

RENDERED: FEBRUARY 24, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-001678-MR

REBECCA MERCER

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KEN M. HOWARD, JUDGE  
ACTION NO. 14-CI-01236

ESTATE OF JOHN W. DEMPSTER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON AND D. LAMBERT, JUDGES.

DIXON, JUDGE: Rebecca Mercer (Mercer) files this appeal from the judgement of the Hardin Circuit Court, following a jury trial. Because we hold that the punitive damages levied against Mercer did not violate due process, we affirm.

## Facts

Mercer filed a claim in the Hardin Circuit Court, alleging unjust enrichment and a variety of other claims.<sup>1</sup> The Estate of John W. Dempster counterclaimed, alleging slander of title and abuse of process.

Mercer testified that she and John W. Dempster were involved romantically. She testified that they also acquired several properties together, and that she helped him collect rent over those properties. Though John W. Dempster used his name alone to acquire each of the properties, he sold Mercer one property on a contract for deed.<sup>2</sup> John W. Dempster created a revocable living trust and transferred ten parcels of land into that trust. The beneficiaries of that trust were his three sons: Jeffrey Dempster, Jeremy Dempster and Johnnie W. Dempster, II in equal shares. Mercer was evicted from one of the properties owned by John W. Dempster after his death, for her nonpayment of rent. The beneficiaries of the John W. Dempster revocable trust agreed to sell the properties.

Mercer filed a lis pendens notice on all of the John W. Dempster Revocable Trust's properties. Mercer did not file a corresponding lawsuit concerning those properties, however, citing instead John W. Dempster's probate case number. The Dempsters filed suit in order to have Mercer remove the notices

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<sup>1</sup> Mercer's unjust enrichment claim was her only claim that the trial court permitted to proceed to the jury.

<sup>2</sup> Mercer's testimony over this matter was somewhat contradictory. At one point, Mercer claimed that there was a written agreement between her and John W. Dempster. Regardless, she never introduced any deed to the trial court in her name over any of these properties. She also told the trial court that John W. Dempster had never told her that she was entitled to a one-half share of the profits from their endeavor.

in order to cure the associated cloud on the title. The court ordered the lis pendens notices be released. Mercer then filed a complaint concerning the properties and filed lis pendens notices on each of these properties again. The court ordered all the lis pendens notices to be released a second time, and ordered all of the net proceeds from their sale be held pending the outcome of that litigation. The court also directed Mercer not to file any more lis pendens notices on the trust properties without leave of the court. Mercer filed lis pendens notices over the properties a third time, and the circuit court held her in contempt. The Dempsters presented evidence at trial that Mercer's repeated filings of lis pendens notices reduced their value.

The Dempsters filed a lawsuit against Mercer to foreclose upon the property which she bought from John W. Dempster on contract for deed, because Mercer had not been making payments on that property. The court ordered the case to mediation. As a result of that mediation, Mercer agreed to buy that property for \$6,000; if she did not pay, Mercer agreed to quit claim the interest in the property to the Dempsters and dismiss her claims.<sup>3</sup> Shortly before that figure became due, Mercer filed for bankruptcy, listing all of the trust assets. The automatic stay placed upon the trust assets prevented the Dempsters from selling any of the trust properties during the pendency of the bankruptcy action. The Dempsters entered the Bankruptcy Court for the Western District of Kentucky's order into evidence dismissing the action, in which the court found Mercer to be a

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<sup>3</sup> Mercer stated at trial that she did not remember signing that agreement.

“serial filer,” stated that she had filed the bankruptcy “in bad faith,” and that Mercer appeared to have only filed it as “a litigation tactic.” The court forbid Mercer from filing bankruptcy in that district for five years.

The jury awarded damages in the amount of \$684,000 against Mercer, including \$500,000 in punitive damages. This appeal follows.

## **Analysis**

### **I. Procedural Irregularities**

CR<sup>4</sup> 76.12(4)(c)(iii) states that each brief shall contain the following:

A “STATEMENT OF POINTS AND AUTHORITIES,” which shall set forth, succinctly and in the order in which they are discussed in the body of the argument, the appellant's contentions with respect to each issue of law relied upon for a reversal, listing under each the authorities cited on that point and the respective pages of the brief on which the argument appears and on which the authorities are cited.

CR 76.12(4)(c)(iv) provides that it shall contain

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.

Finally, CR 76.12(4)(c)(v) provides that briefs shall “contain at the beginning of the argument a statement with reference to the record showing whether the issue

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<sup>4</sup> Kentucky Rules of Civil Procedure.

was properly preserved for review and, if so, in what manner.” Mercer has not complied with any of these provisions.

