decline to address this claim of error.

Apparent Authority of Agent for TCC

The jury returned a verdict holding both Scott Kiscaden, individually, and TCC liable for not following through with their obligation to wash the coal in accordance with the purported contract with S & L. The jury found that Kiscaden was an apparent agent for TCC and that he led Rowe and Levisa to believe that TCC had agreed to a contract to wash the coal.

TCC argues that the circuit court erred in denying its motion for a directed verdict because no evidence was offered to establish that Kiscaden was acting as an agent for TCC when Kiscaden was negotiating the coal washing contract. Kiscaden, on the other hand, argues that if, in past, he was the agent of TCC, he could not be held liable individually under the facts of this case; only TCC, the principal, Kiscaden insists, can be held liable.

Kentucky's highest court discussed the principle of apparent authority of an agent to bind a principal in Aeroplane Oil & Refining Co. v. Disch:[22]

> "The liability of the principal is not limited to such acts of the agent as are expressly authorized or necessarily implied from express authority. All such acts of the agent as are within the apparent scope of the authority conferred on him are also binding upon the

[22] 203 Ky. 561, 262 S.W. 939 (1924).

> principal, apparent authority being that which, though actually not granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing."[23]

Apparent authority is defined as "not actual authority but [] the authority the agent is held out by the principal as possessing. It is a matter of appearances on which third parties come to rely."[24]

The criteria for deciding whether an agency relationship exists have been set forth repeatedly in Kentucky case law. "Agency and scope of authority, actual or apparent, may be established by circumstances and practices."[25] Agency must be proven by the person alleging agency and the resulting authority.[26] Finally, "[a]gency cannot be proven by a mere statement, but it can be established by circumstantial evidence including the acts and conduct of the parties such as the continuous course of conduct of the parties covering a number of successive transactions."[27]

A finding of apparent authority must be based upon the representation or conduct of the principal, not the agent.[28]

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[23] Id. at 960, quoting 21 R.C.L. 854.

[24] Mill Street Church of Christ v. Hogan, Ky. App., 785 S.W.2d 263, 267 (1990).

[25] People's Nat. Bank v. Citizens' Sav. Bank, 239 Ky. 30, 38 S.W.2d 959, 960 (1931).

[26] See Mill Street Church, supra, n. 24, at 267.

[27] Id. at 267.

[28] See Enzweiler v. Peoples Deposit Bank, Ky. App., 742 (continued...)

Therefore, it is the actions of TCC, not Kiscaden, that must be examined in order to determine if sufficient evidence was proferred to bind TCC as a principal of Kiscaden under an apparent agency analysis. Evidence to establish an apparent agency relationship between Kiscaden and TCC is lacking.

The evidence presented at trial that tends to show an apparent agency relationship between Kiscaden and TCC revolves around the actions of Kiscaden, not TCC. Rowe and Levisa point out that Kiscaden became the co-owner of White Oak Mining & Construction, a company formed by the merging of all of Todd Kiscaden's (Scott's brother) companies, which included TCC, into one conglomerate.[29] Also, there was evidence that Scott telephoned TCC in late January or early February 1995 and told TCC to be looking for shipments of S & L's coal. Finally, Kiscaden told Rowe that he would take care of washing the coal at TCC. Testimony that Kiscaden negotiated as if he owned TCC or had the authority to act on TCC's behalf is irrelevant as to whether Kiscaden was an apparent agent of TCC. No evidence was presented to prove that TCC did anything to hold Kiscaden out as its agent under an apparent agency theory and there was a lack of proof to establish that Kiscaden was an apparent agent of TCC.

In ruling on a motion for a directed verdict, the trial court is to consider the evidence in the strongest possible light

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[28] (...continued)
S.W.2d 569, 570 (1987).

