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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001665-MR

TONY COTTON AND
THE UNIVERSITY OF LOUISVILLE
PROTECTION AND ADVOCACY
COALITION ("ULPAC") APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 18-CI-002159

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION AND
UNIVERSITY OF LOUISVILLE APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, NICKELL, AND SPALDING, JUDGES.

NICKELL, JUDGE: Tony Cotton and ULPAC[1] have appealed the Jefferson Circuit Court's October 16, 2018, opinion and order granting motions to dismiss

[1] ULPAC appears to be an entity created solely for the purpose of acting as a plaintiff in this action.

filed by National Collegiate Athletic Association ("NCAA") and University of Louisville ("U of L"). Following a careful review, we affirm.

NCAA is a voluntary, unincorporated association made up of approximately 1,200 public and private colleges and universities located across the country. It is responsible for promulgating, interpreting, and enforcing bylaws governing intercollegiate athletics. Regulations passed by NCAA govern the conduct of intercollegiate athletic programs of member institutions. The NCAA Committee on Infractions ("COI"), which is made up of volunteers from member institutions and the general public, is tasked with determining when violations of NCAA regulations occur and imposing appropriate sanctions.

U of L is a public university located in Louisville, Kentucky. It is a member of NCAA and is therefore subject to NCAA regulations. In 2015, NCAA initiated an investigation into U of L's men's basketball program regarding alleged improper activities which violated several NCAA regulations related to recruiting and improper benefits. At the conclusion of the inquiry, on June 15, 2017, the COI issued a decision finding multiple major infractions of NCAA regulations. The decision imposed penalties requiring U of L

> vacate all regular season and conference tournament wins in which ineligible student-athletes competed from the time they became ineligible through the time they were reinstated as eligible for competition through either the student-athlete reinstatement process or through a grant of limited immunity.

. . .

> [I]f any of the student-athletes competed in the NCAA Division I Men's Basketball Championships at any time they were ineligible, the institution's participation in the championships shall be vacated.

The effect of the decision of the COI ultimately required U of L to vacate 123 wins and its tournament appearances from 2011 to 2015, including its 2012 and 2013 trips to the Final Four and the 2013 National Championship.

Cotton is a fan of U of L men's basketball. ULPAC is ostensibly an organization "comprising at least 400 members, all of whom by their assertions to ULPAC have detrimentally relied on promises made by NCAA to UL." Cotton and ULPAC brought this action asserting multiple claims against NCAA alleging damages resulting from its treatment of the U of L men's basketball program. Specifically, they claimed NCAA induced them to purchase tickets to witness the 2013 National Championship game by NCAA promising the game would determine the champion "for the year 2013 for the rest of known time." They asserted they purchased tickets because U of L was one of the teams playing in the game. Claims for relief sounded in "tort, equity, breach of contract, trust, unjust enrichment and equitable and promissory estoppel."

NCAA and U of L separately filed motions to dismiss the action for failure to state a claim upon which relief could be granted pursuant to CR[2] 12.02(f). NCAA asserted: Cotton and ULPAC were not entitled to assert claims for violations of any rights belonging to U of L regarding penalties imposed by the COI; purchasing a ticket to a sporting contest does not entitle the purchaser to contest subsequent penalties; spectator disappointment in a sporting contest result is insufficient to satisfy the requirements of standing; U of L was an improper party to the suit; the COI's decision was neither arbitrary nor capricious; U of L owed no fiduciary duty to Cotton or ULPAC; NCAA did not violate any rights held by Cotton or ULPAC; NCAA was not unjustly enriched; no claim for promissory estoppel existed; and no viable claim for equitable estoppel had been presented by Cotton or ULPAC. U of L asserted the same arguments in its motion to dismiss, adding: no compensable injury had been alleged; it had been named as an "indispensable party" to the action although no relief had been demanded from it and it did not wish to participate in the litigation; sovereign immunity protected it from unwillingly being pulled into the case; Cotton and ULPAC did not possess the requisite "close relationship" with U of L to bring suit on its behalf; and Cotton and ULPAC did not have standing under any theory to bring the action.

[2] Kentucky Rules of Civil Procedure.

In its order granting the motions to dismiss, the trial court stated:

> [i]n *Powers v. Ohio*, the United States Supreme Court established the contours through which a third party may obtain standing. "The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party, and there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 410-11[, 111 S.Ct. 1364, 1370-71, 113 L.Ed.2d 411] (1991) (other citations omitted). The Kentucky Supreme Court has held "standing to sue means that a party has a sufficient legal interest in an otherwise justiciable controversy to obtain some judicial decision in the controversy." *Kraus v. Kentucky State Senate*, 872 S.W.2d 433, 439 (Ky. 1993).
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> . . . .
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> The act of viewing a basketball contest or purchasing merchandise related to that basketball contest, regardless of the ultimate outcome or its status in history, does not create standing for Plaintiffs here. The internal punishment scheme of the NCAA as applied to the University of Louisville does not create the "injury in fact" required by the Supreme Court under *Powers*, as cited above. Plaintiffs, regardless of the level of their passion, as fans of the University of Louisville, do not have the requisite close relationship required to pursue claims on their own behalf. Finally, there are no legally cognizable interests which need to be protected by Plaintiffs via the pursuit of an action against the NCAA. This Court, in analyzing Plaintiffs' claims under the Kentucky Supreme Court's definition in *Kraus*, cited above, finds that Plaintiffs lack a sufficient legal interest to pursue their claim, and that the claim they are attempting to pursue is not a justiciable controversy.

