

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000066-MR

DON RICHARDSON

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 07-CI-00176

GARY GREGORY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL AND WINE, JUDGES; HARRIS,¹ SENIOR JUDGE.

NICKELL, JUDGE: Don Richardson has appealed from the Wayne Circuit Court's judgment denying him recovery in a collection action against Gary Gregory and Opal Sexton. For the following reasons, we affirm.

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Richardson is a businessman in Wayne County, Kentucky, where he owns and operates several businesses. Gary and his brother Richard Gregory were employees of one of Richardson's businesses, Pisgah Lumber Company. Richard also worked for and lived in a house on the premises of Donald Richardson Farms. In December of 2004, Richard was indicted on a charge of attempted arson in connection with a suspicious fire at another of Richardson's businesses, Monticello Wood Products. Subsequent to the fire, Richard continued to reside at the farm and meet with Richardson in connection with his employment.

Richardson testified at the trial of the matter that Gary approached him in December of 2004 inquiring about borrowing money to post Richard's bond in the criminal case. Richardson ultimately issued a check drawn on the Pisgah Lumber Company account and a check drawn on his farm account in the amount of \$5,000.00 each. Both checks were made payable to Gary. Richardson also gave Gary \$5,000.00 cash for Richard's benefit. At the time of the money transfers, Richard's bond had already been posted by his mother, Opal. Richard passed away before he was tried on the criminal charges and the bond money was returned to Gary.

Richardson filed the instant civil action seeking repayment of the \$15,000.00 from Gary and Opal. Richardson also alleged Gary was indebted to him for the purchase price of a truck Richardson had obtained for Gary's use as a

logging crew supervisor.² Gary counter-claimed for amounts allegedly due him in connection with his employment.³

At the trial of the matter, Richardson contended he had loaned the money to Gary and Opal for Richard's benefit and he was to be repaid when Richard's bond was released. He conceded the terms of the loan and provisions for its repayment were not reduced to writing. However, it is undisputed that one of the non-financial conditions of Richard's bond prohibited him from contacting Richardson in any way, and that Richard and Richardson had no discussions regarding the loan. At the close of Richardson's case, the trial court granted Opal's motion for a directed verdict as no evidence had been adduced indicating she was in any way connected to the transfer of the funds.⁴

Gary argued the debt was Richard's and that he, Gary, was not responsible for its payment. Gary testified it was common practice for him to act as a conduit for transferring money to Richard and other members of the work crew of which Gary was the supervisor. Gary stated Richardson wrote checks directly to him which Gary cashed and paid the men with that cash. Gary argued

² Although the trial court denied Richardson's claim for sums allegedly owed in relation to the truck, no appeal has been taken from the denial. Therefore, no further discussion on the matter is warranted.

³ The trial court rejected Gary's counter-claim. No appeal has been taken from that portion of the trial court's ruling.

⁴ No appeal has been taken from the entry of the directed verdict and no arguments are advanced in the instant appeal regarding Opal's liability for the amounts at issue herein.

he had never agreed to repay any sums to Richardson that had been given to him for Richard's benefit.

At the end of the trial, the court found the funds advanced by Richardson had been used to pay Richard's criminal defense attorney, not to post his bond as Richardson alleged he had been led to believe. The court further found the debt belonged solely to Richard. Finally, the court concluded Richardson had failed to carry his burden of proof as to Gary's responsibility for the debt and dismissed the action. This appeal followed.

Before this Court, Richardson contends the trial court's determination that Gary owed nothing on the debt was erroneous as it was unsupported by substantial evidence. Alternatively, Richardson contends the court abused its discretion in dismissing the matter when it relied on erroneous findings of fact. As this appeal centers solely on a factual matter, the proper scope of our review is the clearly erroneous standard. On appellate review, we will not disturb a trial court's determination of factual disputes unless it is clearly erroneous, meaning it is unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Regardless of the weight of the evidence, the presence of conflicting evidence, or the fact that we as a reviewing court might have reached a contrary conclusion, we must give due regard to the trial court's opportunity to assess the credibility of the witnesses. CR⁵ 52.01. Based upon a careful review of the record

⁵ Kentucky Rules of Civil Procedure.

we conclude the trial court's decision was supported by substantial evidence and its choice of which evidence was most credible was not clearly erroneous.

The only witnesses testifying during the forty-minute trial were Richardson, Gary, and a bank representative who introduced copies of the two checks at issue. As the bank records regarding the checks were undisputed, the trial court was left only to determine the weight and credibility of the conflicting testimony given by Richardson and Gary regarding the circumstances surrounding the loaned funds. Both men had a stake in the litigation and the trial court obviously found Gary's testimony was more credible as it concluded Richardson had failed to carry his burden of proving Gary was in any way obligated to repay the alleged debt. It is well-settled in this Commonwealth that the "trier of fact has the right to believe the evidence presented by one litigant in preference to another. The trier of fact may believe any witness in whole or in part." *Bissell v. Baumgardner*, 236 S.W.3d 24, 29-30 (Ky. App. 2007) (quoting *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996) (internal citations omitted)). Thus, as there was no jury impaneled, the trial court alone was vested with the discretion to determine the credibility of the witnesses and to adjudicate the matter. There was substantial evidence supporting the trial court's decision, and we discern no error in the determination.

Therefore, for the foregoing reasons, the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

James M. Frazer
Monticello, Kentucky

BRIEF FOR APPELLEE:

L. Lee Tobbe
Monticello, Kentucky