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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000595-MR

RILEY PARTIN — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 02-CI-00161

BYRD PARTIN;
WHITLEY COUNTY, KENTUCKY;
AND LUCILLE PARTIN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

TAYLOR, JUDGE: Riley Partin brings this appeal from a February 23, 2007, Judgment of the Whitley Circuit Court upon a jury verdict finding that a new

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

roadway constructed by Riley was not comparable to an old roadway as required under the parties' settlement. We affirm.

The underlying facts of this case have been succinctly set forth in a previous opinion of this Court, and we cite to same herein:[2]

> The genesis of this appeal has its origins in a dispute concerning a right-of-way to a cemetery. [Riley Partin] is the owner of property upon which a road and cemetery are located. [Riley] maintained the road leading to the cemetery was a private road upon which a right-of-way easement provided ingress and egress to the cemetery. Conversely, [Byrd and Lucille Partin] claim the road was a public and/or county road and not a private road.
>
> A civil action ensued concerning the nature of the roadway. Eventually, the parties entered into a settlement agreement. The settlement agreement was recited for the court, and this recitation appears in the transcript of record. On July 26, 2004, the circuit court entered a judgment purporting to reflect the parties' settlement agreement. . . .

The July 26, 2004, settlement judgment recited the parties' settlement agreement and provided in relevant part:

> IT IS AGREED, ORDERED AND ADJUDGED the Plaintiff, Riley Partin, shall cause to be conveyed by Quitclaim Deed to the Fuston Cemetery Association, Inc., the Fuston Cemetery and the adjoining parking area as set forth on his plat map made a part hereof and attached hereto as Exhibit "A".
>
> . . . .
>
> IT IS AGREED, ORDERED AND ADJUDGED the Plaintiff, Riley Partin, shall agree that the Fuston Cemetery-Laurel Fork Road, County Road Number 1711 (a/k/a 711) in its current location is a county road in the

[2] Riley Partin v. Byrd Partin, Appeal No. 2004-CA-001879-MR rendered May 12, 2006.

> Whitley County, Kentucky, road system to be maintained by Whitley County, Kentucky and said county so agrees.
>
> . . . .
>
> IT IS AGREED, ORDERED AND ADJUDGED that in the event the Plaintiff, Riley Partin, desires to relocate said roadway to said cemetery from the Laurel Fork Road he may do so by constructing a shorter road that is suitable, comparable, and acceptable to the Whitley County Fiscal Court and said Whitley County Fiscal Court shall adopt said new road as a county road and shall abandon the current road to said cemetery which shall revert to the Plaintiff Riley Partin in fee.

Riley did not believe that the settlement judgment accurately reflected the parties' settlement agreement. As such, Riley filed a Kentucky Rules of Civil Procedure (CR) 59 motion to alter, amend or vacate the judgment; the circuit court ultimately denied the CR 59 motion.

Thereafter, Riley filed an appeal to the Court of Appeals. In Appeal No. 2004-CA-001879-MR, this Court agreed with Riley's contention that the settlement judgment did not reflect the parties' agreement. Specifically, this Court stated:

> Having reviewed the transcript of the proceedings, we agree that the parties never mentioned the parking area and that [Riley] did not agree to deed a parking area to the Fuston Cemetery Association. As such, we must conclude the circuit court committed error by requiring [Riley] to deed the parking area to the Fuston Cemetery Association. The parties simply never agreed to such a condition, and it was error for the circuit court to impose such a condition upon [Riley].
>
> . . . .

> Considering the entire transcript of the proceedings and the more relevant portions delineated above, we believe it was the parties intent that the new roadway be similar to and comparable with the condition of the old roadway which it was replacing. We do not believe the new roadway must be "suitable, comparable, and acceptable" to the Whitley County Fiscal Court; such terms are simply outside the parties' expressed or reasonably implied intent. Rather, we simply interpret the parties' agreement to mean that the new roadway must be similar to and comparable with the old roadway. This interpretation is consistent with the parties' express intent that the new roadway would serve as a replacement for the old roadway. *See Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381 (Ky.App. 2002).

Thus, this Court reversed the judgment of the Whitley Circuit Court and remanded the cause for further proceedings for the reasons set out above.

Shortly after this Court's May 12, 2006, opinion was rendered, Byrd and Lucille filed a motion in circuit court to assign the case for trial. By order entered June 15, 2006, the case was set for a jury trial; the trial was conducted on February 20, 2007. The only question submitted to the jury was:

> Do you believe from the evidence that the new roadway constructed by Riley Partin is similar to, and comparable with, the old roadway to the Fuston Cemetery.

The jury responded "No."

Pursuant to the jury's verdict, the court adjudged that the new roadway constructed by Riley was "not similar to nor comparable with the existing original roadway . . . [and, thus] . . . the existing original roadway shall not be closed or abandoned by the County . . . ." This appeal follows.

During the parties first visit to this Court, we were presented with the issue of whether the trial court correctly interpreted the intent of the parties in entering a judgment that accurately reflected the settlement agreement reached by the parties that had been dictated into the record. The second appeal now before this Court looks to whether the trial court properly submitted to the jury a dispute arising in the enforcement of the judgment in light of this Court's earlier opinion.

