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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0834-MR

JENNMAR SERVICES — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 21-CI-00617

PODIUM MINING, LLC AND
ROBERT DUSTIN ROWE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MOYNAHAN, AND TAYLOR, JUDGES.

MOYNAHAN, JUDGE: Appellant, Jennmar Services ("Jennmar"), appeals from a judgment of the Floyd Circuit Court that held Appellee, Robert Dustin Rowe ("Rowe"), was not personally liable for debts incurred by Podium Mining, LLC ("Podium"). Having carefully reviewed the record on appeal and the relevant law, we AFFIRM.

BACKGROUND

Podium is a Kentucky-based limited liability company ("LLC") engaged in coal mining ventures in Pike County, and Rowe is Podium's owner. Jennmar, USA, is a Pennsylvania-based company that manufactures and sells mining equipment. Its subsidiary, the Appellant, Jennmar Services, provides staffing services to mining and other industrial employers. In December 2020, Podium and Jennmar, USA, entered into an agreement that was remarkably lacking in specificity. Essentially, Jennmar, USA, sold mining equipment to Podium on credit and, in return, Podium granted Jennmar, USA, a purchase money security interest in that mining equipment.

During the sales call that generated this transaction, a Jennmar representative told Rowe that the Jennmar Services division could also supply all of Podium's human resources requirements, from hiring qualified employees and paying their health insurance and workers' compensation premiums to providing mandatory safety training and drug testing services. The Jennmar representative assured Rowe that the company's labor services would be billed separately at a single hourly rate and that he would supply a detailed "Sales Order and Agreement" delineating the services and associated costs. Notably, no such document exists in the trial record. Rowe accepted this offer. He submitted a completed credit application to Jennmar Services that only references the purchase

of mining equipment. The credit application requests credit references and authorizes Jennmar to contact those references. As noted, the application grants Jennmar a purchase money security interest in the mining equipment it sold to Podium. Finally, the credit application contains a short section titled "Personal Guaranty" that stated the signatory unconditionally guarantees all indebtedness incurred by Podium. Rowe signed the credit application and listed his title as "Owner" of Podium.

The business arrangement did not last long. Following approximately six months of missed payments, Jennmar sent a demand letter—addressed to Rowe—stating that Podium was in default due to non-payment of past-due invoices for mining labor. Neither party disputes the amount owed which is noted to be $706,180.34. However, Rowe disputes Jennmar's assertion that he is personally liable for the debt as a guarantor.

Jennmar filed a complaint in Floyd Circuit Court seeking to hold Rowe personally liable based on the alleged signed guaranty. After hearing the matter, the trial court ruled that the credit application was an information request that did not establish a formal business relationship, and, as such, did not meet the statutory requirements necessary to create a valid guaranty. The trial court then entered a judgment against Podium, for the full amount of the debt, plus interest

and attorney's fees. However, it dismissed the personal guaranty claim against Rowe. Jennmar timely filed a Notice of Appeal contesting the dismissal.

STANDARD OF REVIEW

The issue in this case is based upon the interpretation of statutory and contractual language. The interpretation of a contract or statute is a question of law for the courts and is subject to *de novo* review. *Smith v. Bethlehem Sand & Gravel Company, LLC*, 342 S.W.3d 288, 291 (Ky. App. 2011); *Cumberland Valley Contractors, Inc. v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

ANALYSIS

I. Kentucky Rules of Appellate Procedure

Compliance with the Kentucky Rules of Appellate Procedure ("RAP") must be addressed before undertaking analysis of the legal issues presented by this case. Podium argues that Jennmar's brief should be stricken due to its failure to properly preserve a choice of law issue in compliance with RAP 32(A)(4). In fact, Podium goes so far as to ask the Court to dismiss the case outright, citing the case of *Robbins v. Robbins*, 849 S.W.2d 571 (Ky. App. 1993), to support this course of action. However, review of the *Robbins* case reveals that the noncompliant party therein failed to provide any citations to a voluminous record and did not preserve its primary argument, and the Court still declined to impose the sanction of dismissal. Podium is correct that the choice of law issue was not properly

preserved on appeal; however, choice of law is an ancillary argument here. Jennmar preserved its main argument—that a valid personal guaranty exists under Kentucky law—and supported it with pinpoint citations to the trial record. Therefore, the Court declines to dismiss this case based on Jennmar's failure to properly preserve one alternative argument.

We also note that Podium should have followed RAP 41(A)(4), which states that a party citing an unpublished Kentucky opinion must clearly state that the opinion is not binding authority. On page eleven of its brief, Podium cites the unpublished case of *Kentucky Powder Co. v. May*, No. 2021-CA-0650-MR, 2022 WL 2542087, at *3 (Ky. App. 2022) without any indication that the case is not binding precedent. Furthermore, Podium cites two unpublished federal cases[1] on pages twelve and fourteen, respectively. While citation of unpublished federal cases does not fall under the scope of Kentucky's RAP 41(A)(4), we note that the U.S. Court of Appeals Sixth Circuit does adhere to Federal Rule 32.1, which contains a similar *caveat*. Podium does not indicate anywhere in its brief that these two federal cases are unpublished and should not be considered binding authority. Counsel for both parties are reminded that "[f]ailing to comply with the civil rules

[1] *BP Prods. N. Am. Inc. v. McGuirk Oil Co., Inc.*, No. 1:10-CV-00089-JHM, 2011 WL 2149627 (W.D. Ky. 2011); *Associated Warehousing, Inc. v. Banterra Corp.*, 491 F. App'x 516 (6th Cir. 2012).

is an unnecessary risk the appellate advocate should not chance." *Curty v. Norton Healthcare, Inc.*, 561 S.W.3d 374, 378 (Ky. App. 2018).

