

**ARKANSAS COURT OF APPEALS**

DIVISION II

No. CA10-883

SPILL RESPONDERS, INC., ET AL.  
APPELLANTS

V.

CHARLES E. "CHUCK" FELTS AND  
DALE ORR  
APPELLEES

**Opinion Delivered** April 6, 2011

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT,  
THIRTEENTH DIVISION  
[NO. CV05-2139]

HONORABLE COLLINS KILGORE,  
JUDGE

AFFIRMED IN PART; DISMISSED IN  
PART

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**DOUG MARTIN, Judge**

The Pulaski County Circuit Court directed a verdict against appellants Spill Responders, Inc.; G. Robert Hardin; and Michael Dixon Berg and Larita Maria Berg, Trustees of the Michael Dixon Berg and Larita Maria Berg Family Trust, on their breach-of-contract claim against appellees Charles Felts and Dale Orr. The circuit court also awarded appellees \$27,450.50 toward their attorneys' fees. Appellants now appeal those rulings.<sup>1</sup> We affirm in part and dismiss in part.

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<sup>1</sup>This is the second appeal in this case. We dismissed the earlier appeal for lack of a final order. *Spill Responders, Inc. v. Felts*, 2009 Ark. App. 669.

*Background*

In 1999, Spill Responders, Inc. (SRI), was formed to engage in the business of cleaning and removing hazardous material from job, accident, and other sites. Hardin, the trustees, and appellees are the shareholders in SRI. Appellees each owned a one-sixth share, Hardin owned a one-third share, and the trustees owned a one-third share. Felts was the general manager and president of Spill Responders and ran the day-to-day operations. Orr was the vice president and helped run the company's day-to-day operations.

A dispute arose over the direction of the company. In late November 2004, the shareholders negotiated a Stock Purchase Agreement (the Agreement) whereby appellees would purchase the other shares in the company for \$50,000. The Agreement was contingent upon appellees being able to obtain financing suitable to them.

After the Agreement had been signed, but before it closed, Hardin and Berg allegedly permitted four trucks that were critical to the company's business operations to be repossessed for non-payment of the loans. In addition, appellees were unable to get financing on terms they desired. As a result, appellees notified Hardin and the trustees on December 30, 2004, that they were unable to obtain suitable financing and would be unable to close unless the purchase price was renegotiated.

On January 6, 2005, Felts was terminated from his position. Orr had been fired the month before.

On March 1, 2005, Hardin and the trustees filed a complaint against appellees, alleging that appellees had breached the agreement to purchase their shares of stock. The corporation

asserted claims for breach of fiduciary duty, fraud, and conversion. Appellees filed a counterclaim against appellants and a third-party complaint against Michael Berg, individually, asserting a breach-of-contract claim against the corporation and claims for intentional interference with contractual relationships, breach of fiduciary duty, and constructive fraud against Hardin and Michael Berg.

The case was tried to a jury. At the close of appellants' case-in-chief, appellees moved for a directed verdict as to appellants' breach-of-contract claim. The argument was based on the assertion that no evidence was presented as to the damages Hardin suffered as a result of any breach. The circuit court granted the motion. The remaining claims were submitted to the jury. Nine members of the jury found that appellees did not breach any fiduciary duties owed to SRI. The jury unanimously found that SRI did not breach its contract with appellees. The jury also unanimously found that Hardin and the trust did not breach any fiduciary duties owed to appellees. Finally, the jury unanimously found that Hardin, Michael Berg, and the trust did not intentionally interfere with any contractual relationship between Felts and SRI. Judgment was entered on the jury's verdict on February 4, 2008.

Following the entry of judgment, appellees moved for attorneys' fees and expenses on February 19, 2008. The motion asserted that the fees should be awarded pursuant to the Agreement. The request totaled \$50,690.79. Appellees later reduced the amount sought to \$34,313.13 after eliminating fees for time spent seeking unemployment compensation for appellees. After holding several hearings on the motion, the circuit court ultimately awarded appellees \$27,450.50 in fees.

After this court dismissed the earlier appeal for lack of a final order, *Spill Responders, supra*, the circuit court entered an amended judgment on March 23, 2010. The judgment dismissed the claims that this court held lacked finality.

On April 2, 2010, appellants filed a motion for a new trial, claiming that they were entitled to nominal damages for appellees' alleged breach of contract. Appellees argued that appellants' motion for new trial was untimely because it related to the original judgment entered February 4, 2008. On May 3, 2010, the circuit court entered an order denying appellants' motion for new trial.<sup>2</sup> This appeal followed.

