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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000770-MR

STEVE E. WATKINS AND ANGELA WATKINS APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE MARC I. ROSEN, SPECIAL JUDGE
ACTION NO. 10-CI-00627

KENNETH NOE AND K C & J CONTRACTING, LLC APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: This appeal concerns competing claims of alleged breach of an oral contract for construction of a pond and dam on property owned by Steven E. (Steve) and Angela (Angela) Watkins (collectively Watkins). Due to flaws in the Watkins' brief and a concession in their reply brief that jurors reached the correct verdict, we affirm the decision of the Whitley Circuit Court.

FACTS

The Watkins maintain they contracted with Kenneth Noe to construct a dam and pond on their wooded property. The couple met with Noe—who had been referred to them by a friend—in December 2009 and struck a deal for—they say—$21,000.00 in goods and services. The Watkins further allege the purchase price was paid in full. Noe disputes both the purchase price and receipt of payment.

The Watkins allege they bargained with Noe as an independent contractor. Noe claims he spoke with them as an agent of his company.

Once work began,[1] and the contour of the land became visible, Steve changed the location and size of the pond, as well as the direction, height and width of the dam.[2] The project scope changed so much that in April 2010 Noe

[1] According to answers to interrogatories provided by Noe, the land was to have been cleared of trees and logs *before* construction of the pond and dam began but was not so timber clearing was added to the project's cost. Noe stated a logger working on the property while construction was underway interfered by burying stumps and dropping trees in the area of construction work. Noe further stated Watkins revised the dam's location and water level three times—revisions requiring Noe's crew to move the downed timber to and fro on the jobsite.

According to Noe, the revised project was divided into three phases with each phase being priced at an estimated $8,000.00—depending on how work progressed—for a total projected cost of $24,000.00. Noe asserts Watkins made only two cash payments—$1,100.00 toward road construction and $3,000.00 toward pond construction—both amounts being reflected on separate bills. An additional $2,000.00 toward pond construction was paid by check to "Kenny Noe" and dated April 13, 2010—the day Noe alleges Steve terminated the contract and fired him. The memo on the check reads "pond Finished (Final Pmt.)," but Noe stated he accepted the check only as partial payment and never tried to cash it; Watkins admitted stopping payment on the check.

[2] Steve asserts he agreed to pay $21,000.00 for the entire project in two payments—$11,000.00 when the equipment arrived on his property, and the $10,000 balance upon completion. The equipment arrived in December 2009. Steve stated he paid $11,000.00 in cash at that time, but due to poor weather, work did not begin until February or March, 2010. According to Steve, as the work progressed, the pond was made smaller and the dam shorter than originally planned due to discovery of a natural spring that would have been in the middle of the dam as first designed.

brought in a subcontractor—C & C Excavating, LLC[3]—with additional, larger equipment to complete the new design. Claiming Noe provided substandard and inferior work, and did not cure defects[4] when apprised of them, Steve terminated the contract, paid Noe in full and hired another contractor to complete the desired project at a cost of another $25,000.00.

On August 12, 2010, Watkins filed a civil complaint against Noe individually alleging breach of contract; breach of warranty (both as to merchantability and fitness for a particular purpose); failure to cure admitted defects; committing unfair and unconscionable acts in violation of Kentucky's Consumer Protection Act;[5] and property damage. Watkins demanded compensatory damages in excess of $4,000.00,[6] costs and attorneys' fees.

On September 20, 2010, Noe answered the complaint, maintaining Watkins never contracted with him personally as a sole proprietor or private individual, but rather *through* him with K C & J Contracting, LLC,[7] the company of which he is the managing member. Noe denied a purchase price was ever

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As part of a separate agreement for $2,000.00, a driveway with culvert was to be created from an existing dirt road.

[3] The subcontractor was owned by Noe's brother.

[4] These four defects were specified, but not exclusive: dam too short; dam too narrow; fill dirt contained trees and debris; and, topsoil not removed before water impounded.

[5] Kentucky Revised Statutes (KRS) 367.170.

[6] The demand included refund of the entire purchase price and cost of removing defective work.

[7] The name of this entity appears in various spellings throughout the record. We have chosen to identify it by the name appearing in the notice of appeal.

agreed upon and averred he personally warranted nothing, but warranted services and materials[8] only as the agent of K C & J Contracting, LLC. As a result, Noe asked that the complaint be dismissed for several reasons, including failure to join a necessary party.

