

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000991-MR

DAVID KAPLAN;
MELINDA JAYE KAPLAN; AND
LAWRENCE BRUCE KAPLAN

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 00-CI-000727

GARY WADE PUCKETT

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,¹ SENIOR
JUDGE.

KELLER, JUDGE: David Kaplan, Melinda Jaye Kaplan, and Lawrence Bruce

Kaplan (David, Melinda, and Lawrence, respectively, and the Kaplans,

collectively) appeal from the Jefferson Circuit Court's judgment setting aside two

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

conveyances of real property. The first took place on August 15, 1995, when David and his late wife, Rita Kaplan (Rita), conveyed approximately five acres in Shelby and Jefferson Counties to Melinda and Lawrence. The second took place on February 19, 1996, when David and Melinda, as executor of Rita's estate, conveyed property in Louisville to David, Lawrence, and Melinda. Gary Wade Puckett (Puckett) argued to the trial court that the conveyances were fraudulent and made in order to avoid payment of potential judgments for legal malpractice claims against David. Initially, the trial court found for David, Melinda, and Lawrence. However, on reconsideration, the trial court reversed itself and entered a judgment setting aside the conveyances as fraudulent. It is from this judgment that the Kaplans appeal. On appeal, the Kaplans argue that the trial court erred when it determined that the conveyances were fraudulent and that evidence the court relied on in doing so was not newly discovered evidence. Puckett argues that the court did not err. For the reasons set forth below, we vacate and remand.

FACTS

Puckett's mother died in a fire in October 1993. Puckett was charged with her murder and, in 1994, a jury found Puckett guilty of murder and arson. David represented Puckett at trial. Following his conviction, Puckett retained new counsel and, in January 1995, filed a motion for a new trial. Among other issues, the motion cited a number of alleged errors made by David at trial. The court granted Puckett's motion, and a second jury found Puckett not guilty in September 1996. Approximately one month after that verdict, Puckett filed a legal

malpractice claim against David. In his complaint, Puckett alleged essentially the same errors as he had in the motion for new trial.

Before the trial of the malpractice case, and to protect his statute of limitations, Puckett filed an action to set aside the 1995 and 1996 conveyances of real property referenced above. Litigation in the malpractice case proceeded and a jury awarded Puckett \$590,000 in damages. We note that, one of the primary issues during the malpractice trial was David's failure to retain an expert to offer alternative explanations for the source of the fire and the source of traces of accelerant on the clothing of Puckett and his mother. In his defense, David noted that the Commonwealth had failed to disclose exculpatory evidence, and that the Commonwealth's expert had made several misleading statements while testifying at trial. Puckett argued that David should not have relied on the Commonwealth's disclosures but should have retained an expert to independently assess the evidence.

David appealed the judgment in the malpractice case. The Court of Appeals affirmed, and, while the case was pending before the Supreme Court of Kentucky, the circuit court conducted a bench trial in the fraudulent conveyance case.² The parties filed into evidence various documents, including the motion for a new trial in the underlying criminal case, the 1995 and 1996 deeds, and Rita's will. Additionally, the attorney who represented Puckett during the second

² We note that the Supreme Court of Kentucky affirmed the Court of Appeals in the malpractice case. However, one Justice did not sit on the case and the other Justices were evenly divided; therefore the Court affirmed without opinion. The Court issued the Order affirming the judgment in the malpractice case after the trial court had issued its final judgment in this matter.

criminal trial testified that an attorney should assume that a malpractice claim would follow a successful ineffective assistance of counsel claim. He testified that he had never been the subject of an ineffective assistance of counsel claim and that none of the attorneys in “his circle” had been. He was unaware of how many RCr 11.42 motions are filed or how many of those motions contain ineffective assistance of counsel claims.

Lawrence testified that Rita wanted to transfer the property to her children before her death. To effectuate that transfer, Rita executed the 1995 deed and her will four days before her death. Although Rita wanted her children to have her share of the remaining real property, that property was subject to a mortgage and could not be conveyed until the estate had been probated.

David, who represented himself, Lawrence, and Melinda, testified that he did not believe that Puckett’s RCr 11.42 claim would lead to a malpractice claim. According to David, ineffective assistance of counsel is commonly used by attorneys attempting to obtain a new trial in criminal matters and would not provide notice of a possible malpractice claim. As to the conveyances of property, David testified that they were made to effectuate Rita’s wishes, not to avoid any claims from creditors.³

³ We note that Puckett argued to the trial court in his motion to set aside, that the court improperly took judicial notice that ineffective assistance of counsel claims are common in RCr 11.42 actions. Puckett stated that the only person to provide testimony on that issue was his expert, who stated that he was not familiar with the number of RCr 11.42 actions or the number of times ineffective assistance of counsel is alleged. However, during his opening statement, David stated that ineffective assistance of counsel claims are common in RCr 11.42 actions. At the end of the trial, the court asked David if he wanted all of his statements to be used as evidence. He stated that he did and the court retrospectively administered the oath to David. Puckett did not object. Therefore, what David said during his opening statement was evidence,

