

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001273-MR
AND
NO. 2012-CA-001327-MR

SONDRA DAVIDSON

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM PULASKI CIRCUIT COURT
v. HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 11-CI-00411

CHRIS KING

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, CLAYTON and NICKELL, JUDGES.

NICKELL, JUDGE: Sondra Davidson appeals from a Pulaski Circuit Court order and judgment entered after a jury trial. Davidson brought suit against Chris King who acted as her budget advisor. On appeal, her sole claim is that the trial court erred in directing a verdict for King on her claim for breach of fiduciary duty.

King has cross-appealed, arguing the trial court erred in not directing a verdict for him on his breach of contract claim against Davidson.

We begin by commenting on appellate practice, and in particular, the structure of appellate briefs. Both briefs filed in this case are deficient which hampers our review. Davidson's brief, which lacks page numbers, fails to conform to CR¹ 76.12(4)(c)(iv) requiring an appellant's brief to include a:

“STATEMENT OF THE CASE” consisting of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal, with ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings, or date and time in the case of all other untranscribed electronic recordings, supporting each of the statements narrated in the summary.

Davidson's statement of the case is minimal and does not cite to the record.

Indeed, her entire brief, excluding the appendix, is just five pages. While King's counterstatement of the case contains some citations to the record, it does not contain “*ample* references to the specific pages of the record, . . . supporting each of the statements narrated in the summary, so as to fully conform with CR 76.12(4)(d)(iii). (Emphasis added).

Another flaw in Davidson's brief is her citation to an unpublished opinion without including said opinion in the appendix to the brief as required by CR 76.28(4)(c). Additionally, for some unexplained reason, the videotaped trial, which would have been helpful, is not part of the record available for our review.

¹ Kentucky Rules of Civil Procedure.

Upon the filing of a notice of appeal, one of the two video recordings, or a court-certified copy of that portion thereof recording the court proceeding being appealed shall be filed with the clerk and certified by the clerk as part of the record on appeal.

CR 98(2). Furthermore, neither party referred us to the page number in the record at which we could read the lease agreement that is central to this case. Also, neither party included the lease in the appendix to their brief. Finally, the deed to the subject property which was supposedly executed on October 14, 2009, and may have been admitted at trial, is not part of the record.

These deficiencies do not justify striking the briefs or reviewing the appeal only for manifest injustice. *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). However, we stress that it is not the task of the appellate court to search the record for pertinent evidence not pointed out by the parties in their briefs. *Baker v. Weinberg*, 266 S.W.3d 827, 834 (Ky. App. 2008).

FACTS

Davidson and King became acquainted while attending the same church. King worked through the church as a “Crown Financial Budget Advisor.”² Davidson, who was experiencing serious financial difficulties, sought King’s advice. King proposed that she sell him her home, which was fully paid for, and

² According to King’s deposition, “Crown Financial” is “an at-home study” program. He read two books and his pastor sent a letter to the organization stating he had completed the course. King testified he had counseled nine people, but none of the nine had chosen to continue the relationship. We also noted a certificate in the record awarded to King by Christian Financial Concepts Inc. reflecting completion of one year of service between March 1999 and March 2000 as a “volunteer referral budget counselor.”

enter into a lease with him with an option to buy the home back. Accordingly, on October 14, 2009, Davidson entered into a “Residential Lease with Option to Purchase Agreement” with King. The home had been appraised for \$121,000.00;³ King purchased it from Davidson for \$25,000.00; and, Davidson could buy the home back from King for \$26,000.00.

Davidson agreed to pay King \$300.00 per month, payable on the first day of every month for one year, beginning on November 1, 2009, and ending on October 31, 2010. Davidson made timely payments in November and December, 2009. She made a partial payment of \$200.00 on January 24, 2010. In the months that followed, she made five partial rent payments, but none after July 4, 2010. She also failed to pay for utilities, services, insurance and taxes on the residence, as required by the lease agreement.

On February 1, 2011, King served Davidson with an eviction notice. When Davidson did not vacate the premises, King filed a forcible detainer complaint

³ A “Response to Motion Dismiss (sic) and Response to Motion for Possession” filed by Davidson on October 6, 2011, asserts the fair market value of the home was about \$130,000.00 on October 14, 2009. According to King’s “Answers to Interrogatories and Requests for Production of Documents,” the home was appraised at about \$121,000.00 on October 12, 2009. According to an “Order to Vacate Forcible Detainer Judgment from Order entered February 23, 2012,” on October 14, 2009, Davidson signed a deed conveying the subject property to King. In this order, the circuit court stated:

The District court ruled that the relationship between Sondra Davidson and Chris King is not that of landlord and mere tenant, that issues of title were raised, and that Sondra Davidson is not guilty of forcible detainer. The District Court’s decision was not appealed to this Court; the Court is without jurisdiction to rule on the Defendant’s motion for possession under a forcible detainer claim. [Kentucky Revised Statutes (KRS) 383.210; 23A.010]. Accordingly, the February 23, 2012 ruling requiring [Davidson] to vacate the subject property is vacated.

against her. According to King's brief, the Pulaski District Court determined, after a hearing, that it lacked jurisdiction to rule on Davidson's claim of home ownership.⁴ Nothing in the appellate record verifies that statement.

