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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001222-MR

KENNETH A. BRUNER APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 09-CI-004421

DISCOVER BANK APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

DIXON, JUDGE: Kenneth A. Bruner, *pro se*, appeals from a summary judgment rendered by the Jefferson Circuit Court in favor of Appellee, Discover Bank. We affirm.

In 2009, Discover Bank (through its servicing company DFS Services, LLC) filed a debt collection action against Bruner, contending that he owed

Discover a credit card debt of $9,464.82. In response, Bruner challenged the standing of DFS Services to sue on behalf of Discover. Following a period of discovery, the circuit court granted summary judgment in favor of Discover, which Bruner appealed. In *Bruner v. Discover Bank*, 360 S.W.3d 774 (Ky. App. 2012), a panel of this Court vacated the judgment and remanded the matter to the circuit court for consideration of DFS Services' standing to sue on behalf of Discover. This Court delineated three elements that a creditor must establish before it can succeed on a summary judgment motion in a debt collection action:

> (1) a bill of sale listing the name and account number of the defendant; (2) a document specifically detailing how the creditor/plaintiff reached the principal and interest amounts that it is suing for; and (3) documentary evidence that the defendant is in fact the person responsible for the debt. Regarding the first of these elements, an assignment from the demonstrated owner of the debt for the purpose of collection or the demonstrated owner's specific authorization to its agent to collect the debt on its behalf through legal proceedings, serve virtually the same purpose as a bill of sale.

Id. at 778.

Upon remand, the circuit court granted Discover's motion to file an amended complaint, and Bruner filed a motion to dismiss for lack of standing.[1] The court denied Bruner's motion to dismiss, noting that Discover had produced evidence of the servicing agreement. In March 2013, Discover moved for summary judgment and introduced the affidavit of Michael Croghan, a records

[1] According to the amended complaint, DB Servicing Corporation replaced DFS Services, LLC as the servicing agent for Discover on January 1, 2011. Discover provided copies of its prior servicing agreement with DFS Services as well as the 2011 agreement with DB Servicing.

custodian for DB Servicing. Attached to the affidavit were copies of the cardmember agreement, the servicing agreement, statements detailing Bruner's account history, and Bruner's signed credit card application. In his response and affidavit, Bruner asserted that Discover had not presented sales receipts and that he did not have any recollection of the account. The court granted summary judgment in favor of Discover, and this appeal followed.

Quite simply, the form and content of Bruner's brief do not comply with the requirements set forth in CR 76.12. Despite the mandates of CR 76.12(4)(c)(iv)-(v), the brief contains approximately two citations to the record, and there are no references to the record showing how the issues are preserved for appeal. Further, although Bruner raises several allegations in his brief, all of the issues are combined as one singular "Argument." Our review also indicates that, while Bruner cites case law and statutes, much of the text is copied verbatim from those sources. Bruner also cites several unpublished decisions; however, he fails to provide us with copies of those opinions. CR 76.28(4)(c). Finally, the appendix to the brief does not include an index to "set forth where the documents may be found in the record." CR 76.12(4)(c)(vii).

In *Hallis v. Hallis*, 328 S.W.3d 694, 696-97 (Ky. App. 2010), this Court explained:

> CR 76.12(4)(c)(v) requires that a brief 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.
>
> Compliance with this rule permits a meaningful and efficient review by directing the reviewing court to the most important aspects of the appeal: what facts are important and where they can be found in the record; what legal reasoning supports the argument and where it can be found in jurisprudence; and where in the record the preceding court had an opportunity to correct its own error before the reviewing court considers the error itself.

Bruner cites several cases and statutes; however, "we cannot know how that authority applies in his case because he fails utterly to cite to the record and he fails to tell this Court how he preserved his argument before the [circuit] court." *Id*. at 698. The record on appeal is approximately 650 pages. We are not required to scour the record to find where it might provide support for Bruner's claims. *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006).

We have wide latitude to determine the proper remedy for a litigant's failure to follow the rules of appellate procedure. *Age v. Age*, 340 S.W.3d 88, 97 (Ky. App. 2011). "Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief

or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only . . . [.]" *Hallis*, 328 S.W.3d at 696 (citation omitted).

In considering the available options, we are not inclined to simply disregard the significant deficiencies in Bruner's brief. *See id*. Rather than strike the brief, we elect to review the issues for manifest injustice, which occurs if "the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be shocking or jurisprudentially intolerable." *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (internal quotation marks and citation omitted).

Although Bruner asserts several allegations in his appellate brief, he primarily argues the evidence failed to establish that he had a contractual relationship with Discover or that Discover suffered damages. We have reviewed the entirety of Bruner's claims, and we find no basis for concluding manifest injustice occurred.

Despite Bruner's characterization of the issues, this was simply a credit card debt collection case. Discover presented proof of the cardmember agreement (stating that the account holder's use of the card constituted acceptance of the agreement's terms), itemized billing statements addressed to Bruner from 2005 through 2008, and a credit card application signed by Bruner on November 30, 2004. Although Bruner advanced several theories and allegations, he was unable to produce any affirmative evidence to defeat Discover's motion for summary judgment. "Unsupported allegations are insufficient to create a genuine issue of

material fact." *de Jong v. Leitchfield Deposit Bank*, 254 S.W.3d 817, 825 (Ky. App. 2007). Likewise, "[a] party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment." *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007).

In granting summary judgment in favor of Discover, the court stated, in relevant part:

> Bruner argues that Discover has not proved its damages because it has not provided signed credit card slips documenting each purchase or transaction. However, Discover did provide copies of each billing statement sent to Bruner from the time the account was opened in December 2004 until it was charged off. These statements detailed balance information, purchases, credits, and interest charges including the applicable interest rate. Bruner does not deny receiving these statements; in fact, payments were made monthly until June 2008. The record does not indicate Bruner disputed any of the charges or interest rate.

We find no error in the circuit court's decision granting summary judgment in favor of Discover.

For the reasons stated herein, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Kenneth A. Bruner Jr., *Pro se* Louisville, Kentucky	James T. Hart Cincinnati, Ohio