

RENDERED: MAY 8, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NOS. 2018-CA-001759-MR AND 2019-CA-000922-MR

SHAUN MCGINNIS

APPELLANT

v. APPEALS FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 16-CI-00148

RORY CLICK

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND MAZE, JUDGES.

DIXON, JUDGE: Shaun McGinnis appeals the order following jury trial entered on October 29, 2018, and order for bond entered on June 10, 2019, by the Mercer Circuit Court. Following review of the record, briefs, and law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Shaun McGinnis, Rory Click, and Mark Darland were close friends and business partners. On January 29, 2014, Rory and Mark filed a complaint for

dissolution of the partnership in Mercer Circuit Court, Action No. 14-CI-00029.

The case was mediated on June 26, 2015, and Shaun and Rory entered into a confidential settlement and winding-up agreement dated July 2015.¹

In June 2016, Shaun filed a complaint alleging breach of contract, slander, libel, defamation, intentional infliction of emotional distress (IIED), tort of outrage, and tortious interference with his ability to earn money. In his amended answer, Rory counterclaimed, alleging abuse of process, breach of contract, defamation, libel, slander, intentional interference with economic opportunity, and IIED.

During a two-day jury trial, beginning on September 24, 2018, both parties testified and called witnesses. Among the witnesses called was Tyler Darland, Mark's son, who testified as to his own firsthand knowledge of events and was also asked to testify regarding his deceased father's statements. Shaun objected to Tyler's testimony concerning his father's statements as hearsay. The trial court overruled Shaun's objections and allowed the testimony into evidence.

At the end of the proof, both parties moved for directed verdicts on all tried issues. The trial court granted directed verdict on all issues, except the breach of contract claims of both parties. The jury ultimately returned a verdict in favor of Rory, awarding \$10,000 liquidated damages. On October 29, 2018, the trial

¹ The exact date of entry was not included in the settlement agreement.

court entered its findings of fact, conclusions of law, and judgment consistent with the jury's verdict and awarded Rory his reasonable attorney's fees and costs, pursuant to the parties' prior settlement agreement. This first appeal followed.

On May 1, 2019, Rory moved the trial court to require Shaun to post a supersedeas bond on appeal. Shaun responded to this motion, informing the trial court that he was not asking for a stay on appeal. On June 10, 2019, the trial court ordered Shaun to post a \$25,000 supersedeas bond, and this second appeal followed.

HEARSAY

Shaun first argues that the trial court improperly allowed out-of-court statements—hearsay—into evidence from a deceased third party, Mark. The standard of review concerning a trial court's evidentiary rulings is for abuse of discretion. *Tumey v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969). “The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound reasonable principles.” *Penner v. Penner*, 411 S.W.3d 775, 779-80 (Ky. App. 2013) (citation omitted).

“Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky.” KRE² 802. Several bases for admission of out-of-court statements of unavailable declarants exist under KRE 802.

² Kentucky Rules of Evidence.

There is no question that Mark was deceased and, therefore, obviously unavailable to testify. However, none of the alleged statements admitted fit within any of the permissible exceptions. The pertinent parts of Tyler's testimony regarding Mark's statements include the following statements: "[Mark] said, now it can all be over with" and "[Mark] said he wasn't going to [sue Rory]; that he would just let bygones be bygones, and he didn't want to ruin their friendship because he was friends with Rory and Shaun, so he just wanted to pretty much keep peace." Mark's out-of-court statements proffered by Tyler did not fall into any exceptions to the hearsay rule. Nevertheless, any error in admitting Tyler's testimony regarding Mark's statements was neither prejudicial nor unfair. The admission of Mark's statements was harmless because his statements neither tended to prove nor disprove any elements of either party's claims. More specifically, the only issue presented to the jury was whether either party breached the confidential settlement agreement—the contract at issue—by disclosing its terms to a third party. Mark's statements neither tended to prove nor disprove any elements of either party's breach of contract claim. As such, the trial court's decision to allow the testimony was not an abuse of discretion and does not constitute reversible error.

IIED

Shaun's second argument asserts the trial court abused its discretion in directing a verdict against him regarding his IIED claim. The standard of review of a trial court's denial of a motion for directed verdict is well-established.

Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice."

Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461-62 (Ky. 1990)

(citations omitted). "[O]ur review is independent of the grounds relied on or stated by the trial court to deny the directed verdict motion. Rather, we must make our own review of the entire record to determine whether the trial court's ruling was clearly erroneous." *Brooks v. Lexington-Fayette Urban County. Hous. Auth.*, 132 S.W.3d 790, 798 (Ky. 2004), *as modified on denial of reh'g* (May 20, 2004) (citation omitted).

