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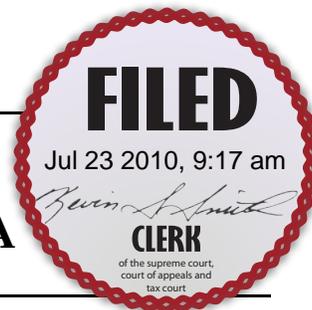
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**IN THE
COURT OF APPEALS OF INDIANA**



THOMAS CHRISTMAN,)

Appellant-Plaintiff,)

vs.)

No. 85A02-0910-CV-1014

MATTHEW CHRISTMAN,)

Appellee-Defendant.)

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. 85C01-0709-PL-518

July 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Thomas Christman appeals the trial court's judgment in his action to partition land filed against his son Matthew. Thomas raises three issues, which we restate as: 1) whether the trial court erred in qualifying Dr. Percy Langill as an expert witness; 2) whether the trial court improperly modified the commissioners's report; and 3) whether the trial court erred in ordering Thomas to pay Matthew \$22,892.00. Concluding 1) the trial court did not abuse its discretion in qualifying Dr. Langill as an expert witness; 2) the trial court did not improperly modify the commissioners's report; and 3) the trial court did not abuse its discretion in ordering Thomas to pay Matthew \$22,892.00, we affirm.

Facts and Procedural History

In the 1990's, Thomas, Matthew, and Thomas's father, James, were partners in Christman Family Farms. In 1997, James and his wife established a trust, which included 385 acres of tillable farm land, a 144-cow dairy facility, grain storage facilities, a one-story home, a farmhouse, a small rental house, and other buildings and structures. The trust's assets were to pass to Thomas and Matthew as joint owners with rights of survivorship when James and his wife died. In 2001, Thomas and Matthew had a "falling out." Appellant's Brief at 4. Three years later, James removed his one-half interest in the farm from the trust and conveyed it to Thomas. After James died in March 2005, Thomas and Matthew became successor co-trustees of the trust and its remaining assets, including the other one-half interest in the farm. As a result of James's prior conveyance and the terms of the trust, Thomas was to own 75% of the farm, and Matthew 25%.

In August 2005, Matthew filed an action against Thomas to compel him to wrap up the trust and to compensate him for the fair rental value of the farm's income-producing assets, including the tillable portion of the real estate, the dairy facility, and the three houses, one of which Thomas was using as his personal residence. Later that year, while the litigation was still pending, Matthew attempted to take possession of the main farm house on the real estate, which was unoccupied. Thomas contacted the county sheriff and asked him to remove Matthew from the property. Matthew attempted to take possession of the farm house again in 2006 with similar results.

Trial was held on the trust litigation in July 2006. Matthew obtained a judgment against Thomas, in his capacity as a beneficiary of the trust, for the fair rental value of the income-producing assets listed above through December 31, 2005. The trial court also ordered Thomas to sign a trustee's deed conveying the real estate remaining in the trust to Thomas and Matthew as joint tenants with rights of survivorship within thirty days of the judgment. When Thomas failed to comply with the court's order, Matthew obtained a court order freezing Thomas's bank accounts to satisfy the judgment entered against him. Following a January 2007 hearing, Thomas signed the trustee's deed conveying the remaining property from the trust. At some point following the trial court's judgment, Matthew's counsel tendered to Thomas's counsel a written offer to lease the dairy facility for \$1,500 per month. Thomas did not respond to the offer.

In September 2007, Thomas filed a complaint to partition the real estate distributed to Thomas and Matthew from the trust. Matthew responded with a counterclaim seeking his

proportionate share of the fair rental value of the income-producing assets for 2006 and 2007.

The trial court entered partial judgment on the pleadings for partition of the property and, pursuant to Indiana Code section 32-17-4-6, appointed three commissioners to perform the partition. The commissioners, who completed the partition report in March 2008, concluded a physical partition of the real estate could be accomplished without harm to either party. The commissioners recommended that Matthew receive 130 acres and Thomas receive 331 acres with all of the improvements. The commissioners also examined tax statements and noted Thomas had paid 75% of the 2006 payable in 2007 real estate taxes. The commissioners recommended Matthew pay the remaining 25% of the taxes as well as any penalties and interest.

Matthew filed an objection to the commissioners's report wherein he argued in part that the 25% of the taxes he was ordered to pay should be set off against 25% of the fair rental value of the real estate and its improvements. Matthew also asserted Thomas should be responsible for any tax penalties. Matthew further asked the commissioners to consider his counterclaim and pointed out that the report failed to address the 2007 real estate taxes payable in 2008.

In September 2008, after meeting with counsel for both parties, the trial court issued an "Agreed Order for Supplemental Report from Commissioners." The order, which was signed by counsel for both parties, ordered the commissioners to report any adjustments they deemed appropriate on Matthew's counterclaim and to determine if Thomas was entitled to a set off for the \$16,404.98 he spent on improvements to the real estate. In December 2008, at

the request of the parties, the commissioners issued a report with the fair market rental values of the following income-producing improvements for 2006 and 2007:

- | | | |
|----|--------------------|-----------------|
| 1. | One Story Home | \$7200 per year |
| 2. | Farm House | \$6000 per year |
| 3. | Small Rental House | \$3000 per year |
| 4. | Dairy Facility | \$ 0 per year |
| 5. | Grain Storage | \$3200 per year |
| 6. | Tillable Ground | \$110 per acre |

Appellant's Appendix at 65.

In March 2009, the commissioners issued a Supplemental Report to their March 2008 report. Pursuant to the trial court's order, the commissioners reported on the adjustments they deemed appropriate upon the parties' respective claims. First, the commissioners recommended that Matthew pay 25% of all real estate taxes, as well as tax penalties and interest. Second, because the improvements Thomas made were located on the parcels of real estate awarded to him, the commissioners recommended Thomas was not entitled to a set off for them. Third, because Thomas earned no rental income on the improvements in 2006 or 2007, the commissioners recommended Matthew was not entitled to the income-producing value of the dwellings, live stock, dairy facilities, or grain storage.¹ Lastly, the commissioners recommended Matthew did not have to reimburse Thomas for any of the \$6,818.00 loss he suffered in 2006. In summary, the commissioners recommended partition of the land with Matthew to pay 25% of the real estate taxes as well as penalties and interest. In addition, the commissioners recommended that Matthew was not entitled to the income-producing value of the improvements as he requested in his counterclaim.

¹ The tillable acreage was leased for \$110.00 per acre. Thomas received 75% of the lease

Both parties filed objections to the commissioners's supplemental report. Thomas now argued that he was entitled to reimbursement for insurance expenses he paid on the farm. Matthew complained that the commissioners failed to include the value of the dairy improvements in the partition of the farm. Matthew argued that the dairy facility did have monetary value and that he should be entitled to an additional amount of acreage to compensate him for the monetary value of the dairy facilities and improvements. Matthew also again argued that he was entitled to the fair rental value of the tillable acreage, dwellings, livestock, and dairy facilities. The trial court held a hearing on the parties' objections to the commissioners's report.

Over Thomas's objection at the hearing, the trial court qualified Matthew's witness, Dr. Percy Langill, as an expert to give testimony on the fair rental value of the dairy facilities and improvements. Dr. Langill is a veterinarian and dairy manager with a Master's Degree in Business Administration. He has owned and managed dairy facilities, and considered economic data and information derived from the dairy departments at the Universities of Minnesota and Wisconsin, in determining the fair rental value of the dairy facility in this case. He also considered historical financial data compiled by the Chicago Board of Trade. Dr. Langill testified the dairy facility in this case has a maximum monthly rental value of \$1,584.00 per month. Following the hearing, the trial court issued an order in October 2009, which provides in relevant part as follows:

FINDINGS OF FACT

payments and Matthew received 25%.

7. From March 24, 2005, through the present, [Thomas] has had exclusive possession and occupation of the one (1) story home situated upon the subject real estate.

8. From March 24, 2005, through the present, [Thomas] has leased the small rental house on the subject real estate to third parties.

9. From March 24, 2005 to the present, [Thomas] has had exclusive possession of the farm house situated upon the subject real estate. Said farm house has remained vacant through said period of time.

