

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT J. MCMAHON, ARLA J. MCMAHON,
and PATRICK MCMAHON, a/k/a PATRICK K.
MCMAHON, a/k/a PATRICK KENNETH
MCMAHON,

UNPUBLISHED
November 6, 2007

Plaintiffs/Counter-Defendants-
Appellees,

v

No. 270477
Lenawee Circuit Court
LC No. 02-002641-CH

CHARLES E. MCMAHON, a/k/a CHARLES
MCMAHON, a/k/a CHARLES EDWIN
MCMAHON, and MARIA A. MCMAHON, a/k/a
MARIA MCMAHON, a/k/a MARIA ANNE
MCMAHON,

Defendants/Counter-Plaintiffs-
Appellants.

Before: Kelly, P.J. and Meter and Gleicher, J.J.

PER CURIAM.

Defendants/counter-plaintiffs (“defendants”) appeal as of right from the trial court’s *nunc pro tunc* order dismissing their counterclaim against plaintiffs/counter-defendants (“plaintiffs”).¹ We affirm in part and vacate in part.

I. Basic Facts and Proceedings

This case involves a disputed partnership between Robert, Patrick, and Charles, who are brothers. Arla was Robert’s wife, and Maria is married to Charles. The partnership was involved in the operation of McMahan Farms, a commercial farm in Blissfield that produced various commodities, including corn and soybeans, and was also engaged in the livestock business. Charles managed the day-to-day activities of the farm, and the farm received federal

¹ Because all the parties share the same last name, we will refer to them, individually, by first name only. We also note that Robert J. McMahan passed away before trial.

subsidies from the United States Department of Agriculture (USDA) from 1994 to 2001. After McMahon Farms defaulted on a \$500,000 loan, the property was foreclosed and sold for \$6.3 million.

Plaintiffs filed a complaint, seeking an accounting, partnership dissolution, and compensatory damages. Defendants filed a counterclaim, alleging that they were merely paying rent to plaintiffs for their property located on McMahon Farms. Defendants also alleged tortious interference and unjust enrichment. Following a bench trial, the trial court entered a judgment, which found that there was a partnership between Robert, Patrick, and Charles and held Maria liable to plaintiffs. The judgment awarded plaintiffs \$632,269.50 in damages, plus \$1,605.97 in interest, and \$93,197.87 in costs, for a total of \$727,073.34.

II. Expert Witness Report

Defendants first argue that the trial court abused its discretion when it included the report of plaintiffs' expert witness, Daniel Maloy, in the judgment because his testimony was inadmissible pursuant to MRE 702. We disagree.

A. Preservation

To preserve an evidentiary error for appellate review, a party must object on the same ground that it presents on appeal. MRE 103(a)(1); *Klapp v United Ins Group Agency (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Because defendants failed to object to Maloy's testimony, this issue has not been preserved for appellate review. However, because the issue involves a question of law, i.e., whether testimony is admissible under MRE 702, and because all the facts necessary for its resolution have been presented, we will overlook the preservation requirements and consider the issue. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006), citing *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

B. Standard of Review

Generally, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion exists when the trial court's decision is outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court must ensure that any expert testimony admitted at trial is reliable, and "[w]hile the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'" *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004) (internal footnote omitted).

C. Maloy's Report

As amended January 1, 2004, MRE 702 provides as follows:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A trial court must ensure that all expert opinion testimony, regardless of whether it is based on novel science, is reliable. *Gilbert, supra* at 781. “MRE 702 requires the trial court to ensure that each aspect of an expert witness’s proffered testimony—including the data underlying the expert’s theories and the methodology by which the expert draws conclusions from that data—is reliable.” *Id.* at 779. The facts or data on which an expert bases an opinion or inference must be in evidence, but the trial court may receive expert testimony subject to the condition that the factual bases of the opinion be admitted in evidence at a later time. MRE 703.

