

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002546-MR

TAMARA LOUISE HALE

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 02-CI-00339

MICHAEL ALLAN HALE

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order awarding the husband \$31,757.49 for damage to the marital residence the court found the wife was responsible for while she was in possession of the property. We reject the wife's argument that the husband failed to meet his burden of proof that she was the cause of the damage. However, upon review of the record, we adjudge that the trial court used an erroneous before-damage valuation of the property in determining that the husband was entitled to his full repair costs. Accordingly, we vacate the award and remand

for recalculation of damages using the \$98,000 before-damage valuation of the property.

Appellee, Michael Hale, filed for divorce from appellant, Tamara Hale, on April 3, 2002. At the hearing set for December 16, 2003, the attorneys for both parties announced that the parties had reached an agreement resolving all property matters and thus there was no need for a hearing. It is undisputed that a separation agreement existed on December 16, 2003. However the agreement was not signed on that date. On February 6, 2004, Michael filed a motion to enforce the settlement agreement, stating that Tamara had refused to sign the agreement that the parties had reached on the date of the scheduled hearing. On February 10, 2004, the court entered an order scheduling a hearing on the motion for February 17, 2004. Subsequently, on March 12, 2004, the court reset the hearing date for April 20, 2004. On April 27, 2004, the separation agreement was filed in the record showing that the agreement had been signed by both parties on April 20, 2004. It is undisputed that the agreement signed by the parties on April 20, 2004, was the same agreement that existed on December 16, 2003.

The parties' separation agreement provided, among other things, that Michael would get the marital residence and would pay Tamara \$71,000 for her interest in the marital residence and his retirement benefits. The agreement also set

forth specific terms of the transfer of the property. The agreement stated that Tamara would have exclusive possession and use of the property until the closing transaction on the property, which could not occur any earlier than February 2, 2004. The agreement also provided that Tamara would not damage, destroy, or impair the property while in her possession.

It was undisputed that when Michael took possession of the marital residence on February 3, 2004, after Tamara had moved out, there was assorted damage to the property. The damage included gouges in the hardwood floors, burns in the carpet, chipped and broken bathroom tiles, a cracked and broken toilet bowl, a cracked vanity top, a split door jam, garbage strewn about, flea infestation, and a wooden stake driven into the air conditioner unit. Accordingly, on May 6, 2004, Michael filed a motion for set-off of the cost of repairing the damage against the \$71,000 Michael was to pay Tamara under the separation agreement. A hearing on the matter was held before the domestic relations commissioner on June 17, 2004. On July 13, 2004, the domestic relations commissioner entered her report recommending that Michael be awarded \$15,000 for the damage to the property to be set-off from the \$71,000 owed to Tamara. In her findings, the commissioner specifically found that, although the total cost of the repairs was approximately \$31,000, the reduction in value of the property as a result of the damage was

between \$13,000 and \$18,000, and thus Michael could receive no more than that amount in damages. Both parties thereafter filed exceptions to the report. On November 12, 2004, the court granted the exceptions of Michael to the extent he sought the full cost of the repairs - \$31,757.49. The court specifically found that the full repair cost was less than the difference in the fair market value of the property before and after the damage. This appeal by Tamara followed.

Tamara's first argument is that the trial court erred in awarding Michael the full amount of the repair costs because that amount was more than the reduction in the value of the property as a result of the damage. Both parties agree that under Ellison v. R & B Contracting, Inc., 32 S.W.3d 66, 70 (Ky. 2000), the full amount of repair costs for damage to real property is recoverable only if the injury to the property is temporary - where the cost to restore the property to its original state is less than the amount by which the injury decreased the property's value. And Tamara does not dispute that the full cost to restore the property to its original state was \$31,757.49 or the appraised value of the property after the damage. Where the parties disagree is to the value of the property before the damage to the property occurred.

At the June 17, 2004, hearing, Ken Smith, the real estate appraiser who appraised the property before and after the

damage, testified to the value of the property. Smith testified that he conducted an appraisal of the property before the damage on December 11, 2003, and his final appraisal valuation on that date was \$98,000. Smith then testified as to the damage he observed to the property on February 7, 2004, and to the value of the property after the damage - between \$80,000 and \$85,000. Smith's full written appraisal report from the December 2003 appraisal was also admitted as an exhibit. The report clearly stated that the estimated market value of the property as of December 11, 2003, was \$98,000. However, a letter from Ken Smith dated June 1, 2004, was also admitted as an exhibit in which Smith lists the specific damages he observed in the February 7, 2004 inspection of the property. The last sentence of said letter states, "Subject to repair estimates the appraised value of \$115,000 on the December 11, 2003 appraisal would be reduced to an estimated range of \$80,000 to \$85,000."

The domestic relations commissioner in her report used the \$98,000 before-damage valuation in concluding that the \$31,757.49 in repair costs was greater than the reduction in value of the property as a result of the damage, which was between \$13,000 and \$18,000. Accordingly, the commissioner recommended awarding Michael a \$15,000 set-off. In ruling on the exceptions, the trial court stated:

THE COURT HEREBY FINDS that the Petitioner should be entitled to the cost of repair of the damages to his property. The estimates tendered for repair of that damage total \$31,757.49, and there was no direct evidence to dispute these costs. The Court further finds that the repair costs are less than the difference in the fair market value attributed to the project in the report of Ken Smith dated June 1, 2004 that was admitted into evidence, when one utilizes a mid point range of his current valuation of the home, as was suggested by the Commissioner.

