RENDERED: JULY 19, 2024; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0368-MR

NANCY LOUISE HURT (NOW WARF) — APPELLANT

v.

APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE MICA WOOD PENCE, JUDGE
ACTION NO. 18-CI-00104

LARRY J. HURT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CETRULO, AND TAYLOR, JUDGES.

ACREE, JUDGE: Appellant, Nancy Hurt, appeals from an order of the Metcalfe Family Court which declined to modify the terms of the dissolution of the marriage between Nancy and Appellee, Larry Hurt. Nancy argues the mediation agreement dividing marital property between Nancy and Larry inaccurately reflects Nancy's

understanding of the disposition of the marital real property. After our review, we affirm.

Nancy filed for divorce from Larry on July 18, 2018. The parties lived on ten acres in Metcalfe County. The deed for the property, recorded at the Metcalfe County Clerk's Office, confirms this size.

The parties participated in a mediation on May 3, 2021. Both parties had legal representation at all times preceding and during the mediation. During the two-and-a-half years leading up to the mediation, the parties exchanged voluminous discovery and both Nancy and Larry were deposed.

The mediator prepared a mediation agreement upon conclusion of the mediation. Both parties and their attorneys were able to review the agreement and suggest changes. The parties and their attorneys signed the agreement and initialed each page that day.

As for disposition of the acreage and marital residence, the mediation agreement stated as follows:

> 6807 Tompkinsville Road – This property shall be awarded to Nancy to include 4 acres contiguous to the house and on the left side of Larry Hurt Road as you come into the property less approximately 6 acres which shall be conveyed to Larry. He shall have the survey prepared to divide the parcel at his cost.

Upon completion of the survey, Larry would be required to transfer Nancy's portion of the property within a reasonable time.

After the mediation, the parties were again deposed. Both parties were asked whether they believed the agreement constituted a fair and reasonable agreement concerning the issues of their divorce and whether they requested the family court to approve the agreement as part of their divorce decree. Both parties answered in the affirmative.

The parties filed a joint motion to submit the case for entry of a final decree of dissolution of marriage, and the family court entered its findings of fact, conclusions of law, and decree of dissolution on June 22, 2021. The family court concluded the mediation agreement resolved all issues underlying the dissolution and that the agreement was not unconscionable.

Larry moved the court to order Nancy to adhere to the parties' agreement on January 26, 2023. On March 6, 2023, Nancy filed her response to Larry's motion. Therein, Nancy argued the division of real property in the mediation agreement did not reflect her understanding of the agreement. She believed she would receive the lot upon which the house sits plus an additional four acres, rather than a total of four acres which includes the marital home. Nancy requested a new survey as to the house and lot and an additional four acres.

On March 10, 2023, the family court entered its order granting Larry's motion to enforce the mediation agreement and denied Nancy's motion. Nancy now appeals.

Nancy presents two arguments. First, she argues the family court erred in failing to conduct an evidentiary hearing on a motion to modify the mediation agreement to conform with Nancy's understanding of how the real property was to be divided. Second, she argues the mediation agreement was ambiguous regarding the division of real property and that extrinsic evidence was required to discern the parties' intent.

Nowhere in Nancy's brief are we directed to the location in the record where these arguments were preserved for our review. Our Rules of Appellate Procedure list all requirements of an appellant's opening brief. *See* RAP[1] 32(A). Perhaps the most critical requirement is that the appellant's brief "shall contain 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." RAP 32(A)(4). Nancy's failure to comply with this requirement is not trivial.

"The requirement that each issue include a statement of preservation is intended 'to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal.'" *Krugman v. CMI, Inc.*, 437 S.W.3d 167, 171 (Ky. App. 2014) (quoting *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990)). Doing so "assure[s] the reviewing court that 'the issue was properly presented to the trial court, and therefore, is appropriate for . . .

[1] Kentucky Rules of Appellate Procedure.

consideration.'" *Gasaway v. Commonwealth*, 671 S.W.3d 298, 311 (Ky. 2023) (quoting *Cotton v. NCAA*, 587 S.W.3d 356, 360 (Ky. App. 2019)). This failure unduly impedes the work of our appellate courts.

"Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, [RAP 31(H)(1) (formerly CR[2] 76.12(8)(a))]; or (3) to review the issues raised in the brief for manifest injustice only[.]" *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (citing *Elwell*, 799 S.W.2d at 47). Indeed, "the manifest injustice standard of review is reserved only for errors in appellate briefing related to the statement of preservation." *Ford v. Commonwealth*, 628 S.W.3d 147, 155 (Ky. 2021). We elect to apply the manifest injustice standard to this appeal.

"A contractual provision is ambiguous if the provision is susceptible to multiple or inconsistent interpretations." *McMullin v. McMullin*, 338 S.W.3d 315, 320 (Ky. App. 2011) (citing *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003); *Transport Ins. Co. v. Ford*, 886 S.W.2d 901, 905 (Ky. App. 1994)). If no ambiguity exists, "the terms of the contract will be strictly enforced as written." *Id*. (citing *Whitlow v. Whitlow*, 267 S.W.2d 739, 740 (Ky. 1954)). Nancy directs us to no ambiguity and our own examination reveals none.

[2] Kentucky Rules of Civil Procedure.

Review of the family court's order reveals no manifest injustice as to the division of real estate provided by the mediation agreement. The family court concluded the agreement plainly and clearly divides the property, which consists of ten acres, so that Larry receives six acres and Nancy would receive four. We agree with this assessment. Simply, when Larry's six acres are removed from the ten total acres, Nancy is left with four.

Nancy says it was a mistake to memorialize the property division in the mediation agreement as it did. She is thus identifying a unilateral mistake. And it is correct that courts may set aside contracts "on the ground of [a] unilateral mistake . . . where it is a palpable mistake or convincingly and clearly shown the minds of the parties in fact did not meet." *Fields v. Cornett*, 70 S.W.2d 954, 957-58 (Ky. 1934). However, "[c]ancelling an executed contract is an exertion of the most extraordinary power of a court . . . [that] ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them." *Id.* at 957.

The facts of this case do not reflect that such a unilateral mistake occurred. Nancy and her attorney had ample opportunity to review the mediation agreement before entering it to ensure the agreement was as Nancy understood it.

She signed the agreement and initialed each page, indicating her understanding. Nancy stated in her deposition after the mediation that she understood the agreement and that she wished for the family court to approve it.

Further, there was no manifest injustice in the family court declining to conduct an evidentiary hearing as to Nancy's post-decree motions. Nancy has provided us with no Kentucky statute or decision that requires such hearing. We identify no reversible error in this respect.

Based on the foregoing, we affirm the Metcalfe Family Court's March 10, 2023 Order.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Dawn L. McCauley Lebanon, Kentucky	T. Richard Alexander, II Glasgow, Kentucky