Following the trial, the court entered an opinion and order finding for the Kaplans. The court stated that Puckett had the burden of proving by clear and convincing evidence that the conveyances were fraudulent. Puckett could meet that burden by producing evidence of the following “badges of fraud”: (1) that the conveyances were between persons who are related or occupy a confidential relationship; (2) that the conveyances contained false statements as to consideration; (3) that the conveyances were made by a debtor in anticipation of a suit against him or after suit is filed; and (4) that the conveyances were made by a debtor who transferred all or any appreciable part of his property when insolvent. *Russell Co. Feed Mill, Inc. v. Kimbler*, 520 S.W.2d 309, 311 (Ky. 1975). The court found that Puckett had established that the conveyances were between persons who are related; therefore, the burden shifted to the Kaplans to “produce evidence that the conveyances did not involve fraud.” In finding for the Kaplans, the court stated that:

The Kaplans assert that they had no knowledge of a pending lawsuit. They maintain that the conveyances were part of Rita Kaplan’s estate plan and were done in furtherance of that plan. Puckett contends that his motion for RCr 11.42 relief alleging ineffective assistance of counsel alerted Kaplan that Puckett would file a suit against him and caused Kaplan to convey the properties away.

The Court is aware that there are a great many RCr 11.42 motions filed in Jefferson County and that many of those motions allege ineffective assistance of counsel. The Court further notes that most of those allegations are

and Puckett’s expert did not provide the only testimony regarding RCr 11.42 claims.

unsubstantiated. Thus, the RCr 11.42 motion, standing alone, will not suffice as notice of a potential claim.

In this matter, the first transaction occurred on August 15, 1995 – more than seven months after Puckett filed the RCr 11.42 motion and only a few days before Mrs. Kaplan died. The second transaction did not occur until February 17, 1996 – more than a year after the RCr 11.42 motion. Both transactions occurred before Puckett was acquitted in his second trial and before he filed his malpractice complaint against Kaplan.

There simply is insufficient evidence to support Puckett's claim of fraudulent conveyance. These transactions are unlike the conveyance in *Kimble* [sic] [*Russell Co. Feed Mill, Inc. v. Kimble*, 520 S.W.2d 309 (Ky. 1975)]. There, the creditor confronted the debtor about an unpaid obligation. Three days later, the debtor conveyed his farm to his children. The *Kimble* court found that the hasty conveyance was done in anticipation of a suit. In the instant case, the conveyances are more akin to the *Webb* [*Myers Dry Goods Co. v. Webb*, 297 Ky. 696, 181 S.W.2d 56 (1944)] case where the debtor conveyed property to his children at a time when he owed no debt to the plaintiff.

This Court finds that the conveyances were not made with the intent to hinder or defraud Puckett and, therefore, were not fraudulent.

Puckett then filed a motion to set aside and/or for a new trial and a motion to supplement the record. In his motion to supplement the record, Puckett noted that Kaplan had testified during his deposition that he had only been sued for malpractice one other time, approximately twenty years earlier. However, after the trial, Puckett discovered that Kaplan had been sued for malpractice four other times. Furthermore, one of those suits was filed on May 30, 1995, two and a half months before the first conveyance. Based on this “newly discovered evidence,”

Puckett asked the court to set aside its initial opinion and order or to schedule a new trial.

In his response, David argued that the evidence of the other malpractice claims was not “newly discovered” as it could have been discovered through reasonable diligence. We note that, somewhat ironically, Puckett argued that he was entitled to rely on David’s testimony and, based on that testimony, had no reason to conduct an independent search of the records for any other malpractice claims.

After a hearing, the court granted the motion to supplement in an order entered February 15, 2007. In granting the motion to supplement the record, the court stated that:

A judgment may be set aside on the ground that the moving party has a meritorious claim that he was prevented from presenting due to fraud or deceit by the prevailing party. Rice v. Dowell, 322 S.W.2d 468 (Ky. 1959). Newly discovered evidence is grounds to alter, amend or vacate a judgment only when the moving party shows reasonable diligence in the discovery of the evidence after trial and, if timely introduced, it would have resulted in a different outcome. Glidewell v. Glidewell, 859 S.W.2d 675 (Ky. App. 1993). The trial court also may alter, amend or vacate a judgment to correct manifest errors of fact or law. Buell v. Security Gen. Life Ins. Co., 784 F.Supp. 1533 (D.Colo., 1992).