10. During the entire year of 2006, [Thomas] had exclusive possession and use of the 385 acres of tillable farmland, and grew and harvested crops from the same. Additionally, during the entire year of 2006, and from January 1, 2007 to September 24, 2007, [Thomas] had exclusive possession of, and utilized and operated, said dairy facility, producing and selling milk products from the same.

11. [Thomas] has not paid [Matthew] any money for his possession and use of said assets.

* * *

13. [Thomas] utilized all depreciation, for tax deduction purposes, available from the income-producing assets situated upon the subject real estate for the tax years 2006 and 2007, to the exclusion of, and detriment to [Matthew], and [Matthew's] ownership interests therein.

14. In late 2005, [Matthew] attempted to take possession of the vacant farmhouse situated upon the subject real estate. [Matthew's] efforts to take possession of said dwelling were refused by [Thomas] and [Matthew] was therefore effectively precluded from using that farmhouse.

15. [Matthew], in late 2006, again attempted to take possession of a vacant dwelling on the subject real estate, and again was effectively precluded from doing so.

* * *

18. Dr. Langill, [Matthew's] witness as to the fair rental value of the dairy facility situated upon the subject real estate is a credible witness to testify to the same, based upon his education and related training, including a Doctorate

Degree in Veterinary Medicine, and a Master's Degree in Business Administration, both with emphasis on the dairy industry, its science and management of dairy operations. Further, the Court finds that Dr. Langill has substantial experience in the dairy industry based upon his having been employed in various dairy facilities, and having owned and managed dairy facilities. While Dr. Langill has not done an appraisal of this kind before, everyone has to start somewhere. The fact that this was his first appraisal does not disqualify him from opining as to the fair rental value of the dairy facility. If anything, it goes to the weight to be given to his testimony. The Court believes he was well qualified to offer such an opinion. It was based upon his personal examination of said dairy facility, his utilization of economic data and information derived from the dairy departments at the Universities of Minnesota and Wisconsin, respectively, as well as his use and reliance upon historical financial data compiled by the Chicago Board of Trade, all of which information and data being derived from the Midwestern United States dairy industry. . . . Dr. Langill's opinion as to the monthly rental value of said dairy facility, was One Thousand Five Hundred Eighty-Four Dollars (\$1,584.00) as a maximum value. The Court declines to use that maximum finding instead that the income-producing value of the dairy facility upon the subject real estate for the year 2006, as well as for January 1, 2007 through September 25, 2007, is One Thousand Five Hundred Dollars (\$1,500.00) per month.

* * *

21. The parties should be obligated to pay taxes and assessments on the subject real estate for the years 2006, and 2007, in amounts proportionate to their ownership interests, with [Thomas] paying Seventy-Five Percent (75%), and [Matthew] paying Twenty-Five Percent (25%), respectively.

22. [Thomas] should pay any interest and/or penalties arising from said real estate tax and assessment obligation for said years, as a result of [Thomas] exercising exclusive possession, use, and occupation of the subject real estate, to the detriment of [Matthew], as well as the lack of [Thomas] making any payment to [Matthew] for the fair rental value of the same.

23. [Thomas] has incurred attorney fees in the sum of eight thousand seven hundred ninety six dollars (\$8,796.00) rounding down. While those sums are reasonable relative to [Thomas], they are not so as to [Matthew]. The Court believes that the actions of [Thomas] throughout this action resulted in additional attorney fees. Accordingly, the Court finds reasonable attorney fees as to be allocated in this proceeding to be six thousand dollars (\$6,000.00). 25% of that sum is \$1,500.00 and that same should be deducted from the

Judgment awarded in favor of [Matthew], against [Thomas], as provided below.

CONCLUSIONS OF LAW

* * *

2. . . . [Matthew] is entitled to judgment on his Counterclaim, as against [Thomas], in the sum of Twenty-two Thousand Eight Hundred Ninety-two Dollars (\$22,892.00), the same representing Twenty-five Percent (25%) of the share of the fair rental value of all income-producing assets for the year 2006, as well as the year 2007, up to, and including September 24, 2007 (less attorney fees).

Appellant's App. at 15-20. Thomas appeals.

