

Commonwealth of Kentucky
Court of Appeals

NO. 2022-CA-1460-MR

GEORGE DIXON AND TINA DIXON

APPELLANTS

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE JEREMY MICHAEL MATTOX, JUDGE
ACTION NO. 21-CI-00095

STEVEN TURLEY AND TONYA
RENE TURLEY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: GOODWINE, KAREM, AND McNEILL, JUDGES.

KAREM, JUDGE: George and Tina Dixon appeal, *pro se*, from the Bourbon Circuit Court's order granting Steven and Tonya Turley's motion to dismiss the Dixons' action based on claim and issue preclusion. For the reasons stated herein, we reverse the Bourbon Circuit Court's order and remand for proceedings consistent with this Opinion.

FACTUAL AND PROCEDURAL BACKGROUND

The Dixons and the Turleys own adjoining properties in Bourbon County, Kentucky, which share a common boundary line marked by a fence. The Dixons' property sits at a higher elevation than the Turleys' property, which causes water to flow under the shared fence from the Dixons' property to the Turleys' property.

On February 27, 2018, Ms. Dixon filed a complaint against Mr. Turley and his son, Steven Austin Clay Turley, in the Bourbon District Court, Small Claims Division (the "First Action"). Ms. Dixon alleged that by filling a ditch on the Turleys' property, the Turleys caused unnatural pooling and mud on the parties' boundary line. Ms. Dixon asserted claims of (1) destruction of property, (2) harassment, (3) emotional distress, (4) interference with the productivity of the farm, and (5) interference with the quality of life. Following a bench trial on April 10, 2018, the Bourbon District Court entered judgment for the Turleys. Ms. Dixon did not appeal the outcome of the First Action.

Less than one year later, on January 15, 2019, George and Tina Dixon filed a second action against Mr. Turley in the Bourbon District Court, Small Claims Division (the "Second Action"). In their complaint, the Dixons alleged private nuisance based on the following:

[Mr. Turley] . . . [h]as caused ongoing damages to the secondary Fence which is attached to the main fence. He

is intentionally pushing the fence out with his shoes. This causes us to have to repair it one or two times a week. We have fencing all around our property. In the past ten years no maintenance has been needed to any of our boundary fences except the continuous weekly repairs along the Turley side.

Over the past two years we've noticed the run off from our other neighbor's land backing up on our property. Upon closer inspection we discovered the natural flow of the water had been blocked by Mr. Turley causing the water to stagnate. When it rained the swirling water dug a hole two and a half feet deep. We had to add concrete and rocks to one fence pole in order to protect it from further damage. In the past year [Mr. Turley] intentionally added concrete slab (on his property) in the path of the water and begun packing dirt and gravel on and around it. Now the water is backing up on our property again. Leaving stagnant water and mud in it's [sic] wake.

On February 12, 2019, the Bourbon District Court held another bench trial. However, the only evidence the Dixons brought to the trial for the Second Action was the evidence presented to the district court in the First Action.

Following the trial, the Bourbon District Court again entered judgment in favor of the Turleys. The district court noted in its order that the Dixons were "complain[ing] of the same issues that were adjudicated" in the First Action and that some of the pictures filed at the hearing pre-dated the First Action's complaint.

The Dixons appealed the district court's finding in favor of the Turleys in the Second Action to the Bourbon Circuit Court on February 22, 2019. The circuit court entered an order on March 9, 2020, affirming the district court. The circuit court upheld the district court's holding concerning the private nuisance claim of water diversion and pooling, explaining that the "Dixons did not present any evidence to support the claim that the value of [their] property was any less because of the alleged damage to the fence or the standing water, beyond mere allegations." In reviewing the evidence supporting the allegation that Mr. Turley damaged the fence by repeatedly rubbing his foot on the fence, urinating on the fence, and running his truck into the fence, the circuit court stated that "[t]here was no proof that the damage to the fence was by Mr. Turley."