[29] This merger, however, took place after the events that led to the initiation of this lawsuit.

in favor of the party opposing the motion.[30] A directed verdict must not be entered unless there is "a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable [people] could differ."[31]

Actual Implied Authority

Despite the lack of evidence to support a finding that Kiscaden was an apparent agent for TCC, we must also evaluate the evidence under a theory of actual implied authority. "Implied authority is actual authority, circumstantially proven, which the principal is deemed to have actually intended the agent to possess, and includes only such powers as are practically necessary to carry out the duties actually delegated."[32]

> In examining whether implied authority exists, it is important to focus upon the agent's understanding of his authority. It must be determined whether the agent reasonably believes because of present or past conduct of the principal that the principal wishes him to act in a certain way or to have certain authority.[33]

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[30] See Everley v. Wright, Ky. App., 872 S.W.2d 95, 96 (1993).

[31] Taylor v. Kennedy, Ky. App., 700 S.W.2d 415, 416 (1985).

[32] Estell v. Barrickman, Ky. App., 571 S.W.2d 650, 652 (1978); see also Armour v. Haskins, Ky., 275 S.W.2d 580, 582 (1955).

[33] Mill Street Church, supra, n. 24, at 267.

Actual implied authority under an implied agency can be deduced from the surrounding facts of a case.[34]

Rowe directs us to numerous examples of evidence in the record which tends to circumstantially support a finding that Kiscaden possessed actual implied authority to bind TCC. First, Kiscaden signed a document faxed to Randy May, the president of Pike County Coal Corporation, on April 14, 1994. The fax reads as follows: "Attached are the new proposed fee schedules for the Processing Agreement at Tennessee Construction Company, as well as a proposed lease. Please review them at your leisure and contact me when you wish to discuss them. I should be available this evening as well as most of the day Friday. Thanks for your indulgence. Sincerely, QUAKER COAL COMPANY, INC. /s/ Scott Kiscaden, ds, President."

The second document to which Rowe directs our attention is another fax sent from Kiscaden to Randy May on May 10, which reads as follows: "Randy, the draft Processing Agreement looks ok. Please forward execution copies to Todd in Utah. Thanks. /s/ Scott."

Kiscaden testified that he was merely a "conduit" between Pike County Coal and Todd Kiscaden, with Kiscaden's role limited to passing the contracting information between Todd Kiscaden and Pike County Coal. Kiscaden testified that this arrangement was necessary because Todd was in either Utah or South America throughout the negotiations between Todd and Pike County Coal, and

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[34] See CSX Transp., Inc. v. First National Bank of Grayson, Ky. App., 14 S.W.3d 563, 567 (2000).

that communicating through Kiscaden was the only way that Pike County Coal could contact Todd.

Our review of the record indicates that there was sufficient evidence presented at trial from which the jury could find that Kiscaden was acting as an actual agent for TCC. Consequently, TCC's motion for a directed verdict was properly denied. The only question to be determined by the court on a motion for directed verdict is whether the plaintiff has introduced "evidence of probative value having fitness to induce conviction in the minds of reasonable [persons]?"[35] "The court must draw all fair and rational inferences from the evidence in favor of the party opposing the motion, and a verdict should not be directed unless the evidence is insufficient to sustain the verdict. The evidence of such party's witnesses must be accepted as true."[36] Circumstantial evidence "will authorize a submission of the contested issue to the jury," and is capable of sustaining the jury's verdict.[37]

The jury could reasonably have inferred from the faxes sent to May and other evidence summarized above that Kiscaden was acting as an agent for TCC and that TCC intended Kiscaden to have authority to act on its behalf. It was further reasonable for the jury to believe that Kiscaden was acting on TCC's behalf, with the

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[35] See James v. England, Ky., 349 S.W.2d 359, 361 (1961); see also Louisville & N. R. Co. v. Chambers, 165 Ky. 703, 178 S.W. 1041 (1915).

[36] Grant v. Wrona, Ky. App., 662 S.W.2d 227, 229 (1983), quoting 7 Clay, Kentucky Practice, CR 50.01, (3rd Ed. 1974).

