RENDERED: MARCH 7, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001910-MR

CITY OF HILLVIEW — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 05-CI-00374

TRUCK AMERICA TRAINING, LLC;
JAMES CARTER AND DEBORAH CARTER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

DIXON, JUDGE: In this breach of contract action, the City of Hillview ("City") appeals from a judgment of the Bullitt Circuit Court following a bench trial on the issue of liability and a jury trial on damages. The trial court concluded the City breached a land purchase contract with Truck America Training, LLC ("Truck

America"), and a jury awarded Truck America damages as a result of the City's breach. Finding no error, we affirm.

This litigation has previously been before this Court on Truck America's appeal of summary judgment granted in favor of the City. *Truck America Training, LLC v. City of Hillview*, 2007 WL 866694 (Ky. App. 2007) (2006-CA-000727-MR). At issue in that appeal was the enforceability of the lease-purchase contract executed by James and Deborah Carter to purchase a forty-acre site from the city for $800,000.00. A panel of this Court vacated the summary judgment and remanded for further proceedings. Our prior opinion stated, in relevant part:

> In its memorandum supporting its motion for summary judgment, the City presented evidence of the following sequence of events. In December 1998, the City of Hillview conveyed a 40-acre tract of unimproved land located at 364 Ferguson Lane in Bullitt County to the Kentucky League of Cities Funding Trust for $800,000.00. The Trust immediately leased the property back to the City, and the City paid the Trust between $75,000.00 and 76,000.00 annually in rent for the property. Since the rent payments were a financial drain on the City, it was eager to find a sub-lessee.
>
> In early 1999, the City's mayor, Leemon Powell, negotiated a lease agreement for the Ferguson Lane property with Homeplate Enterprises. Difficulties developed, and litigation between the City and Homeplate resulted. Mayor Powell testified by deposition that by that time, he "tried to get anybody I could to buy it." Deposition at 10.
>
> Mayor Powell then negotiated an agreement with Jim and Debby Carter and George and Vivian Cambron. The parties anticipated that the site would be used as a

training facility for the operation of tractor-trailers and other heavy equipment. The Trust agreed to permit the City to re-purchase the parcel for its immediate re-sale, and the Mayor proceeded to consummate the deal.

On January 29, 2002, the City executed an agreement prepared by the City Attorney entitled "lease-purchase offer," which was approved by the City Council. . . .

. . . .

While Truck America was never identified by name in the agreement, the company took possession of the property. Truck America and another limited liability company, American Heavy Equipment Training, remitted monthly lease payments to the City beginning December 30, 2002. According to Mayor Powell, "Truck America and the Carters were the same people." Deposition at 13.

The outstanding litigation with Homeplate Enterprises referenced in the parties' agreement was concluded in the fall of 2004. By letter to the City dated October 7, 2004, Truck America, the Carters, and the Cambrons expressed their eagerness to complete the purchase of the property and requested a closing date. By this time, the City was under a new administration. No longer eager to complete the transaction, it did not respond to the inquiry about a closing date.

On April 5, 2005, Truck America filed a complaint against the City of Hillview . . . [.] Truck America alleged that the defendant[] had interfered with its interest in the Ferguson Lane property by failing to convey title pursuant to the terms of the "lease-purchase offer". . . .

. . . .

Highlighting the failure of the Carters to respond in timely fashion to requests for admission, on January 4, 2006, the City filed a motion for summary judgment asserting that there were no genuine issues of material fact precluding judgment in its favor. One of the City's requests for admission had asked the Carters to admit that

they had executed the disputed agreement in their capacity as individuals. Another requested the Carters to admit that an agreement with them as individuals - and not with Truck America - had been finally approved by means of a formal City Council resolution. The City argued that since these and several other crucial items contained in those requests were now deemed admitted, the plaintiffs could not hope to prevail at trial.

Truck America and the Carters filed an extensive response, and on January 27, 2006, the trial court denied the City's motion for summary judgment. On February 1, 2006, the City filed a motion to alter, amend, or vacate the court's order denying summary judgment.

On March 7, 2006, the trial court granted the City's motion to vacate. The trial court concluded that the ambiguous nature of the signatures of the Carters and the Cambrons was insufficient to bind an unnamed, limited liability company; that the contract could not have been and was not assigned to Truck America; and that the individual plaintiffs could not have executed the agreement both in their individual capacities and as representatives of Truck America. Citing the fact that the "time to choose their capacity has passed by their failure to respond to the request for admissions, interrogatories, and requests for production of documents propounded by the City," the trial court determined that the City was entitled to judgment as a matter of law. This appeal followed.