The same day, Noe filed a separate motion to dismiss alleging the proper—but unnamed—defendant was "K C & J Contracting, LLC," and, the trial court lacked jurisdiction over Noe because he was not a party to the Watkins contract. Coupled with Noe's answer to the complaint was a counterclaim seeking actual and punitive damages, costs and attorneys' fees for being harassed, inconvenienced and wrongly prosecuted by Watkins since Noe did not deal with Watkins in an individual capacity. Also filed that day was a motion by K C & J Contracting, LLC, to intervene as a third-party plaintiff and to file a complaint on the theory there was not one contract, but two contracts—one struck in December 2009 when the project began and concluded by mutual agreement when the size and scope of the project grew considerably, and a second contract struck in April 2010 to complete the new design.

Ultimately, K C & J Contracting, LLC, was permitted to intervene as a third-party defendant and file a counterclaim against Watkins alleging breach of

[8] In answers to interrogatories, Noe stated none of the services provided was defective; he never acknowledged any alleged defect; and no alleged defect went uncured. He further stated no breach occurred since all work was performed to the extent permitted by Watkins; Watkins never paid for the work performed; the services and goods *originally* requested were provided and suitable for their intended purpose; the expectation of Watkins changed once the project was underway; Watkins wrongfully terminated the contract without just cause; and, because none of the work was defective, it did not cost $25,000.00 for someone else to complete the job.

contract and failure to pay for materials, labor and subcontract labor. K C & J Contracting, LLC, demanded $8,000.00, costs and attorneys' fees. Watkins responded Noe never identified himself as a managing member of K C & J Contracting, LLC; Noe never said he was not acting in his individual capacity; the vehicles and equipment used on the jobsite bore no company name[9] until the oral contract had been formed and nearly completed; and at all times, Watkins believed the deal was with Noe in his individual capacity.

On March 14, 2011, Watkins moved to file a first amended complaint equating both defendants and treating them as one and the same. *Watkins adopted an opposite stance on appeal, arguing Noe, K C & J Contracting, LLC, and a third entity, KC & J Excavating, are all separate.* Noe and K C & J Contracting, LLC, filed a single answer on March 30, 2011. Leave to file the amended complaint was ultimately granted on April 4, 2011.

A jury trial commenced on December 12, 2012. Watkins maintained all dealings were with Noe alone and he never mentioned he was working for anyone but himself. Evidence offered by the defense indicated otherwise. While Noe did not mention the name "K C & J Contracting, LLC" during his first meeting with Watkins in December 2009, during their second meeting, a business card identifying the company's name was given to Watkins by Noe's wife—April Noe—and a discussion ensued about how the company name evolved. Watkins used the information from the card to contact Noe on multiple occasions to discuss

[9] Magnetic signs stating "K C & J" were added to vehicle doors.

the project. Then, in January 2010, Noe and his son—Christopher—delivered equipment to the jobsite. During this third meeting, Christopher wore a K C & J Contracting, LLC jacket. In early March, excavation work began using trucks bearing signs with the company name and employees wearing company jackets.

Written proof of the completed work was two bills bearing the name KC & J Excavating—one for "Dozier (sic) Work" dated April 2, 2010, in the amount of $3,000.00, for which cash was paid, and a second dated April 7, 2010, for work described as "Widened Rd. and installed culbert" (sic) in the amount of $2,100.00 for which $1,100.00 was paid in cash and $1,000.00 was still owed. According to the defense, the first of three phases of the revised project was completed on April 13, 2010. Thereafter, Watkins terminated the contract and hired the logger who was removing trees from the wooded property to complete the two remaining phases of construction. Watkins denies existence of the two bills but uses them to argue KC & J Excavating and K C & J Contracting, LLC, are separate and distinct entities. Watkins further argues, since KC & J Excavating did the work according to the bill, Watkins could not owe money to K C & J Contracting, LLC, because there is no proof it did any work or contracted with Watkins.