Discussion and Decision

I. Testimony of Dr. Langill

Thomas first contends the trial court erred in qualifying Dr. Langill to testify as an expert regarding the fair rental value of the dairy facility. Thomas has waived appellate review of this issue because his argument is not supported by citations to authorities and relevant parts of the record on appeal. See Ind. Appellate Rule 46(A)(8)(a); Davis v. State, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (noting that failure to present citation to authority constitutes waiver of the issue for appellate review), trans. denied. Waiver notwithstanding, we find no error.

Indiana Evidence Rule 702(a) provides that if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” The Indiana Supreme

Court has explained that under this rule, a witness may be qualified as an expert by virtue of knowledge, skill, experience, training, or education. Kubsch v. State, 784 N.E.2d 905, 921 (Ind. 2003). Only one characteristic is necessary, and a witness may qualify as an expert on the basis of practical experience alone. Id. It is within the trial court's sound discretion to determine whether a person qualifies as an expert witness. Id. On appeal, we will not substitute our judgment for that of the trial court. Id.

Here, the trial court determined Dr. Langill qualified as an expert witness based upon his education and related training. Dr. Langill has a Doctorate Degree in Veterinary Medicine and a Master's Degree in Business Administration, both with an emphasis on the science and management of dairy operations. In addition, Dr. Langill has owned and managed dairy facilities. The trial court did not abuse its discretion when it qualified Dr. Langill as an expert witness.

II. Commissioners's Partition Report

Thomas next contends the trial court improperly adjusted the commissioners's partition report. A partition is a proceeding in which a cotenant of land enforces a right to divide the property and have the shares set off in severalty. Pavy v. Pavy, 121 Ind. App. 194, 98 N.E.2d 224, 226 (1951). The partition of co-tenancies by appointed commissioners is governed by statutes enacted more than one hundred and fifty years ago. See Ind. Code sec. 32-17-4-1 et seq. According to these statutes, a person with an interest in land held in joint tenancy or tenancy in common may file a petition to compel partition of the land in the circuit court or court having probate jurisdiction of the county in which the land or any part of the

land is located. Ind. Code sec. 32-17-4-1 and -2. The proceedings, practice, and pleading for a partition action are the same as in civil suits. Ind. Code sec. 32-17-4-3. If the court determines a partition should be made, the court shall award an interlocutory judgment that the partition be made to the parties who desire partition. Ind. Code sec. 32-17-4-4.

Upon judgment of partition, the court can either divide the property itself or appoint commissioners pursuant to Indiana Code section 32-17-4-6. Gilstrap v. Gilstrap, 397 N.E.2d 1277, 1282 (Ind. Ct. App. 1979). If the court appoints commissioners, the court must appoint three of them who 1) are disinterested resident freeholders, 2) reside and own land in the county in which court is held, and 3) are not related to any of the parties. Ind. Code sec. 32-17-4-6. The commissioners must file a partition report with recommendations to the trial court. Ind. Code sec 32-17-4-9. The trial court can either confirm the report or set it aside in its entirety. Gilstrap, 397 N.E.2d at 1282 (citing Ind. Code sec. 34-17-5-11 and -12). The court may not second-guess the commissioners's judgment by making adjustments in the recommended distribution. Id.

However, in a partition proceeding, the legal and equitable rights of the parties are within the cognizance and protecting power of the courts. Mayfair Investment Corp. v. Bryant, 922 N.E.2d 123, 130-31 (Ind. Ct. App. 2010). The ultimate goal of any partition proceeding is that it be equitable to the parties involved. Id. at 131. This court has previously recognized the authority of trial courts to go beyond the express provisions of the partition statutes in order to accomplish an equitable division. Id. For example, our courts have recognized the trial court's authority to exercise equitable powers to settle disputes

between parties in a partition proceeding, including ordering an accounting between the parties, Peden v. Cavins, 134 Ind. 494, 34 N.E. 7 (1893), reforming a mortgage, Conyers v. Mericles, 75 Ind. 443 (1881), and awarding compensation for improvements in land, Willett v. Clark, 542 N.E.2d 1354 (Ind. Ct. App. 1989). Particular deference is given to the judgment of the trial court where the proceeding sounds in equity. Mayfair, 922 N.E.2d at 131. Judgments in equity are clothed in a presumption of correctness. Id.

Here, the commissioners recommended Matthew pay 25% of the real estate taxes as well as the penalties and interest. The commissioners also recommended Matthew was not entitled to the fair rental value of the income-producing assets for 2006 and 2007 as he requested in his counterclaim because Thomas earned nothing on these assets during this period. The trial court, however, ordered Thomas to pay the penalties and interest on the real estate taxes and ordered Thomas to pay Matthew \$22,892.00 to compensate him for the fair rental value of the income-producing assets from January 1, 2006 through September 24, 2007. The trial court explained it was ordering Thomas to pay the interest and penalties on the taxes and awarding Matthew the fair rental value of the improvements because Thomas had exclusive possession, use, and occupation of the real estate to Matthew's detriment in 2006 and 2007. In addition, when Matthew twice attempted to take possession of an empty dwelling on the property, Thomas called the sheriff's department and had him escorted off of the property. When Matthew offered to rent the dairy facility, Thomas ignored the offer. In addition, as the trial court pointed out in its order, Thomas utilized all tax deduction depreciation available from the income-producing assets of the farm to the detriment of

Matthew and his ownership interests. Specifically, Thomas testified he used losses from prior years to offset monetary gain he achieved in 2006 by using depreciation attributable to the income-producing assets as an expense against income. Based upon these facts and circumstances, the trial court was well within its equitable powers to order Thomas to pay the tax interest and penalties and to award Matthew the fair rental value of the improvements for 2006 and 2007. This was not an improper adjustment to the commissioners's report, and we find no error.

III. Money Judgment

Thomas further argues that the trial court's money judgment was improper for several reasons. First, he claims the trial court erred in ordering him to pay the fair rental value of the income-producing assets in 2006 and 2007 because these assets, including the dairy facility and the three houses on the property, produced no income during this time period. Thomas is correct that generally if a tenant in possession farms the land to the exclusion of the co-tenant, the tenant in possession is chargeable only with a share of the actual profits. See Porter v. Mooney, 64 Ind. App. 479, 116 N.E. 60, 63 (1917). However, where the tenant in possession intentionally fails to put the improvements to their maximum use, the trial court can consider what the fair rental value would have been if the improvements had been used to their capacity. See McCrum v. McCrum, 36 Ind. App. 636, 76 N.E. 415, 417 (1905) (noting if tenant in possession intentionally allows his stock to eat up crops, fact finder may consider fair market value of the crops had they not been destroyed). Here, the evidence reveals that Thomas operated the dairy facility at a 20% capacity in 2006, and then used

losses from prior years to offset the gain he achieved. He also lived in one of the houses on the property, apparently without paying rent, and refused to allow Matthew to live in an empty house. The trial court did not err in using the potential fair rental value of the income-producing assets on the farm in determining damages.

Thomas also complains that the trial court ordered him to pay the interest and penalties on the real estate taxes. According to Thomas, “[w]ith the availability of such information at hand, all [Matthew] needed to do was catch a ride to the courthouse and bring his checkbook. He did neither.” Appellant’s Brief at 20. However, we have already determined the trial court was within its equitable powers to order Thomas to pay the interest and penalties where Thomas exercised exclusive possession, use, and occupation of the real estate to the detriment of Matthew.

Lastly, Thomas argues the trial court should have ordered Matthew to pay 25% of Thomas’s actual attorney fees of \$8,796.00 rather than just 25% of the \$6,000 in attorney fees the trial court found to be reasonable. Indiana Code section 32-17-4-21 authorizes an award of attorney fees in partition proceedings to be determined by the court. According to the statute, the court shall assign costs and expenses awarded against each partitioner as the court may determine in equity. Ind. Code sec. 32-17-4-21(b). Such an award is left to the trial court’s discretion. See Burger v. Schnaus, 61 Ind. App. 614, 112 N.E. 246 (1916). Here, the trial court concluded Thomas’s conduct resulted in additional attorney fees. Such a determination was within the trial court’s discretion and we find no error. The trial court’s

money judgment was not improper.

Conclusion

The trial court did not 1) abuse its discretion in qualifying Dr. Langill as an expert witness; 2) improperly modify the commissioners's report; or 3) abuse its discretion in ordering Thomas to pay Matthew \$22,892.00.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.