II. Guaranty Clause

In order for a guaranty to be enforceable in Kentucky, it must conform to the requirements of KRS[2] 371.065(1), which states:

> No guaranty of an indebtedness which either is not written on, or does not expressly refer to, the instrument or instruments being guaranteed shall be valid or enforceable unless it is in writing signed by the guarantor and contains provisions specifying the amount of the maximum aggregate liability of the guarantor thereunder, and the date on which the guaranty terminates.

When we are tasked with applying a statute, the plain meaning controls. *Commonwealth v. Est. of Cooper*, 585 S.W.3d 253, 257 (Ky. App. 2019) (citation omitted). In determining the meaning of a statute, "we . . . look first to the plain language of a statute and, if the language is clear, our inquiry ends." *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017) (citation omitted). "In interpreting a statute, '[w]e have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion.'" *Id.* (quoting *Cosby v. Commonwealth*, 147 S.W.3d 56,

[2] Kentucky Revised Statutes.

59 (Ky. 2004)); *Thompson v. Killary*, 683 S.W.3d 641, 646 (Ky. 2024) (citation omitted).

Per KRS 371.065(1), in order for a guaranty to be enforceable, it must either be ***written on the instrument being guaranteed*** or expressly refer to the instrument being guaranteed. If neither of these prerequisites is met, a guaranty can still be enforceable so long as it is memorialized in a writing signed by the guarantor that specifies both the amount of maximum aggregate liability and the date on which the guaranty terminates. Review of the document in dispute reveals that it clearly does not expressly refer to any document being guaranteed. The plain language of the guaranty clause neither refers to nor purports to guarantee any financial obligation for outsourcing Podium's staffing requirements. And, although Rowe signed the document that included the guaranty clause, there is no statement that sets forth the maximum limit of his personal liability, nor is there an ending date for the guaranty located anywhere on the document.

These omissions leave only one pathway for an enforceable guaranty to exist; it must be physically written on the instrument being guaranteed. And, indeed, this is the argument that Jennmar advances: that the asserted guaranty is enforceable against Rowe because it was written on the instrument being guaranteed. However, as noted above, the plain meaning of the statute's language controls. The operative words here are "written on the instrument being

guaranteed." Jennmar's observation that a guaranty clause exists on the face of the signed credit application is correct. But the Sales Order and Agreement that Jennmar promised to provide regarding its personnel services was never supplied. Yet it is that document that would have constituted the actual instrument being guaranteed. A personal guaranty is a contract and is, therefore, subject to the general rules of contract interpretation. The requirements of a contract are offer and acceptance, full and complete terms, and consideration. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002) (citations omitted). Absent a contract with full and complete terms, as the Sales Order and Agreement was supposed to have, the credit application is exactly what the trial court determined it to be: an information gathering tool used to assess Podium's creditworthiness.

Jennmar's alternate argument—that the third page of the document alone creates an enforceable contract—is unavailing. A personal guaranty is a contract and is, therefore, subject to the general rules of contract interpretation. The requirements of a contract are offer and acceptance, full and complete terms, and consideration. *Id.* Absent any mention of the proposed staffing arrangement, it is impossible to ascertain from page three exactly what offer Podium accepted, much less the full and complete terms of any such contract.

III. Choice of Law

The guaranty Rowe signed states in pertinent part:

> This Guaranty is an absolute, continuing, unconditional and unlimited guarantee of payment and will be enforceable before or after proceeding against Customer, and without any resort to any collateral or other Guarantor or surety. This Guaranty will be governed by the laws of the Commonwealth of Pennsylvania, USA and Guarantor hereby consents to its jurisdiction.

A choice of law clause would ordinarily merit discussion and legal analysis. However, as noted above, this issue was not preserved for the Court's consideration. When the grounds of the argument before this Court are "different from those asserted in the court below, [they] are not properly preserved for appellate review." *Daugherty v. Commonwealth*, 572 S.W.2d 861, 863 (Ky. 1978) (citations omitted). Here, Jennmar advanced the argument that Pennsylvania law should govern the disputed contract for the very first time in its brief to this Court. Therefore, review of this assertion would be improper. *Lewis v. Commonwealth*, 318 S.W.2d 857, 859 (Ky. 1958). A trial court must have the opportunity to rule on all the issues in a case prior to appeal. Here, neither side raised the choice of law issue at trial, and the trial court did not reference the provision in its final order. Therefore, this issue cannot be presented now for appellate review. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010).

CONCLUSION

For the reasons set forth above, the judgment of the Floyd Circuit Court is hereby AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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