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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001576-MR

JOSEPH STEVEN CLARK — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 08-CI-00485

HECTUS & STRAUSE, PLLC;
AND C. THOMAS HECTUS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

JONES, JUDGE: Joseph Steven Clark appeals from a jury verdict entered in favor of the Appellees, Hectus & Strause, PLLC and C. Thomas Hectus (hereinafter collectively referred to as "the Hectus Firm"), and from the trial court's denial of

his motion for judgment notwithstanding the verdict. For the reasons set forth below, we AFFIRM.

I. Background

This is not the first time this action has been before us on appeal. In a prior published opinion, *Clark v. Hectus & Strause PLLC*, 345 S.W.3d 857 (Ky. App. 2011), we succinctly outlined the factual background of this claim. We adopt our prior factual recitation as follows:

> Appellant and a number of other defendants were charged in federal court with conspiracy to traffic in cocaine. On September 13, 2003, Appellant agreed to pay Appellees a retainer of $10,000 to represent him in the case. The parties did not have a standard written fee agreement. Instead, the fee was part of a "flat fee" arrangement set forth in correspondence between the parties.
>
> On February 13, 2004, Appellee Hectus sent a letter to Appellant indicating that further funds would be needed because it appeared likely that the case would proceed to trial:
>
> > Finally, as you will recall, I had advised you that my initial retainer will not cover the preparation and trial of this case. It now appears that it is likely that we are going to trial, and I will have to begin trial preparation in earnest. The remainder of the trial fee, an additional $10,000, will be due and payable within thirty (30) days.
>
> On March 20, 2004, Appellant replied to this correspondence with a letter agreeing to pay Appellees an additional flat fee of $10,000 "for preparation and trial fee of for [sic] my case. This gives us a total of $20,000 to complete my case when we go to trial." At the bottom of this letter is the notation "agreed and accepted,"

> Appellee Hectus' signature, and the date "3/26/04." Nothing else in the record illustrates the intentions of the parties with respect to this sum.
>
> Ultimately, Appellant's case did not proceed to trial. Instead, he entered a guilty plea one day before trial was set to begin and was later sentenced to 140 months' imprisonment. On July 7, 2008, Appellant sent a letter to Appellees demanding a refund of the second $10,000 payment because his case had been resolved prior to trial. Appellees refused this demand, and Appellant filed the current action seeking reimbursement of this amount or part of it.

Id. at 858.

The trial court originally granted summary judgment in favor of Hectus. Clark appealed. On appeal, we concluded that the parties' fee agreement was ambiguous with respect to "the issue of who was entitled to what in the event that a trial did not take place." Accordingly, we remanded so that this question could be "be resolved by a finder of fact." *Id.* at 860.

On July 18, 2012, Clark's claim against the Hectus firm was tried before a Marion County jury. Following a presentation of the evidence, the jury returned a verdict in favor of the Hectus Firm by answering the following interrogatory in the negative: "Do you believe from the evidence that Plaintiff is entitled under the agreement to a refund of all or a portion of the second payment of $10,000 paid on behalf of the Plaintiff to the Defendants on or about March 25, 2004." Thereafter, Clark moved for judgment notwithstanding the verdict, which the trial court denied.

This appeal followed.

II. Analysis

Clark alleges three separate assignments of error on appeal: 1) the trial court erred in denying Clark's motion notwithstanding the verdict where it was undisputed that Clark's criminal case did not go to trial; 2) it was reversible error for the trial court to have allowed Mr. Hectus to testify in narrative format; and 3) the trial court committed reversible error by refusing to allow Clark to present expert testimony during his case-in-chief.

A. Motion Notwithstanding the Verdict

A reviewing court may not disturb a trial court's decision on a motion for a judgment notwithstanding the verdict unless that decision is clearly erroneous. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

On appeal, Clark maintains that the trial court should have granted him a judgment notwithstanding the verdict because there was no dispute that Clark's federal criminal case did not go to trial. Accordingly, Clark asserts that the proof was absolutely clear that the Hectus Firm did not perform the entire agreement, and therefore, "no reasonable jury could differ on this fact." Under Clark's logic, he should have been awarded a judgment in his favor on the refund issue leaving only the question of the amount of refund he was due for the jury to decide.

Kentucky Rule of Civil Procedure ("CR") 50.02 rovides:

> Not later than 10 days after entry of judgment, a party who has moved for a directed verdict at the close of all

> the evidence may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party within 10 days after the jury has been discharged may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Id.

