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IN THE COURT OF APPEALS OF INDIANA

DAN FRY, PAULA FRY,	)	
	)	
Appellants-Defendants/	)	
Counterclaim-Plaintiffs,	)	
	)	
and	)	
	)	
RALPH FRY and TRIPLE F FARMS,	)	
	)	
Appellants-Intervenors/	)	
Counterclaim-Plaintiffs,	)	
	)	
vs.	)	No. 67A01-1002-PL-35
	)	
WILMA SUTHERLIN HADLEY,	)	
	)	
Appellee-Plaintiff/	)	
Counterclaim-Defendant.	)	

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Robert J. Lowe, Special Judge
Cause No. 67C01-0812-PL-674

August 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Dan Fry, Paula Fry, Ralph Fry and Triple F Farms (collectively "the Frys") appeal from the trial court's order in favor of Wilma Sutherlin Hadley ("Hadley") in her action for ejectment, and against the Frys on their counterclaims for breach of contract, promissory estoppel, slander, and interference with a contractual relationship. The Frys raise the following restated and consolidated issue for our review: whether the trial court erred by finding and concluding that the Frys failed to meet their burden of proving their counterclaims and by failing to award damages and lost wages to Ralph Fry ("Ralph").

We affirm.

FACTS AND PROCEDURAL HISTORY

Hadley is the owner of a farm in Putnam County. After her husband's death in 1986, a farm hand, Alan Evans, who was paid a weekly wage, farmed her property. He was allowed to place his mobile home on Hadley's farm at a site having access to electricity, water, and a septic system. In the early 1990s, Hadley became disenchanted with Evans's personal life and fired him. Hadley then sought out her neighbor, Ralph, to help her with her farm.

Hadley and Ralph verbally agreed that Ralph would manage her farm in exchange for Hadley paying Ralph the same weekly wage she had paid Evans, and Ralph would be allowed the use of Hadley's pastures, barns, and other buildings for his farm operation. Hadley paid for the seed, fertilizer, chemicals, and fuel. There was no definite discussion about the duration of the agreement.

Ralph began working for Hadley pursuant to their verbal agreement with his son, Dan, assisting him. In 1997, Hadley invited Dan, who was planning to marry Paula, to move his modular home on her property at the site where Evans had kept his mobile home. Dan and Paula had access to septic, electricity, and water from a well near Hadley's barn that was powered by electricity paid for by Hadley. Hadley did not ask for rent from Dan and Paula and continued to pay for the real estate taxes on that land. Hadley was approached about giving the land to Dan and Paula; however, Hadley only agreed to give it some thought.

Ralph and Dan gradually expanded their own farming operation and made greater use of Hadley's property. Hadley paid Ralph the agreed upon wage until August of 2003 when she became dissatisfied with the arrangement and stopped making the payments without notice. In particular, Hadley was displeased with the placement of hogs on her property against her wishes. She was also upset about the sale of her cattle while she was in the hospital. She did not receive the money from that sale until several months later.

As Dan and Ralph's use of Hadley's buildings increased so did Hadley's expenses since she paid for the utility service to those buildings. Dan started a cattle breeding business, and Dan and Ralph began to keep cattle in Hadley's barn. Dan had an office built inside Hadley's barn without first seeking Hadley's permission.

After Hadley ceased paying wages to Ralph in 2003, the parties did not discuss the issue. Ralph continued to farm Hadley's land and continued to use her pastures and buildings. Hadley continued to pay for the seed, fertilizer, chemicals, and fuel. Ultimately, Hadley sought the advice of counsel, and letters were sent to Dan and Ralph on December

18, 2007, demanding the removal of all of their personal property within thirty days. Ralph and Dan removed their property within that time period.

When Hadley sent the December 18, 2007 letters, she also requested that Dan and Paula remove their modular home from her property within forty-five days. The parties agreed to an extension of time for the removal of the home, but Dan and Paula had not moved the home by the time of trial. The parties have since entered into a post-trial stipulation that the modular home has now been removed from Hadley's property.

Hadley filed a complaint for ejectment, immediate possession, and damages on June 4, 2008. Dan and Paula filed a counterclaim against Hadley on June 20, 2008 alleging that Hadley had made a contract to make a will, breached a contract, breached a lease, adverse possession of Hadley's land, slander, intentional interference with business relationships, promissory estoppel, and unjust enrichment. The counterclaim was amended to add Ralph and Triple F Farms as parties and they were allowed to intervene in the action.

