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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001926-MR
AND
NO. 2009-CA-002123-MR

CONSOL OF KENTUCKY, INC. AND
CONSOL ENERGY, INC. APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM KNOTT CIRCUIT COURT
v. HONORABLE KIMBERLY CORNETT CHILDERS, JUDGE
ACTION NO. 06-CI-00060

KEITH RANDALL SPARKMAN,
D/B/A IN-DEPTH SANITARY
SERVICE GROUP[1] APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: JOHNSON,[2] J. LAMBERT, AND NICKELL, JUDGES.

[1] Pursuant to Court policy, the style of the case reflects the parties as listed in the Notice of Appeal filed by appellants. The Notice of Appeal uses multiple spellings of appellee's name. Additionally, the Notice of Cross-Appeal identifies appellee/cross-appellant as "Keith Randall Sparkman d/b/a In-Depth Sanitary Services, Inc."

[2] Judge Laurence B. VanMeter having been elected to the Supreme Court of Kentucky during the remand of this appeal, Judge Robert G. Johnson has been assigned to succeed him on this panel.

NICKELL, JUDGE: We previously reversed and remanded this appeal for lack of appellate jurisdiction. The accompanying cross-appeal was dismissed for the same reason and for challenging the wrong judgment. On discretionary review, the Supreme Court of Kentucky[3] reversed and remanded, holding the parties had impliedly consented to amend the complaint to include the proper business entity; the notice of cross-appeal sufficiently conferred appellate jurisdiction on this Court; and, failure to specify the final judgment in the notice of appeal as the item being appealed did not require automatic dismissal of the appeal. On remand, we now address the merits of the appeal and cross-appeal. We affirm in part, reverse in part, and remand.

FACTS

As a sole proprietor, Keith Sparkman runs a commercial cleaning business known as In-Depth Sanitary Services, Inc. In 2002, he incorporated a business known as In-Depth Sanitary Service Group, Inc., of which he is one-half owner with his wife. The similarity of names caused some confusion.

In 2001, In-Depth began cleaning facilities for Consol of Kentucky, Inc. (CKI), a coal mine operator with holdings in Mousie, Kentucky. Consol Energy, Inc. (Energy), a Delaware corporation headquartered in Pennsylvania, describes itself as "a service company, providing administrative, professional, and other services to its wholly-owned subsidiaries" of which CKI is one.

[3] *Sparkman v. Consol Energy, Inc.*, 470 S.W.3d 321 (Ky. 2015).

Initially, In-Depth had yearlong cleaning contracts for two CKI mining locations. A third cleaning contract with CKI for a different property was acquired in 2004. Each cleaning contract, prepared by CKI and executed by Sparkman as In-Depth's president, contained the following pertinent clauses:

> 10. The company retains the right to inspect the work to determine if the work is being done in accordance with this contract and to evaluate it for payment.
>
> 11. If contractor's work under this contract, in the opinion of the company, is not satisfactory, or if the work is not performed when specified (time being of the essence of this contract), the company may notify contractor of the company's dissatisfaction. If the deficiency or deficiencies are not corrected within ten (10) days of such notification, the company may cancel this contract prior to the completion of the work to be performed hereunder by giving three days written notice of such cancellation, and upon such cancellation, the company may, at its option, take possession of all equipment, supplies, and materials then on the premises and use the same and complete the work hereunder or cause a new contractor to complete such work, all of which shall be done for the account of the contractor.
>
> . . .
>
> 13. Under the terms of this contract, the company may order extra work or make additions, alterations or deductions in the work, and contractor may claim an addition to the contract sum only when ordered pursuant to a written purchase or change order, except in an emergency endangering life or property. These changes shall be executed under the conditions of the original contract documents except that any claim for extension of time caused thereby shall be adjusted to the time of ordering such change.

In-Depth had no cleaning contracts with Energy; all contracts were with CKI.

From Sparkman's perspective, things went well until 2005, when an In-Depth crew painted a tile floor. Sparkman claimed the floor was painted in response to numerous complaints about the floor's appearance, but company officials prevented moving the furniture which hampered In-Depth doing a thorough job. CKI warehouseman Dan Page characterized the paint job as "sloppy," refused to pay, and wanted the associated cost deducted from an invoice. Shortly thereafter, CKI terminated two of the cleaning contracts.

