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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001534-MR

KEVIN M. ADAMS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 10-CI-002820

HARGADON, LENIHAN & HERRINGTON, PLLC; A. NEAL HERRINGTON; AND CHRIS MORRIS — APPELLEES

OPINION
REVERSING & REMANDING

** ** ** ** **

BEFORE: ACREE, JONES, AND TAYLOR, JUDGES.[1]

[1]A brief note on the procedural history of this appeal is necessary to explain the delay in this opinion's rendition. The notice of appeal in this case was filed on September 6, 2012. Shortly thereafter, the appellees moved to dismiss the appeal. That motion was denied by order entered February 12, 2013. Appellees filed a second motion to dismiss the appeal in March of 2013, which was denied the following August. In March of 2014, appellees Neal Herrington and Christopher Morris moved to dismiss the appeal against them as individuals, and in May of 2014, appellee Hargadon, Lenihan & Herrington moved to dismiss the appeal against it. Herrington's and Morris's motions were passed to the merits panel, and Hargadon, Lenihan &

JONES, JUDGE: Appellant, Kevin Adams, appeals the entry of summary judgment in favor of Appellees on his claim of entitlement to a share of the attorney's fees collected in the settlement of a personal injury and wrongful death action. While there are certainly facts in the record that support a judgment in favor of the Appellees, we cannot agree with the circuit court that the record is so one-sided that it would be impossible for Adams to prevail. The evidence is in conflict with respect to whether Adams and Appellees entered into an enforceable fee-sharing agreement, making resolution by summary judgment inappropriate. Accordingly, we REVERSE the circuit court's judgment in favor of Appellees and remand this matter for further proceedings.

I. BACKGROUND

The action that forms the basis for Adams's claim stems from a tragic fire that took the lives of Tracey Whitney, her three children, and Gary and Elizabeth Matheny on February 17, 2003. It is undisputed that approximately two

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Herrington's motion was denied. Because of issues concerning Adams's reply brief and supplementation of the record—which are discussed in greater detail in the body of this opinion—the appeal was then held in abeyance for thirty days by order entered March 23, 2015. Several motions to continue the abeyance were subsequently filed, resulting in the appeal being held in abeyance until April 29, 2016. On August 17, 2017, the appeal was assigned on the merits to a panel with Judge Debra Lambert serving as presiding judge. Judge Lambert was sworn in as a Justice of the Kentucky Supreme Court in early 2019. As an opinion had not yet been rendered in this appeal, Special Judge Michael Henry was substituted as the presiding judge on March 8, 2019. Special Judge Henry's term as special judge ended on April 24, 2019; no opinion had been rendered in this appeal at that time. On May 3, 2019, Judge Allison Jones was substituted as presiding judge in this appeal, with Judges Glenn Acree and Jeff Taylor serving as associate judges.

years before the fire, Adams contracted with Whitney to represent her, as next friend of one of her children, in a case against her landlord (the "Landlord Case"). Adams brought in Chris Morris, an attorney with Hargadon, Lenihan and Herrington ("HLH") to act as co-counsel on the Landlord Case. Record (R.) 1389. During the pendency of that action, Adams began working for a new law firm and Morris became lead counsel on the Landlord Case. Morris and Adams agreed that Adams would receive one-third of any fee recovered in the Landlord Case. Following Whitney's untimely death, however, the Landlord Case was dismissed.

After the fire, Morris contacted putative clients for the purpose of representing them in a wrongful death action (the "Fire Case"). The putative clients were the decedents' families—Mamie Cook, Allen Caraway, Brian Hall, and Earlena Hall—who collectively constitute all of the plaintiffs in the Fire Case. The parties dispute how Morris came to make this contact. Adams testified in his deposition that he informed Morris that the fire had occurred, gave Morris Cook's telephone number so that Morris could contact her, and suggested that Morris attend Whitney's funeral. Additionally, Adams testified that he later called Cook at Morris's request to verify that Cook had met Morris and to vouch for Morris as an attorney. In contrast, Morris testified that he learned about the fire from the Louisville Courier-Journal and immediately contacted the putative clients and drove to Madisonville to meet them. Morris acknowledged that he did have a

conversation with Adams about the fire but testified that this conversation occurred after he had already met with the putative clients.

On May 14, 2003, Adams sent a fee-splitting contract (the "Contract") to Neal Herrington, a partner at HLH. At this time, Morris was not a partner at the firm, making Herrington the appropriate person to sign on the firm's behalf. Herrington promptly executed and returned the Contract to Adams; it does not appear that either Herrington or Morris took any umbrage with respect to Adams's assertions that he assisted Morris in securing the representation or his apparent belief that he would be providing some assistance to them in prosecuting it.

The Contract, which Adams drafted and Herrington signed and returned to Adams, provides as follows:

> In re: Madisonville Fire which claimed the lives of Tracey Whitney, Majellica Pallacios, Adrian Pallacios, and Cristian Caraway, Gary & Elizabeth Matheny
>
> I, A. Neal Herrington, agree to tender one-third of any attorney fee recovered in the six (6) above cases which arose from a fire in Madisonville, Kentucky, to Kevin M. Adams in consideration of the work he did in prosecuting and securing the cases.

R. 948. The Contract was appended to a letter from Adams to Herrington:

> Dear Neal:
>
> I hope this letter finds you doing well. I wanted to drop you a line regarding the above cases. As you will recall, I referred the premises liability case of Tracey Whitney and her son Cristian [sic] Caraway to you last fall. At

first, I stayed on the case in order to assist [Morris] in the prosecution of that case. However, in the course of my move from my old firm, I referred the case outright to your firm in consideration of one-third of the fee from that case.

I was shocked to hear of the fire that claimed the lives of Tracey and her family on February 17, 2003. [Morris] and I immediately realized that the family would need counsel in that faulty wiring was blamed for the tragedy. I called Tracey's sister and mother, whom I had spoken with before, in order to express my condolences and to let them know that we would be glad to advise them regarding the fire. ***Tracey's family was very receptive to me and I know you and [Morris] have been working very hard on the case ever since.***

[Morris] and I have spoken many times regarding my referral fee of one-third in the six (6) cases listed above. As you can understand, this case may generate a substantial amount of revenue and I would like to get a short[,] signed statement from you regarding this matter. I wanted to discuss this in person and I have tried to get a lunch meeting with you and [Morris] but you are both obviously very busy.

I think very, very highly of you and I would love to work with you more extensively in the future. That is why I wanted to get something in writing so that I can rest easy regarding this matter. ***I check in with Tracey's mother from time to time and she is under the understanding that I am working these cases with you.*** I've let her know that you and [Morris] are the lead counsel and that you are one of the most experienced and talented trial lawyers in this area.

I'm [sic] prepared a short confirmation of my referral fee in this matter for you to review. If you could look it over and return to me in the envelope provided, I would very much appreciate it. I'm sure you can understand that my

> family's financial security is riding on this case and that's why I'd like to get some peace of mind regarding this.

R. 1511-12 (emphases added).

The letter indicated that Morris was copied on the letter, and Adams later testified that he personally mailed a copy of the letter to Morris and called Morris to tell him that he was sending the letter. However, both Morris and Herrington testified that Morris was unaware of the letter and the Contract until the parties were mediating settlement of the Fire Case. Herrington also testified that he signed the Contract because he trusted the truth of Adams's representations in the letter, but subsequently learned from Morris that those representations were false. It does not appear, however, that Herrington made any effort to ascertain the truth of the facts from speaking with Adams, Morris, or the clients at issue before signing and returning the agreement to Adams.

On February 13, 2004, a complaint was filed in the Hopkins Circuit Court on behalf of the decedents' families. Attorneys from HLH, including Morris and Herrington, were listed as counsel of record. The same day that the complaint was filed, Morris mailed a copy of it to Adams. R. 1704. In the cover letter attached to the copy of the complaint, Morris informed Adams as follows:

> I'm sorry for the delay in mailing you a copy of the Complaint in this matter. Enclosed please find a copy of the Complaint that we have filed in the Hopkins County Circuit Court. I also sent a courtesy copy to the adjuster from Ohio Casualty and inquired if she is interested in

> discussing settlement in this matter due to the egregious behavior on all parties.
>
> If not, then we will proceed with other litigation int his [sic] matter. Neal, Eric[,] and I are working on the case, and we have already come up with a good set of Interrogatories and Requests for Production. I hope this eases your mind about the matter. Thank you for your consideration in this matter.

While Morris's letter did not explicitly refer to the prior referral agreement and its accompanying letter from Adams to Herrington, its use of the phrase "eases your mind about the matter" is very similar to Adams's statement in his letter to Herrington that he wanted a signed referral agreement in place to provide him with "some peace of mind." The letter also apprised Adams about key developments in the litigation such as settlement discussions with the insurance adjuster and discovery.

On February 3, 2006, Adams contacted Morris via email to suggest hiring a vocational expert. Morris responded the next day, informing Adams that he had already hired a vocational expert and that the damages for all victims were approximately $2.3 million. Important to the dispute at hand, Morris did not question Adams regarding his continued interest in the case or ignore the inquiry. Instead, Morris again responded with case-related updates, including an approximate damages figure. While not explicit, when viewed in a light most

favorable to Adams, this could be seen as an attempt to provide Adams with some expectation of his potential referral fee in the case.

In late February and in early March of 2006, Adams sent Morris links to articles regarding different litigation where individuals had been killed in fires. This conduct suggests Adams believed he was assisting with the litigation. This time, Morris did not respond.

Claims against the defendants in the Fire Case were ultimately settled and dismissed. In April of 2006, after HLH refused to pay Adams's claim for one-third of the fee collected in the Fire Case, Adams filed notice that he was asserting an attorney's lien. The Hopkins Circuit Court ordered that one-third of the fee HLH collected in the Fire Case be deposited into court. Thereafter, HLH filed several motions with the circuit court seeking to dismiss Adams's notice of intent to claim an attorney's lien, as it contended that Adams had not complied with the proper procedure to claim a lien. In February of 2008, Adams was granted leave to file an intervening complaint against Morris, Herrington, and HLH (collectively referred to as the "Appellees"), in which he alleged breach of contract. Concurrent with his intervening complaint, Adams filed a motion for summary judgment and a motion to hold discovery in abeyance. In September of 2008, Adams's motion for summary judgment was denied. Adams filed a CR[2] 59.05 motion to vacate the

[2] Kentucky Rules of Civil Procedure.

denial of summary judgment, which was denied in January of 2009. The parties agreed to transfer the action to the Jefferson Circuit Court by order entered April 8, 2010.

Following transfer to Jefferson County, the parties continued to engage in discovery. In August of 2010, Adams moved for partial summary judgment on the issue of whether the Contract was valid and enforceable. In the memorandum accompanying his motion, Adams alleged that pertinent facts were undisputed: he and HLH had represented Whitney in the Landlord Case prior to Whitney's death; he and Morris had spoken with members of Whitney's family following the fire to inquire whether they wished to pursue an action based on the fire; Whitney's family had contracted for HLH to pursue the Fire Case; Herrington had signed the Contract on behalf of HLH; and HLH was now refusing to honor the Contract. Adams argued that the terms of the Contract were plain and unambiguous and that the Contract was clearly enforceable.

Adams's deposition was taken in late January of 2011 and Appellees filed a motion for summary judgment the following February. Appellees contended that it was undisputed that none of the plaintiffs in the Fire Case had ever entered into any contract with Adams, but that all of the plaintiffs had contracted directly with HLH to provide representation. Further, Appellees noted that Adams had testified in his deposition that he had never appeared in the Fire

Case, had not been co-counsel in the Fire Case, and had not drafted any pleadings in the Fire Case. Appellees agreed with Adams that the terms of the Contract were plain and unambiguous, in that the Contract clearly provided that Adams was entitled to a fee for the work he did in "prosecuting and securing" the Fire Case. Based on Adams's testimony, however, Appellees contended that it was clear that Adams had neither "prosecuted" nor "secured" the Fire Case. Appellees quoted a portion of Adams's deposition testimony, in which Adams had testified that he believed he had prosecuted and secured the Fire Case by bringing Morris and Herrington "on board" in the Landlord Case and by "vouching for" Morris and Herrington to Cook in telling her that Morris and Herrington were "good folks" that would do a "good job."

Additionally, Appellees argued that the Contract was unenforceable because it was not supported by new consideration, but was rather based on past consideration—the work Adams "*did* in prosecuting and securing" the Fire Case. Appellees noted that Adams had testified to his belief that, at the time Herrington signed the Contract, he was not obligated to perform any further work related to the Fire Case. Further, Adams's own expert had given the opinion that "the agreement was based on retrospective work" that Adams did. Appellees also contended that the Contract could not be enforced because it violated SCr[3] 3.130,

[3] Kentucky Supreme Court Rules.

which requires that a client be advised of and consent in writing to division of fees among attorneys. Finally, Appellees argued that, at the very least, Morris and HLH were entitled to summary judgment because neither had been parties to the Contract. Appellees attached as exhibits affidavits of Brian Hall, Allen Caraway, and Earlena Hall, in which each swore that they had never met or spoken to Adams and had not consented to the fee division.

Appellees renewed their motion for summary judgment in February of 2012, and filed an AOC-280 form with the circuit court indicating that the matter was ready for submission. On March 6, 2012, Adams filed a motion for a briefing schedule, contending that he could not respond to Appellees' motion for summary judgment until he received transcripts of Herrington's and Morris's depositions. The circuit court entered an order granting Adams ten days from receipt of the transcripts of Herrington's and Morris's depositions to file a response to Appellees' motion for summary judgment. On March 21, 2012, Adams notified the circuit court that he had received transcripts of Herrington's and Morris's depositions that day.

Despite its order granting Adams an extension of time to respond to Appellees' summary judgment motion, on March 30, 2012, the circuit court entered an order granting Appellees summary judgment. The circuit court concluded that the Contract must be construed against Adams, as he had drafted it.

In examining the terms of the Contract, specifically the terms "securing" and "prosecuting," the circuit court noted that those terms had not been defined. The circuit court noted that Black's Law Dictionary did not define "secure," but defined "prosecute" as meaning "[t]o commence and carry out a legal action." Adams's deposition testimony indicated that the extent of his involvement in the Fire Case had been a few calls to Morris, and all plaintiffs in the Fire Case had testified that they had no contact with Adams. Accordingly, the circuit court concluded that Adams had neither commenced nor carried out the Fire Case and, therefore, had not prosecuted the Fire Case as required by the terms of the Contract. Further, the circuit court concluded that there had been no consideration for the Contract because the consideration clause cited only Adams's past performance. Finally, the circuit court concluded that Herrington's signing the Contract did not bind Morris or HLH.

On April 2, 2012, Adams filed a response to Appellees' motion for summary judgment and a counter-motion for summary judgment. Adams reiterated that Herrington did not dispute that he had signed the Contract and that, while Morris disputed Adams's claims that they had had multiple conversations about the Fire Case, Morris did not dispute that he had sent a copy of the complaint to Adams after Adams requested that he do so. Adams argued that the Contract was clear, and that the words "secure" and "prosecute" were irrelevant. Rather,

Adams contended that Appellees were now estopped from challenging consideration because Herrington had already signed the Contract. Alternatively, Adams contended that Appellees were incorrect as a matter of law in their assertion that past performance was insufficient consideration to support a contract.

On April 4, 2012, Adams filed a CR 59.05 motion seeking to vacate the circuit court's order granting summary judgment on the grounds that the circuit court issued the order prior to the date on which he was required to respond to Appellees' summary judgment motion. The circuit court granted Adams's motion and set aside the summary judgment as prematurely entered. On May 15, 2012, the circuit court again granted summary judgment to Appellees, entering an order identical to the March 30, 2012, order granting summary judgment. Adams then filed another CR 59.05 motion. Citing to numerous errors made by the circuit court in its order, Adams contended that it was clear that the circuit court had read neither his response to Appellees' motion for summary judgment nor the transcripts of Morris's and Herrington's depositions. Appellees thereafter moved to correct factual inaccuracies in the May 15, 2012, order and requested an order releasing the funds that had been escrowed. The circuit court heard oral arguments on these motions in July of 2012.

Although conceding the factual and procedural errors cited by the parties in their motions, the circuit court entered an August 7, 2012, order denying

Adams's motion to alter, amend, or vacate; granting Appellees' motion to correct factual inaccuracies in its previous opinion; and ordering that the funds escrowed in the Fire Case be released. In denying Adams's motion, the circuit court specifically noted that the deposition testimony he cited in support of his motion had not been filed of record, emphasizing that the court's only access to that testimony had been through portions quoted in documents filed by the parties. The circuit court succinctly set out the bases for its holding that summary judgment in favor of Appellees was proper as a matter of law:

> The Court's rulings have been based primarily on the deposition testimony of Adams, in which he was repeatedly unable to cite facts supporting his claim that he was instrumental in securing and prosecuting the case.
>
> The results of the Herrington and Morris depositions do not change this finding. The Court has located a document produced in discovery from the Hopkins County case dated August 23, 2002[,] which names Adams as "co-counsel."[4] Thereafter, there is no further evidence of Adams' [sic] involvement until an e-mail string in February of 2006 in which Adams suggests the use of a vocational expert. Morris had already employed such an expert. Finally, in Herrington's deposition[,] he expressed a willingness to pay Adams. While one might draw the inference that Adams was involved in the case, this evidence certainly does not rise to the level of affirmative evidence necessary to defeat a properly supported motion for summary judgment.

[4] The document to which the circuit court refers was filed in the Landlord Case, not the Fire Case.

> Once again, the Court cites the case of *Breckinridge County v. Beard*, [233 Ky. 823,] 27 S.W.2d 427 (Ky. 1930)[,] which holds that in order to recover under a contract there must be performance. Further, the Court relies upon *Sawyer v. Mills*, 295 S.W.3d 79 (Ky. 2009)[,] for the proposition that past consideration is insufficient to support a promise. Thus, if it could be shown that Adams "secured" the case by "vouching" for Morris and HLH, he did so before the execution of the contract. Of course, as argued by HLH, the contract having been drafted by Adams, it must be strongly construed against him, see *Mammoth Cave National Park Ass'n v. Whittle & Demunbrum*, 70 S.W.2d 990 (Ky. 1934).

R. 2215.

Adams filed a timely notice of appeal citing only the August 7, 2012, order denying his CR 59.05 motion to alter, amend, or vacate. Following the filing of the notice of appeal, significant motion practice ensued, which has added to the procedural complexity of this case. In September of 2014, Adams filed his reply brief with this Court, to which he attached copies of Herrington's and Morris's depositions. This precipitated Appellees' motion to strike Adams's reply brief. In response to Appellees' motion to strike, Adams filed a motion to supplement the record with Herrington's and Morris's depositions. This Court determined that the circuit court was in the best position to determine whether it was appropriate to include the depositions in the record; accordingly, it abated the appeal for thirty days and provided Adams ten days to move the circuit court to correct or supplement the record.

Adams did so, and, on April 6, 2015, a substitute judge summarily granted the motion to supplement the record with Morris's and Herrington's depositions. Appellees moved the circuit court to reconsider that order, alleging that the substitute judge had failed to afford it a hearing on the motion to supplement and that the regular sitting judge on the case was in the best position to determine whether supplementation of the record was appropriate. On Appellees' motions, this appeal remained in abeyance. By order entered March 18, 2016, the regular circuit court judge determined that Morris's and Herrington's depositions should be included in the record on appeal. In so concluding, the circuit court stated as follows:

> The Court did not have access to the depositions of Christopher Morris and A. Neal Herrington at the time it reached its decision on the issue of summary judgment. At no time was this Court asked for leave to file depositions in their entirety as part of the record, as required by the General Order cited by Adams herein. In spite of Adams' [sic] affidavit testimony indicating that he filed those depositions on April 2, 2012[,] and then again on August 7, 2012, those materials were not *physically* in the Court's file. The Court relied on the testimony cited in the parties' memoranda, most particularly the deposition of *Adams.* However, this Court is cognizant of the need for the appellate court to have the entire record before it so that it may consider, *not just what this Court used as a basis for its decision, but perhaps what it should have considered.*

R. 2292 (emphases in original).

Upon receipt of the circuit court's order, this Court restored the appeal to its active docket, ordered the circuit clerk to prepare a supplemental certification in accordance with the circuit court's order, and directed the parties to file memoranda addressing issues stemming from the circuit court's orders of April 6, 2015, and March 18, 2016.[5] Upon receipt of the supplemental record and the filing of the ordered memoranda, the appeal was finally ready for review.

II. STANDARD OF REVIEW

While Adams's briefs to this Court address only the circuit court's order granting summary judgment to Appellees, his notice of appeal failed to mention that order, instead designating only the circuit court's August 7, 2012, order denying his CR 59.05 motion. Accordingly, Appellees contend that this Court's review is limited to whether the circuit court abused its discretion in denying Adams's CR 59.05 motion. We disagree.

When a party erroneously designates an order denying CR 59.05 relief in his or her notice of appeal, we utilize a substantial compliance analysis and

[5] In their supplemental brief to this Court, Appellees note that the circuit court's March 18, 2016, order explicitly found that Adams had not followed the proper procedure to make Morris and Herrington's depositions part of the record prior to the circuit court ruling on Appellees' motion for summary judgment. Although we agree with Appellees that it was incumbent upon Adams to ensure that the record before the circuit court was sufficient for it to rule on the summary judgment motion, it is apparent from a review of the August 7, 2012, order that the circuit court did consider the depositions at least to the extent that they were quoted in the parties' pleadings. We have therefore reviewed the depositions of Herrington and Morris in our consideration of this appeal.

consider "the appeal properly taken from the final judgment that was the subject of the CR 59.05 motion." *Tax Ease Lien Invs. 1, LLC v. Brown*, 340 S.W.3d 99, 103 n.5 (Ky. App. 2011). In this case, the final judgment that was the subject of Adams's CR 59.05 motion is the May 15, 2012, order granting Appellees' motion for summary judgment.

"The circuit court's decision to grant summary judgment is reviewed *de novo*." *Harstad v. Whiteman*, 338 S.W.3d 804, 809-10 (Ky. App. 2011) (citing *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001)). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest Inc. v Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "The party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

III. ANALYSIS

On appeal, Adams contends that the circuit court erred as a matter of law in concluding that the Contract was unenforceable. In support of this contention, Adams argues that the Contract is plain and unambiguous, that the circumstances surrounding execution of the Contract demonstrate that there was a meeting of the minds, and that there was sufficient consideration to support the Contract.

"The fundamental elements of a valid contract are 'offer and acceptance, full and complete terms, and consideration.'" *Energy Home, Div. of Southern Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 834 (Ky. 2013) (quoting *Commonwealth v. Morseman*, 379 S.W.3d 144, 149 (Ky. 2012)). "[A]n enforceable contract must contain definite and certain terms setting forth promises of performance to be rendered by each party." *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997) (citing *Fisher v. Long*, 294 Ky. 751, 172 S.W.2d 545 (1943)). "Mutuality of obligations is an essential element of a contract, and if one party is not bound, neither is bound." *Id.* (citing *Morgan v. Morgan*, 309 Ky. 581, 218 S.W.2d 410 (1949)).

When interpreting a contract, the primary objective is to effectuate the parties' intent. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). "Any contract or agreement must be construed as a whole,

giving effect to all parts and every word in it if possible." *Id.* at 384-85 (quoting *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986)). "Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties." *Id.* at 385 (citations omitted). If the contract is unambiguous, however, we must discern the parties' intent "from the four corners of the instrument, without resort to extrinsic evidence." *Id.* (citing *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000); *L.K. Comstock & Co., Inc. v. Becon Const. Co.*, 932 F. Supp. 948, 964 (E.D. Ky. 1994)). "A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Id.* (citing *Transport Ins. Co. v. Ford*, 886 S.W.2d 901, 905 (Ky. App. 1994); *Luttrell v. Cooper Indus., Inc.*, 60 F. Supp. 2d 629, 631 (E.D. Ky. 1998)). "A writing is interpreted as a whole and all writings that are part of the same transaction are interpreted together." *Cook United, Inc. v. Waits*, 512 S.W.2d 493, 495 (Ky. 1974).

The Contract itself is short and simple. It provides that Herrington will pay Adams one-third of any fee recovered in the Fire Case "in consideration of the work [Adams] did in prosecuting and securing the [Fire Case]." In interpreting the Contract, the circuit court looked only to this one sentence. The

circuit court correctly noted that the words "prosecuting" and "securing" were undefined in the Contract, and that those terms could be susceptible to multiple meanings. The circuit court did not, however, consider the cover letter that was appended to the Contract. Rather, after determining that the terms "prosecuting" and "securing" were ambiguous, the circuit court supplied definitions for those terms from the dictionary. "Non-technical words generally are to be understood in their ordinary and popular sense, *unless the intent of the parties to use them otherwise is shown clearly from the context*." *Bradford v. Billington*, 299 S.W.2d 601, 604 (Ky. 1957) (emphasis added) (citing *Spring Garden Ins. Co. v. Imperial Tobacco Co.*, 132 Ky. 7, 116 S.W. 234 (1909)).

Considering the context—specifically, the cover letter appended to the Contract—it does not appear that the parties intended that the terms "prosecuting" and "securing" carry the traditional meaning, or dictionary definition, ascribed to them. The cover letter makes no reference to Adams's prosecuting or securing the Fire Case. Rather, the cover letter characterizes the fee due to Adams as a "referral fee." The cover letter indicates that Adams's entitlement to the fee is based on his contacting Whitney's family to advise them that HLH would consult with them about possible claims arising from the fire and on Adams's vouching for Morris and Herrington to Whitney's family. Considering the Contract together with the cover letter, it appears that the parties intended the terms "prosecuting" and

"securing" to mean "referring." This is the most logical interpretation since, at the time Adams sent the letter, no formal suit had been filed in the matter.

The parties' testimony supports this understanding. In an affidavit sworn by Herrington on July 9, 2008, and attached to one of Appellees' motions for summary judgment, Herrington avers that he considered the letter and the Contract to constitute one document. R. 1506. Herrington testified in his deposition that his understanding of the Contract and cover letter was that "if [Adams] referred the case in and [HLH] did work on it, then [Adams is] entitled to be paid a referral fee." Herrington Dep. 26:2-7. Adams testified that—despite the fact that he had drafted the Contract to include the term "prosecuting"—he did not believe that he was ever required to prosecute the Fire Case under the terms of the Contract. Adams Dep. 176:16-22. Adams believed that he had performed under the Contract by "working on the [L]andlord [C]ase, [by] originating this [the Fire Case] to [HLH], and vouching for [HLH]. . . ." *Id.* at 175:6-25.

As explained by the circuit court in its opinion, there are facts of record that support Appellees. However, having reviewed the totality of the record, we cannot agree that the facts are so one-sided that Appellees were entitled to judgment as a matter of law. When viewed in a light most favorable to Adams, the facts could support a finding by a jury that Adams assisted in securing the representation at issue. Thereafter, Adams presented Appellees with a contract

setting out the terms of a referral-fee agreement, which was accepted. Thereafter, Morris engaged in conduct consistent with the existence of a valid agreement, including sending Adams a copy of the complaint, responding to questions about the litigation, providing him with information about their discussions with the adjuster, and giving a damages estimates. While not conclusive, these facts are certainly suggestive of Morris believing a referral agreement was in place. They are sufficient to overcome summary judgment and place the issue before a jury.[6]

IV. CONCLUSION

Based on the foregoing, we REVERSE the order of the Jefferson Circuit Court granting summary judgment in favor of Appellees, and REMAND this matter for further proceedings.

TAYLOR, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING IN RESULT ONLY: I concur with the majority because the evidence of record when the summary judgment was granted did not "show that there is no genuine issue as to any material fact";

[6] We note that Kentucky's Rules of Professional Responsibility contain certain provisions regarding fee sharing, including client consent. While the Appellees have pointed out that there was no client consent to the agreement, it is unclear to us, based on the record, whose responsibility it was to obtain client consent. Most importantly, however, neither this Court nor the circuit court has jurisdiction to determine issues related to whether the lawyers violated any ethical rules associated with the alleged referral fee agreement.

therefore, Hargadon, Lenihan & Herrington is not "entitled to a judgment as a matter of law." CR 56.03.

However, I do not agree that reversal can be based on parts of depositions that were not in the record when the trial court performed its duty to rule on the motion. To the extent the majority opinion bases reversal on such evidence, I can only concur in the result.

BRIEFS FOR APPELLANT:	BRIEFS FOR APPELLEES:
Garry R. Adams Louisville, Kentucky	A. Neal Herrington Christopher H. Morris Louisville, Kentucky