RENDERED: MAY 3, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2000-CA-001774-MR

MICHAEL FENNESSY AND IRISH-
AMERICAN BLOODHORSE AGENCY, LTD. APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE VAN METER, JUDGE
ACTION NO. 99-CI-01208

JOE DODGEN, D/B/A SEVEN FOLD FARM APPELLEE

AND NO. 2000-CA-001886-MR

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OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, EMBERTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: In April 1999, Joe Dodgen brought suit on behalf of Seven Fold Farm, a thoroughbred boarding operation in Fayette County, against Irish-American Bloodhorse Agency Ltd. and its owner, Michael Fennessy. Dodgen sought past-due boarding fees and other charges related to the care of Fennessy's horses. Fennessy responded in May 1999 by contesting some of Dodgen's charges and by entering a counter-claim for damages allegedly resulting from Dodgen's tardiness in presenting two of Fennessy's mares for breeding. In December 1999, Dodgen began adding an interest charge of two percent per month to past due amounts and, as of January 1, 2000, purported to raise Fennessy's boarding fee.

The matter was heard by the court without a jury in June 2000. By order entered July 21, 2000, the court awarded Dodgen boarding fees at the pre-January 2000 rate and expenses for worming medication and farrier's services. It also awarded him pre-judgment interest on amounts due prior to January 1, 2000. The total award was in excess of $48,000.00. The court denied Dodgen's claim for veterinary expenses, and it denied Fennessy's counterclaim. Both parties appealed.

In appeal no. 2000-CA-001886, Dodgen contends that he should have been awarded pre-judgment interest for the period from January 1, 2000, until judgment and that he should have been reimbursed for the alleged veterinary charges. In appeal no. 2000-CA-001774, Fennessy contends that, contrary to the court's finding, he proved the existence of substantial damages as a result of the late breeding of his mares and that even if he did

not prove substantial damages he was entitled to an award of nominal and possibly punitive damages. Convinced that neither appeal merits relief, we affirm the trial court's judgment.

Dodgen contends that even if his increased charges after January 1, 2000, are not to be allowed, he should still be awarded pre-judgment interest on the basic charges outstanding from that date until judgment. In denying interest for that period, the trial court found that Dodgen's unilateral imposition of interest charges and increased fees as of January 1, 2000, was not authorized under the oral contract between the parties and likely interfered with the settlement of the dispute. Dodgen challenges neither of these findings, and both are supported by substantial evidence. A party, of course, is not entitled to damages he could reasonably have avoided.[1] Because Dodgen likely contributed to his own injury by prolonging the period he was deprived of his funds, the trial court did not err by limiting his award of pre-judgment interest accordingly.

Next, Dodgen contends that the court overlooked his claim for veterinary expenses. His complaint included a claim for such expenses totaling almost $5,000.00. By the time of trial that amount had become $6,170.00. Dodgen's proof, however, did not include an itemization of that amount, and there was evidence both that Fennessy had not authorized some of the services and that some of the charges had been included in other bills. Be that as it may, the written judgment makes no mention

[1]Smith v. Ward, Ky., 256 S.W.2d 385 (1953); *Restatement (Second) of Contracts,* § 350 (1981).

of this claim, and in its oral findings the court refers only to a $105.00 veterinary charge. If Dodgen wished to preserve this issue for appeal, it was his duty to request the court to make an adequate finding.[2] His failure to do so constitutes a waiver of this alleged error and precludes our review.[3]

Fennessy's appeal concerns the breeding of two of his mares. In February 1999 he contracted for stud services, and the subject mares became eligible in March and April. Dodgen knew, Fennessy alleges, where the mares were to be bred, that they were to be bred as early in the season as possible, and he knew when they became ready. Nevertheless, he deliberately failed to arrange the breeding until compelled to do so in June 1999. This late breeding, Fennessy contends, not only resulted in the foals being worth less than they would have been had they been conceived earlier in the year, but also diminished the value of the mares, which either would continue to bear late, lower-valued foals or would need to be left barren for a season.

The trial court ruled that Fennessy had failed to substantiate the alleged damages; it denied his claim, therefore, without deciding whether Dodgen had breached a duty. Fennessy contends that he adequately proved his alleged compensatory damages. He also contends that the court erred by failing to rule on Dodgen's breach and to consider, if there was a breach, Dodgen's liability for nominal and punitive damages. We are convinced that there was no reversible error.