The Kentucky Supreme Court recently discussed the review of a judgment entered pursuant to settlement agreement in *Island Creek Coal Co. v. Wells*, 113 S.W.3d 100 (Ky. 2003). Therein, the Court stated:

> Given that "'[s]ettlement agreements are a type of contract and therefore are governed by contract law,'" and that "the construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court," we review de novo the lower courts' interpretations of the contract contained in the agreed judgment.

Id. at 103 (citations omitted). However, the Supreme Court in *Island Creek Coal* was silent as concerns factual disputes arising in the enforcement of a settlement judgment, including allegations of breach of the settlement terms.

Riley contends that the trial court improperly submitted the case to the jury because he had not breached the settlement judgment. Riley asserts that the new roadway was never completed and was never presented to the fiscal court; thus, no breach of the settlement judgment occurred upon which Byrd and Lucille could maintain a breach of contract action. As such, Riley maintains that Byrd and

Lucille prematurely sought and the trial court prematurely held a jury trial upon the claim of breach of the settlement judgment. In his brief, Riley particularly argues:

> [B]efore Riley Partin completed the new road and prior to the new road being offered to Whitley County as being similar and comparable to the old road, the Appellees, Lucille Partin and Byrd Partin, requested that the case be assigned for trial.
>
> Logically, the only claim available to the Appellees would have been that Riley Partin had breached his agreement by not constructing a road similar and comparable to the old road. This issue would have been ripe for decision if Appellee, Whitley County, had been offered the new road and rejected it. Since no offer was made to substitute the new road for the old road and Whitley County had made no decision (one way or the other), there was no breach of the agreement. Therefore, since no breach had occurred, there was no issue ripe for decision that required a trial.

Riley's Brief at 4.

To resolve this issue, it is necessary for this Court to undertake a review of the settlement judgment. It is well-established that construction and interpretation of a contract are matters of law for the court, and our review proceeds *de novo*. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99 (Ky. 2003); *City of Worthington Hills v. Worthington Fire Protection District*, 140 S.W.3d 584 (Ky.App. 2004). Under the settlement judgment, we think it was agreed that the old roadway was a county road and was maintained by Whitley County. It was further agreed that Riley could "relocate" the old roadway to the cemetery by constructing a new roadway that was similar to and comparable with the old roadway. After construction of the new similar and comparable roadway, the

fiscal court agreed to adopt and maintain said new roadway as a county road. However, under the settlement judgment, the fiscal court is only required to adopt the new roadway if said roadway is similar to and comparable with the old roadway.

In this case, the record reveals a November 22, 2004, letter from Riley's attorney to Byrd and Lucille's attorney. Therein, it was stated that Riley "has constructed a new road with gravel, drainage, and a shorter access to the cemetery. If you would please evaluate this road and let us know whether the road is 'suitable, comparable and acceptable' to your clients.'" From this letter, it is clear that Riley informed Byrd and Lucille that a new roadway had been constructed and even quoted from the settlement judgment to determine whether the new roadway was comparable and acceptable to Byrd and Lucille. Additionally, in a December 27, 2006, affidavit, Riley stated that he had "constructed a new road which is similar to and comparable with the old road." From the record, it is also evident that Byrd and Lucille did not believe that the new roadway was comparable to the old roadway and, thus, alleged that Riley had breached the settlement judgment.

Under the terms of the settlement judgment, we believe that Byrd and Lucille properly set forth a claim for breach of contract and that it was unnecessary for the fiscal court to have first rejected the new roadway. Under the settlement judgment, we think it sufficient that Riley constructed the new roadway, informed Byrd and Lucille of the completed new roadway, and sought their approval by

citing to the terms of the settlement. Accordingly, we conclude that Byrd and Lucille properly set forth a claim against Riley for breach of the settlement judgment.

Riley next argues that the trial court committed error by submitting the case to the jury because the issue of whether the new roadway was similar to and comparable with the old roadway was a question of law for the court to decide. In support thereof, Riley specifically argues:

> The Court of Appeals had ruled that the interpretation and construction of the parties' agreement was a question of law and not a question of fact. The Court of Appeals also ruled that, under the parties' agreement, the new road constructed by Riley Partin need only be similar to and comparable with the old road. Thus, the issue tried by the Whitley Circuit Court was an action sounding in equity rather than an action in law.

Riley's Brief at 6.

As earlier noted, we agree with Riley that the interpretation and construction of a contract are matters of law for the court. *See Frear*, 103 S.W.3d 99. However, in this case, the issue presented to the jury was whether Riley breached the terms of the settlement judgment; *i.e.*, whether the new roadway was similar to and comparable with the old roadway. Although we acknowledge that this case presents a rather unique situation regarding the interpretation of a judgment that arises from a settlement between the parties, we can find no authority that would preclude a trial court from submitting a factual dispute arising

from enforcement of the settlement judgment to a jury.[3] This is clearly distinguishable in our opinion from a situation where the trial court merely interprets the contract terms.

