

RENDERED: November 16, 2001; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001403-MR

JOHNNY EARLS AND WANDA EARLS

APPELLANTS

v. APPEAL FROM ROWAN CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 99-CI-90101

RICHARD HARDIN AND BRENDA HARDIN

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Johnny Earls and his wife, Wanda Earls, have appealed from an order of the Rowan Circuit Court entered on May 9, 2000, which adjudged that Richard Hardin had satisfied the terms of a written land contract and ordered specific performance by transfer of the property to the appellees. Having concluded that the trial court did not misconstrue or misapply the law, we affirm.

In 1993, Richard Hardin lived in a camper trailer on property owned by the Earlses and performed odd jobs for Johnny

Earls. In June 1993, Hardin orally agreed to purchase two, one-acre lots from the Earlses for \$5,000.00. He paid \$100.00 down and agreed to make payments of \$100.00 per month plus 12% interest on the unpaid balance. Between September 1993 and January 1994, Hardin orally agreed to purchase three more lots from the Earlses for \$7,500.00, payable in monthly installments of \$150.00, and bearing 12% interest.<sup>1</sup> At the time Hardin purchased the first two lots in June 1993, he also purchased a camper trailer from the Earlses for \$600.00. The camper trailer was located on one of the lots and Hardin was living in it. In July or August 1994, Hardin purchased a mobile home from the Earlses for \$5,000.00.<sup>2</sup> Finally, in September 1995, Hardin purchased a 1984 GMC van from the Earlses for \$3,000.00.

Following a dispute over the correct amount owed on these purchases, Richard Hardin filed a complaint<sup>3</sup> in Rowan Circuit Court seeking to quiet title to the realty and to obtain a general warranty deed from the Earlses. Hardin alleged that he had fully paid for the property as required by his agreement to pay \$12,500.00 for the five lots by making monthly installment

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<sup>1</sup>While both parties agree that five lots were to be purchased for \$12,500.00, they disagree on the exact dates of the purchases. Hardin claims the latter three lots were purchased on January 1, 1994. The Earlses claim one lot was purchased on September 1, 1993, and two additional lots were purchased on January 1, 1994.

<sup>2</sup>Hardin stated he purchased the mobile home on July 1, 1994; Johnny Earls stated that it was purchased on August 1, 1994.

<sup>3</sup>Hardin later filed an amended complaint which stated he had transferred his interest in the property at issue to his wife, Brenda, and added her as a plaintiff to the suit.

payments. He stated that the Earlses claimed he still owed \$6,861.13 for the property. On June 2, 1999, the Earlses filed a motion to dismiss the complaint based on KRS<sup>4</sup> 371.010, the Statute of Frauds, claiming Hardin had failed to state a cause of action because the sales agreements were oral. On June 15, 1999, in response to the motion to dismiss, Hardin produced an "Affidavit of Sale, and or Land Contract." This document purported to be a written land contract for the purchase of the five lots which had been signed by Richard Hardin, Johnny Earls and Wanda Earls, before a notary public on May 23, 1994. On July 28, 1999, the Earlses filed an answer and counterclaim admitting that Hardin had purchased five lots for \$12,500.00, a mobile home, a camper trailer and a van, but alleging that he was in default on the payments and owed a balance of \$6,861.31 plus interest. The Earlses also denied the existence of a written land contract. On August 2, 1999, Hardin filed a reply to the counterclaim, admitting that he had entered into oral agreements to purchase the five lots, the camper trailer, the motor home and the van. He stated that he fully paid for all of the personal property and the parties had executed a written land contract for the realty.

Following discovery, the trial court conducted a bench trial concerning ownership of the five tracts of real property.<sup>5</sup>

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<sup>4</sup>Kentucky Revised Statutes.

<sup>5</sup>Several other issues not involved in the present appeal were also included in the trial proceedings including the  
(continued...)

Witnesses at the trial included: Richard Hardin, Johnny Earls, Katherine Caudill, a notary public, and Jonathan Stiles, a certified public accountant. Hardin testified that in late 1992, he began living on property owned by Johnny Earls and performed work for him. He said that around June 1993, he purchased a camper trailer from Earls for \$600.00. He claimed he was to pay this debt by making monthly installment payments of \$50.00 and in exchange for services rendered to Earls. He stated that he performed work for Earl such as logging, hauling rock, welding and operating a bulldozer and backhoe. Hardin admitted that sometimes Earls paid him cash, but he claimed that other times his work was credited toward payments on the camper trailer. He claimed this debt was paid in full in October 1993. Hardin testified that he orally agreed to purchase two lots from the Earlses in June 1993 for \$5,000.00, payable in monthly installments of \$100.00, or \$50.00 per lot. He claimed that in January 1994, he orally agreed to purchase three more lots from the Earlses for \$7,500.00, payable in monthly installments of \$150.00. Hardin testified that he presented the Earlses with a written contract for the realty, which Johnny Earls rejected because it was too long and complex. He claimed that in May 1994, the parties executed a more simple, two-page land contract, which was signed by him and the Earlses and notarized by

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<sup>5</sup> (...continued)  
Earlses' ownership of another tract of property by adverse possession and the existence of an easement across one of the five tracts.