Defendants primarily contend on appeal that the majority of the underlying data and facts upon which Maloy relied in reaching his conclusion regarding the amount of damages were based on documents prepared by Robert and Patrick. Defendants also complain that Maloy was unable to substantiate by a source independent of Robert and Patrick many of the documents he relied upon in reaching the total damages amount. Maloy, a certified public accountant, testified that plaintiffs gave him a large number of records regarding the McMahon Farms operations. The lower court record reveals that Robert and Patrick prepared some of these records, Charles prepared some, and third parties prepared others. Maloy reviewed these records to determine whether: (1) there was a partnership or joint venture between the parties; and (2) if so, whether Charles properly accounted to his brothers for the income of McMahon Farms. Maloy subsequently prepared a report concluding that the three brothers were engaged in either a partnership or a joint venture and Charles failed to provide Robert and Patrick with \$632,269.52 from the proceeds of the McMahon Farms operations. We conclude that Maloy’s testimony was based upon sufficient facts and data as required by MRE 702.

The fact that some of the records relied upon by Maloy in preparing his report were contributed by plaintiffs goes to the weight of his testimony and does not affect the reliability of his methods. An opposing party’s disagreement with an expert’s opinion or interpretation of facts is directed to the weight to be given to the testimony, and not its admissibility. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401; 628 NW2d 86 (2001). Furthermore, each of the documents attached to Maloy’s report was separately introduced at trial through the testimony of Arla and Patrick. It is noteworthy that defendants did not employ an expert of their own to contest Maloy’s testimony or offer additional evidence to refute the factual findings introduced by Maloy. Finally, a review of Maloy’s report shows that his opinion was based upon data derived from the application of reliable accounting principles and methods. Accordingly, we conclude the trial court did not abuse its discretion when it included Maloy’s findings in the June 13, 2005, judgment.

III. The Existence of A Partnership

Defendants next argue that the trial court erred in concluding that there was a partnership between Robert, Patrick, and Charles. We disagree. The determination of whether a partnership exists is a question of fact. *Miller v City Bank & Trust Co*, 82 Mich App 120, 123; 266 NW2d 687 (1978). We review the trial court’s findings of fact entered after a bench trial to determine if they were clearly erroneous. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One*

LLC, 269 Mich App 324, 329; 712 NW2d 168 (2005). “Findings of fact are deemed clearly erroneous where the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.* at 329-330. Questions of law are reviewed de novo. *Kelly v Builders Square, Inc.*, 465 Mich 29, 34; 632 NW2d 912 (2001).

A “partnership is defined as “an association of 2 or more persons, which may consist of husband and wife, to carry on as co-owners a business for profit. . . .” *Byker v Mannes*, 465 Mich 637, 644; 641 NW2d 210 (2002), quoting MCL 449.6(1). Thus, “if the parties associate themselves to ‘carry on’ as co-owners a business for profit, they will be deemed to have formed a partnership relationship regardless of their subjective intent to form such a legal relationship.” *Byker, supra* at 646. Stated otherwise, MCL 449.6(1) “does not require partners to be aware of their status as ‘partners’ in order to have a legal partnership.” *Id.*

MCL 449.7 provides factors to consider when determining whether a partnership was created:

In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by [MCL 449.16,] persons who are not partners as to each other are not partners as to third persons;

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property;

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

- (a) As a debt by installments or otherwise,
- (b) As wages of an employe [sic] or rent to a landlord,
- (c) As an annuity to a widow or representative of a deceased partner,
- (d) As interest on a loan, though the amount of payment vary with the profits of the business,
- (e) As the consideration for the sale of the good-will of a business or other property by installments or otherwise.

“Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently

carrying on in the usual way the business of the partnership” *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 344; 561 NW2d 138 (1997), quoting MCL 449.9(1) (emphasis deleted). A partnership may own real property, and a partner “is a co-owner with his partners of specific partnership property holding as a tenant in partnership[.]” MCL 449.25; *Kay Investment Co, LLC v Brody Realty*, 273 Mich App 432, 440; 731 NW2d 777 (2006).