[37] See Kelly v. Walgreen Drug Stores, 293 Ky. 691, 170 S.W.2d 34, 37 (1943)

acquiescence of TCC, when he negotiated the deal to wash the coal for S & L. Further, Kiscaden testified that his actions toward Pike County Coal in this earlier transaction could be considered "negotiating a contract" and that he was a "conduit" between Pike County and Todd. The totality of this evidence was sufficient for a jury to believe that Kiscaden had actual authority under an implied agency theory to bind TCC, despite the fact that Kiscaden testified that he was not an agent for TCC.

It has long been held that the trier of fact has the right to believe the evidence presented by one litigant in preference to another.[38] The trier of fact may believe any witness in whole or in part.[39] And the trier of fact may take into consideration all the circumstances of the case, including the credibility of the witness.[40]

The circuit court did not err in denying TCC's motion for a directed verdict because sufficient evidence was presented to support a finding that Kiscaden was an agent of TCC. Because it is a fundamental tenet in Kentucky that the law "generally protects an agent from liability for lawful acts done within the scope of [the agent's] agency on behalf of a disclosed principal," we hold that

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[38] See King v. McMillan, Ky., 293 Ky. 399, 169 S.W.2d 10, 14 (1943).

[39] See Webb Transfer Lines, Inc. v. Taylor, Ky., 439 S.W.2d 88, 95 (1968).

[40] See Hayes v. Hayes, Ky., 357 S.W.2d 863, 866 (1962).

the circuit court did err in denying Kiscaden's motion for a directed verdict or for judgment notwithstanding the verdict.[41]

Prejudgment Interest

On December 28, 1998, Kenneth Rowe, d/b/a R & M Mining, and Levisa Coal, Inc., filed a motion seeking an award of prejudgment interest on the judgment award from and after April 1, 1995. The court entered judgment on December 28, 1998. In an amended judgment entered on March, 4, 1999, the court denied Rowe and Levisa's motion for prejudgment interest.

"[T]he responsibility for deciding whether to award interest [is] one for the court, not the jury."[42] "The trial court has the discretion to weigh the equitable considerations and determine whether prejudgment interest should be awarded."[43] "Prejudgment interest is awarded as a matter of course where damages are liquidated."[44] "In order for damages to be deemed liquidated, there must be some certainty as to the amounts."[45]

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[41] American's Collectors Exchange, Inc. v. Kentucky State Cent.Executive Committee, Ky. App., 566 S.W.2d 759, 761 (1978), citing Potter v. Chaney, Ky., 290 S.W.2d 44, 46 (1956).

[42] Nucor Corp. v. General Electric Co., Ky., 812 S.W.2d 136, 144 (1991).

[43] Murray v. McCoy, Ky. App., 949 S.W.2d 613, 615 (1996), citing Nucor, supra, n. 42., see also Church and Mullins Corp. v. Bethlehem Minerals Co., Ky. App., 887 S.W.2d 321 (1992).

[44] Faulkner Drilling Co., Inc. v. Gross, Ky. App., 943 S.W.2d 634, 638 (1997), citing Nucor, supra, n. 42.

[45] Id.

However, a "trial court is not bound to make such an award upon unliquidated claims."[46]

Liquidated damages are those damages that are "[m]ade certain or fixed by agreement of parties or by operation of law."[47] Unliquidated damages are those "[d]amages which have not been determined or calculated, . . . not yet reduced to certainty in respect to amount."[48]

The damages in the case under consideration were disputed and are properly characterized as unliquidated. Therefore, we must decide whether the circuit court abused its discretion in failing to award Rowe and Levisa prejudgment interest in light of the facts and equities involved in the case under consideration.

The equitable principles involved in evaluating whether the trial court should award prejudgment interest on unliquidated damages are thus explained:

> "Interest is charged not only because of the value to the one who uses money, but also as compensation to the one who has been deprived of the use of money. Interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness; it is denied when its exaction would be inequitable . . . . [t]he tendency of

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[46] North Ridge Farms, Inc. v. Stathatos, Ky. App., 760 S.W.2d 89, 91 (1988)(citations omitted).

