RENDERED: OCTOBER 17, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000988-MR

EDWARD F. VAUGHN APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 11-CI-002977

ZOPPOTH LAW FIRM APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES

COMBS, JUDGE: Edward Vaughn appeals the order of the Jefferson Circuit Court which found him liable for damages to the Zoppoth Law Firm. Following our review, we affirm.

Vaughn was a member of Cobia Group LLC, a limited liability corporation comprised of eight members which had been formed in 2005 for the purpose of

purchasing property in Florida for rental purposes. Cobia obtained financing from Countrywide Home Loans, Inc. In order to receive a lower interest rate, Cobia purchased the property in the names of member Gary Renfro and his wife Rhonda.[1] When the other members of Cobia did not provide money, the Renfros eventually defaulted on the loan.

Vaughn feared that Renfro would exercise an indemnity clause in Cobia's operating agreement according to which he might be liable. Therefore, in 2007, he sued Countrywide, alleging that Countrywide had fraudulently financed the property. Vaughn's counsel was David Vandeventer.

After Vandeventer withdrew from representation due to personal reasons, Vaughn contacted Scott Zoppoth. On May 8, 2009, Vaughn signed an engagement agreement with Zoppoth. According to its terms, Vaughn was to pay a retainer of five thousand dollars and the legal fees that were generated throughout the representation.

On May 22, 2009, Zoppoth met with both Vaughn and Renfro. He believed that as the owner of record, Renfro's participation in the lawsuit was necessary in order to qualify for standing. At the time of the meeting, Renfro's objective was to settle with Countrywide in order to bring an end to the conflict. Vaughn, on the other hand, was eager to expose Countrywide's alleged wrongdoing through a trial. Zoppoth cautioned Vaughn and Renfro that their differences had the potential of

[1] All parties admit that it was improper for the property to be purchased in this fashion. It was done at the direction of the attorney who had formed Cobia. Separate lawsuits charged that he committed malpractice.

evolving into a conflict of interest. Additionally, if the case were to be resolved in favor of Countrywide, Renfro would potentially be able to exercise the indemnity clause against the other members of Cobia-- including Vaughn as Vaughn had feared. However, the resolution of the conflict with Countrywide was uncertain at this point. In order to reduce their legal fees, Vaughn and Renfro agreed to joint representation.

Zoppoth filed an amended complaint in federal court adding the Renfros as plaintiffs. After that federal complaint was filed, Vaughn and Zoppoth made an arrangement for Zoppoth to represent Vaughn in two other proceedings. Zoppoth began billing Vaughn in June 2009. However, after the five-thousand-dollar retainer had been depleted, Vaughn did not pay Zoppoth. Approximately eighteen months later, on March 14, 2011, Zoppoth sent Vaughn a letter requesting payment of $10,226.50. After receiving no payment, Zoppoth filed a complaint on April 26, 2011, asserting that Vaughn had breached the contract, had been unjustly enriched, and was liable for damages to Zoppoth.

A jury trial was held March 19-21, 2013. In his defense, Vaughn claimed that his contract with Zoppoth was not binding because of the dual representation of Vaughn and Renfro. After the jury found in favor of Zoppoth, the court awarded him $10,226.50 plus interest. The interest was broken into two parts: eight percent per year for the services rendered from August 1, 2009, until the time of trial. Time running from the trial until the satisfaction of the judgment would be subject to interest of twelve percent per year. This appeal follows.

While the underlying facts are complicated, they are really not pertinent to the issues of this appeal, which are straightforward. Vaughn's first argument is that the trial court erred in rejecting his tendered jury instructions. Jury instructions are a matter of law; therefore, our review is *de novo*. *Howell v. Commonwealth*, 296 S.W.3d 430, 432-33 (Ky. App. 2009).

Kentucky has a "bare bones" approach to jury instructions, limiting the amount of detail that can be provided to the jury. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). The intent is to "pare down unfamiliar and often complicated issues in a manner that jurors, who are often not familiar with legal principles, can understand." *Id*. The bare bones may be "fleshed out" in closing arguments. *Cox v. Cooper*, 510 S.W.3d 530, 535 (Ky. 1974).

In the case before us, the jury was instructed that:

> A contract is an agreement between two or more parties creating rights and obligations. In this case, the evidence has shown that The Zoppoth Law Firm and Edward Vaughn entered into a written contract whereby The Zoppoth Law Firm agreed to provide legal services for Edward Vaughn.
>
> If you find from the evidence that a contract was entered into between The Zoppoth Law Firm and Edward Vaughn, and that both agreed and understood the conditions under which services would be provided, then you must determine the following:
>
> Did Edward Vaughn breach the contract which he entered into with The Zoppoth Law Firm?