Sensing trouble was afoot, Sparkman began writing letters to document his view of events and tried to secretly record a meeting with CKI's Vice President of Central Appalachian Operations, Jack Richardson. After the botched recording episode, CKI deemed Sparkman and In-Depth a security risk. Whether painting the floor was at CKI's direction, or an impromptu decision made by Sparkman, the business relationship was unraveling and CKI terminated the last cleaning contract. All three agreements were terminated before their terms naturally expired.

Amy Little, a former In-Depth employee who had cleaned at CKI, quickly received the new CKI cleaning contracts. Finding this suspicious, Sparkman—in his individual capacity—and In-Depth Sanitary Services, Inc., filed a complaint in Knott Circuit Court. Sparkman believed criticism of the newly-painted floor and the alleged submission of unauthorized invoices was a pretext to end his cleaning contracts with CKI. He surmised the reason for the change was Little was having an affair with Clell Scarberry, a general mine foreman for CKI

and/or Energy, who wanted his girlfriend to have the job. Named as defendants in the complaint were CKI; Energy; Little; Scarberry, and, Craig Campbell, Human Resources Supervisor for CKI and/or Energy.[4] The complaint alleged: CKI and Energy breached cleaning contracts with In-Depth; Little broke a non-compete clause in her employment contract with In-Depth; Little induced CKI and/or Energy to breach the In-Depth cleaning contracts by having sexual and personal relations with Scarberry; Little breached her employment contract with In-Depth and Sparkman; Little, Scarberry, Campbell, CKI and Energy engaged in conduct each knew or should have known would be detrimental to Sparkman and In-Depth; Scarberry's sexual and personal relations with Little induced Little to break both her non-compete clause and her employment contract with In-Depth; Campbell induced Little to breach her employment contract and non-compete clause by ending the contracts with In-Depth, hiring Little and giving her a service contract, requiring In-Depth to perform extra work, requiring In-Depth to work at less than authorized pay, "strong arming" In-Depth and Sparkman, failing to pay invoices on a timely basis, terminating In-Depth's contracts and withholding sign-in sheets; and finally, CKI and Energy are jointly and severally liable for the acts or omissions of their employees—including the torts of contract breach, interfering with employee-employer contract/relationship, enticing Little away from her employment contract, and, inducing Little to break her non-compete clause. As a result, Sparkman and In-Depth requested compensatory, consequential, and

[4] Little, Scarberry and Craig Campbell were dismissed prior to the jury returning a verdict. None is a party to this appeal.

punitive damages, as well as a jury trial. Noticeably absent from the complaint was any mention of Energy tortiously interfering with CKI's cleaning contracts with In-Depth. No amended complaint was ever filed.

CKI, Energy, Scarberry and Campbell filed a joint answer. Little answered the complaint separately. Upon securing different counsel, the quartet filed an amended answer a few days later specifying Scarberry and Campbell are employees of CKI—not Energy—and admitting Campbell withheld sign-in sheets requested by plaintiffs. The amended answer admitted In-Depth's cleaning contracts were with CKI alone, and Little now cleans for CKI. It denied existence of an inappropriate sexual relationship between Little and Scarberry, but stated if one existed it was outside the scope of CKI employment. The amended answer urged dismissal of the complaint due to improper venue, being outside the statute of limitations, and not naming the real party in interest. Defendants specifically sought dismissal of the claims for punitive damages, or alternatively, asked that they be bifurcated.

Trial was set for August 2009. In a pretrial memorandum filed in July, defendants—now appellants—acknowledged "a dispute about the parties to the various contracts." Defendants argued Scarberry and Campbell, as well as Page and Richardson, had told Sparkman numerous times CKI was dissatisfied with In-Depth's work and submission of bills for unauthorized work. According to the defense memo, the only contracts mentioned to that point in the litigation were In-Depth's cleaning contracts with CKI and Little's employment contract with In-

Depth which contained a non-compete clause. Defendants argued no third party was involved in In-Depth's cleaning contracts with CKI, thus eliminating any potential claim for tortious interference because Scarberry and Campbell acted on behalf of CKI, and CKI could not interfere with a contract to which it was a signatory. Defendants roughly calculated CKI's maximum liability for breaching the three cleaning contracts to be $39,500—"the amount [CKI] would have paid for the remaining months on the contracts, minus Plaintiffs' expenses." As for interfering with Little's employment contract with In-Depth, defendants claimed they knew nothing of the non-compete clause, did not interfere with Little's employee-employer relationship, and, any action on their part was taken solely to protect their legitimate interests.