It is well-established that whether a party breached the terms of a contract generally constitutes an issue of fact for the jury. *Scott Farms, Inc. v. Southard*, 424 S.W.2d 574 (Ky. 1968); *Schmidt v. Schmidt*, 343 S.W.2d 817 (Ky. 1961); *Harlan Fuel Co. v. Wiggington*, 262 S.W. 957 (Ky. 1924).

In this case, both parties submitted conflicting evidence upon whether the new roadway constructed by Riley was similar to and comparable with the old roadway. *See Harlan Fuel Co.*, 262 S.W. 957. Thus, we conclude that whether Riley breached the settlement judgment presented an issue of fact that was properly submitted to the jury.

Riley further maintains that the trial court erred by excluding the testimony of his expert witness, Mark Comparoni.[4] For reasons hereinafter stated, we disagree.

A trial court's ruling on admission of expert testimony is reviewed under the abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000). An abuse of discretion occurs when a trial

[3] This opinion in no way limits the rights of the parties to enforce the judgment under Kentucky Rules of Civil Procedure (CR) 69, CR 70, or CR 71, nor do we exclude the enforcement of settlement judgments from these rules.

[4] In this case, the record indicates that Riley Partin sought to introduce the testimony of Mark Comparoni. Comparoni was a licensed surveyor and conducted a survey of the two roadways. By avowal, Comparoni testified that the old roadway and the new roadway were similar and comparable and repeatedly referred to a plat he had prepared.

court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581.

By a pretrial order entered June 15, 2006, this case was set for jury trial on February 20, 2007. Therein, the trial court also ordered the parties to exchange a list of witnesses who would testify at trial and to produce the exhibits to be introduced at trial no later than sixty days before trial. It is undisputed that Riley timely provided a list of witnesses, which included Comparoni, but failed to produce an exhibit (plat) prepared by Comparoni. Byrd and Lucille moved to exclude the testimony of Comparoni due to Riley's failure to comply with the pretrial order. The trial court agreed and excluded Comparoni's testimony.

Upon the whole, we cannot say that the trial court abused its discretion by excluding Comparoni's testimony. The trial court was obviously concerned that Riley's noncompliance with the pretrial order resulted in prejudice to Byrd and Lucille. By failing to timely produce Comparoni's plat for inspection, Byrd and Lucille were deprived of the opportunity to evaluate Comparoni's opinion in preparation for trial. And, Riley's failure to timely produce the plat was a patent violation of the trial court's pretrial order. Thus, we hold that the trial court did not abuse its discretion by excluding Comparoni's testimony.

Riley also claims that the "verdict is not supported by sufficient evidence." Riley, however, failed to state how this issue was preserved for our review. An appellant is required to state in his brief precisely how each error was preserved in the trial court for appellate review. CR 76.12(4); *Skagggs v. Assad ex*

rel. Assad, 712 S.W.2d 947 (Ky. 1986). As an appellate court, we are generally "without authority to review issues not raised in or decided by the trial court." *Reg'l Jail Auth. v. Tackett*, 770 S.W.2d 225 (Ky. 1989).

As Riley failed to show that this error was preserved for appellate review, we will not consider the merits of such claim of error in this appeal. Even if we were to reach the merits thereof, it is clear the jury's verdict was sustained by sufficient evidence, especially in view of the fact that the jury visited the premises to inspect the new and old roadways. *See Rust v. City of Newport*, 284 Ky. 567, 145 S.W.2d 511 (Ky. 1940); *Com., Dept. of Hwys. v. Stocker*, 423 S.W.2d 510 (Ky. 1968).

Riley finally contends that the trial court erred by failing to follow the law of the case as established in the prior opinion of this Court in Appeal No. 2004-CA-001879-MR. Riley interprets that opinion as holding "that the old road to the cemetery (by the terms of the parties' agreement) did not include a parking lot or parking area." Riley believes the trial court further erred by allowing Byrd and Lucille "to present evidence of a parking area on the old road" and by preventing Riley from introducing "evidence that no parking existed." Riley insists that such error prevented the jury from "accurately compare[ing] the new and old road[way]."

We recognize that the law of the case doctrine generally provides that "a final decision of an appellate court is determinative of an issue . . . and a lower court is bound by the higher court's decision." *Ranier v. Kiger Ins., Inc.*, 998

S.W.2d 515, 518 (Ky.App. 1999). However, this court's previous opinion in Appeal No. 2004-CA-001879-MR should not be misconstrued as holding that the old roadway did not include the parking area. Rather, it was merely held that there was no "agreement" to convey the parking area located at the end of the old roadway to the Fuston Cemetery Association. We find no error in any interpretation of the settlement judgment that a new roadway would only be similar to and comparable with the old roadway if it contained a similar and comparable parking area. Thus, we reject Riley's claim that the trial court erred by failing to follow the law of the case as established in Appeal No. 2004-CA-001879-MR.

For the foregoing reasons, the Judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

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