Vaughn tendered instructions which focused on whether Zoppoth had performed negligently by breaching an ethical duty when he represented both

Vaughn and Renfro. The nature of Zoppoth's conduct constituted Vaughn's entire defense. Vaughn thoroughly represented his theory to the jury. He detailed the many possible scenarios by which dual representation might have created conflicts of interest. In contrast, Zoppoth put forth evidence that no conflict whatsoever had arisen during the short time that he represented Vaughn.

It has long been a fundamental principle of our jurisprudence that the jury weighs the evidence and assesses the credibility of witnesses. *See Barnett v. Commonwealth*, 1 S.W. 722 (Ky. 1886). The primary allegation in this case was that Vaughn had breached a contract. The jury instructions narrowly and properly focused on that issue and duly refrained from commenting on the evidence. As this court noted in *Harstad v. Whiteman*, 338 S.W.3d 804, 818 (Ky. App. 2011), a court must decline to highlight evidence in an instruction and thereby give undue prominence to it. Such an improper emphasis on the evidence would invade the province of the jury. The court committed no such error in this case.

Vaughn next argues that the trial court should have granted his motion for a directed verdict. In considering a motion for directed verdict,

> the trial court must draw all fair and rational inferences from the evidence in favor of the party opposing the motion, and a verdict should not be directed unless the evidence is insufficient to sustain the verdict. The evidence of such party's witnesses must be accepted as true.

Spivey v. Sheeler, 514 S.W.2d 667, 673 (Ky. 1974) (citations omitted). We may not reverse the trial court's denial of directed verdict unless it would have been

"clearly unreasonable" for the jury to find liability. *Mountain Water Dist. v. Smith*, 314 S.W.3d 312, 314 (Ky. App. 2010) (*quoting Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)).

In order to succeed in an action for breach of contract, a plaintiff must prove: "1) existence of a contract; 2) breach of that contract; and 3) damages flowing from the breach of contract." *Metro Louisville/Jefferson County Government v. Abma*, 326 S.W.3d 1, 8 (Ky. App. 2009). Vaughn asserts that the first element was not satisfied because Zoppoth's joint representation of Vaughn and Renfro nullified their agreement.

Kentucky Rule[s] of the Supreme Court (SCR) 3.130(1.7) (a) prohibits representation of multiple clients if: " (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client[.]"

However, a lawyer may continue representation as long as:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

SCR 3.30(1.7)(b).

Vaughn and the Renfros were not adverse parties. The operating agreement of Cobia included an indemnity clause which *could* have created a conflict of interest if Renfro had ultimately been found liable to Countrywide. However, when Vaughn and Renfro retained the services of Zoppoth, the outcome of the litigation was wholly unknown. At the time, both were adverse to Countrywide, and they asserted the same claims in the amended complaint.

It is undisputed that Zoppoth did not obtain written consent to the joint representation. However, Zoppoth presented testimony at trial that he had discussed the possibility of a future conflict with Renfro and Vaughn. Nonetheless, they had agreed to proceed with the joint representation.

Furthermore,

Vaughn does not offer any legal authority for the proposition that representation which creates a ***potential*** conflict of interest inherently nullifies a contract. On point, Comment 8 to SCR 3.130(1.7) provides that: "[t]he ***mere possibility*** of subsequent harm does not itself require disclosure and consent." (Emphasis added.) This observation suggests that Zoppoth acted above and beyond his ethical obligation when he counseled Vaughn and Renfro about the potential for future conflict. Therefore, Vaughn met his burden, and we cannot conclude that the evidence warranted a directed verdict.

Finally, Vaughn claims that the court improperly awarded Zoppoth prejudgment interest. The trial court, not the jury, determines awards of interest,

and we may not reverse unless the court abused its discretion. *Nucor Corp. v. General Electric Co*., 812 S.W.2d 136, 143 (Ky. 1991). In the case of liquidated damages, however, interest is included in the judgment as a matter of right. *Poundstone v. Patriot Coal Co., Ltd*., 485 F.3d 891, 901 (6th Cir. 2007). Damages of a fixed amount as a result of an agreement between parties are liquidated. *Nucor Corp. v. General Electric Co*., 812 S.W.2d at 141. Prejudgment interest is appropriate for unpaid legal fees. *Brown v. Fulton, Hubbard & Hubbard*, 817 S.W.2d 899 (Ky. App. 1991).

In this case, the jury determined that Vaughn breached his contract with Zoppoth. The damages were the fees generated by the contractual rate. Therefore, the amount was fixed by the agreement, and the court did not err in awarding prejudgment interest.

Accordingly, we affirm the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:
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BRIEF FOR APPELLEE:
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