As the ones alleging the existence of a partnership, plaintiffs bear the burden of proving a partnership, and this burden is stricter because the alleged partners are relatives. *Lobato v Paulino*, 304 Mich 668, 670-671, 674; 8 NW2d 873 (1943); *Miller, supra* at 123. Indicia of a partnership relation are mutual agency, joint liability, *Lobato, supra* at 674; *Miller, supra* at 125, the common authority in the administration and control of the business, a common interest in the capital employed, and a sharing in the profits and losses of the business, *Barnes v Barnes*, 355 Mich 458, 462; 94 NW2d 829 (1959); *Miller, supra* at 124-125. A capital contribution is an essential element of a partnership. *Employment Security Comm v Crane*, 334 Mich 411, 416; 54 NW2d 616 (1952).

In the present case, we conclude that plaintiffs established a partnership between Robert, Patrick, and Charles. First, the evidence shows that Robert, Patrick, and Charles operated McMahon Farms since 1982 as a for-profit business. See *Byker, supra* at 644. The evidence established that McMahon Farms operated as a commercial farm that produced various commodities, including corn and soybeans, and was also engaged in the livestock business. Although the farming operation accounted for the majority of the partnership’s income, there are also 13 houses on the property, some of which were operated as rental properties. Arla testified that Robert initially contributed land and capital towards McMahon Farms and also worked on the property for many years. Patrick testified that he initially contributed land, labor, and capital to the business and was subsequently involved in the management of the farming operations, including planning, tillage, harvesting, crop rotation, financing, and marketing. See *Crane, supra* at 416.

Second, the evidence establishes that the parties shared in the profits and losses of the business. See MCL 449.7(4). The record evidence shows that Robert and Patrick both received profits from the sale of crops and shared in the losses of the farm from 1982 to 1997. Further, Patrick testified that, although he failed to receive profits from the farm from 1997 to 2001, he forwarded a payment for the annual spring planting costs during that time. Defendants note that Charles stopped paying Robert and Patrick the annual profits from the sale of the crops from 1997 to 2001 and classified such payments as “rent” that were carried forward to the following year. However, the trial court rejected Charles’s characterization of the partners’ annual profits as rent. In reviewing the trial court’s findings, we give regard to the trial court’s opportunity “to judge the credibility of the witnesses who appeared before it.” *Bracco v Michigan Technological Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998). Furthermore, the evidence establishes that Charles applied for and received multiple USDA subsidies from 1994 to 2001. On all the application forms to the Lenawee County Farm Service Agency, Charles indicated that Robert and Patrick each had a 25 percent share of McMahon Farms.

Finally, the record establishes that Robert, Patrick, and Charles were jointly liable for McMahon Farms’s liabilities. *Lobato, supra* at 675; *Miller, supra* at 125. The evidence introduced at trial indicates that all three of the brothers executed and were personally liable for

four separate loans against the property. After McMahon Farms defaulted on these loans, Robert, Patrick, and Charles were each responsible for their repayment. Based on the foregoing, we conclude that plaintiffs satisfied their burden of establishing a partnership between Robert, Patrick, and Charles. Accordingly, the trial court's determination that plaintiffs established a partnership was not clearly erroneous. MCR 2.613(C); *Carrier Creek*, *supra* at 329.

IV. Liability of Maria McMahon

Defendants finally argue that the trial court erred in including Maria in the judgment when there was no evidence that she was involved in the partnership. We agree. As plaintiffs note on appeal, the only evidence introduced at trial indicating that Maria was included in the partnership was her signature on two separate loans. However, there was no evidence introduced by plaintiffs indicating that she contributed capital or land, or shared in the profits and losses of McMahon Farms. See MCL 449.7; *Crane*, *supra* at 416; *Lobato*, *supra* at 670-675; *Miller*, *supra* at 124-125. Maloy's report, which is incorporated into the judgment, does not once mention Maria. Further, the mere fact that Maria is married to Charles is insufficient to establish a partnership between Maria and Robert and Patrick. *Bell & Hudson, PC v Buhl Realty Co*, 185 Mich App 714, 718-719; 462 NW2d 851 (1990); *Green v Evans*, 156 Mich App 145, 159; 401 NW2d 250 (1985); see also MCL 449.7(1). Accordingly, we vacate the portion of the judgment indicating that Maria is liable to plaintiffs; however, we affirm the remainder of the judgment and the *nunc pro tunc* order dismissing defendants' counterclaim.

Affirmed in part, and vacated in part. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher