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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000251-MR

IGNACIO TORIBIO and
GLORIA TORIBIO — APPELLANTS

v.

APPEAL FROM HENDERSON CIRCUIT COURT,
HONORABLE KAREN WILSON, JUDGE
ACTION NO. 11-CI-00617

RM SPECIALTIES, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER, AND MAZE, JUDGES.

KRAMER, JUDGE: RM Specialties, LLC ("RM") filed a complaint in Henderson Circuit Court alleging various claims related to its removal of a tree on the real property of Ignacio and Gloria Toribio. Following a jury trial, and in accordance with the verdict, the circuit court entered judgment in favor of RM, including prejudgment interest. We affirm.

Factual and Procedural Background

The sufficiency of evidence, and any reasonable inferences that could drawn from it, continue to be contested between the parties. "Upon appellate review, we are constrained to view the sufficiency of the evidence in the light most favorable to the verdict. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence." *Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 868 (Ky. 2016) (citations omitted). Through that lens, the relevant facts are as follows:

On or about May 26, 2011, as a result of strong storms and wind, a large tree fell onto rental property owned by the Toribios. The tenants of the home called Ignacio Toribio to report the incident. Ignacio was traveling from Mexico to Kentucky at the time, but called the couple's insurance agent, James Roll ("Roll") at Vaughn Insurance Agency. Ignacio left a voicemail with Roll telling him about the tree and asking him to "take care of it." Roll immediately called RM, also a customer of and insured through Vaughn Insurance. Rick Murch ("Murch"), owner of RM, went to the property and gave Roll a verbal estimate of the cost to remove the tree. Roll testified that he authorized RM to begin removal of the tree for several reasons. The primary reason was the voicemail from Ignacio instructing him to "take care of" the tree. Second, he knew that Ignacio was traveling and could not tend to the property. Third, he wanted to prevent even

greater loss to the property as a result of more storms that were forecast for the area. Ignacio returned to Kentucky later that day.

The tree had fallen across the house and caused so much damage that it was inside the home in some areas. RM spent the first day cutting limbs and branches from the tree. On the second day, RM had to subcontract with a third party for rental and operation of heavy equipment to lift the large tree trunk from the home as it was being cut into sections. Six of RM's employees also worked two twelve-hour days to remove the tree. And the end of removal and clean-up, RM covered the home with a large tarp for temporary protection.

Ignacio showed up at the rental property both days RM was working to remove the tree. He thanked Murch for getting there so fast and doing the work. Ignacio also let Murch into the home to view the interior damage. It is uncontested that at no time did Ignacio express dissatisfaction with the work. At no time did Ignacio tell RM to stop doing the work. There is no indication in the record that Ignacio ever inquired into RM's cost over the course of the two days.

After removal of the tree, RM submitted an invoice to Roll in the amount of $5890. Roll filed a claim with GuideOne Insurance. The insurance company issued a check to the Toribios in the amount of $5390. This represented the cost of the tree removal ($5890) minus a $500 deductible to be paid by the Toribios. Rather than pay RM, however, the Toribios deposited the check into an

escrow account. They continued to refuse to pay RM, prompting RM to file this lawsuit. Sometime after the tree was removed, the house was declared a total loss by the insurance company due to the extensive damage caused by the fallen tree.

In its verified complaint, RM alleged, in part, that the Toribios had interfered with the contractual relationship between RM and Roll, who was an agent of the Toribios. In their defense, the Toribios consistently maintained two arguments. First, they asserted that Roll was not their authorized agent and therefore had no authority to hire RM. Second, they argued that, regardless of whether a contract existed between RM and Roll and/or RM and the Toribios, RM charged too much for removal of the tree.

The jury did not find that Roll was an agent of the Toribios.[1] The jury found the existence of an implied contract between the Toribios and RM and awarded RM $5890. The circuit court also awarded prejudgment interest to RM. This appeal followed.

[1] Jury Instruction No. 2 states "Are you satisfied from the evidence that the Toribios expressly authorized James Roll to enter into a contract on their behalf to remove the tree from the property described in the evidence?" The jury did not answer yes or no, however, a written message was sent to the circuit court asking, "If we answer yes to any one instruction, do we need to answer all three." The Court responded "[n]o" to the jury's question in writing. The jury also did not answer yes or no to Instruction No. 4, which states "Are you satisfied from the evidence (1) that RM Specialties rendered valuable services to the Toribios, (2) that the Toribios accepted or received those services or those services were rendered with the Toribios' knowledge and consent, and (3) that the circumstances were such that the Toribios were reasonably notified that RM Specialties expected to be paid?" Prior to jury deliberations, the Toribios objected to the jury instructions based on what they argued was a lack of evidence, but had no objection to the form and content of the instructions.

Analysis[2]

The Toribios make four arguments on appeal: (1) Roll was not their agent and had no authority to give RM the go-ahead to remove the tree; (2) there was insufficient evidence to find the existence of an implied contract; (3) the trial court erred in awarding prejudgment interest; and (4) the trial court erred in awarding attorney's fees.

We need not address the merits of the Toribios' first argument. The jury did not find that Roll was an agent of the Toribios. Therefore, the issue is moot. Further, whether Roll was or was not an agent of the Toribios has no bearing on the jury's ultimate finding that a contract implied in fact existed between the Toribios and RM.

Regarding the Toribios' second contention, they are essentially arguing that the circuit court erred in denying their motion for directed verdict on the matter of implied contract. They assert that there was insufficient evidence to support the existence of an implied contract between the parties. We disagree.

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[2]Kentucky Rule of Civil Procedure 76.12(4)(c)(v) requires "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." *Krugman v. CMI, Inc.*, 437 S.W.3d 167, 170 (Ky. App. 2014). We note that the Toribios make a preservation statement at the beginning of each issue as follows: "This issue was preserved for appeal by the timely filing [sic] a Notice of Appeal which appears in the record at TR. 174." An issue cannot be preserved in a notice of appeal; it must be preserved in the underlying record, and the appellate brief must state where each issue is properly preserved in the trial court record. The Toribios have failed to comply with CR 76.12(4)(c)(v). Given that the record in this case is small, we will not strike the Toribios' brief although it would be well within our discretion to do so. *See id.*

"In ruling upon a motion for a directed verdict, the trial court must draw all fair and rational inferences from the evidence in favor of the party opposing the motion, and a verdict should not be directed unless the evidence is insufficient to sustain the verdict. The evidence of such party's witnesses must be accepted as true." *Spivey v. Sheeler*, 514 S.W.2d 667, 673 (Ky. 1974) (internal quotation marks and citation omitted). We find no error in the circuit court's denial of the Toribios' motion for directed verdict.

With respect to a contract implied in fact,

> if the proven facts and circumstances are such as to fairly show that both the party rendering the services or furnishing the necessities and the one receiving them expected, understood and intended compensation should be paid, the court or the jury trying the case will be authorized to find an express contract for payment was entered into. This particular type of agreement is denominated a contract implied in fact, it differs from an express contract only in the mode of proof required; and it is implied only in that it is to be inferred from the circumstances, the conduct, and the acts or relations of the parties, rather than from their spoken words. In short, from the evidence disclosed the court may conclude the parties entered into an agreement, although there is no proof of an express offer and a definite acceptance.

Victor's Executor v. Monson, 283 S.W.2d 175, 176-77 (Ky. 1955) (internal quotation marks and citations omitted).