The Frys filed a request for specific findings of fact and conclusions thereon. On July 15, 2009, the trial court issued its findings and conclusions thereon finding in favor of Hadley in her action for ejectment, and against the Frys on their counterclaims for breach of contract, promissory estoppel, slander and interference with a business relationship. The Frys filed a motion to correct error that was summarily denied by the trial court. Because the modular home has now been removed from Hadley's property, we do not address Hadley's ejectment action here on appeal. Additional facts will be supplied as needed. The Frys now appeal.

DISCUSSION AND DECISION

The Frys requested special findings of fact and conclusions thereon.[1] Our standard of review is therefore two-tiered: we determine whether the evidence supports the trial court's findings, and whether the findings support the judgment. *Weiss v. Harper*, 803 N.E.2d 201, 205 (Ind. Ct. App. 2003). We will not disturb the trial court's findings or judgment unless they are clearly erroneous. *Id*. Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them. *Id*. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id*. We will neither reweigh the evidence nor reassess the credibility of witnesses, but will consider only the evidence favorable to the judgment and all reasonable inference to be drawn therefrom. *Id.*

The Frys are also appealing from a negative judgment. A party appealing from a negative judgment must show that the evidence points unerringly to a conclusion opposite that reached by the trial court. *J.W. v. Hendricks County Office of Family &Children*, 697 N.E.2d 480, 481 (Ind. Ct. App. 1998). We will reverse a negative judgment on appeal only if the decision of the trial court is contrary to law. *Id*. at 482.

The Frys claim that the trial court erred by concluding that they have failed to meet their burden of proof regarding their counterclaims. The Frys' counterclaim included allegations of breach of contract, adverse possession, slander, nuisance, interference with a

[1] We commend the trial court on the thoroughness of its factual findings, which greatly aided appellate review.

business relationship, intentional infliction of emotional distress, promissory estoppel, unjust enrichment, wanton aggression, and a wage claim. We will address the counterclaims in the order in which they were addressed in the trial court's findings and conclusions.

The trial court found that Dan and Paula had failed to meet their burden of proof on their claims against Hadley for slander and interference with a business relationship. In order to prove their claim for slander Dan and Paula had to establish that Hadley spoke false defamatory words about them. *See Branaman v. Hinkle*, 137 Ind. 496, 502, 307 N.E. 546, 548 (1894) (false defamatory words if written and published are libel and if spoken are slander). In the case of slander, a communication is defamatory per se if it imputes criminal conduct, a loathsome disease, misconduct in a person's trade, profession, office, or occupation, or sexual misconduct. *Rambo v. Cohen*, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992). Dan and Paula alleged that Hadley, or her agents, had slandered them; however, the record reveals that they were unable to identify a source or demonstrate what was said. At best, the evidence shows that one of their witnesses heard about some trouble with cattle, but could not identify the source. The trial court's conclusion that there is insufficient evidence is supported by the findings which are supported by the record.

Dan and Paula claimed that Hadley interfered with their attempt to rent pasture from Delores Risk ("Risk"). In order to meet their burden of proof of interference with a business relationship, Dan and Paula were required to establish that Dan and Paula had a valid relationship with Risk, Hadley's knowledge of the existence of the relationship, Hadley's intentional interference with that relationship, the absence of a justification, and damages

resulting from Hadley's wrongful interference with the relationship. *See Rice v. Hulsey*, 829 N.E.2d 87, 91 (Ind. Ct. App. 2005) (listing elements of tortious interference with a business relationship). The record reveals that Dan contacted Risk about renting pasture from her and her three sons. One of her sons had heard that Dan and Hadley were having difficulties. Risk and her sons decided not to rent the pasture to Dan. Risk informed Dan of their decision, and Risk then spoke with Hadley about renting to Dan. Hadley admitted telling Risk, upon Risk's inquiry, that she had a great deal of trouble with Dan. Although the Frys point to conflicting evidence in the record and attack Hadley's and Risk's credibility, that showing is insufficient to establish that the evidence points unerringly to a conclusion opposite that reached by the trial court.

Dan and Paula had claimed that they were entitled to damages for intentional infliction of emotional distress. In order to establish their claim, Dan and Paula needed to show that Hadley intentionally or recklessly caused severe emotional distress to them. *Inlow v. Wilkerson*, 774 N.E.2d 51, 55 (Ind. Ct. App. 2002). Hadley's nephew initially represented her in her action for ejectment. Hadley had given Dan and Paula a deadline for removing the modular home from her property, and then agreed to an extension of time. After the final date had passed, Hadley's nephew, Paul, and his son, Bruce, inspected Hadley's buildings. Bruce drove an ATV, which made a great deal of noise, near Dan and Paula's home. Bruce then shut off the power to the pump that powered the well used by Dan, Paula, and their children. Dan was able to restore the power, but Bruce was dissuaded from again shutting

off the power only by calling law enforcement officers to the property and threatening him with arrest.