Although there was proof that Mr. Turley ran his truck into the fence, the circuit court reasoned that the record and testimony at trial revealed Mr. Turley fully repaired the damage. Lastly, the circuit court also upheld the district court's dismissal of the Dixons' claim for damages associated with "medical costs, weight gain, emotional distress, and slander" because the Dixons "failed to make a connection between these claims" and the Turleys' alleged conduct.

The Dixons filed the instant complaint against the Turleys on May 17, 2021. Specifically, the Dixons claimed that Mr. Turley had, since April 2020, "placed fill materials in, plugged, clogged and diverted natural water ways and

drainage ditches which flow upon, onto and across his property which block and/or divert the natural flow and drainage of water.” The complaint further alleged that, since April 2020, Mr. Turley had “constructed buildings, altered the construction of such buildings and/or altered the lots upon which such building are constructed so as to direct and/or redirect the natural flow of rain and storm water[.]” They claimed that the preceding actions constituted a “constant and continuing trespass” as well as a “constant and continuing private nuisance.”

The Dixons also requested injunctive relief from the circuit court requiring Mr. Turley “to remove the fill and other obstructions which now block and/or divert the natural flow of water[;]” “redirect the flow of rain water and storm water off of the buildings and building lots on his property” away from the Dixons’ property; and to prohibit the Turleys “from making any changes to or upon their property in the future which blocks, diverts or alters the natural flow of water[.]”

Additionally, the Dixons requested a temporary and permanent restraining order prohibiting Mr. Turley and his family from communicating with the Dixons and entering the Dixons’ property. They further requested damages for Ms. Dixon’s mental and emotional pain and suffering.

On June 8, 2021, the Turleys filed a motion to dismiss under Kentucky Rule of Civil Procedure (“CR”) 12.02 for failure to state a claim upon

which relief may be granted under the doctrines of *res judicata* and collateral estoppel. The Bourbon Circuit Court granted the motion in an order dated November 10, 2022. In its order, the circuit court held that the Dixons’ claims were barred by claim preclusion and issue preclusion. Thereafter, the Dixons filed the present appeal.

ANALYSIS

The Dixons’ brief deviates from the formatting and substance requirements of the Rules of Appellate Procedure (“RAP”) by failing to incorporate preservation statements or citations to the record. Even *pro se* litigants – like the Dixons – are expected to file briefs that demonstrate a “good faith attempt to comport” with the briefing requirements of RAP 32. *Hallis v. Hallis*, 328 S.W.3d 694, 698 (Ky. App. 2010) (considering CR 76.12, the predecessor to RAP 32).

“Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, [RAP 31(H)(1)]; or (3) to review the issues raised in the brief for manifest injustice only[.]” *Id.* at 696 (citation omitted). In this case, because the record is small and we have been able to determine whether the Dixons properly preserved their arguments, we will ignore the deficiency and proceed with the review.

We also note that the Dixons' brief includes issues and arguments not ripe for this Court's review. Appellate courts are "without authority to review issues not raised in or decided by the trial court" and may not "consider any claim or contention which is based upon a portion of the record below that has not been made part of the record before the appellate court." *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 852 (Ky. 2016) (internal quotation marks and citations omitted); RAP 25(B). Because "there can be no error" where an issue was never "presented to the trial court for decision," this appeal is limited to whether the Bourbon Circuit Court appropriately applied the doctrine of *res judicata*. *Deng*, 487 S.W.3d at 852.

1. Standard of Review

Turning to the applicable standard of review in this case, CR 12.02(f) outlines the following for a trial court's dismissal of a complaint for failure to state a claim:

The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (internal quotation marks and footnotes omitted). We review dismissals under CR 12.02(f) *de novo*,

accepting the plaintiff's factual allegations as true and drawing all reasonable inferences in the plaintiff's favor. *Gall v. Scroggy*, 725 S.W.2d 867, 868-69 (Ky. App. 1987); *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968) (“For the purpose of testing the sufficiency of the complaint the pleading must not be construed against the pleader and the allegations must be accepted as true.”).

