

RENDERED: NOVEMBER 16, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-001926-MR  
AND  
NO. 2009-CA-002123-MR

CONSOL ENERGY, INC. AND  
CONSOL OF KENTUCKY, INC. APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM KNOTT CIRCUIT COURT  
v. HONORABLE KIMBERLEY CHILDERS, JUDGE  
ACTION NO. 06-CI-00060

KEITH RANDALL SPARKMAN,  
D/B/A IN-DEPTH SANITARY  
SERVICE GROUP<sup>1</sup> APPELLEE/CROSS-APPELLANT

OPINION  
REVERSING AND REMANDING  
AND DISMISSING CROSS-APPEAL

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BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

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<sup>1</sup> Pursuant to Court policy, the style of the case reflects the parties as listed in the Notice of Appeal filed by the appellants. We note that the Notice of Appeal uses multiple spellings of the appellee's name. We further note that the Notice of Cross-Appeal identifies the appellee/cross-appellant as "Keith Randall Sparkman d/b/a In-Depth Sanitary Services, Inc."

NICKELL, JUDGE: Consol of Kentucky, Inc. (CKI)<sup>2</sup> and its parent company, CONSOL Energy, Inc. (CONSOL), appeal from a judgment entered by the Knott Circuit Court on August 28, 2009, finding against them following a six-day jury trial. Keith Randall Sparkman d/b/a In-Depth Sanitary Service Group cross-appeals from an order entered by the same court on October 14, 2009. Having reviewed the record, the briefs and the law, we reverse and remand the appeal to the trial court for further proceedings and dismiss the cross-appeal, all for lack of jurisdiction.

This dispute chronicles a contractual relationship between Sparkman, operator of a janitorial service, and CKI, operator of three eastern Kentucky mining facilities for whom Sparkman cleaned. The relationship began in 2001 and ended abruptly in 2005. The facts underlying the dispute are of little substantive value to our review because our resolution of this appeal and cross-appeal rests entirely upon a confusion of names and the proper parties not being before the Court. Without jurisdiction over the named parties, our review cannot proceed. *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990).

A few facts are necessary to understand our resolution. Sparkman jointly owned a general cleaning company with his wife. When this company began cleaning for CKI, the contracts were executed between In-Depth Sanitary Serv. Group (Group) and CKI, with Sparkman signing on behalf of Group. In

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<sup>2</sup> The jury awarded compensatory damages against CKI in the amount of \$34,500.00 for breach of two contracts. CKI contests neither the jury's findings regarding breach nor the amount of its award.

2002, Sparkman filed Articles of Incorporation for an entity named In-Depth Sanitary Service, Inc. (Inc.), but as late as 2005, Sparkman still entered year-to-year and month-to-month cleaning contracts with CKI on behalf of Group. On February 10, 2005, Sparkman signed the CONSOL Energy Contractor Register as Inc.'s president.

In February 2005, via certified letter, CKI terminated two of its three cleaning contracts with Group. No reason was stated in the letter, but subsequent correspondence indicates the termination was due to alleged unsatisfactory workmanship.<sup>3</sup> A few months later, CKI terminated Group's third contract based on Sparkman being disgruntled over the ending of the first two contracts and Sparkman's alleged attempt to secretly record conversations with CKI/CONSOL representatives which caused CKI/CONSOL to deem Sparkman and his company a security risk. Sparkman believed the cleaning contracts were terminated so the work could be awarded to Amy Little, a former Inc. employee assigned to clean the Mill Creek facility, whom he suspected was having an affair with Clell Scarberry, the mine supervisor at the Mill Creek facility.

The early terminations spawned the filing of a civil complaint by "Keith Randall Sparkman, Individually and In-Depth Sanitary Services Inc." alleging CKI and CONSOL breached the cleaning contracts. Coupled with the allegation of breach were claims against Little, Scarberry, and, Craig Campbell,

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<sup>3</sup> In particular, Sparkman had painted a tile floor without pre-authorization and had done so in a sloppy fashion. Other unauthorized work had been billed at a rate exceeding agreed upon terms.

CKI's and/or CONSOL's Human Resources Supervisor.<sup>4</sup> In addition to alleging breach of the cleaning contracts with "Plaintiffs," the complaint alleged CKI and CONSOL were liable for:

Interfering with Employee-Employer  
Contract/Relationship, Enticing Employee away from her  
employment, Inducing the Defendant, Amy Little, to  
break her contract not to compete, Inducing the  
Defendant, Amy Little, to break her contract with  
Plaintiffs.

This particular count appears to pertain exclusively to Little's employment contract with Inc.—it does not in any way reference CONSOL's alleged meddling in CKI's contract with Group. Thus, noticeably absent from the complaint is any allegation that CONSOL tortiously interfered with CKI's cleaning contracts even though that was a major point of contention during trial and resulted in a significant jury award against CONSOL.

As reflected in the judgment entered on August 28, 2009, a jury awarded damages to "Keith Randall Sparkman d/b/a In Depth Sanitary Service Group" against CKI in the amount of \$34,500.00 for breaching two of the contracts and \$678,450.00 against CONSOL for lost compensation in the amount of \$278,450.00 due to CONSOL<sup>5</sup> having disapproved of "Plaintiff" as the cleaning contractor; \$50,000.00 to the "Plaintiff" for past and future pain and suffering and

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<sup>4</sup> Little, Scarberry and Campbell were all dismissed from the lawsuit during trial. None is a party to this appeal or cross-appeal.