Noe testified KC & J Excavating was an entity he wholly owned before forming his current business in 2008 and confirmed it was separate and distinct from K C & J Contracting, LLC. Noe further testified that prior to forming K C & J Contracting, LLC, he did business under the name "Kenny Noe, d/b/a K C

& J Excavating." He simply used leftover KC & J Excavating stationery to create the two bills for Watkins.

At the conclusion of the evidence, jurors were instructed to answer a series of eight interrogatories in which they found: Watkins formed an oral contract with Noe in his individual capacity in December 2009 for construction of a pond and dam; Noe did not breach that contract. Watkins formed a second oral contract for construction of a dam in April 2010 with K C & J Contracting, LLC. Jurors found K C & J Contracting, LLC, did not breach the second contract, and awarded K C & J Contracting, LLC, $7,000.00. Final judgment consistent with the jury's verdict was entered on January 23, 2013.

Thereafter, Watkins moved for judgment notwithstanding the verdict (JNOV) which both defendants opposed and the trial court denied on April 17, 2013. This appeal of both the final judgment and the denial of JNOV followed.

ANALYSIS

As a Court of review, we rely on litigants—particularly appellants—to direct us to relevant portions of the record and salient case law. CR[10] 76.12 specifies our requirements. The briefs filed on behalf of Watkins miss the mark widely.

Watkins poses five questions to this Court:

1. Should [Watkins] have been granted a directed verdict after the introduction of the [Noe's and K C & J, Contracting, LLC's] evidence?

[10] Kentucky Rules of Civil Procedure.

2. Should [the Watkins] motion for [JNOV] have been granted?

3. Were the jury instructions proper?

4. Was the jury's verdict supported by the evidence?

5. Was the judgment supported by the evidence and properly granted?

These may be relevant questions, but merely formulating them and typing them on paper is not enough. An explanation of how the questions were resolved by the trial court and case law demonstrating error in the trial court's decision are required.

In *Ray v. Ashland Oil, Inc.,* 389 S.W.3d 140, 145-46 (Ky. App. 2012), we explained the importance of adhering to the rules of appellate practice:

> It is a dangerous precedent to permit appellate advocates to ignore procedural rules. Procedural rules "do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated." *Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007) (quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)). Enforcement of procedural rules is a judicial responsibility of the highest order because without such rules "[s]ubstantive rights, even of constitutional magnitude, . . . would smother in chaos and could not survive." *Id.*

> *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). The Court went on to provide detailed reasons for the procedural rules and concluded that "the rules are not only a matter of judicial convenience. They help assure the reviewing court that the arguments are intellectually and ethically honest." *Id*. at 697.

CR 76.12(4)(c)(iv) requires a "STATEMENT OF THE CASE" containing a chronological summary of facts and procedural events supported by "ample references to the specific pages of the record, or tape and digital counter number. . . ." This information is critical to our review because we will not search a record for error. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

CR 76.12(4)(c)(v) requires an "ARGUMENT" which must contain "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." This information is also critical to our review because we are not authorized to consider questions on which a trial court has not ruled. *Stice v. Leonard*, 420 S.W.2d 672, 674 (Ky. 1967).

The eleven-page Brief for Appellant contains only two references to the record, both appearing in the argument portion of the brief, and two case citations. The four-page Reply Brief contains three references to the record and no legal authority. In light of the questions raised, so few record and case citations is unacceptable.

One of the issues identified by Watkins is whether a directed verdict should have been granted. Watkins knows whether he moved for a directed verdict, but we do not unless we are shown proof such a motion was made, where it was made, and the grounds on which it was requested. We could search the record and find the answer, but that is not our role and we will not take on the role of an advocate for one party—doing so would be unfair to the opposing party. *See Milby,* 580 S.W.2d at 727. Upon cursory review of the record we have determined no manifest injustice has occurred. *Elwell v. Stone,* 799 S.W.2d 46 (Ky. App. 1990) (citing *Massie v. Persson,* 729 S.W.2d 448 (Ky. App. 1987) *overruled by Conner v. George W. Whitesides Co.,* 834 S.W.2d 652 (Ky. 1992)).

Similarly, Watkins asks whether a JNOV motion should have been granted. Again, we are not told whether and where such a motion was made or the grounds on which it was requested. Just as we will not search the record for errors, neither will we search the record for arguments.