[47] Nucor, supra, n. 42, at 141, quoting Black's Law Dictionary 930 (6th ed. 1990).

[48] Nucor, supra, n. 42, at 141, quoting Black's Law Dictionary 1537 (6th ed. 1990).

the courts is to charge and allow interest in accordance with the principals of equity, to accomplish justice in each particular case."[49]

Scott Kiscaden made clear to Rowe on February 24, 1995, that the coal washing would have been accomplished had Rowe been able to get the "clowns"[50] out of the picture. Kiscaden was an agent of TCC. Taking into account considerations of fairness, in light of the facts of this case, it was an abuse of discretion for the circuit court to deny Rowe prejudgment interest. The failure to award prejudgment interest to Rowe is inequitable.

On remand, the court shall award interest from April 1, 1995, to March 4, 1999, the date of the final judgment, at the rate of eight percent per annum.[51] The interest on the total judgment shall accrue at twelve percent per annum compounded annually.[52]

Attorneys' Fees

Bowles, Rice, McDavid, Graff & Love, P.L.L.C. agreed to represent S & L Coal on April 19, 1996, upon a referral from Thomas E. Bulleit, Jr. The circuit court found that Bulleit was associated with another law firm at the time of the referral but that Bulleit anticipated joining Bowles Rice in an "of counsel"

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[49] Newcor, supra, n. 42, at 143 (quoting 47 C.J.S. Interest and Usury §6 (1982).

[50] The "clowns" to which Kiscaden refers are apparently the agents of S & L Coal.

[51] See KRS 360.010; see also Finucane v. Prichard, Ky. App., 811 S.W.2d 348 (1991), Borden v. Martin, Ky. App., 765 S.W.2d 34 (1989).

[52] See Finucane, supra, n. 51; Borden, supra, n. 51; KRS 360.040.

capacity, and this occurred later in the same month. The original agreement between Bowles Rice and S & L Coal was based on an hourly charge arrangement, but this was subsequently converted to a contingent fee arrangement.

Richard A. Getty was associated with Bowles Rice when S & L Coal entered into this representation agreement. Getty was named as the "Responsible Partner" in the S & L Coal case, which meant Getty would provide initial guidance concerning strategy while other lawyers associated with Bowles Rice would conduct discovery and handle pretrial matters.

On February 28, 1998, Getty, and two other attorneys associated with Bowles Rice, withdrew from the firm and formed a new law firm. Shortly thereafter, Bowles Rice advised S & L Coal of Getty's departure from the firm. Bowles Rice directed S & L Coal to choose whether it would commit to continued representation by Bowles Rice or to representation by Getty's firm.

Lewis had retained Bowles Rice to secure the services of Getty. Therefore, on March 17, 1998, Lewis, in response to Bowles Rice's request concerning representation, directed that S & L Coal's representation be continued with the Getty firm. The circuit court found that S & L Coal had good cause to terminate Bowles Rice's representation of S & L Coal because Getty's services were essential to S & L Coal since Lewis wanted Getty to try the case. When Getty accepted the case, S & L Coal entered into a new contingent fee arrangement.

According to the circuit court's findings, Bowles Rice had devoted $64,909.00 worth of time to the case as of April 8,

1998, the mediation date, and had expended another $4,531.75 as of that date. The court deducted from the out-of-pocket expenses $800.00 in copying charges and an additional $384.00 due to an admitted overcharge and awarded Bowles Rice $68,256.75 as a fee and and for expenses associated with its representation of S & L Coal.

The court also found that the contingent fee arrangement entered into between Getty and S & L Coal was reasonable and awarded Getty its contingent fee according to the arrangement it made with S & L Coal, less the fee and expenses awarded Bowles Rice.