*Standard of Review*

In reviewing an order granting a motion for directed verdict, this court views the evidence in the light most favorable to the party against whom the verdict was directed, and if any substantial evidence exists that tends to establish an issue in favor of that party, it is error for the circuit court to grant the motion for directed verdict. *Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 948 S.W.2d 388 (1997); *Haupt v. Kumar*, 103 Ark. App. 298, 288 S.W.3d 704 (2008).

*Discussion*

As noted, appellants challenge the circuit court's decision to direct a verdict against appellants on their breach-of-contract claim so as to undermine the basis for an award of

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<sup>2</sup>The thirty-day period for the court to dispose of the motion expired on Sunday, May 2, 2010. The court's order was entered on the following business day, Monday, May 3, 2010.

attorneys' fees to appellees. For their first point, appellants argue that the circuit court erred in granting the directed verdict because, appellants argue, they presented substantial evidence that appellees had breached the terms of the agreement whereby appellees were to purchase the shares held by Hardin and the trustees. Appellants further argue that damages are presumed to flow from a breach of contract so that they should be entitled to an award of nominal damages.

Appellants had the burden of proving with some degree of specificity the amount of their damages. *Marine Servs. Unlimited, Inc. v. Rakes*, 323 Ark. 757, 918 S.W.2d 132 (1996). It is unnecessary for this court to address the merits of this argument, however, as appellants raised this argument for the first time in their motion for a new trial. Our supreme court has stated that an issue must be presented to the circuit court at the earliest opportunity in order to preserve it for appeal. *LaFont v. Mixon*, 2010 Ark. 450, 374 S.W.3d 668. Any error argued on appeal must have first been directed to the circuit court's attention in some appropriate manner, so that the court has an opportunity to address the issue. *Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996). A party cannot wait until the outcome of a case to bring an error to the circuit court's attention. *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003). Stated another way, a circuit court does not abuse its discretion by denying a post-trial motion seeking to raise an issue that was not raised at trial. *Cochran v. Bentley*, 369 Ark. 159, 251 S.W.3d 253 (2007); *Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004).

Here, appellees moved for a directed verdict at the close of appellants' case. After some discussion, the circuit court reserved ruling until after the noon recess. The court did not revisit the matter until the court was ready to recess for the evening, at which time the court indicated that it was granting the motion. At no point did appellants argue that they were entitled to nominal damages. Not until after judgment was entered on February 4, 2008, did appellants raise the entitlement to nominal damages for the first time, when they filed their motion for judgment notwithstanding the verdict on March 4, 2008. Accordingly, the argument was not timely raised below and is therefore not preserved for this court's review on appeal.

For their second point, appellants argue that the circuit court erred in awarding appellees attorneys' fees. Specifically, appellants argue that fees are not warranted because the jury determined that SRI did not breach its contracts with appellees; that appellants did not breach any fiduciary duties owed to appellees; and that appellants did not interfere with the contractual relationship between SRI and appellees. Appellants further argue that the award was excessive because it was approximately eighty percent of the amount requested.

We do not have jurisdiction to hear this portion of the appeal. Our supreme court has held that, where the order granting or denying attorneys' fees is entered after entry of the judgment, the issue of attorneys' fees is a collateral matter. *Craig v. Carrigo*, 353 Ark. 761, 121 S.W.3d 154 (2003). As such, the challenging party must file a notice of appeal from the fee order, and without such a notice, this court will not address any argument on the fee issue.

*Id.* Arkansas law is well settled that the failure to file a timely notice of appeal deprives the appellate court of jurisdiction. *Id.* This rule applies to orders granting attorneys' fees. *Id.*

Appellants' problem arises in the present case because, after the circuit court entered its order awarding attorneys' fees to appellees on November 3, 2008, appellants amended their notice of appeal. The amended notice, however, did not reference the order awarding attorneys' fees; instead, the only order mentioned in the amended notice of appeal was the original February 2008 judgment. Rule 3(e) of the Arkansas Rules of Appellate Procedure—Civil provides that a notice of appeal “shall designate the judgment, decree, order or part thereof appealed from.” Orders not mentioned in a notice of appeal are not properly before the appellate court for review. *See Conlee v. Conlee*, 366 Ark. 398, 235 S.W.3d 899 (2006); *Arkansas Dep't of Human Servs. v. Shipman*, 25 Ark. App. 247, 756 S.W.2d 930 (1988). In their notice of appeal filed after the entry of the amended judgment and the denial of their motion for a new trial, appellants again failed to reference the order awarding attorneys' fees. We therefore lack jurisdiction to consider the award of attorneys' fees.

Affirmed in part; dismissed in part.

PITTMAN and ABRAMSON, JJ., agree.