In a pretrial memorandum filed a few weeks later, Sparkman spoke of "defendants" when addressing the "viability of [his] intentional interference claim." He cited no case law, nor did he distinguish one defendant from another or specify their alleged roles—seemingly lumping all defendants together. In August 2009, plaintiffs filed a memorandum in support of an instruction on tortious interference with a business expectancy. The pleading was based entirely on *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855 (Ky. 1988), and Palmore's *Kentucky Instructions to Juries,* 4th Ed.1989, Sec. 51.02, which is based on *Hornung*. Having failed to allege tortious interference with a contract or business expectancy in the complaint, and then not specifying in pretrial pleadings who may have committed the tortious

interference or how, Sparkman and In-Depth simply argued they were entitled to an instruction on the theory. In a two-page memo filed during trial, Sparkman and In-Depth argued the instruction on tortious interference should not include the seven factors expressed in Section 767 of the Restatement (Second) of Torts—because Kentucky follows the "bare bones" approach to jury instructions—*Olfice v. Inc. v. Wilkey,* 173 S.W.3d 226, 228 (Ky. 2005). Sparkman maintained the factors should be left to the attorneys to argue during summation.

Trial began August 17, 2009, and continued six days. Sparkman's theory of the case was Little was having an affair with Scarberry—a married man. Scarberry wanted to switch CKI's cleaning contracts from In-Depth to his girlfriend. CKI approved the painting of the tile floor, but upon completion of the task by the In-Depth crew, criticized the floor's appearance and claimed the work was unauthorized. Complaints about the painted floor and submission of invoices for unauthorized work were a pretext for Scarberry to favor Little—whom he had married prior to trial—with the CKI cleaning contracts. Two of the CKI contracts would have expired December 31, 2005, but were terminated as of February 28, 2005, via certified letter signed by Campbell on Energy letterhead.

Then, in a letter sent to In-Depth in care of Sparkman dated June 7, 2005, Campbell fully explained the reason for early termination of two contracts and the fate of the remaining contract:

> The contracts for Mill Creek Prep Plant and Jones Fork Shaft/Slope Mine were terminated due to In-Depth's failure to satisfactorily perform its work and failure to

> correct the deficiencies after notice of same. We have had serious problems with In-Depth in addition to its unsatisfactory performance. Unauthorized work was billed by In-Depth and it also submitted bills for amounts not authorized under our contracts. You are the president of In-Depth and you have attempted to secretly record conversations with the General Manager. Those actions cause us concerns about In-Depth's honesty. In addition, you have expressed extreme displeasure with our having terminated two of the In-Depth contracts. As a result, be advised that In-Depth has been deemed a security risk to our company and its remaining contract at the Jones Fork Main Office, Bath House, Warehouse, and Plant Office is terminated immediately.

Sparkman maintained but for Scarberry's illicit affair with Little, the cleaning contracts would have been renewed annually—as they had been since 2001. All three mining locations ceased operating in 2009.

Defendants argued the terminations were justified. As stated in the June 7 letter, CKI deemed In-Depth's work performance as unsatisfactory—something well within its prerogative under the express terms of the contracts. Energy maintained it simply honored CKI's request to change its cleaning contractor. Further, if the reason for the requested change was to give the new contract to Little, the impetus was to benefit Little, not to hurt Sparkman. Moreover, when the terms of the contracts ended, CKI could have changed janitorial service providers without question.

Ultimately, jurors found for Sparkman and In-Depth, awarding $34,500 against CKI for breach of the three cleaning contracts. The only other defendant left, Energy, was directed to pay a total of $678,450 ($278,450 for its

"disapproval" of Sparkman as CKI's cleaning contractor out of "spite, ill will, or desire to do injury to him"; $50,000 for past and future pain and suffering and mental anguish; and, $350,000 in punitive damages against Energy for gross negligence).

