

RENDERED: FEBRUARY 18, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-00400-MR

KELLY TOLSON

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE FRANK A. FLETCHER, JUDGE  
ACTION NO. 06-CI-00120

KATHERINE ALLEN

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: Kelly Tolson (Tolson) brings this appeal from a February 22, 2010, Summary Judgment of the Breathitt Circuit Court dismissing his complaint as falling within the Statute of Frauds. For the following reasons, we reverse and remand.

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

## FACTS

Tolson and Katherine Allen (Allen) had a sporadic, romantic relationship from 1999 to January 2006. In November 2005, Tolson purchased a 1994 Fleetwood mobile home for \$7500 from Shelia Prater. Tolson put title to the mobile home in Allen's name. However, Tolson paid the entire purchase price of \$7500. When Tolson and Allen ended their relationship in January 2006, Allen retained possession and title to the mobile home. When Allen would not transfer the mobile home to Tolson, Tolson filed a complaint for breach of contract. Tolson contends that Allen was to transfer the title of the mobile home to both herself and Tolson according to their oral agreement. Allen, on the other hand, contends that the mobile home was a gift to her so she would "take him [Tolson] back."

On July 31, 2007, the Breathitt Circuit Court granted Allen's motion for summary judgment, declaring the oral agreement unenforceable under the Statute of Frauds as applicable to the sale of goods with a value of greater than \$500. This Court reversed and remanded, finding that the alleged oral agreement to transfer title of the mobile home to Tolson could not be considered a "contract for the sale of goods" because Allen gave no goods or other consideration in return for the transfer of title. However, we did not rule out the possibility that other provisions of the Statute of Frauds might apply. Finally, this Court held that there was an issue of material fact as to whether the alleged oral agreement existed.<sup>2</sup>

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<sup>2</sup> *Tolson v. Allen*, 2007-CA-001644, 2008 WL 4683019 (Ky. App. October 24, 2008).

On January 27, 2010, Allen again moved for summary judgment, contending that any oral agreement was unenforceable under two other provisions of the Statute of Frauds. First, Allen argued that any agreement that may have existed was a contract incapable of being performed within one year. Kentucky Revised Statutes (KRS) 371.010(7). Second, she argued that any agreement was a contract in contemplation of marriage. KRS 371.010(5). On February 22, 2010, the Breathitt Circuit Court, relying on Allen's second argument, granted her motion for summary judgment. This appeal followed.

We note that the circuit court failed to explain why it concluded the Statute of Frauds applied to the alleged oral agreement between Tolson and Allen, summarily declaring that “[p]ursuant to KRS 371.101(5)(7) [sic], the Motion of the Defendant for Summary Judgment is hereby GRANTED and this case is hereby DISMISSED with prejudice.” The court did not directly identify which provision of the statute it relied on to grant summary judgment. Nor did the Court explain why either provision applied. However, the Court did cite to *Wesley v. Wesley*, 181 Ky. 135, 204 S.W. 165 (1918), a case which applied the Statute of Frauds to a contract in contemplation of marriage. Additionally, we note that Allen conceded that KRS 371.010(7) did not apply as any contract that might exist was capable of being performed within a year. Therefore, we infer that the Court relied on KRS 371.010(5) as the basis for its decision.

#### STANDARD OF REVIEW

“The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Pearson ex rel. Trent v. Nat’l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when “it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record “in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor.” *Id.* A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id. at 481.* In *Steelvest* the word “‘impossible’ is used in a practical sense, not in an absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

#### ANALYSIS

Tolson contends that the Breathitt Circuit Court incorrectly granted Allen’s motion for summary judgment based on the Statute of Frauds. Tolson asserts that the parties were not contemplating marriage and that a genuine issue of material fact exists as to whether the mobile home was an outright gift to Allen or whether the parties had orally agreed that Allen would place title in Tolson's name if they separated. Allen asserts that the mobile home was a gift and that there was no oral

agreement. In the alternative, Allen asserts that, if there was an oral agreement, that agreement is governed by KRS 370.010(5), and is not enforceable.

KRS 370.010(5) provides that:

No action shall be brought to charge any person:

...

(5) Upon any agreement made in consideration of marriage, except mutual promises to marry;

...

unless the promise, contract, agreement, representation, assurance, or ratification . . . be in writing and signed by the party to be charged therewith . . . .

While Allen agrees with Tolson that the couple was not contemplating marriage, she argues that their agreement so closely mirrored an agreement in contemplation of marriage as to deserve the same effect. According to Allen, Tolson's contention that she agreed to return the mobile home if their relationship ended was, like a promise made in contemplation of marriage, dependent on the parties' continued romantic relationship. Furthermore, Allen contends that, because of that overriding similarity, any such agreement should, like a promise made in contemplation of marriage, be in writing to be enforceable.

We disagree with Allen. First, we note that there is no evidence that the parties ever discussed marriage, especially as it pertains to the agreement in question. Second, Allen has not cited, nor have we found, any authority that would support extending KRS 371.010(5) to agreements that are not actually made in the contemplation of marriage but rather in the contemplation of cohabitation or

romantic involvement. In fact, the common law of Kentucky does not recognize that any contractual rights or obligations arise from cohabitation. *See Murphy v. Bowen*, 756 S.W.2d 149 (Ky. App. 1988). Consequently, KRS 371.010(5) does not apply to any oral agreement that may exist between Allen and Tolson and the circuit court's summary judgment was granted in error.

### CONCLUSION

For the foregoing reasons, the February 22, 2010, summary judgment is reversed and this matter is remanded to the circuit for further proceedings. As noted in our prior opinion, there is an issue of material fact regarding the existence of an agreement between Tolson and Allen. Therefore, on remand, the circuit court must determine if an oral agreement existed and, if such an agreement existed, its terms.

ALL CONCUR.

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