The trial court found that Bruce's conduct was inappropriate and contrary to law, and that he was acting as Hadley's agent. However, the trial court found that Dan and Paula had failed to establish the loss of money or property, and the evidence of emotional distress was insufficient. The evidence of the emotional distress suffered by the children could not be the basis of recovery as they were not named parties to the action. Although Dan and Paula point to evidence they claim supports their position, this showing does not establish that the evidence points unerringly to a conclusion opposite that reached by the trial court. Instead, it is a request for this court to reweigh the evidence, a task we are prohibited from doing.

Ralph was allowed to intervene in the action to bring his claim for unpaid wages under the Indiana Wage Claim Statute[2]. After Hadley fired Evans, she approached Ralph and offered him a similar deal. She wanted Ralph to put out her crops in exchange for a weekly wage and the use of her pasture and barns. Hadley admitted that she stopped paying Ralph's wages when she became upset with the Frys, but that Ralph continued to put out crops for Hadley and she continued to pay for fertilizer and seed. Ralph and his family increased their use of Hadley's property, and she continued to pay real estate taxes and the utility bills. The parties testified that they had little, if any, conversation about the souring of their relationship, but were aware that the relationship had become strained.

[2] *See* Ind. Code § 22-2-9-1.

The trial court concluded that Ralph had acquiesced to a modification of the agreement by the course of his conduct. Parties may mutually modify contractual undertakings. *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154, 161 (Ind. 2005). Furthermore, modification of a contract can be implied from the conduct of the parties. *Skweres v. Diamond Craft Co*., 512 N.E.2d 217, 221 (Ind. Ct. App. 1987). Questions regarding the modification of a contract are questions of fact based on the evidence in each case and determined by the trier of fact. *Id*.

Here, Ralph was aware that Hadley was upset and that Hadley had stopped paying him in 2003. Nevertheless, Ralph continued to put out the crops and increased his use of Hadley's pasture and barns until he received a letter, in 2007, expressing Hadley's desire to terminate their agreement. Hadley paid for seed, fertilizer, and supplies, and paid the utilities and other costs associated with the increased use of her property. Such evidence supports the trial court's determination that there was a modification of the oral agreement between Ralph and Hadley.

The trial court also concluded that the Frys' counterclaim for unjust enrichment failed because of the many benefits Frys received from the arrangement and the numerous costs Hadley had incurred associated with the Frys' increased use of her property. As before, the evidence regarding the benefits the Frys received and the expenses that Hadley incurred support the trial court's determination that the Frys'claim for unjust enrichment should fail.

The remaining claims brought by the Frys are based on a theory of breach of contract. The Frys believed that Hadley promised to include them in her will or make an inter vivos gift. The parties agree that there was never a written agreement. Hadley testified that the issue of inheritance was discussed, but went no further than her agreeing to think about it. Ralph testified that he was uncertain about whether the issue came up, but felt clear that the promise was made and that promise motivated him to enter into the agreement with Hadley. Dan testified that Hadley stated that Ralph would be taken care of in the same manner as Evans, who had been in Hadley's will, and no further details were discussed.

Dan and Paula claimed that Hadley promised that they would inherit something from her when they moved their modular home on the site where Hadley's previous farmhand had kept his mobile home. Dan testified that he understood that he and Paula would inherit something. Paula testified that she did not remember a specific promise that they would inherit something from Hadley, but that they would be taken care of by her. Noble Fry, Ralph's father, testified that he asked Hadley to give Dan a 99-year lease regarding the home site, but that Hadley refused, stating that her word was good. Hadley testified that no promises were made to Dan and Paula about inheriting from her.

The trial court concluded that the terms of the alleged oral contract were uncertain and not definite, and that the trial court would not fill in the gaps in the alleged contract for the parties. The Frys point to evidence in the record that supports their position, but conflicting evidence also exists. No deed was executed, and Hadley continued to pay the real estate taxes on the property upon which Dan and Paula's modular home sat rent-free. There was no

guidance as to how much property Dan and Paula thought they were inheriting. Plus, as the trial court noted, there was a question about whether the alleged promise to Dan and Paula ran afoul of the alleged promise to Ralph to inherit some unknown portion of Hadley's farm. The Frys have not met their respective burdens of proving that the evidence points unerringly to a conclusion opposite that reached by the trial court.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.