

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000956-MR

KATHERINE KISCADEN

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 16-CI-00043

CAM MINING LLC AND  
THOMAS B. RATLIFF TRUST

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: GOODWINE, JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: Katherine Kiscaden appeals from the May 9, 2017, judgment of the Pike Circuit Court dismissing her action against CAM Mining, LLC (“CAM”), and the Thomas B. Ratliff Trust for a lack of jurisdiction. Following a careful review, we affirm.

On December 23, 1996, Kiscaden and several of her relatives entered into a Surface Lease Agreement (“Lease”) with Costain Coal, Inc., granting Costain the right to surface mine property they owned in Pike County, Kentucky. One tract leased to Costain was jointly owned by Kiscaden, her family, and Costain.<sup>1</sup> Other tracts of surface property were wholly owned by Costain. After mining operations concluded, Costain was to transfer its 62.5% ownership interest in the jointly held tract to Kiscaden and her relatives, and two of its wholly owned tracts solely to Kiscaden. The Lease expired for coal mining purposes on December 23, 2003.

The parties executed a Memorandum of Surface Agreement (“Memorandum”) which was recorded in the Pike County Court Clerk’s Office setting forth the duration of the lease; briefly describing the mining rights and privileges accruing thereunder; and, rather than setting forth any terms and conditions, instead directed reference to the Lease as the appropriate manner to ascertain the full terms and conditions. No mention of the transfer obligations appeared in the Memorandum. The Lease itself was never recorded.

Costain subsequently merged with Lodestar Energy, Inc. By 2001, financial woes forced the company to file for bankruptcy protection. Initially, the

---

<sup>1</sup> Kiscaden and her family owned a 37.5% interest and Costain owned the remaining 62.5%.

bankruptcy filing sought to restructure but when those plans failed, the matter was converted to a liquidation in 2003. Kiscaden was not listed as a creditor and did not receive notice of any of the bankruptcy proceedings.

On May 22, 2003, the bankruptcy court entered an order authorizing the sale of Costain/Lodestar's assets free and clear of any liens, claims, and encumbrances. On May 30, 2003, the bankruptcy Trustee executed a Trustee's Deed transferring Costain's interest in fifty-two tracts of real estate to CAM, including the tracts referenced in the Lease. That same day, the Trustee executed an Assignment of Leases assigning a number of leases held by Costain to CAM. The Lease at issue in this matter was not assigned to CAM.

Over five years later, on July 7, 2008, Kiscaden, by counsel, sent a letter to CAM requesting conveyance of the three tracts of land as contemplated under the Lease. CAM responded and indicated it had not assumed the Lease nor any obligations contained therein. CAM indicated all assets it had purchased were "free and clear of liens, claims and encumbrances" and instructed Kiscaden to direct further inquiries regarding the Lease to Costain's bankruptcy Trustee. Kiscaden took no immediate action.

CAM sold several tracts of land to the Thomas B. Ratliff Trust on February 29, 2012. The properties described in the Lease were included in this sale.

On November 16, 2015, Kiscaden's counsel again sent a letter to CAM, this time alleging Costain's bankruptcy did not alter the obligation under the Lease, CAM had purchased the Lease, and the obligation to convey the three tracts of land "is about to mature." The letter also accused CAM of violating the provisions of the Lease by conveying at least a portion of the properties to "either Landmark Mining or some of Thomas Ratliff's family." It went on to demand conveyance of the subject properties to Kiscaden "as soon as practical" after regulatory releases were secured.

When no relief was forthcoming, Kiscaden filed the instant action asserting CAM had become the holder of the Lease and failed to fulfill the transfer obligations required thereunder. She alleged her interest in the properties was superior to the Ratliff Trust and sought immediate conveyance of the subject properties pursuant to the terms of the Lease. Alternatively, she demanded the properties be sold and the proceeds be divided among the parties according to their respective interests. Following a brief period of discovery, CAM and the Ratliff Trust moved for summary judgement. The trial court passed consideration of the motions and convened a bench trial on December 15, 2016. At the conclusion of trial, the trial court directed the parties to submit proposed findings of fact and conclusions of law. All parties complied.

On May 9, 2017, the trial court entered its findings of fact, conclusions of law and judgment dismissing the action based on a lack of jurisdiction. The trial court concluded Kiscaden was asking it to reverse the bankruptcy court's 2003 order approving the Trustee's deed, an improper request as the bankruptcy court "retain[ed] jurisdiction to enforce and implement the terms and provisions" of the sale of Costain's assets to CAM. It found the proper forum for Kiscaden to seek relief was—and remained—in the bankruptcy court, and her attempt to circumvent that court's authority a decade and a half after it had entered a final order was improper. The trial court specifically found Kiscaden was on constructive notice of the bankruptcy proceedings when the Trustee's Deed was filed of record in June of 2003; the Memorandum was insufficient to constitute notice of Costain's obligations under the Lease; CAM never assumed the Lease or any of its obligations; and it was wholly without jurisdiction to amend, modify, or change the bankruptcy court's rulings in any way. The trial court dismissed the action with prejudice, but noted it was in no way attempting to preclude Kiscaden from pursuing her claims in the bankruptcy court. This appeal followed.