In ruling on defense motions for judgment notwithstanding the verdict (JNOV) or to alter, amend or vacate the verdict, the trial court corrected the jury's award of a double recovery for breach of contract, deducting $34,500 from the total award owed by Energy, making it responsible for paying $643,950. The trial court also rejected the defense argument that Energy, as CKI's parent, was not a third party to CKI's contracts and therefore, could not have interfered with its cleaning contracts. Finally, the trial court overruled the defense argument that a massive amount of punitive damages should not have been awarded on a simple breach of contract case that was allowed to escalate into much more as trial progressed. This appeal by CKI and Energy followed. Sparkman and In-Depth cross-appealed, raising a single issue to be addressed only in the event of retrial.

ANALYSIS

Appellants challenge the judgment entered by the Knott Circuit Court following a six-day jury trial. A motion for JNOV or to alter, amend or vacate the judgment was also denied. Applying an abuse of discretion standard, we will reverse only for clear error. *McVey v. Berman*, 836 S.W.2d 445, 448 (Ky. App. 1992).

A civil suit begins with the filing of a complaint. Pursuant to CR[5] 8.01, the pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Technical precision is not required, but the complaint must give the defendant fair notice and identify the claim. *Cincinnati, Newport & Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky. 1962). While CR 8.01 requires only that a complaint contain a "short and plain statement of the claim," it does not obviate the claimant's responsibility to state the entitled relief upon which the claim is based. *See O'Rourke v. Lexington Real Estate Co. L.L.C.*, 365 S.W.3d 584, 587 (Ky. App. 2011).

We have read the complaint filed in this case numerous times. Nowhere do we see a claim of intentional interference with a contract or business expectancy. Additionally, the record is devoid of any motion to amend the complaint—not prior to trial, not during trial, and not post-judgment. CR 15.01. Furthermore, there was no attempt to conform the complaint to the proof as permitted by CR 15.02.

The complaint filed in this case contains nine counts. Count I alleges CKI and Energy breached contracts with Sparkman and In-Depth. Count II alleges Little broke the non-compete clause in her employment contract. Count III alleges Little induced CKI and Energy to breach contracts with Sparkman and In-Depth. Count IV alleges Little breached her employment contract with Sparkman and In-Depth. Count V alleges Little engaged in conduct she knew or should have known

[5] Kentucky Rules of Civil Procedure.

would injure Sparkman and In-Depth. Counts VI and VII allege Scarberry and Campbell engaged in conduct they knew or should have known would injure Sparkman and In-Depth and induce Little to break her employment contract and specifically, the non-compete clause in that contract. Count VIII alleges CKI and Energy are liable to Sparkman and In-Depth for the:

> torts of Breach of Contracts, Interfering with Employee-Employer Contract/Relationship, Enticing Employee away from her employment, Inducing the Defendant, Amy Little, to break her contract not to compete, Inducing the Defendant, Amy Little, to break her contract with Plaintiffs [which they knew or should have known would injure Sparkman and In-Depth].

Little was dismissed from the case before the jury verdict; the allegations against her are no longer of any concern. Scarberry and Campbell were also dismissed before the verdict; the allegations against them are also of no concern. CKI has not appealed the jury's finding of breach as to any of the cleaning contracts. Having conceded the point, the jury's verdict of $34,500 against CKI will stand.

Thus, Energy's role in this case is the only matter before us. The proof at trial established: as CKI's parent company, Energy maintained the register on which In-Depth was an approved contractor; provided letterhead listing both the Energy logo and CKI's name with Kentucky address and telephone numbers; issued purchase orders for CKI using a Pittsburgh, Pennsylvania address and telephone number; and paid salaries and invoices on CKI's behalf. Despite this scant proof—none indicating improper purpose or a desire to cause harm—

Sparkman was allowed to pursue a theory that Scarberry and Campbell were employees of Energy—not CKI—and they engineered termination of the three cleaning contracts to oust In-Depth in favor of Little.