The court dismissed Bulleit's claim, concluding that Rules of the Supreme Court (SCR) 3.130(1.5)(c) require that a contingency fee contract be in writing and that enforcement of Bulleit's oral fee contract would be in violation of public policy.

Bowles Rice appeals (1999-CA-002058) and Getty cross-appeals (1999-CA-002352) the court's distribution of attorney fees between the two firms. Bulleit also appeals (1999-CA-002057) from the court's denial of his claim to a division of a fee with Getty.

1999-CA-002058 and 1999-CA-002352

Bowles Rice argues that it and S & L Coal were parties to a valid and enforceable contingent fee agreement on March 17, 1998. Getty argues that S & L Coal's discharge of Bowles Rice rendered that contingent fee agreement an unenforceable nullity. Without great elaboration, it is clear from the evidence and under law that

Bowles Rice held a valid and enforceable contingent fee agreement with S & L Coal.[53]

Bowles Rice also argues that the circuit court's finding that S & L Coal's discharge of Bowles Rice was for cause was plain error. Getty argues that there was sufficient evidence to support the conclusion that S & L Coal had cause to discharge Bowles Rice and that even if Bowles Rice is correct, Bowles Rice would still not be entitled a fee greater than that which the court awarded.

The initial question presented is whether a discharge of a law firm by a client who chooses to retain the services of an attorney who leaves the originally retained law firm and forms a new law firm and whose service the client considered an essential factor in hiring the originally retained law firm, is a discharge for cause. We present this question in this way because the court found that S & L Coal had retained Bowles Rice because it wanted Getty, who was then associated with Bowles Rice, to try the case and that this desire was an essential consideration in its decision to retain Bowles Rice.[54]

The circuit court was asked to decide whether Bowles Rice was discharged for cause. It determined that S & L's decision to switch its representation from Bowles Rice to Getty was a "for cause" discharge because Getty's services were essential to its

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[53] See Gordon v. Morrow, 186 Ky. 713, 218 S.W. 258 (1920).

[54] Ky. R. Civ. P. (CR) 52.01 provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

We do not set aside the court's finding on this point in the case under consideration as that finding was supported by substantial evidence.

choice of representation. The focus on whether the discharge of Bowles Rice was for cause was due to the circuit court's concern with the applicability of the rule, concerning the proper measure of the fee to be paid to an attorney employed under a contingent fee agreement when that attorney is discharged before completion of the contract, that was announced by this Court in Labach v. Hampton.[55] In Labach, the attorney who was seeking payment was discharged without cause. Since the circuit court decided Bowles Rice had been discharged for cause, it held that Labach was inapplicable to the case under consideration. This was error.

The general rule as to what constitutes the basis for a discharge of an attorney for cause is as follows: when there is exhibited conduct on the part of the attorney that puts to an end the existence of a relationship based on mutual trust, confidence and good will, then the discharge is for cause.[56] This determination is critical as it has a direct bearing "on the right of the attorney to compensation and the amount thereof[.]"[57]

Here, the court concluded that S & L Coal's desire to have Getty try the case was good cause for discharging Bowles Rice. All S & L Coal had was a good reason to discharge Bowles Rice, not a basis for making a discharge for cause. Bowles Rice had not engaged in conduct that put to an end the existence of a relationship based on mutual trust, confidence and good will.

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[55] Ky. App., 585 S.W.2d 434 (1979).

[56] Gordon, supra, n. 53.

[57] Id. at 265 (citation omitted).

Therefore, the court's conclusion that S & L Coal had good cause to discharge Bowles Rice was clear error.