Katherine Caudill. Hardin further stated that he orally agreed to purchase a mobile home from Earls in July 1994 for \$5,000.00, and he was to make monthly installment payments of \$50.00. He also claims that in September 1995, he orally agreed to purchase a GMC van from Earls and he was to pay the debt through credit for work that he performed for Earls. Hardin introduced as evidence of his monthly payments on the realty and the mobile home a series of receipts signed by the Earlses, canceled checks and bank statements. He also introduced the May 23, 1994, land contract. Hardin claimed that he paid in full the debts on the camper trailer in October 1993, the GMC van in October 1995, and the realty and the mobile home in January 1999.

Johnny Earls testified that he sold Hardin two lots and a camper trailer in June 1993 for \$5,875.00, payable in monthly installments of \$50.00. He stated that Hardin purchased a third lot in September 1993 for \$2,500.00, and two additional lots in January 1994, again for \$2,500.00 each, to be paid by \$50.00 monthly installment payments. He said that he sold Hardin a mobile home for \$5,000.00 in August 1994, with monthly payments of \$50.00 and a \$100.00 initial payment. Earls testified that he also sold Hardin a GMC van for \$3,000.00 in September 1995, payable by \$50.00 monthly installments. He stated that all of those transactions involved monetary installment payments and he never accepted services from Hardin as payment. Earls introduced a handwritten ledger of Hardin's accounts, which indicated that in January 1999, Hardin still owed \$6,729.95 for these various

items. Earls acknowledged that his signature was on the written land contract, but he claimed he did not remember signing the document. On cross-examination, Earls admitted there were some discrepancies between the receipts produced by Hardin and the credit entries in his written ledger of accounts. He also acknowledged that the receipts noted that they were payment for land, and that they did not mention the GMC van. Furthermore, Hardin received a certificate of title to the van dated October 11, 1995.

Wanda Earls testified that her signature was on the written land contract, but she also claimed she did not remember signing it. She acknowledged having received some payments from Hardin and giving him receipts. Katherine Caudill testified that her signature was on the May 23, 1994, written land contract, but she could not recall meeting with the parties or signing the document.

Jonathan Stiles testified that based on his analysis of Johnny Earls' ledger and Hardin's receipts, Hardin purchased five real estate lots from the Earlses for \$2,500.00 each with payment by monthly installments of \$50.00 each at 12% interest. In addition, with the purchase of the camper trailer, the mobile home and the GMC van, the payments increased by \$50.00 for each purchase. He determined that in January 1999, when Hardin ceased making payments, the balance due on all the items was \$5,451.69; or if the van were excluded from consideration, the balance due was \$1,357.31. On cross-examination, Stiles conceded that the

balance due would be less if Hardin made payments that were not recorded in Earls' ledger.<sup>6</sup>

On May 9, 2000, the trial court entered an order adjudging that Richard Hardin and the Earlses had entered into a valid land contract for the sale of the five real estate lots and that Hardin had paid the purchase price in full. The trial court found that Hardin had fully paid for all of the personal property and the real estate purchased from the Earlses. Consequently, Hardin did not owe the Earlses any money on any of the property. The trial court specifically found Hardin's testimony to be credible and the Earlses' testimony not to be credible. As to the issue of the written land contract, the trial court noted the testimony of Katherine Caudill, who acknowledged her signature and seal on the contract. The trial court ordered the preparation and execution of a property deed from the Master Commissioner transferring ownership of the five lots to Hardin. This appeal followed.

The Earlses contend the trial court misconstrued the law by concluding that Hardin had fully satisfied and complied with the terms of the written land contract. They reluctantly acknowledged that the trial court had broad authority in finding the existence of a land contract between the parties, but disagree that Hardin paid the amount due under the contract. They assert that Hardin's testimony concerning an agreement by

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<sup>6</sup>Stiles later provided a letter to the trial court based on the additional payments as of January 1999, with revised figures of \$4,705.82 and \$611.47 respectively.

Johnny Earls to credit him for services performed violated the  
parol evidence rule.

Initially, we note that because this case was tried  
before the court without a jury, its factual findings "shall not  
be set aside unless clearly erroneous, and due regard shall be  
given to the opportunity of the trial court to judge the  
credibility of the witnesses. . . ." <sup>7</sup> A factual finding is not  
clearly erroneous if it is supported by substantial evidence,  
which is defined as evidence of substance and relevant  
consequences sufficient to induce conviction in the mind of a  
reasonable person. <sup>8</sup>

The Earlses' argument fails on both procedural and  
substantive grounds. First, the issue of the application of the  
parol evidence rule is not properly before this Court. The  
Earlses have provided no citation to the record showing where  
this issue was properly preserved for our review. <sup>9</sup> "It goes  
without saying that errors to be considered for appellate review

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<sup>7</sup>Kentucky Rules of Civil Procedure (CR) 52.01. See also  
Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995); and A & A  
Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky.App., 998  
S.W.2d 505, 509 (1999).