We note that nowhere in Clark's brief does he provide a citation to the record where he moved for a directed verdict. Indeed, it appears from our review of the record that he made no such motion before the trial court. Clark's failure to move for a directed verdict was fatal to his motion for judgment notwithstanding the verdict. As we explained in *Huddleston v. Murley*, 757 S.W.2d 216, 217 (Ky. App.1988),

> According to CR 50.02, which governs these motions, a prerequisite to making one is that the moving party make a motion for directed verdict at the close of all the evidence. Appellants have nowhere shown or even alleged to this Court that they thusly preserved their right to move for judgment n.o.v. CR 75.01 places a burden upon appellants to designate portions of the trial proceedings they wish to be included in the record on appeal. Appellants failed to do this, leaving this Court ignorant of any trial motions that may have been made. Thus, we must presume that they did not move for a directed verdict and have no right to seek judgment n.o.v.

> We affirm the trial court's denial of appellants' motion for judgment n.o.v.

Id.

Likewise, we affirm the trial court's denial of Clark's motion for a judgment notwithstanding the verdict. Clark did not move for a directed verdict, and therefore, was not entitled to the relief he sought before the trial court.

B. Mr. Hectus's Narrative Testimony

Clark's next assignment of error is that the trial court committed reversible error when, during the Hectus Firm's case-in-chief, it permitted Mr. Hectus, over Clark's objection, to provide the jury with an unhindered narrative statement of his recollection of the services he provided during his representation of Clark.

"[T]he trial court has inherent authority to control the trial proceedings and specific authority under KRE[1] 611(a) to control the mode of interrogation of witnesses." *Mullikan v. Commonwealth*, 341 S.W.3d 99, 104 (Ky. 2011). Thus, we review a trial court's decision regarding the examination of witnesses for an abuse of discretion. *Id.*

Mr. Hectus represented both himself and the Hectus Firm. Accordingly, during direct examination he was serving both as counsel and witness. After having been sworn in, Mr. Hectus began testifying in a narrative fashion. After a period of time, Clark objected. The trial court sustained Clark's

[1] Kentucky Rules of Evidence.

objection; it instructed Mr. Hectus to "announce his questions" to the jury before giving any additional testimony. Thereafter, Mr. Hectus began to "announce" his questions to the jury. He asked himself questions such as: "What was my agreement with Mr. Clark?"; "What happened next?"; "What discussions were had about a plea?"; "What happened next?"; and "What did you do to prepare for trial?"

It cannot be reasonably disputed that Mr. Hectus did give particularly long answers to some of his questions; however, having reviewed the record, we find no instance where the trial court abused its discretion. The trial court sustained Clark's objection requiring Mr. Hectus to "announce" his questions to the jury. When Mr. Hectus appeared to be straying beyond the scope of his "announced" questions, it was incumbent on Clark to object. We cannot find where Clark proffered adequate objections to the testimony he now complains about on appeal. Accordingly, we affirm the trial court with respect to the form of Mr. Hectus's direct examination testimony.

C. Mr. Taylor's Expert Testimony

As part of his case-in-chief, Clark sought to call an attorney, Daniel T. Taylor III, to testify as an expert. The Hectus Firm objected on the basis that Mr. Taylor's testimony would not assist the jury in understanding the evidence or determining a fact in issue. The trial court agreed. It concluded that Mr. Taylor's testimony would constitute opinion evidence as to the standard of care and ethical obligations, which were not at issue in a breach of contract case.

On appeal, Clark appears to be arguing that the trial court abused its discretion because the record was insufficient to allow it to make a reasoned opinion. Clark confuses two distinct concepts: 1) whether expert testimony is necessary; and 2) whether a particular expert is qualified to render an opinion. Had the trial court been making a determination regarding Taylor's qualifications to testify as an expert, then we would agree with Clark that the record was inadequate. However, in this case, the trial court was making an initial, threshold determination regarding the necessity of any expert testimony. The trial court determined that such testimony was not necessary because this case involved the simple question of the scope of the parties' contract--an issue that did not require expert opinion.[2] We believe the record was sufficient for the trial court to make this determination without the necessity of conducting a hearing or further factual development of the record.

Lastly, we observe that Clark failed to preserve any argument with respect to Mr. Taylor's proffered testimony on direct because he did not preserve it by avowal or otherwise point us to anywhere in the record where he provided an expert summary to the court. "This Court has stated that 'excluded testimony must be placed in the record by avowal to be preserved for our review.'" *Charash v. Johnson*, 43 S.W.3d 274, 281 (Ky. App. 2000) (quoting *Transit Auth. of River City v. Vinson*, 703 S.W.2d 482, 487 (Ky. App. 1985)).

[2] Mr. Taylor was ultimately allowed to testify on rebuttal given the scope of Mr. Hectus's direct testimony.

In sum, having reviewed the record, we find no error with respect to the trial court's ruling regarding Mr. Taylor's testimony.

III. Conclusion

For the reasons set forth above, we affirm the Marion Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Theodore H. Lavit
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Lebanon, Kentucky

BRIEF FOR APPELLEE:

C. Thomas Hectus
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