Based on the circuit court's erroneous conclusion, we remand this case for a hearing to fix the fee due Bowles Rice. That firm is "entitled to a fee [equal to the contingent fee portion of the settlement recovery] less the value of the services reasonably required of [Getty] to complete the contract."[58]

In its cross-appeal, Getty argues that Bowles Rice introduced no proof of the real value of its services and that the proof of the value of the services rendered by Bowles Rice to S & L Coal does not support the court's finding concerning the value of services rendered by Bowles Rice. Getty concedes that Bowles Rice did put on evidence of its hourly rate, but this evidence, Getty says, does not prove the value of Bowles Rice's services. Bowles Rice contends that sufficient evidence of record supports the court's finding concerning the value of the legal services it provided to S & L Coal.

In light of our decision in the Bowles Rice appeal, the question presented by Getty's cross-appeal is moot since it will not be necessary for Bowles Rice to present proof of the value of legal services it provideed to S & L Coal. Under the Labach analysis we are requiring the circuit court to apply on remand, it will be necessary only for evidence to be presented concerning the value of the services reasonably required of Getty to complete the contract.

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[58] Labach, supra, n. 55, at 436.

Bulleit appeals from the circuit court's refusal to award him a fee. Bulleit argues that he is owed a fee from Getty and that Supreme Court Rule (SCR) 3.130(1.5) does not prohibit oral agreements between attorneys to divide a fee.[59]

> SCR 3.130(1.5)(c) provides, in relevant part, that:
>
> A contingent fee agreement shall be in writing and should state the method by which the fee is to be determined . . . [and] [u]pon recovery of any amount in a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and showing the remittance to the client and the method of its determination.[60]

Clearly the requirement that contingent fee agreements shall be in writing applies to agreements made between a lawyer and his client.

SCR 3.130(1.5)(e) provides two methods for accomplishing the division of a fee between lawyers. One method, as provided in SCR 3.130(1.5)(e)(1)(b), allows a division of a fee between lawyers to be made if "[b]y written agreement with the client, each lawyer assumes joint responsibility for the representation; and [t]he client is advised of and does not object to the participation of all the lawyers involved; and [t]he total fee is reasonable." SCR 3.130(1.5)(e)(1)(a) allows for a division of a fee between lawyers who are not in the same firm if the division "is in proportion to

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[59] Supreme Court Rule (SCR) 3.130 incorporates the Kentucky Rules of Professional Conduct.

[60] Emphasis supplied.

the services performed by each lawyer." SCR 3.130(1.5)(e)(1)(a) does not require that an agreement for the division of fees be in writing.

The circuit court relied on an erroneous legal conclusion in dismissing Bulleit's claim. Bulleit makes several arguments to this Court in an attempt to explain why he is entitled to an attorney fee, and Getty makes several arguments to explain why Bulleit is not entitled to an attorney fee. Getty correctly points out that Bulleit has not directed our attention "to the record showing whether this issue was properly preserved for review and, if so, in what manner."[61] However, due to the erroneous legal conclusion reached by the circuit court none of these specific issues have been adjudicated; therefore, these issues are not yet ripe for our review.[62]

Conclusion

As to appeal number 1999-CA-000646-MR, the circuit court's order denying TCC's motion for a directed verdict is affirmed as evidence was presented to establish that Kiscaden was acting as an agent for TCC when Kiscaden negotiated the coal washing contract. The court's denial of Kiscaden's motion for a directed verdict or for judgment notwithstanding the verdict, is reversed. The circuit court's order denying prejudgment interest is reversed and this case is remanded for an award of prejudgment interest as set forth in this opinion. As to all other issues

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[61] CR 76.12(4)(c)(v).

[62] See Eaton Asphalt Paving Co., Inc. v. CSX Transportation, Inc., Ky. App., 8 S.W.3d 878 (1999).

presented in appeals numbers 1999-CA-000646-MR, 1999-CA-000683-MR and 1999-CA-000849-MR, the judgment is affirmed.

The order which awarded attorneys' fees is reversed and this case is remanded to award atorneys' fees consistent with this opinion. This case is also remanded for a hearing to determine the sufficiency of Bulleit's claim. Finally, Getty's cross-appeal is dismissed as moot.

ALL CONCUR.

APPEAL NO. 1999-CA-000646-MR

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