With these principles in mind, we reiterate “a directed verdict is appropriate where there is no evidence of probative value to support an opposite result because the jury may not be permitted to reach a verdict upon speculation or conjecture.” *Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276, 285 (Ky. 2014), *as corrected* (Apr. 7, 2015) (internal quotation marks, brackets, and citation omitted). “[A] trial court should only grant a directed verdict when there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ.” *Id.* (internal quotation marks and citation omitted).

“[A] plaintiff claiming emotional distress damages *must* present expert medical or scientific proof to support the claimed injury or impairment.” *Osborne v. Keeney*, 399 S.W.3d 1, 17-18 (Ky. 2012) (emphasis added) (citation omitted). It is uncontested that Shaun failed to present any expert medical or scientific proof to support his claimed injury or impairment. Consequently, the trial court did not abuse its discretion by directing a verdict in favor of Rory on this issue.

BREACH OF CONTRACT

Shaun’s third argument contends the trial court abused its discretion in denying his motion for directed verdict regarding Rory’s breach of contract claim against him. As previously discussed, a directed verdict should only be granted in

the “complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ.” *Toler*, 458 S.W.3d at 285 (internal quotation marks and citation omitted). Rory offered Tyler’s testimony to support his breach of contract claim against Shaun. Tyler testified that on or about July 16, 2015, Shaun was at Mark and Tyler’s home when Tyler overheard Shaun’s conversation with Mark regarding the “previous arrangement,” referring to the confidential settlement agreement between Shaun and Rory. Tyler further testified that he overheard Shaun tell Mark the settlement amount. Shaun attacks this testimony because Tyler never said the settlement amount and testified he was unclear of the exact date of the conversation, as well as the exact words that were said. We agree with the trial court’s denial of a directed verdict on this issue because Tyler’s testimony, although imperfect and contested, still constitutes evidence that Shaun breached the terms of the parties’ settlement agreement. *Id.*

Shaun further challenges the validity of the liquidated damages clause. The amount of liquidated damages presented at trial was stipulated by both parties as \$10,000—the amount agreed upon by the parties in their prior settlement agreement. No further evidence regarding damages was presented at trial. When parties agree to pay a stipulated sum as liquidated damages for breach under a contract, their agreement is not necessarily determinative of the question of damages. *Smith v. Ward*, 256 S.W.2d 385, 387 (Ky. 1953); *Robert F. Simmons*

and Assoc. v. Urban Renewal and Community Dev. Agency of Louisville, 497 S.W.2d 705, 706 (Ky. 1973); *Mattingly Bridge Co., Inc. v. Holloway & Son Constr. Co.*, 694 S.W.2d 702, 706 (Ky. 1985); *Man O War Restaurants, Inc. v. Martin*, 932 S.W.2d 366, 369 (Ky. 1996). However, the general rule is that the agreement will be enforced where the damages are uncertain or difficult to reasonably ascertain and the amount agreed upon is not greatly disproportionate to the actual injury. *Id.* Here, as the actual damages are uncertain and difficult to reasonably ascertain, the trial court did not abuse its discretion in allowing the parties to stipulate the amount of liquidated damages.

SUPERSEDEAS BOND

The sole issue raised in Shaun’s second appeal is whether the trial court improperly ordered Shaun to post a supersedeas bond when he did not ask for a stay on appeal. We review a challenge to a supersedeas bond for an abuse of discretion. *Indus. Redistribution Ctr., Inc. v. Plastipak Packaging, Div. of Beatrice Foods Co.*, 706 S.W.2d 2, 3 (Ky. App. 1986).

Little has been written on the topic of supersedeas bonds. As an appellate court, we lack authority to approve them, and are limited to granting leave to file a bond in the circumstances described in CR³ 73.06, or “to review the sufficiency of supersedeas bonds already filed in a pending appeal.” *Henry Vogt*

³ Kentucky Rules of Civil Procedure.

Mach. Co. v. Scruggs, 769 S.W.2d 766, 767 (Ky. App. 1989) (citation omitted).

From the record provided to us, we cannot determine whether Shaun has, in fact, posted bond. If he has, the bond set is clearly “sufficient.” Whether the bond amount was excessive appears to be beyond the scope of our authority.

CONCLUSION

Therefore, and for the foregoing reasons, the orders entered by the Mercer Circuit Court are **AFFIRMED**.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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