STATE OF MICHIGAN

COURT OF APPEALS

KENNETH JUDKINS,

Plaintiff-Counterdefendant-Appellee,

v

WILLIAM M. FISHBECK,

Defendant-Counterplaintiff-Appellant,

and

RICHARD JUDKINS,

Intervening Defendant-Appellee.

UNPUBLISHED
October 16, 1998

No. 202153
Washtenaw Circuit Court
LC No. 91-041542 CB

Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant William Fishbeck appeals from the trial court's judgment, which awarded plaintiff Kenneth Judkins $259,712 plus interest for his share of a farming partnership between the parties, court costs in the amount of $49,107.45, and attorney fees in the amount of $82,455.50 as sanctions. We affirm.

The trial court found that plaintiff and defendant entered into a partnership agreement to operate the Fishbeck farm from January 1, 1982, to February 4, 1990. Defendant contends that he operated the farm under an oral agreement with his parents, Murray and Harriet Fishbeck, and that the trial court erred when it determined that his oral agreement terminated upon Murray's death in 1981 and excluded evidence relating to the agreement.[1] Defendant further contends that this excluded evidence would show that plaintiff was defendant's employee and not his partner. We disagree.

The appropriate standard for review in this case is not, as defendant contends, whether the trial court made a clearly erroneous finding of fact, but whether the trial court abused its discretion by excluding evidence relevant to the accounting action between plaintiff and defendant.[2] *Kent Concrete, Inc v Hospital Bldg & Equipment Co*, 150 Mich App 91, 95; 388 NW2d 357 (1986); *Nogueras v Maisel & Associates*, 142 Mich App 71, 80-81; 369 NW2d 492 (1985). A trial court's decision as to admissibility of evidence will not be overturned on appeal in the absence of an abuse of discretion. *Kent Concrete, supra*.

The parties had a bifurcated bench trial. The first trial determined whether the parties operated as a partnership, while the second trial determined an accounting of the partnership interests.[3] Both plaintiff and defendant testified that they intended to divide the farm profits, with defendant receiving seventy-five percent of the profits and plaintiff receiving twenty-five percent. Both plaintiff and defendant testified that each party contributed capital to the enterprise. Furthermore, the parties filed partnership income tax returns from 1982 to 1989, which reflected the seventy-five percent/twenty-five percent profit-sharing agreement. Evidence that plaintiff and defendant shared profits, contributed capital, and filed partnership tax returns supports the trial court's conclusion that the parties intended a partnership rather than an employment relationship. MCL 449.7(4); MSA 20.7(4); *Miller v City Bank & Trust Co*, 82 Mich App 120, 123-127; 266 NW2d 687 (1987); *Falkner v Falkner*, 24 Mich App 633, 642-644; 180 NW2d 491 (1970).

Defendant also argues that he was prejudiced by the trial court's exclusion of evidence regarding the operation of the Fishbeck farm before Murray Fishbeck's death in 1981. We disagree. In a suit for a partnership accounting, evidence may be admitted that is pertinent and relevant to the issues framed in the pleadings. *Nogueras, supra* at 80. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, proofs in an accounting are limited to the period from when the partnership commenced until the partnership was terminated, as that period is alleged in the pleadings. See *Henderson v Connolly's Estate*, 294 Mich 1, 7-8; 292 NW 543 (1940). The pleadings in this case relate to plaintiff's and defendant's partnership, which lasted from 1982 to 1990. Plaintiff's claim is for the farm revenue, lake revenue, and partnership assets acquired from 1982 to 1990. The pleadings in this case did not create an issue of fact regarding the ownership or operation of the Fishbeck farm before 1982.

This Court will not find an abuse of discretion in a ruling on the exclusion of evidence in a bench trial, without first according due deference to the trial judge's favored position and presumed ability to determine relevancy, weight, and credibility in reaching a judgment without a jury. See *Hoffman v ACIA*, 211 Mich App 55, 102; 535 NW2d 529 (1995). In civil cases, an abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). The trial court did not abuse its discretion in excluding evidence relating to the Fishbeck farm as it was owned and operated before the parties commenced their partnership on January 1, 1982. The trial court properly limited the proofs in this case to the period January 1, 1982, to February 4, 1990, as that is the period during which plaintiff alleged in the pleadings that he and defendant were partners. See *Henderson, supra*. Accordingly, we hold that the trial court properly excluded evidence of how defendant and his parents operated the Fishbeck farm before 1982 as irrelevant to the accounting of the partnership.

Furthermore, defendant was not prejudiced because the trial court admitted abundant evidence relating to the history of the Fishbeck farm operation before the partnership. Defendant was allowed to present evidence regarding many, if not most, of the issues raised in his offer of proof.[4]

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Helene N. White

[1] This Court previously construed defendant's oral agreement with Murray and Harriet Fishbeck in *In Re Harriet Fishbeck Trust*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 1996 (Docket No. 170708), and affirmed the probate court's judgment that defendant held a fee interest in one-half of the farm and a life estate in the remaining half under the terms of the oral agreement.

[2] Contrary to defendant's contention, the trial court did not make a determination that the business created by the oral agreement ended upon Murray's death. Rather, the trial court ruled that evidence regarding the farm business before 1982 was irrelevant, because the issue in the case was an accounting between plaintiff and defendant for their partnership established on January 1, 1982.

[3] Defendant did not call any witnesses or make an offer of proof for the excluded evidence during the partnership trial. Furthermore, defendant's counsel conceded to the trial court that the parties were joint venturers. Defendant's counsel subsequently made an extensive offer of proof at the accounting trial.

[4] For example, defendant presented evidence regarding the "common pot" accounting method used on the farm before 1982, which he felt was crucial to the trial court's understanding of the partnership accounting. Furthermore, the trial court was aware of the oral agreement between defendant and his parents, because it reviewed the probate court's order construing the agreement.