Davidson, meanwhile, filed an action against King in Pulaski Circuit Court, asserting claims of unlawful eviction, conversion, negligence, breach of fiduciary duty, and undue influence. King counterclaimed against Davidson alleging breach of contract. Because the district court did not enter a forcible detainer order against Davidson, and she never lost possession of the subject home, the circuit court dismissed her claims of unlawful eviction and conversion prior to a jury trial.

After the close of Davidson's case at trial, the circuit court entered a directed verdict in favor of King on the claims of breach of fiduciary duty, negligence, and undue influence. Davidson's remaining claims of fraud and breach of contract, and King's counterclaim for breach of contract were sent to the jury, which found for King on Davidson's claims. The jury also found in favor of King on his counterclaim, but awarded no damages, despite proof that Davidson had failed to pay King \$31,954.00 in rent.

Davidson moved for a new trial, arguing the trial court erred in directing a verdict for King on the breach of fiduciary duty claim. The trial court denied the

⁴ Davidson moved the trial court to alter, amend or vacate its order dismissing her conversion claim and requiring her to vacate the subject property. In the motion, Davidson argued: all forcible detainer actions must be filed in district court, the district court dismissed King's complaint in Case No. 11-C-00276, and King did not appeal the dismissal. King responded the district court dismissal was not on the merits, was not in favor of either party and resulted from Davidson having "raised issues of title to the property."

motion because Davidson had failed to offer expert testimony on the applicable standard of care. The trial court specifically found neither exception mentioned in *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. App. 1965), applied because the duty of care owed by a budget counselor to a client is specialized and not generally known by the public. While Davidson had called King as a witness, the circuit found he had testified the field of budget counseling is complex and he admitted no wrongdoing obviating the need for expert testimony on the applicable standard of care. This appeal by Davidson and cross-appeal by King followed.

APPEAL

Davidson contends the trial court erred in granting King a directed verdict on her breach of fiduciary duty claim because she did not produce an expert witness to establish the standard of care for a budget counselor.

On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.

Bierman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998) (citation omitted). In any negligence action under Kentucky law, a plaintiff must prove “(1) the defendant owed a duty of care to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury.” *Osborne v. Keeney*, 399 S.W.3d 1, 18 (Ky. 2012). Existence of a duty is a question of law for the court; breach and injury are questions of fact for the jury.

Boland-Maloney Lumber Co., Inc. v. Burnett, 302 S.W.3d 680, 686 (Ky. App. 2009) (internal citations omitted).

Generally, each person “owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury.” . . . [I]n cases involving professionals or professions requiring special skill and expertise, the standard is typically measured by the standard of conduct customary in the profession under

the circumstances. In such cases, expert testimony is typically required to establish the standard of care.

However, expert testimony is not always required in cases involving professional negligence. Rather, our courts have long recognized an exception in cases where the negligence of the professional is so apparent that even a layperson could recognize it. Restated, an expert witness is required to establish the standard of care in professional negligence cases in Kentucky, unless the standard is within the general or common knowledge of laypersons.

Id. at 686-87.

Davidson argues breach of fiduciary duty is a common law action for which expert testimony is not needed to establish the standard of care because the duty is not of a specialized or professional nature outside the ordinary understanding of a layperson. The trial court disagreed, stating in its order overruling Davidson's motion for a new trial, that the subject matter of the litigation was not common knowledge as illustrated by King's own testimony about the complexity of the field. The trial court explained,

it is fair to say that the majority of people who do have financial problems do not seek assistance of a budget counselor. While one who does seek the assistance of a budget counselor would likely expect the budget counselor, from the title alone, to aid in a budget creation, most persons would lack knowledge of the budget counselor's limits or of the behavior not to be engaged in when assisting individuals in gaining control of their financial situation.

Davidson argues expert testimony was unnecessary because a fiduciary duty is created "in all cases where there has been a special confidence reposed in one who

in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 486 (Ky. 1991) (internal citation omitted). She maintains King’s fiduciary duty to her was created through their confidential relationship, and the standard of care was not unique to the type of relationship or status and qualifications of the parties. To support her argument that the standard of fiduciary duty does not vary, she relies on an unpublished opinion of this Court, *Holmes v. Couch*, 2007-CA-000445-MR, 2008 WL 2468764 (Ky. App. 2008). However, *Holmes* is not binding and factually distinguishable.

In *Holmes*, developers of a residential subdivision were sued for breach of fiduciary duty by Holmes, a homebuyer. Holmes argued a breach occurred when defendants approved Holmes’ neighbor’s plans to build a walk-out basement and pool. A panel of this Court affirmed the grant of summary judgment to the defendants on the ground that the relationship between Holmes and the developers was not characterized by a fiduciary duty. This Court recognized that while every business relationship involves a duty of good faith and fair dealing, not all business relationships

encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty. . . . The fact that one businessman trusts another, . . . does not rise to a confidential relationship. Every contract includes an element of confidence and trust that each party will faithfully perform his obligation under the contract. Neither is the fact that the relationship has been a cordial

one, of long duration, evidence of a confidential relationship.

Id. at *7. The opinion further states, “the party seeking to have a fiduciary relationship recognized must show more than mere subjective trust. An aggrieved party must also show that he trusted the other party to act as a fiduciary and such trust was reasonable under the circumstances. Only in rare commercial cases is it reasonable to believe the other party will put your interests ahead of its own.

Holmes, at *8 (quoting *In re Sallee*, 286 F.3d 878, 891-92 (6th Cir. 2002) (internal citations and footnotes omitted)).

In *Holmes*, the question of whether an expert witness was needed to establish the standard of care was never explored because the relationship between the developers and *Holmes* never went beyond a normal contractual bond. By contrast, the question in the case before us is not whether a fiduciary relationship existed, but whether an expert was required to explain the factors present in the budget counselor-client relationship. A layperson could not evaluate whether King breached a fiduciary duty owed to Davidson as a professional budget counselor without first knowing the duties he owed Davidson in that capacity.

We agree with the trial court’s exercise of its discretion.

Green v. Owensboro Medical Health System, Inc., 231 S.W.3d 781, 783 (Ky. App. 2007) (“Whether expert testimony is required in a given case is squarely within the trial court's discretion.”). An expert was required to explain why the relationship

between Davidson and King went beyond a mere subjective trust or normal contractual business relationship.

In the alternative, Davidson argues King's own testimony concerning his training, experience, and certification process was sufficient proof of the standard of care he owed Davidson. To support her contention, she relies on *Jarboe*, a medical malpractice case, where "it is a generally accepted proposition that the necessary expert testimony may consist of admissions by the defendant doctor." *Jarboe*, 397 S.W.2d at 778. As noted previously, King's testimony has not been provided to us, though it appears it should have been certified by the clerk and transmitted to us as part of the appellate record. CR 98(2). It is the duty of the appellant to ensure the record on appeal is "sufficient to enable the court to pass on the alleged errors." *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky. 1968). Therefore, we cannot review King's actual testimony, but rather, "must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). The trial court ruled King had not provided expert testimony through admissions because he never admitted doing anything wrong in his role as Davidson's budget counselor, and his testimony even "included a statement regarding his lack of knowledge of the meaning of 'fiduciary duty.'" The trial court found King's testimony served to illustrate the complexity of the budget counseling field. Under the circumstances, we must assume the record supports the decision of the trial court and therefore, we have no basis on which to reverse.

CROSS-APPEAL

On cross-appeal, King argues the trial court erred in not granting his motion for a directed verdict on his breach of contract claim. He makes several references to statements recorded on the trial tapes. Again, we cannot verify those references because the trial tapes are not before us. As cross-appellant, King shares responsibility for ensuring completeness of the appellate record. *Thompson, supra.*

King argues the trial court should not have submitted the damages portion of the breach of contract claim to the jury since Davidson never disputed, and in fact admitted, she had failed to pay him \$31,954.00 in rent in accordance with the terms of the lease agreement, as demonstrated by a payment calculation sheet prepared by King. He contends although Davidson disputed she breached the rental agreement, she admitted that if a breach had occurred, she owed King that amount. Again, without the record, we cannot confirm King's interpretation of the proof. King argues the jury's award of zero damages on his breach of contract claim against Davidson was flagrantly against the evidence and unreasonable.

Although evidence may have been offered establishing Davidson had not made payments pursuant to the lease agreement, evidence was also elicited that King had purchased her house for just \$25,000.00, which by his own admission in response to interrogatories, was appraised at \$121,000.00. We further note that the jury found King terminated the contract before a valid exercise of the purchase option by Davidson. Under those circumstances, the jury may have reasonably

concluded King was more than adequately compensated for any breach of contract by Davidson.

For the foregoing reasons, the trial order and judgment of the Pulaski Circuit Court are affirmed.

All CONCUR.

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