We note that we have previously struck a brief for the noncompliance with similar provisions in *Hawkins v. Miller*, 301 S.W.3d 507, 508 (Ky. App. 2009) (failure to comply with the spacing requirements and the failure to cite to the record). Furthermore, in *J.M. v. Com., Cabinet For Health & Family Servs.*, 325 S.W.3d 901 (Ky. App. 2010), this Court stated as follows:

In *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990), we established the principle that, where an appellant fails to comply with CR 76.12(4)(c)(iv), a reviewing court need only undertake an overall review of the record for manifest injustice. We believe that principle applies as well to the failure to comply with CR 76.12(4)(c)(v). Another appropriate remedy is to strike J.M.’s brief for noncompliance with the Rule. CR 76.12(8)(a) (“A brief may be stricken for failure to comply with any substantial requirement of this Rule[.]”). We have chosen the less severe alternative of reviewing the case for manifest injustice due to the serious nature of the issues.

*Id.* at 902 n.2. Because Mercer is proceeding pro se, we have opted for the less severe sanction and review the record for manifest injustice.

The Estate of John W. Dempster argues that Mercer’s appeal should be dismissed because she untimely filed her appeal. CR 73.02(1)(a) provides that “[t]he notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).” Our Supreme Court has noted that “[i]t has been and still is the policy of this court to be rather strict in the enforcement of time requirements prescribed by the rules of procedure.”

*Louisville Mem'l Gardens v. Com. Dep't of Transp.*, 579 S.W.2d 618, 619 (Ky. 1979). The circuit court's judgment in this case was entered on October 5, 2015. Mercer filed her notice of appeal on November 4, 2015, exactly 30 days later. We decline to dismiss Mercer's appeal on this basis.

## **II. Failure to Name an Indispensable Party**

The Estate of John W. Dempster has also argued that Mercer's appeal should be dismissed for her failure to join an indispensable party, John W. Dempster Revocable Living Trust. The only appellee named on her notice of appeal was the Estate of John W. Dempster.

Unlike proceedings in the trial courts, where failure to name an indispensable party may be remedied by a timely amendment to the complaint, under the appellate civil rules, failure to name an indispensable party in the notice of appeal is a jurisdictional defect that cannot be remedied after the thirty-day period for filing a notice of appeal as provided by CR 73.02.

*Liquor World of Corbin, LLC v. Commonwealth Dep't of Alcoholic Beverage Control*, 458 S.W.3d 814, 817 (Ky. App. 2014) (quoting *Browning v. Preece*, 392 S.W.3d 388, 391 (Ky. 2013)). “[A]n indispensable party is defined as a party ‘whose absence prevents the Court from granting complete relief among those already parties.’” *Browning v. Preece*, 392 S.W.3d 388, 391 (Ky. 2013) (quoting *Milligan v. Schenley Distillers, Inc.*, 584 S.W.2d 751, 753 (Ky. App. 1979)).

Our review of the record demonstrates, however, that the estate and the trust in this appeal consisted of the same parties. Our Supreme Court has stated that “our policy of substantial compliance ensures the survival of an appeal despite

clerical errors when no prejudice results from those errors and notice is sufficiently conveyed to the necessary parties.” *Flick v. Estate of Wittich*, 396 S.W.3d 816, 824 (Ky. 2013). Because it appears that the Estate of John W. Dempster and the John W. Dempster Revocable Living Trust were actually the same entity, there could be no prejudice by Mercer’s omission of the John W. Dempster Revocable Living Trust. Therefore, we decline to dismiss the appeal as to this issue.

### **III. Amount of Damages**

Although Mercer discusses many different topics in her appeal, we believe that she only actually raises one legal argument. “It is not our function as an appellate court to research and construct a party’s legal arguments[.]” *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005). She has, however, cited no legal authority to support it.<sup>5</sup> “Our courts have established that an alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues and arguments advanced on appeal.” *Drummond v. Todd Cty. Bd. of Educ.*, 349 S.W.3d 316, 325 (Ky. App. 2011) (quoting *Hadley*, 186 S.W.3d at 759). Regardless, due to the amount of punitive damages levied against Mercer in this case, we will address that argument now.

The United States Supreme Court has instructed reviewing courts to consider the following guideposts in reviewing the excessiveness of a punitive damages award:

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<sup>5</sup> Mercer does cite a case entitled “Sebastian v. Floyd.” The full cite is not provided, only the names of the parties, and there is no indication as to how this case could be utilized.

(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 1520, 155 L.Ed.2d 585 (2003) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1599, 134 L.Ed.2d 809 (1996)).

### **A. Reprehensibility**

In considering the degree of reprehensibility of a defendant's conduct, "the most important indicium of a punitive damages award's reasonableness[.]" *Campbell*, 538 U.S. at 409, 123 S. Ct. at 1515, the Supreme Court has considered the following factors:

- 1) whether the harm caused was physical as opposed to economic;
- 2) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
- 3) whether the target of the conduct had financial vulnerability;
- 4) whether the conduct involved repeated actions or was an isolated incident;
- 5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id.*, 538 U.S. at 409, 123 S. Ct. at 1515–16 (citing *Gore*,

517 U.S. at 575–77, 116 S.Ct. 1589). Furthermore, “the existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” *Id.*, 538 U.S. at 419, 123 S.Ct. 1513.

The Estate of John W. Dempster suffered only monetary loss; the harm in this case was entirely economic. Additionally, because the Estate of John W. Dempster suffered only monetary loss, none of Mercer’s conduct “evinced an indifference to or a reckless disregard of the health or safety of others[.]” *Id.*, 538 U.S. at 409, 123 S. Ct. at 1516. Finally, it is questionable as to whether the Estate of John W. Dempster was financially vulnerable. To the extent that the Estate of John W. Dempster expended trust money in order to combat Mercer’s behavior, it appears that it is not financially vulnerable.<sup>6</sup> However, the remaining two factors weigh in the Estate of John W. Dempster’s favor. Mercer filed lis pendens notices on the properties in this case three times, the final time in contravention of a court order, and also listed properties on which she did not have a deed as her assets in a bankruptcy case. The fact that Mercer repeatedly placed liens on the Dempsters’ property four times in order to prevent their sale clearly evidences that her conduct was the result of intentional malice. *See Mo-Jack Distrib., LLC v. Tamarak Snacks, LLC*, 476 S.W.3d 900, 908 (Ky. App. 2015) (“Here, Clark committed

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<sup>6</sup> As yet, no published Kentucky opinion has adopted a definition of “financially vulnerable.” *See generally Ragland v. DiGiuro*, 352 S.W.3d 908, 918 (Ky. App. 2010) (declining to address the definition of “financially vulnerable”).

fraud and filed a meritless lawsuit, which supports a relatively high punitive award.”). No manifest injustice occurred.

### **B. The Punitive/ Compensatory Damages Ratio**

Our Supreme Court has considered the ratio of punitive damages as follows:

*Campbell* emphasized that there is no “bright-line ratio which a punitive damages award cannot exceed.” 538 U.S. at 425, 123 S.Ct. 1513. However, *Campbell* also recognized that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Id.* Thus, while the Supreme Court has made it clear that the question is not governed by a mathematical formula, it is equally clear that punitive/compensatory damage ratios of 10:1 and greater are burdened with at least the appearance of unconstitutionality and cannot survive appellate scrutiny in the absence of special circumstances.

*Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 879–80 (Ky. 2016).

In the present case, Mercer had a total amount of \$184,900 levied against her in compensatory damages, for the Estate of John W. Dempster’s slander of title and abuse of process claims. She had a total of \$500,000 levied against her in punitive damages concerning those claims. This creates a rough compensatory to punitive damages ratio of 5:2. There is apparently no “appearance of unconstitutionality” here.

### **C. Possible Civil or Criminal Penalties**

“Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third

indicium of excessiveness.” *Ragland v. DiGiuro*, 352 S.W.3d 908, 922 (Ky. App. 2010) (quoting *Gore*, 517 U.S. at 583, 116 S.Ct. at 1603) (emphasis omitted). It is true that the legislature has not passed a statute holding Mercer’s conduct criminal. However, because Mercer flaunted court orders by continuing to abuse the process, she was subject to criminal penalties for contempt. “Contempt is the willful disobedience toward, or open disrespect for, the rules or orders of a court.” *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996). Because Mercer’s conduct could have resulted in criminal sanctions, and because she repeatedly engaged in such behavior, we believe that the punitive damages award against her was justified. Again, no manifest injustice occurred.

Our Supreme Court has previously held that punitive damages were available for an abuse of process claim. *Sprint Commc’ns Co., L.P. v. Leggett*, 307 S.W.3d 109, 119 (Ky. 2010). Having reviewed the entirety of the record in this case, we do not believe that the amount of damages levied against Mercer was unconstitutional.

### **Conclusion**

In sum, we hold that the Estate of John W. Dempster was not entitled to a dismissal of this appeal for Mercer’s failure to name an indispensable party because the Estate of John W. Dempster could demonstrate no resulting prejudice. We also hold that the punitive damages awarded against Mercer were not unconstitutionally excessive.

The judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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