

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000303-MR

DANNY ANDERSON

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE STEVEN COMBS, JUDGE  
ACTION NO. 04-CI-01361

WAYNE RUDDER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND NICKELL, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Danny Anderson (“Anderson”) has appealed from the Pike Circuit Court’s January 8, 2007, entry of judgment against him and in favor of Wayne Rudder (“Rudder”). For the reasons that follow, we affirm.

Rudder and Anderson own adjoining parcels of property in the mountainous region of Pike County, Kentucky, with Anderson’s parcel being located uphill from

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<sup>1</sup> Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Rudder. Anderson undertook excavating work upon his property which resulted in damage to Rudder's property through water run off and mudslides. On September 23, 2004, Rudder filed a complaint against Anderson for the damages to his real property caused by Anderson's negligence, and for trespass and nuisance. Following mediation, the parties agreed to a settlement on May 12, 2005, whereby Anderson agreed to repair the damages to Rudder's property and Rudder agreed to keep a twelve foot right-of-way open and unblocked.<sup>2</sup> Rudder's action was consequently dismissed without prejudice on August 23, 2005.

Anderson failed to comply with the terms of the mediated settlement and the original complaint was revived and placed upon the trial court's active docket. Prior to trial, the parties reached a second settlement agreement which was memorialized in an agreed order entered on September 7, 2006. Pursuant to this agreement, Anderson was to (1) immediately pay Rudder \$1,500.00; (2) install remediation devices valued at \$1,500.00 within thirty days to prevent further damages or pay Rudder an additional \$1,500.00; (3) hire a contractor to perform earth removal sufficient to prevent further slides; (4) complete all remediation work within sixty days from September 5, 2006; and (5) confess judgment in the amount of \$8,500.00 without the necessity of further legal proceedings if he failed to complete any of the remediation work in the time specified. A supplemental agreement was entered a short time later wherein Rudder agreed to keep the easement open for Anderson's use.

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<sup>2</sup> The record reveals the two parcels of property at issue were carved out of a larger tract of land. The parties' predecessors in title reserved an easement across Rudder's property for the purpose of ingress and egress to the upper tract.

Anderson failed to complete the required remediation work in the time specified and Rudder moved the trial court to enter judgment in his favor for \$8,500.00 pursuant to the terms of the parties' settlement agreement. The trial court conducted a hearing on the matter on December 13, 2006. At the hearing, Anderson testified that although he had failed to complete the necessary repairs, the failure occurred only because Rudder had blocked the right of way and there was no other means of access to the property. He stated he and his contractor had visited the property just days after entry of the agreement, that four vehicles were parked in Rudder's driveway such that no heavy equipment could pass, and that the driveway was the only improved access to the upper tract. He admitted he had not asked Rudder to move the vehicles since entry of the agreement, nor had he informed the court of the blockage. However, he alleged his access had been blocked continuously over the thirteen year period he had owned the property and Rudder had previously refused to allow him passage across the driveway.

Rudder testified he had vehicles parked in his driveway, but adamantly denied he had ever blocked Anderson's right of way. He contended the easement was located between his driveway and a creek running along the property boundary. He was unsure of the distance between the edge of the driveway and the creek, but argued the majority of the easement fell within that strip of ground. He admitted at least a portion of the driveway could be lying within the boundary of the easement, but denied the driveway constituted the right of way to which Anderson was entitled.

The trial court entered judgment in favor of Rudder on January 8, 2007. This appeal followed.

Before this Court, Anderson generally contends the trial court's entry of judgment against him was erroneous as it was based on a finding of fact which was unsupported by substantial evidence. He argues the trial court erred in finding Rudder did not block the right of way in light of the testimony to the contrary. However, a careful review of the record reveals Anderson's argument is without merit.

First, the judgment entered by the trial court contains no findings of fact. Pursuant to CR<sup>3</sup> 52.01, a trial court is not required to make findings when ruling on motions of any kind except as specifically provided for in CR 41.02.<sup>4</sup> Therefore, we are unable to conclude the trial court erred by not including findings of fact in its order, as it was not required to do so. Further, Anderson did not make any request that the trial court amend its judgment under CR 52.02 to make and include specific findings in its order of judgment. As the alleged failure was not brought to the trial court's attention as required by CR 52.02 and CR 52.04, the issue is deemed waived for purposes of appeal. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

Next, Anderson's argument that the trial court's decision was unsupported by substantial evidence must fail. Anderson did not deny his liability to Rudder, his execution of the agreed order, nor his failure to timely comply with the terms of the agreement. He argued only that he acted in good faith in attempting to make the required repairs, but was prohibited from doing so by Rudder's actions. He now argues the trial

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<sup>3</sup> Kentucky Rules of Civil Procedure.

<sup>4</sup> CR 41.02 specifically requires a trial court to make findings of fact when granting a motion for involuntary dismissal, but only when such decision is made on the merits of the case.

court should have excused his nonperformance based on Rudder's conduct.<sup>5</sup> In support of this argument, Anderson relies on the general rule that a party to a contract may not benefit from a breach by the other party which results from a condition the first party himself created. *Odem Realty Co. v. Dyer*, 242 Ky. 58, 45 S.W.2d 838 (1932). *See also Riddle v. Southern Farm Bureau Life Ins. Co.*, 421 F.3d 400, 406-7 (6<sup>th</sup> Cir. 2005) (discussing nearly 200 year history of the general rule in Kentucky jurisprudence).

Although we agree with Anderson that this is most assuredly the rule of law, we believe his reliance thereon is misplaced as he failed to properly raise the issue with the trial court and thus did not preserve it for our review.

The agreed order specifically provided that if Anderson failed to comply with any of the terms of the agreement, he would confess judgment against himself in a specified amount without the necessity of further legal proceedings. At the final hearing on Rudder's motion for judgment, Anderson for the first time attempted to shift the blame for his inaction to Rudder. He made no motion to be excused from his nonperformance, nor did he request a ruling from the trial court that Rudder had, in fact, made performance impossible. The record is simply devoid of any indication the matter was properly placed before the trial court for its consideration.

It is well-settled that a trial court must be given the opportunity to rule in order for an issue to be preserved for appellate review. *See Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000); *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998). Anderson fails to direct us to a location within the record indicating his argument

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<sup>5</sup> It appears from the record Anderson was attempting to present an affirmative defense to his inaction. The defense, which Anderson bases on Rudder's conduct, falls under the general contract principle of impossibility of performance.

was preserved for our review. The mere fact that he presented testimony Rudder had blocked access to the property is insufficient to preserve his allegation of error. He sought no recourse in the trial court and therefore he has waived any alleged error. *Osborne v. Pepsi-Cola*, 816 S.W.2d 643 (Ky. 1991); *Department of Highways v. Taylor County Bank*, 394 S.W.2d 581 (Ky. 1965). “It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court.” *Skaggs v. Assad, by and through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citing *Combs v. Knott County Fiscal Court*, 141 S.W.2d 859 (Ky. 1940); CR 76.12(4)(c)(iv)(1-1-85)). As the issue was not properly raised or adjudicated in the trial court, we will not consider it for the first time on appeal. *Benefit Association of Railway Workers v. Secret*, 239 Ky. 400, 39 S.W.2d 682 (1931).

For the foregoing reasons, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lawrence R. Webster  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

C.V. Reynolds  
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