Sparkman tried to draw strong parallels between the early ending of his three contracts and rejection of Paul Hornung as a television announcer for a college football program on cable station WTBS. Hornung's claim failed for lack of improper purpose by the NCAA. *Hornung,* 754 S.W.2d at 859, 860. Sparkman's claim should have also failed at trial. This was not a case of intentional interference with a contract by a third party. At most it was a breach of contract case, as strenuously argued by Energy.

As the trial developed, jurors were allowed to find Energy had tortiously interfered with In-Depth's cleaning contracts, a claim not mentioned in the complaint and not grounded in the facts of this case. The claim was discussed mostly in terms of instructions—but submitting an instruction is not the equivalent of alleging a tort in a complaint. In *Hornung,* the leading case on this tort, any contract that might have resulted from negotiations would have been between WTBS and the chosen announcer, but the NCAA had negotiated for—and won —"the right to approve or disapprove any announcer or color analyst used on the broadcasts." When the NCAA committee considered candidates, Hornung was disapproved, prompting him to file suit, alleging he was "disapproved" so Eddie Crowder, a member of the NCAA committee, could be hired, even though Crowder was not selected. There were numerous reasons to reject Hornung—he

had been suspended from the NFL for gambling activity; he was portrayed as a playboy in beer commercials; and, he was more closely associated with professional football than college athletics—all items the NCAA Committee saw as significant negatives. On appeal, our Supreme Court determined Hornung had not proved the NCAA had improperly interfered with his prospective contractual relationship with WTBS since the NCAA had specifically bargained for and received the right to approve game announcers.

Applying *Hornung* to the case at bar, CKI had valid reasons to terminate In-Depth's contracts. Unauthorized work had been invoiced; a tile floor was painted in a sloppy fashion; and ultimately, Sparkman was deemed a security risk. Just as there were valid reasons for the NCAA to reject Hornung, there were valid reasons for CKI to sever ties with In-Depth and Sparkman. The cleaning contracts gave CKI the right to question and ultimately disapprove all work and/or bills. It matters not the justification CKI gave.

Hornung simply does not provide a basis for Sparkman and In-Depth to recoup $678,450 from Energy. No improper purpose or lack of justification has been established on Energy's part. Thus, no instruction should have been given. Ultimately, upon learning CKI desired to change cleaning contractors, Energy tacitly honored its subsidiary's request. Furthermore, CKI had reason to complain about In-Depth's workmanship and submission of unauthorized invoices because the deficiencies it identified to Sparkman were not satisfactorily corrected, and the contracts were ended. CKI has conceded it breached the three cleaning contracts.

According to the Restatement (Second) of Torts § 767, cited as prevailing Kentucky law in *Hornung,* 754 S.W.2d at 857, interfering with an existing contract requires proof a third party was caused "not to perform his contract with the plaintiff," or "the plaintiff [was prevented] from performing his own contract or making that performance more expensive or burdensome." The interference must be both "intentional and improper." In its discussion of whether an actor has a "privilege to interfere, or interference not improper," the Restatement explains:

> [t]he issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation.

Assessment of whether an actor improperly tortiously interferes with a contract requires consideration of seven factors:

> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes;
> (d) the interests sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference and
> (g) the relations between the parties.

In this case, by the specific language of CKI's contracts with In-Depth, two of the agreements could have been terminated as of December 31, 2005, and the third

ended as of June 30, 2005, without any question. For some odd reason, CKI chose not to allow the contracts to end naturally, has admitted its error and will pay $34,500 for breaching the three contracts. That, however, is the extent of this case.

We need not address the other claims raised on appeal, most of which pertain to the award of punitive damages. Since the trial court clearly erred in allowing the claim of tortious interference with a contract to go forward against Energy, any further comment about the claim, the instructions, or the award would be advisory and prohibited. *Newkirk v. Commonwealth*, 505 S.W.3d 770, 774 (Ky. 2016). Additionally, because the case will not be retried, Sparkman's single claim on cross-appeal—that a motion *in limine* filed by defendants should have been denied—would also be advisory and therefore, needs no resolution.

WHEREFORE, we affirm the jury's award of $34,500 against CKI for breach of three cleaning contracts with Sparkman and In-Depth. We reverse all other aspects of the judgment. Finally, we remand to the trial court for entry of an order consistent with this Opinion.

ALL CONCUR.

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