The primary impediment to enforcement of the agreement has been the questionable nature of the Carters' signatures. The signatures did not indicate whether they were executed in either an individual or a representative capacity. While the signature block contained typewritten text suggesting that the Carters were to be bound individually, their signatures were followed by identifiers normally associated with a corporate entity. The hybrid nature of the signatures created the resulting ambiguity as to capacity in which the Carters signed the agreement.

This Court has held that the substance of an agreement rather than the form of the signature block governs the interpretation of a contract. *Simpson v. Heath & Co.*, 580 S.W.2d 505 (Ky.App.1979), involved a situation in which the president of a corporation signed as guarantor of a contract executed by him as president of the corporation. At issue was whether he was individually liable on the guaranty as a matter of law because he followed his signature on the guaranty with the identifier: "Pres." We concluded that the signature created an ambiguity on its face as to whether the parties intended for Simpson to be bound individually. After reviewing the record, we concluded that the issue was not yet appropriate for summary judgment since there remained a question of fact concerning Simpson's intentions. That case was remanded for further proceedings.

In this case, the trial court correctly observed that the Carters could not have executed the agreement both in their capacity as individuals and in their capacity as representatives of Truck America. However, despite the ambiguous nature of the execution, the City's requests for admission, having been deemed admitted by default in answering, must be viewed as binding the Carters in their capacity as individuals. The City accepted the agreement despite the equivocal nature of the execution, and we agree that this acceptance was sufficient to create a binding contract between the parties.

Truck America makes several arguments in support of its contention that the trial court erred by granting summary judgment in favor of the City. After our review of the record and relevant authority, we conclude that only one of its arguments needs to be addressed as it governs the resolution of this appeal.

Truck America contends that it had its own separate legal right to attempt to enforce the Carters' agreement against the City. In order to prevail against the City on the motion for summary judgment, Truck America must be able to demonstrate the existence of an enforceable

contract and its status as a third-party beneficiary of that agreement.

Having determined that a valid contract exists, we must examine whether Truck America can establish itself as a third-party beneficiary of the contract. One who is not an actual party to an agreement may nevertheless enforce it if it creates obligations intended for his benefit. *Sexton v. Taylor County, Kentucky*, 692 S.W.2d 808 (Ky.App.1985). The third person seeking to enforce the terms of a contract in his own name must show that the parties to the contract intended by their agreement to benefit the third-party directly. *Id*. Such intent need not be expressed in the agreement itself; it may be evidenced by the terms of the agreement, the surrounding circumstances, or both. *Id*.

At least two provisions of the disputed agreement indicate that the parties intended that the contract was to benefit Truck America directly. Paragraph 10 provided as a condition of the agreement that the Carters were to obtain the necessary authorization from the Bullitt County Planning Commission to use the premises "for a truck [driver] and/or heavy equipment training facility. . . ." A portion of paragraph 11 provides for an abatement of property taxes if the Carters' on-site business operations produced at least twenty-five jobs for the community. Truck America took possession of the property as anticipated by the parties, and it remitted the monthly rental. Consequently, we can infer both from the terms of the contract and the surrounding circumstances that the parties' agreement was designed to confer a direct benefit on Truck America. In reality, the very *purpose* of the contract was aimed at benefiting Truck America. The City contracted with the Carters in order to lease and sell the property to a going concern with dual expectations: to provide jobs to the community and to pay the rent that had drained the city's coffers.

. . . Since the City was not entitled to judgment as a matter of law, a summary dismissal was not properly granted in this case.

Truck America at *1-5.

On remand, the circuit court held a bench trial, and it ultimately ruled that the City breached the contract with Truck America. A jury trial was held to determine damages for the City's breach. Truck America established that the City evicted Truck America from the property in April 2005, after Truck America had operated successfully on the forty-acre site for two years. Truck America put forth evidence regarding the damages it incurred during the seven-year period that the City refused to sell the property, which denied Truck America use of the forty-acre parcel for its business operations. Truck America presented testimony from Deborah Carter, Truck America's chief financial officer (CFO). Carter testified regarding the day-to-day operations of Truck America, including the financial impact of losing access to the forty-acre parcel, and the impact on student enrollment and tuition. Truck America also introduced testimony from two expert witnesses, Brian Enneking and David Glauber. Enneking, a finance executive, testified regarding the availability of financing for students attending career training schools, such as Truck America. Glauber, a real estate appraiser, conducted an appraisal of the forty-acre parcel for Truck America in May 2005. Glauber determined the fair market value for the property was $3,000,000.00. In turn, the City only called one witness, Jim Carter, the president of Truck America. At the close of the case, Truck America sought damages for: 1) its lost profits, based on decreased student enrollment after Truck America lost the additional forty acres of property, forcing it to reduce class sizes; 2) its lost profits from the

inability to use the property as a source of collateral for its student-loan financing program; 3) equipment losses; 4) alternative rental expenses; and 5) expenses from purchasing additional acreage near the disputed property. The jury ultimately awarded Truck America damages totaling $11,435,259.49. The City now appeals.