<sup>5</sup> CONSOL argued fiercely that as CKI's parent company it was privileged to interfere in CKI's contracts and did so with good intentions and without malice.

mental anguish; and, \$350,000.00 in punitive damages for acting with “gross negligence.” Post-judgment interest was awarded at twelve percent per annum.

This appeal and cross-appeal represent a classic case of gross inattention to detail, clerical error or some combination of the two. No party raises our concerns so we raise them *sua sponte*. From our review, relief has been given to an entity for breach of contracts to which it was never a party. The contracts were executed on behalf of Group; the complaint was filed by Keith Randall Sparkman, individually, and In-Depth Sanitary Services Inc.; and, the judgment was “ENTERED for and on behalf of the Plaintiff, Keith Randall Sparkman d/b/a In Depth Sanitary Service Group[.]” Group and Inc. are wholly separate entities. We have uncovered no evidence in the record that the third creature, “Keith Randall Sparkman d/b/a In Depth Sanitary Service Group,” even exists.<sup>6</sup> Thus, it appears one of the proper parties, Group, is not before us, and the appellees, not being parties to the breached contracts, are not entitled to relief. It also appears this error persisted throughout the litigation, beginning with the filing of the complaint in the name of Inc. and Sparkman who signed the contracts as the signatory for Inc. but not in an individual capacity. These are errors we have no authority to correct.

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<sup>6</sup> To operate under an assumed name, Kentucky Revised Statutes (KRS) 365.015(2) requires the filing of a certificate of assumed name with the Secretary of State. The required certificate was neither referenced nor included in the record on appeal.

To further punctuate the distinction between Group and Inc. we quote from an affidavit signed by Sparkman on May 27, 2009, in which he unequivocally states,

after I began entering into contracts with Consol of Kentucky, I did later establish In-Depth Sanitary Services, Inc., however, I have never entered into a contract with Consol of Kentucky on behalf of In-Depth Sanitary Services, Inc. and all agreements have been between myself D.B.A. In-Depth Sanitary Service Group and Consol of Kentucky.

Sparkman's own words confirm that Group, not Inc., and not Sparkman as an individual, was the proper party to pursue relief for breach in the trial court.

Furthermore, as noted previously, we have located no proof of the legal existence of an entity named Keith Randall Sparkman d/b/a In-Depth Sanitary Service Group and no proof that CKI and/or CONSOL ever contracted with it or breached a contract with it.

We are not the first panel of this Court to encounter a confusion of names that cannot be unraveled. We quote from *Post v. Lee Brick Co., LLC*, 2012 WL 3236566 \*3 (Ky. App. 2012)(2011-CA-001476)(unpublished):

[t]his matter has come before us as a procedural morass. The misidentification, blending, and overlapping of entities and motions constitute a virtual legal counterpart of *A Midsummer Night's Dream*—but without the whimsy and charm of Shakespeare.

(internal footnote omitted). On the strength of *Stallings* we reverse and remand to the trial court the judgment entered on August 28, 2009, for further proceedings and appropriate corrective action, if any there be.

A similar fate must befall the cross-appeal. The notice of cross-appeal identifies the appellee/cross-appellant as “Keith Randall Sparkman, d/b/a In Depth Sanitary Services, Inc.” Just as we have no evidence of the existence of “Keith Randall Sparkman d/b/a In Depth Sanitary Service Group,” neither do we have evidence of the existence of “Keith Randall Sparkman, d/b/a In Depth Sanitary Services, Inc.” in the record on appeal. There was certainly no party by that name in the underlying action. Therefore, the notice of cross-appeal does not properly place this entity before us and under *Stallings* the requested relief must be denied.

Additionally, the notice states the cross-appeal is taken “from the Judgment and Order entered on October 14, 2009.” The only item entered in the record on that date is an order resolving a joint motion by CONSOL and CKI for JNOV and to alter, amend or vacate the judgment entered on August 28, 2009. That order granted a motion to reduce the jury’s award against CONSOL by \$34,500.00, a change to which Sparkman agreed in writing, and otherwise denied all relief sought by CONSOL and CKI. The order from which the cross-appeal is taken has nothing to do with evidentiary rulings made by the trial court—the only matter Sparkman attempts to assert on cross-appeal. To challenge an evidentiary ruling made at trial, Sparkman should have appealed from the trial judgment entered on August 28, 2009. He did not.

Finally, the document from which the cross-appeal is taken is to be included in the appendix to the brief for appellant/cross-appellee when it does not appear in the appendix to the brief for appellant. Sparkman has failed to comply

with Kentucky Rules of Civil Procedure (CR) 76.12(c)(vii) and (d)(v) in that he has not included in his brief the order entered on October 14, 2009.

Wherefore, the appeal is reversed and remanded to the trial court for further proceedings and appropriate corrective action, if any there be. The cross-appeal is dismissed.

ALL CONCUR.

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