The trial court apparently used the \$115,000 before-damage valuation of the property in determining that the full repair costs were less than the reduction in value of the property as a result of the damage. A trial court's findings of fact in domestic matters will not be disturbed unless they are clearly erroneous. Ghali v. Ghali, 596 S.W.2d 31 (Ky.App. 1980). If supported by substantial evidence, the trial court's finding of fact is not clearly erroneous. Black Motor Co. v. Greene, 385 S.W.2d 954 (Ky. 1964). In our view, the \$115,000 before-damage valuation of the property used by the trial court was not supported by substantial evidence.

Ken Smith, who was called by Michael as a witness, clearly testified on direct at the hearing on June 17, 2004, that the market value of the property as of his December 11, 2003, appraisal was \$98,000, which was consistent with his final estimated market value in the written appraisal from that date.

We would note that this appraisal was conducted for the purpose of valuing the parties' real property in the dissolution action and the written appraisal report contained very detailed information about the property and comparable properties. While the written appraisal report indicated that the PVA's value of the property along with a 35-acre tract of land was \$120,000, the final estimated market value "of the real property that is the subject of this report" was clearly stated to be \$98,000. And there was no other evidence offered regarding the value of the property. Accordingly, there was no substantial evidence to support the before-damage valuation figure of \$115,000 in the June 1, 2004, letter from Ken Smith or as accepted by the trial court. Hence, the trial court erred in finding that the full repair costs were less than the reduction in value of the property due to the damage. We, therefore, vacate the court's award of damages and remand for a recalculation of damages using the before-damage valuation of the property of \$98,000.

Tamara's next argument is that, as a matter of law, Michael is not entitled to an award of damages when he knew the damage to the property existed at the time he signed the settlement agreement in April 2004. This argument was never raised below, hence it is unpreserved and precluded from our review. See Kaplon v. Chase, 690 S.W.2d 761 (Ky.App. 1985).

Tamara's final argument is that Michael failed in his burden of proof that Tamara was responsible for the property damage. It was undisputed that the parties' divorce was a protracted and bitter one. The evidence adduced at the hearing established that Tamara moved her belongings out of the marital residence on January 31, 2004. On that same date, Michael showed up at the residence with a load of his furnishings and with some of his friends to help him move. At this point, a dispute arose over whether Tamara had agreed to allow Michael to move in early if he paid her a certain amount of money. The police were called and Michael was made to leave because the most recent court order gave Tamara exclusive possession of the property. Michael testified that he could not move the next day, February 1, because he had a funeral to go to, and could not move the following day, February 2, because he had to work. The parties' son, Jack Hale, testified that he went to the house the day after his mother moved and observed the extensive damage to the property. Michael testified that he first saw the damage to the property when he entered the house on February 3, 2004.

Tamara testified that she did not cause any of the damage to the house. She maintained that when she was last in the house on January 31, 2004, none of the complained of damage existed. However, David Graham, who helped Tamara move, admitted that there was a scratch on the dining room floor as a

result of moving the china cabinet or refrigerator. Also, the parties' daughter, Kathleen Hale, who was in the house during the first part of the day of the move, testified that she observed a large scratch on the wood floor and burn marks on the carpeting that looked to be caused by acid. Kathleen testified that when she confronted Graham about scratching the floor, he said he didn't care. According to Kathleen, when she left the house on the day of the move, she did not see any other damage to the house. Kathleen acknowledged, however, that the damage had to have been caused during the time that her mother had possession of the house.

Although there was no direct evidence in the instant case that Tamara personally caused the damage in the marital residence, there was sufficient circumstantial evidence to find that she was responsible for the damage. A civil claim may be proved by circumstantial evidence so long as it goes far enough to induce a reasonable conviction that the facts sought to be proved are true and tends to eliminate other rational theories. United Electric Coal Companies v. Brown, 354 S.W.2d 502, 503 (Ky. 1962); City of Louisville v. LaFollette, 470 S.W.2d 599, 600 (Ky. 1971). The evidence established that Tamara was in exclusive possession of the marital residence at the time the damage was inflicted on the property. Tamara was at the residence moving on January 31, 2004, and according to the

testimony of Jack Hale, the property was in the damaged condition the next day, February 1, 2004. There was also evidence that at least some of the damage was inflicted intentionally - carpet burns, stake through the air conditioner, and broken toilet and vanity. Neither party disputes that the divorce was bitter and that the parties were involved in a dispute over taking possession of the property the day before the damage was discovered. Accordingly, the trial court did not err in finding that Tamara caused the damage to the property.

For the reasons stated above, the order of the Boyd Circuit Court is vacated and the cause remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

R. Stephen McGinnis
Greenup, Kentucky

BRIEF FOR APPELLEE:

John F. Vincent
Ashland, Kentucky