> The imposition of penalties on the University of Louisville's Men's Basketball program by the NCAA caused a great deal of pain to many associated with the University. However, that angst does not provide an avenue for a group of fans to attack the disciplinary actions of the NCAA, an association of which the Plaintiffs are not members. Plaintiffs' collective disappointment does not provide an avenue to assert claims against the NCAA when they cannot establish that they have a legally cognizable injury for which they may seek redress.

This appeal followed.

Initially, we note Cotton and ULPAC's briefs filed before this Court make little effort to comply with the requirements of the Civil Rules. In contravention of CR 76.12(4)(c)(v), no preservation statements appear at the beginning of each argument. No record citations appear anywhere in the briefs, in contravention of CR 76.12(4)(c)(iv) and (v), which require ample references to the trial court record in the factual statement of the case and in support of each argument presented. Contrary to CR 76.12(4)(c)(vii), the index to the appendix to Cotton and ULPAC's opening brief does not set forth where the documents may be found in the record, nor does the order being challenged appear immediately after the appendix list. These provisions of the rule exist to prevent the Court from having to scour the record to fill in the blanks for practicing attorneys, ensure the orders are readily available to the Court, and ensure only items properly placed in the trial court record—rather than items not subject to judicial review—are

provided as exhibits. It appears at least two of the appended items are not part of the trial court record and were improperly included. Further, the briefs improperly reference and rely on decisions of state circuit courts unrelated to the instant action. Citation to pertinent authority is often incorrect and incomplete,[3] hampering this Court's ability to determine the veracity of Cotton and ULPAC's legal position. Pursuant to CR 76.28(4)(c), copies of unpublished Kentucky appellate decisions relied upon in the argument section must be, but were not, appended to the brief.

Additionally, the vast majority of the arguments presented by Cotton and ULPAC are plainly unpreserved for appellate review. As previously stated, Cotton and ULPAC offer no statement of preservation in their opening brief to this Court, and even though the failure was brought to their attention in the brief filed by NCAA, Cotton and ULPAC did not remedy the error in their reply brief, choosing instead to offer more unpreserved arguments, ones which had never been previously raised. This was plainly improper.

This Court has spoken often about the necessity of following the Civil Rules and the rationale for compliance. Recently, the Court addressed the matter

[3] Illustrative of these failures are: a reference to "*Fox*" but no citation or full case name is given; a discussion of "*Town of Chester v. Laroe Estates, Inc.*" but no citation is given; an incorrect citation to "*Passet v. NCAA*" and an incomplete citation to "*Gerrel Company v. Glenn*," cases which this Court cannot locate. U of L noted the incomplete citation to *Gerrel*, averring the case does not exist; no corrective action was taken in Cotton and ULPAC's reply brief.

at length in *Curty v. Norton Healthcare, Inc.*, 561 S.W.3d 374, 377-78 (Ky. App. 2018), and warned practitioners that leniency should not be presumed.

> 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).

. . . .

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). Although

> noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Curty's brief or dismiss her appeal for her attorney's failure to comply. *Elwell*. While we have chosen not to impose such a harsh sanction, we strongly suggest counsel familiarize himself with the rules of appellate practice and caution counsel such latitude may not be extended in the future.

Curty, 561 S.W.3d at 377-78. Although we would be well within our discretion to do so, as in *Curty*, we have chosen not to strike Cotton and ULPAC's brief or dismiss the appeal for these egregious failures. Instead, we have chosen to disregard the offending portions of the brief and have undertaken our own review of the relatively brief record. We will, however, discuss the sole issue we believe is properly before us—whether Cotton and ULPAC raised a claim for which relief could be granted.

"It is well settled in this jurisdiction when considering a motion to dismiss under [CR 12.02] that the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987)). "Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo." *Fox v.*

Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (citing *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)).

> The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (citation and internal quotations omitted). With these standards in mind, we turn to the matter before us.

The trial court concluded Cotton and ULPAC failed to articulate or establish a legally cognizable injury and did not present a justiciable controversy. We agree.

Although Cotton and ULPAC vehemently argue to the contrary, there has been absolutely no showing of the sort of "injury in fact" giving them the "sufficiently concrete interest" necessary to obtain standing to institute this action in the first instance. *See Powers*, 499 U.S. at 411, 111 S.Ct. at 1370. Likewise, there is a complete failure to allege the existence of a justiciable controversy, the most basic constitutional requirement for bringing any suit. *See* Ky. Const. §112(5); *Lawson v. Office of Atty. Gen.*, 415 S.W.3d 59, 67 (Ky. 2013); *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989). At best, Cotton and ULPAC have presented theoretical legal questions, resolution of which by any

court would be a merely advisory opinion, a business in which courts are plainly not involved. *Kraus*, 872 S.W.2d at 439 (citing *Commonwealth v. Crow*, 263 Ky. 322, 92 S.W.2d 330 (1936)).

Although Cotton and ULPAC are clearly disgruntled by NCAA's actions, try as they might, they simply cannot show entitlement to pursue an action against NCAA for the remedies they seek as they do not have a personal, particularized or concrete injury. The rights they seek to enforce belong to U of L—rights U of L itself chose not to pursue in litigation following NCAA's imposition of sanctions. The thinly veiled attempts to convert U of L's rights into Cotton and ULPAC's personal rights are simply unconvincing. Wrapping them in different cloth does not change the true nature of the claims. In the absence of a justiciable controversy, Cotton and ULPAC had no standing to bring this action in the first instance and, therefore, could not have stated a claim upon which relief could be granted. The trial court correctly dismissed the action.

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

ALL CONCUR.

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