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[2]CR 52.04.

[3]Crain v. Dean, Ky., 741 S.W.2d 655 (1987).

As Fennessy notes, Kentucky's courts recognize lost profits as an element of compensatory damages, but only if the fact of loss is established with reasonable certainty and only then if there is some reasonable basis for estimating the amount.[4] Thoroughbred breeding, of course, is notoriously speculative.[5] Here, Fennessy offered expert testimony to the effect that thoroughbred breeders prefer their foals to be born as early in the year as possible and that late breeding can lessen a foal's value. Birth date, however, is only one of many factors bearing on that value, and the expert could not say, either in general or in any given case, how important the birth-date factor was. It might be significant or it might be completely overshadowed by something else. Not surprisingly then, when the court asked whether his estimate of Fennessy's losses was speculative, the expert readily admitted that it was. We agree with the trial court that this testimony did not satisfy the above standard of proof and that Fennessy was not entitled to compensatory relief.

Nor did the court err by denying, in effect, Fennessy's claim for punitive damages. It is true, as Fennessy suggests, that tort damages may be appropriate for improper interference with contractual or advantageous relations[6] and even for an

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[4]Pauline's Chicken Villa, Inc. v. KFC Corp., Ky., 701 S.W.2d 399 (1985); Illinois Valley Asphalt, Inc. v. Harry Berry, Inc., Ky., 578 S.W.2d 244 (1979).

[5]Schleicher v. Gentry, Ky. App., 554 S.W.2d 884 (1977).

[6]NCAA v. Hornung, Ky., 754 S.W.2d 855 (1988).

egregious breach of a party's own contract.[7] The general rule, however, is that contract remedies and tort remedies are to remain distinct.[8] As part of this distinction, punitive damages are not available for a breach of contract.[9] No doubt aware of this rule, Fennessy characterizes Dodgen's alleged breach as a tort, but in essence he is claiming that, by breaching a term of their agreement, Dodgen deprived him of the benefit of his bargain. Punitive damages are thus inappropriate.

Dodgen's alleged spitefulness would not change this result. Neither the alleged act--even if spiteful--nor the alleged harm--a purely economic loss and one of the foreseeable risks of the business--suggests the outrage that justifies an award of punitive damages.[10] The trial court did not err, therefore, by effectively dismissing this aspect of Fennessy's claim.

It remains possible that Fennessy should have been awarded nominal damages. Nominal damages are appropriate for a breach of contract where substantial damages either did not result or can not be proved.[11] By declining to rule on Dodgen's

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[7]Wittmer v. Jones, Ky., 864 S.W.2d 885 (1993).

[8]Freeman & Mills, Inc. v. Belcher Oil Company, 900 P.2d 669 (Cal. 1995); Story v. City of Bozeman, 791 P.2d 767 (Mont. 1990); Quinn Companies, Inc. v. Herring-Marathon Group, Inc., 773 S.W.2d 94 (Ark. 1989).

[9]Freeman & Mills, Inc. v. Belcher Oil Company, *supra.* KRS 411.184(4).

[10]Owens-Corning Fiberglass Corporation v. Golightly, Ky., 976 S.W.2d 409 (1998); Fowler v. Mantooth, Ky., 683 S.W.2d 250 (1984).

[11]USACO Coal Company v. Liberty National Bank & Trust Company, Ky. App., 700 S.W.2d 69 (1985). *Restatement (Second) of Contracts* § 346 (1981).

alleged breach, the trial court left the nominal-damages issue undecided. Unless there is an exceptional reason merely to vindicate the asserted right, however, "a court will not reverse and remand a case . . . if only nominal damages could result."[12] We are not persuaded that a remand is called for in this case. Although a formal ruling on the question of Dodgen's breach might provide some marginal satisfaction to the parties, the rights involved are well recognized and in no need of special vindication. Accordingly, in both appeal no. 2000-CA-001774 and appeal no. 2000-CA-001886, we affirm the July 21, 2000, judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR MICHAEL FENNESSY AND IRISH-AMERICAN BLOODSTOCK AGENCY, LTD.:

William A. Dykeman
Dykeman & Rosenthal
Winchester, Kentucky

BRIEF FOR JOE DODGEN:

Joe Dodgen, *pro se*
Lexington, Kentucky

[12]*Restatement (Second) of Contracts* § 346 comment b. (1981).