The City sets forth several contentions that relate to its belief that the agreement was unambiguous, that it was not an enforceable contract, and that Truck America could not demand specific performance because it was not a party to the agreement.

The law of the case doctrine sets forth "the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case." *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). In our previous opinion, a panel of this Court concluded that a contract existed and that Truck America was entitled to enforce the agreement as a third-party beneficiary; accordingly, we will not address the City's arguments to the contrary.

The City also contends the trial court erred by permitting Truck America to introduce evidence of speculative damages. The City asserts that Carter engaged in speculation regarding the potential number of students that Truck America could have enrolled if it had continued operating on the land and had expanded its student loan program by leveraging the equity in the property. According to Carter's and Enneking's calculations, Truck America lost more than

$10,000,000.00 in anticipated revenue during the City's seven-year delay in selling the property. The City argues that such evidence was too speculative and unforeseeable to support an award of damages.[1]

As a result of the City's breach, Truck America was entitled to recover damages that "may fairly and reasonably be considered as arising naturally - that is according to the usual course of things - from the breach of the contract itself or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach[.]" *University of Louisville v. RAM Engineering & Const., Inc.*, 199 S.W.3d 746, 748 (Ky. App. 2005). Further, damages for lost profits "may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." *Pauline's Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399, 401 (Ky. 1985). "[W]hile Kentucky law does not tolerate uncertainty as to the *fact* of damage (*i.e.*, recovery will not be had where there is uncertainty as to whether the damage has in fact occurred), once the existence of some damage is certain, uncertainty as to the *amount* of that damage will not defeat recovery."

[1] The City contends the expert testimony from Brian Enneking and David Glauber did not comport with Kentucky Rules of Evidence (KRE) 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). These arguments were not preserved for appellate review. The City's motion *in limine* addressed excluding the evidence under KRE 403 because it confused the issues; however, in its argument before this Court, the City challenges expert qualifications and methodology pursuant to KRE 702. We cannot consider an error on appeal that was not presented to the trial court. *Regional Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). Further, it appears the City did not request a *Daubert* hearing, and the trial court was not obligated to hold a hearing *sua sponte*. *Tharp v. Commonwealth*, 40 S.W.3d 356, 368 (Ky. 2000).

Gibson v. Kentucky Farm Bureau Mut. Ins. Co., 328 S.W.3d 195, 205 (Ky. App. 2010).

The testimony and evidence presented by Truck America indicated that it had intended to use the parcel to expand the training programs for heavy equipment and truck driving, which was known to the City at the time the contract was executed. Truck America's enrollment numbers showed that the expanded programs were successful during the two years Truck America occupied the forty-acre site. As a result of the City's refusal to sell the property, Truck America was deprived of the acreage needed to maintain its expanded business operations, and it lost an anticipated asset that would have collateralized the in-house student loan program. Further, Carter explained that, without the additional acreage for the heavy equipment classes, Truck America was forced to sell that equipment at a loss. Carter presented clear and concise testimony regarding her position as CFO of the company, the business practices of Truck America, her methods for calculating and predicting enrollment month to month, and financing opportunities for potential students. Enneking's testimony explained his methodology for calculating the percentage of additional students that could have enrolled if Truck America had been able to expand its in-house financing by relying on a portion of the equity that Truck America would have had in the forty-acre parcel. Glauber's appraisal and testimony indicated that, at the time Truck America was ready to purchase the tract for $800,000.00, the fair market value of the property was $3,000,000.00. The City cross-examined Truck America's witnesses and urged the

jury to conclude that the losses claimed by Truck America were due to a poor economy rather than the loss of the forty-acre property.

After careful review, we conclude that sufficient proof of damages was introduced to allow the jury to weigh the conflicting evidence and assess the credibility of the witnesses. *Garcia v. Whitaker*, 400 S.W.3d 270, 274 (Ky. 2013). The trial court did not abuse its discretion by admitting the evidence of damages, as it was not unduly speculative or unforeseeable.

For the reasons stated herein, we affirm the judgment of the Bullitt Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Gregg Y. Neal
Shelbyville, Kentucky

Mark E. Edison
Shepherdsville, Kentucky

BRIEF FOR APPELLEES:

Andrew G. Beshear
Cassandra J. Wiemken
Louisville, Kentucky

J. Scott Wantland
Shepherdsville, Kentucky