2. Discussion

The Dixons argue that the Bourbon Circuit Court erred in granting the Turleys' motion to dismiss based on *res judicata* and collateral estoppel. *Res judicata* is an affirmative defense that “operates to bar repetitious suits involving the same cause of action[,]” and involves “two subparts: 1) claim preclusion and 2) issue preclusion.” *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 464-65 (Ky. 1998). “Claim preclusion bars a party from re[litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action.” *Id.* at 465 (citations omitted). Alternatively, “[i]ssue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical.” *Id.*

Under Kentucky law, “[t]he key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts.” *Id.* If the suits “concern the same controversy,

then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.” *Id.* (citations omitted).

Claim preclusion applies when three elements are present: identity of the parties, identity of the causes of action, and the action must have been resolved on the merits. *Id.* (citations omitted). For issue preclusion to apply, the issues must have been (1) the same in both cases, (2) actually litigated in the first case, (3) actually decided in the first case, and (4) necessary to the court’s judgment in the first case. *Id.* (citations omitted).

In this case, the circuit court erred in granting the Turleys’ motion to dismiss based on claim preclusion because, based on the pleadings, the subject matter of the subsequent suit was not identical to that in the former suits. Specifically, the “transactional nucleus of facts” that generated the second complaint allegedly occurred after the district court’s judgment in the Second Action. As the Kentucky Supreme Court has stated, “[o]rdinarily, when new events transpire, a plaintiff would supplement the original complaint under CR 15.04. But if the plaintiff failed to do so, those claims would not be barred by *res judicata*, because the events transpired after the filing of the original complaint.” *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 373 (Ky. 2010).

In their complaint to the circuit court, the Dixons tailored their allegations of damages, continuing trespass, and continuing nuisance to events

occurring “[s]ince April of 2020.” Thus, these constitute new allegations of events that “transpired after the filing” of the complaints in both the First Action and Second Action and the district court’s judgments. *Id.*

Moreover, while the Dixons requested monetary damages in their small claims suit, they requested injunctive relief and restraining orders in their complaint to the circuit court. Claim preclusion does not apply where:

[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts . . . and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

Miller v. Administrative Office of Courts, 361 S.W.3d 867, 873 (Ky. 2011)
(citation omitted).

Thus, in “drawing all reasonable inferences in the plaintiff’s favor,” while some of the general circumstances of the successive suits were the same, the specific, pertinent transactional nucleus of facts was not. *Gall*, 725 S.W.2d at 868-69. Indeed, the circuit court suit would require the production of different proof, and the Dixons’ requested remedies were unique to the circuit court litigation. *See Arnold v. K-Mart Corp.*, 747 S.W.2d 130, 132-33 (Ky. App. 1988).

We next turn to the circuit court’s dismissal based on issue preclusion or collateral estoppel. Again, “[f]or purposes of an issue preclusion analysis, we must compare the two adjudications to determine if they involve the same

controversy,” that is, “whether they both arise from the same transactional nucleus of facts.” *Chesley v. Abbott*, 524 S.W.3d 471, 483 (Ky. App. 2017) (citation omitted). As previously discussed, however, because the Dixons’ present suit is alleging action by the Turleys that occurred after the Second Action’s judgment, as well as requesting injunctive relief, the issues are not identical and there is no issue preclusion.

CONCLUSION

In sum, the circuit court erred in dismissing the Dixons’ complaint under CR 12.02(f) for failure to state a claim upon which relief may be granted. Accordingly, we reverse the Bourbon Circuit Court’s November 10, 2022, order and remand for additional proceedings consistent with this decision.

GOODWINE, JUDGE, CONCURS.

MCNEILL, JUDGE, DISSENTS AND DOES NOT FILE
SEPARATE OPINION.

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