Watkins asks whether the jury instructions were proper. We ask, why does Watkins believe the instructions were flawed—an essential fact not explained in the Watkins brief. We also ask whether Watkins tendered instructions and if so, how similar were they to the ones given by the trial court.

The rest of the story is provided by Noe and K C & J Contracting, LLC, who say the instructions given by the trial court were "essentially the same as those proposed by [Watkins]." If that is the case, and we have no reason to doubt it is, one cannot propose an instruction and then complain when it is given. *Wright*

v. House of Imports, Inc., 381 S.W.3d 209, 214 (Ky. 2012). Noe and K C & J Contracting, LLC, further note Watkins did not tender an instruction on the counterclaim and more importantly, did not object to the instructions before they were given to the jury. Perhaps that explains why Watkins failed to provide the statement of preservation required by CR 76.12(4)(c)(v).

CR 51(3) is very specific on this point.

> 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.

There being no indication Watkins offered a different instruction, moved for different language, or objected before the jury was instructed, we have no option but to conclude the jury was properly instructed. *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 690 (Ky. App. 2009).

Citing *Combs v. Salyer,* 165 S.W.2d 40, 43 (Ky. 1942), Watkins asks this Court to reverse judgment on the counterclaim on a theory of estoppel by conduct. As with the other issues, Watkins fails to tell us whether and where this issue was preserved. Noe and K C & J Contracting, LLC, provide the answer—the theory was not argued to the trial court—therefore, it is unpreserved. Without a ruling by the trial court, we, as a Court of review, have nothing to review. *Knott County Bd. of Educ. v. Patton*, 415 S.W.3d 51, 56 (Ky. 2013); *Fischer v. Fischer,* 348 S.W.3d 582, 588 (Ky. 2011).

Additionally, this theory was not mentioned in the prehearing statement of appeal filed by Watkins, nor was a motion filed seeking leave to add issues pursuant to CR 76.03(8). We "will not consider arguments to reverse a judgment that have not been raised in the prehearing statement or on timely motion." *Wright*, 381 S.W.3d at 212 (quoting *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky. 2008)).

In another case with similar deficiencies, a panel of this Court wrote,

> none of the forty-three issues listed in the Mullinses' prehearing statement appears to directly correlate with the issues presented in the appeal. It has long been the rule in this Commonwealth that an appellant is limited to arguing the issues listed in his prehearing statement:
>
> > CR 76.03(4)(h) provides that within twenty days of filing a notice of appeal, an appellant must file a prehearing statement setting out a "brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional challenges[.]" CR 76.03(8) specifically provides that a "party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion."
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> *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004). In *Sallee*, this Court held that because the issue raised in the brief had not been listed in the prehearing statement or in a motion requesting permission to argue the issue, the issue was not subject to our review. *Id*.

Mullins v. Ashland Oil, Inc., 389 S.W.3d 149, 154 (Ky. App. 2012). We see no reason Watkins deserves a different fate and we will not consider the argument.

CR 76.12(4)(c)(v) requires ample case citations. Watkins cites only two cases. Missing is a basic citation to the applicable standard of review. We cannot deem this acceptable appellate practice.

Finally, in the reply brief, Watkins states,

> Regarding the appellants' claims of the defective construction of said dam and pond, the appellants had their day in Court and they accept the jury's adverse verdict denying recovery.

We take this statement to be a concession that two contracts were formed and neither was breached by Noe nor K C & J Contracting, LLC. Had we been inclined to review the sufficiency of the proof, we would not review the claim in light of this concession. The next statement in the reply brief reads:

> The jury's finding of the appellants' liability on the counterclaim, however, is not supported by the competent and probative evidence in the record and is clearly erroneous.

Despite the deficiencies in the Watkins brief, which would justify striking the brief in its entirety, *Mullins,* 389 S.W.3d at 154, we have instead conducted the limited review permitted by *Elwell.* In light of the evidence introduced by Noe and K C & J Contracting, LLC, and the jury's consideration of that proof, we discern no grounds for relief. *Bierman v. Klapheke*, 967 S.W.2d 16, 19 (Ky. 1998) (jurors determine what evidence to believe and what to doubt). Here there was no indication of a verdict resulting from passion or prejudice. *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988).

For the foregoing reasons we affirm the judgment and order entered by the Whitley Circuit Court.

J. LAMBERT, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY.

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