Ignacio was at the property both days that RM was working to remove the tree. He acknowledged the presence of the crew and thanked them for their

work. He allowed Murch to enter the home to view the extent of the damage. Although Ignacio did not speak directly to Murch before RM started the work, Ignacio had the opportunity to contest the work over the two days and did not. He never attempted to halt RM's work. He did not question RM or Vaughn regarding the cost prior to completion of the work. At trial, Ignacio submitted an estimate he had obtained from Poor Boys Tree Service dated May 27, 2011, at 11:00 a.m. which indicated Poor Boys would remove the tree for $2790. However, Murch testified that he was working at the property on the date and time of Poor Boys' bid and at no time did anyone from Poor Boys come to look at the tree or property while he was working (*i.e.*, May 26-27, 2011). Also, RM would have already completed approximately one-half of the job at the time of the bid from Poor Boys. Regardless, it does not appear that the price of the work would have been of any concern to the Toribios. Whether Poor Boys or RM performed the work, the Toribios' out-of-pocket was limited to the $500 deductible. From the evidence of circumstances and conduct between RM and the Toribios, a reasonable juror could (and did) infer that a contract implied in fact existed between the Toribios and RM and, therefore, that RM was entitled to compensation for removal of the tree.

The Toribios next assert that the circuit erred in awarding prejudgment interest to RM. They argue that RM's claim was not for a liquidated amount and, in any case, an award of prejudgment interest shall be made by the

jury, not the court. RM argues that its damages were liquidated and that the circuit court properly awarded prejudgment interest. We agree with RM.

"Liquidated claims are of such a nature that the amount is capable of ascertainment by mere computation, can be established with reasonable certainty, can be ascertained in accordance with fixed rules of evidence and known standards of value, or can be determined by reference to well-established market values." *3D Enterprises Contracting Corp. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 174 S.W.3d 440, 450 (Ky. 2005) (internal quotation marks omitted). Examples include a bill or note past due, an amount due on an open account, or an unpaid fixed contract price. *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991). In reviewing the damages awarded to RM, it is clear that the amount was fixed and certain. There is no dispute that RM billed $5890 for removal of the tree. This amount was reflected on the invoice submitted to Roll by RM. It was the amount of the claim paid by GuideOne Insurance to the Toribios in the form of a check, minus the Toribio's deductible. It was the amount cited by RM in the verified complaint. Therefore, RM's damages were liquidated. "When the damages are 'liquidated,' prejudgment interest follows as a matter of course." *Id.* An award of prejudgment interest was proper in this instance.

An award of prejudgment interest is a matter of equity to be decided by the court. It is not a question of fact to be decided by the jury. *Id.* at 144. Here,

the circuit court noted that the jury found the existence of an implied contract between RM and the Toribios and ruled that an award of prejudgment interest was an appropriate use of the court's discretion. We agree; there was no error.

Lastly --and perplexing-- the Toribios claim that the circuit court erred in awarding attorney's fees to RM. RM asserts that it did not receive an award of attorney's fees. We note that the Toribios attached a "Trial Order and Judgment" as an appendix to their brief to this Court. That order has a signature on it with the name of the circuit judge; is dated November 13, 2017; and has a stamp on it noting that it was entered by the clerk on November 14, 2017. It states, in relevant part, "IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff is awarded reasonable attorney fees, to be determined upon the Plaintiff's counsel's submission." However, this is not the same trial order and judgment contained in the official record before us. The two orders are identical, with the exception of the award of attorney fees, which is not in the record. For whatever reason, the Toribios came into possession of the order attached to their brief, they apparently relied on it at the trial court in making post-judgement motions. In their motion to vacate or amend the judgment filed on November 17, 2017, they argue that "[a]ttorney fees cannot be awarded in an action of this nature." In ruling on the Toribios' post-judgment motions, the circuit court entered an order on December 28, 2017, which specifically states, in relevant part, "The plaintiff agrees that it is

not seeking attorney's fees (and the judgment entered does not award such fees) . . ." It is unclear from the record how the Toribios came into possession of an order from the circuit court that awarded attorney's fees to RM. However, it is clear that RM did not seek, and the circuit court did not award, attorney fees to RM. Therefore, the issue is moot.

Conclusion

In light of the forgoing, we AFFIRM the judgment of the Henderson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harry L. Mathison
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BRIEF FOR APPELLEES:

Samuel J. Bach
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