<sup>8</sup>Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d  
409, 414 (1998); Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96  
(2000); Faulkner Drilling Co. v. Gross, Ky.App., 943 S.W.2d 634,  
638 (1997); Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843,  
852 (1999).

<sup>9</sup>See CR 76.12(4)(c)(iv); Charash v. Johnson, Ky.App., 43  
S.W.3d 274, 277 (2000) (stating appellate court should not review  
issues not identified as properly preserved by citation to record  
absent manifest injustice); and Elwell v. Stone, Ky.App., 799  
S.W.2d 46, 47 (1990).



must be precisely preserved and identified in the lower court.”<sup>10</sup>  
An appellate court should not review an issue where the trial court has not had an opportunity to rule on the matter.<sup>11</sup>

The Earlses’ position also lacks merit on substantive grounds. The parole evidence rule is one of substantive law, rather than merely one of contract interpretation.<sup>12</sup> A contract should be interpreted to give effect to the true intent of the parties.<sup>13</sup> A court must first look to the language of the contract in discerning the intentions of the parties.<sup>14</sup> Under the parole evidence rule, the terms of an unambiguous contract cannot be varied by extrinsic evidence, so parole evidence will not be considered when interpreting a contract unless it is ambiguous.<sup>15</sup> A contract is ambiguous where it is susceptible to

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<sup>10</sup>Skaggs v. Assad, Ky., 712 S.W.2d 947, 950 (1986).

<sup>11</sup>See generally Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989); Swatzell v. Natural Resources & Environmental Protection Cabinet, Ky., 962 S.W.2d 866 (1998); and Hibbitts v. Cumberland Valley National Bank & Trust Co., Ky.App., 977 S.W.2d 252, 253 (1998).

<sup>12</sup>See Childers & Venters, Inc. v. Sowards, Ky., 460 S.W.2d 343, 345 (1970); and Tractor & Farm Supply, Inc. v. Ford New Holland, Inc., 898 F.Supp. 1198 (W.D.Ky 1995).

<sup>13</sup>Wilcox v. Wilcox, Ky., 406 S.W.2d 152, 153 (1966); Parrish v. Newbury, Ky., 279 S.W.2d 229, 233 (1955).

<sup>14</sup>Hoheimer v. Hoheimer, Ky., 30 S.W.3d 176, 178 (2000). See also Reynolds Metal Co. v. Glass, 302 Ky. 622, 195 S.W.2d 280, 283 (1946); and Gibson v. Sellars, Ky., 252 S.W.2d 911, 913 (1953).

<sup>15</sup>See Gibson, *supra* at 913; Codell Construction Co. v. Commonwealth, Ky.App., 566 S.W.2d 161, 164 (1977); and Friction Materials Co., Inc. v. Stinson, Ky.App., 833 S.W.2d 388, 391 (1992).

more than one reasonable interpretation.<sup>16</sup> Parol evidence consists of prior agreements or behavior of the parties prior to or contemporaneous with the execution of the contract.<sup>17</sup> “Where the parties put their engagement in writing all prior negotiations and agreements are merged in the instrument, and each is bound by its terms unless his signature is obtained by fraud or the contract be reformed on the ground of fraud or mutual mistake, or the contract is illegal.”<sup>18</sup>

In the current case, the Earlses' criticism of the trial court's reliance on parol evidence is misplaced. They contend the trial court improperly admitted and considered evidence by Hardin that he and Johnny Earls had orally agreed to give him credit for work performed for Earls. However, the testimony by Hardin was that he was to receive credit for services he rendered for Earls toward the purchase price of the camper trailer and the GMC van. The written land contract involved only the purchase of the five real estate lots. The agreements to purchase the camper trailer, the mobile home and the van were separate oral contracts. While Hardin made contemporaneous payments on the land and personal property, there

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<sup>16</sup>Transport Insurance Co. v. Ford, Ky.App., 886 S.W.2d 901, 905 (1994); White Log Jellico Coal Co., Inc. v. Zipp, Ky.App., 32 S.W.3d 92, 94 (2000); Luttrell v. Cooper Industries, Inc., 60 F.Supp.2d 629, 631 (E.D.Ky 1998).

<sup>17</sup>Luttrell, supra at 631.

<sup>18</sup>Childers & Venters, Inc., supra at 345 (quoting Hopkinsville Motor Co. v. Massie, 228 Ky. 569, 15 S.W.2d 423, 424 (1929)).

was no evidence that Hardin received or agreed to receive credit for his work on the purchase price of the real property. Hardin produced receipts for the cash payments he made on the realty. The trial court found this evidence to be more credible than the evidence produced by the Earlses. The evidence of the oral agreements concerning credit for work performed did not vary, modify or conflict with the written land sale contract. Consequently, consideration of this evidence in relation to credits on the purchase of the personal property was not improper under the parol evidence rule; and the trial court properly considered it in determining that Hardin had fully paid for the personal property purchased from the Earlses.

For the foregoing reasons, the order of the Rowan Circuit Court is affirmed.

ALL CONCUR.

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