Kiscaden asserts three allegations of error she believes warrant reversal. Our review of the record reveals she is not entitled to the relief she seeks. Therefore, we affirm the trial court's dismissal.

Initially, in contravention of CR<sup>2</sup> 76.12(4)(c)(v), Kiscaden does not state how she preserved any of her arguments in the trial court.

CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

*Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation:

so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

*Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012). Kiscaden has not requested palpable error review.

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory.

*See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010).

---

<sup>2</sup> Kentucky Rules of Civil Procedure.

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.”

*Id.* (quoting *Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007)).

While noncompliance with CR 76.12 is not automatically fatal, in these situations, the Court of Appeals has three options: “(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.” *Id.* (citing *Elwell*, 799 S.W.2d at 47). In considering these options, we cannot disregard the serious and fundamental procedural deficiencies contained in Kiscaden’s brief.

In addition to the noted procedural deficiencies of Kiscaden’s brief, our review is further hampered by the incomplete nature of the record on appeal. Although multiple hearings and a non-jury trial occurred, no recordings of any of these proceedings were included in the certified record. Although the parties cite to specific testimony proffered at the trial, as well as the digital counter number where such testimony could be located, no copy of the videotape has been provided to us, though it appears it should have been certified by the clerk and

transmitted to us as part of the appellate record. CR 98(2).<sup>3</sup> Although the trial court clerk is responsible for preparing the record, the appellant has the legal responsibility to see that the record is prepared and certified by the clerk within the prescribed time period. CR 75.07(5). It is the duty of the appellant to ensure the record on appeal is “sufficient to enable the court to pass on the alleged errors.” *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky. 1968). Therefore, we cannot review the actual testimony, but rather, “must assume that the omitted record supports the decision of the trial court.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). While there may be documentation or evidence supporting her claims, because they were not made a part of the record they cannot be considered on appeal. It is axiomatic that the burden of creating a complete record falls squarely on the party challenging an action of a lower court. “Prejudice will not be presumed from a silent record.” *Baze v. Commonwealth*, 965 S.W.2d 817, 824 (Ky. 1997) (citing *Walker v. Commonwealth*, 476 S.W.2d 630, 631 (Ky. 1972)).

In her first argument, Kiscaden engages in a detailed discussion of the law concerning constructive notice and the “duty of inquiry.” While her

---

<sup>3</sup> In pertinent part, CR 98(2) states: “[u]pon the filing of a notice of appeal, one of the two video recordings, or a court-certified copy of that portion thereof recording the court proceeding being appealed shall be filed with the clerk and certified by the clerk as part of the record on appeal.”

statements of the law are generally correct, no genuine effort is made to tie those statements to the present controversy. Further, we are unable to locate anywhere in the record where Kiscaden presented this line of argument to the trial court. Thus, because the trial court was not first offered an opportunity to rule, Kiscaden may not raise the matter for the first time on appeal. *Elwell*, 799 S.W.2d at 48.

Kiscaden's final two arguments are inextricably intertwined and will be discussed as one. Like her previous argument, Kiscaden includes a detailed discussion of basic legal principles with little analysis or application to the instant facts. Nowhere does she indicate any allegation of error on the part of the trial court. Rather, she challenges actions taken many years earlier in the bankruptcy action. To the extent any of her assertions relate to the matters at bar, they are based on her mistaken belief that CAM assumed the Lease and its obligations or that the Lease somehow "rode through" Costain's bankruptcy proceedings and the obligations automatically attached to CAM. Her claims are without merit.

As the trial court correctly concluded, Kiscaden was improperly attempting to set up her claims after taking no action for nearly fifteen years. The proper jurisdiction for her claims was in the bankruptcy court, and her complete failure to seek relief from that court's ruling could not in any way be seen to confer jurisdiction on the Pike Circuit Court. There was no error.

For the foregoing reasons, the judgment of the Pike Circuit Court is  
AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lawrence R. Webster  
Pikeville, Kentucky

BRIEF FOR APPELLEE CAM  
MINING LLC:

Charles J. Baird  
Pikeville, Kentucky

BRIEF FOR APPELLEE THOMAS  
B. RATLIFF TRUST:

Donald H. Combs  
Pikeville, Kentucky