Puckett seeks to supplement the record with the evidence of David’s false statements, in the form of copies of some of the complaints filed against David over the last 16 years. The discovery of new evidence that was in existence at the time of the trial is sufficient grounds for the trial court to amend its judgment or order a new trial. CR 59.01; CR 59.05. Not only was this

evidence in existence at the time of the trial but its existence was concealed from Puckett by David's false statements. Such deception constitutes sufficient reason to permit this Court to reconsider its prior judgment. Hopkins v. Ratliff, 957 S.W.2d 300 (Ky.App. 1997).

David, an attorney licensed to practice in the Commonwealth, gave sworn deposition testimony that he had been sued for malpractice only once many years ago. In fact, he has been sued for malpractice a number of times in recent years. This Court is gravely concerned by the fact that David quite blatantly lied under oath when he was deposed in this matter. This deliberate deceit misled both Puckett and this Court to the damage of Puckett's claim against all three Defendants. In deceiving Puckett and the Court, David led the Court to believe that he had no notice that a motion for a new trial or a motion under RCr 11.42 could lead to a malpractice claim.

The Court finds that it is appropriate to permit Puckett to supplement the record with the evidence of other malpractice claims against David. The Court further finds that it is appropriate to vacate its March 8, 2005 Order. The Court will enter a new Judgment separate from this Order.

The Kaplans filed a motion to set aside the court's order permitting Puckett to supplement the record. The court denied that motion in an order dated April 11, 2007, and entered a judgment in favor of Puckett on May 3, 2007. In that judgment, the court stated, in pertinent part, as follows:

It is ORDERED AND ADJUDGED that the proposed Findings of Fact and Conclusions of Law tendered by Plaintiff are adopted by the Court and incorporated herein by reference, along with the Opinion and Order entered February 15, 2007 and the Opinion and Order entered April 11, 2007. Plaintiff is awarded Judgment setting aside the conveyance from David Kaplan and Rita Kaplan to Melinda Jaye Kaplan and

Lawrence B. Kaplan, dated August 15, 1995 . . . said conveyance being set aside and held for naught as being [a] fraudulent conveyance.

It is FURTHER ORDERED AND ADJUDGED that the conveyance from David Kaplan and Melinda Jaye Kaplan, as Executor of the estate of Rita Joyce Kaplan to David Kaplan, Lawrence Bruce Kaplan and Melinda Jaye Kaplan dated February 19, 1996 . . . is hereby set aside and held for naught as being a fraudulent conveyance.

It is from this judgment that the Kaplans appeal. On appeal, the Kaplans raise essentially two issues: that the trial court erred when, based on the supplemental evidence, it set aside its initial judgment; and that the trial court's final judgment was not supported by sufficient evidence. For the reasons set forth below, we vacate and remand.

STANDARD OF REVIEW

At the outset, we note that a trial court “has unlimited power to amend and alter its own judgments.” *Gullion v. Gullion*, 163 S.W.3d 888, 891-92 (Ky. 2005) citing *Henry Clay Mining Co. v. V & V Mining Co., Inc.*, 742 S.W.2d 566-67 (Ky. 1987). Therefore, we examine the trial court's order granting Puckett's motion to supplement the record and to alter its judgment for an abuse of discretion. Abuse of discretion is “arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Sherfey v. Sherfey*, 74 S.W.3d 777, 783 (Ky. App. 2002).

ANALYSIS

David argues that the trial court erred by admitting the evidence of the other malpractice claims after trial because that evidence could have been discovered with reasonable diligence prior to trial. Therefore, according to David, the evidence was not newly discovered. However, this argument ignores the language of the trial court's order, which states that the court granted Puckett's motions not only on the basis of newly discovered evidence, but also based on David's misconduct. CR 59.01 provides that a court may grant a new trial based on misconduct of the "prevailing party, or his attorney." Furthermore, CR 59.07 states that

[o]n motion for a new trial in an action tried without a jury, the court may grant a new trial or it may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

In this action, David, who was not truthful during his deposition, was both a party and the attorney for Lawrence and Melinda. Therefore, by not testifying truthfully during his deposition, David acted improperly as both party and attorney. In light of the above, we discern no error in the trial court's action granting Puckett's motions for a new trial and for leave to supplement the record.

However, our analysis cannot stop there. The Kaplans have raised issue with the adequacy of the evidence to support the trial court's ultimate judgment. Pursuant to CR 52.01, when a matter is tried to the bench, "[f]indings of fact 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.” “Unless it can be demonstrated that the judgment below is clearly erroneous or manifestly against the weight of the evidence, the appellant [sic] court will not disturb the findings of the trial judge.” *Harry Harris, Inc. v. Quality Const. Co. of Benton, Ky., Inc.* 593 S.W.2d 872, 874 (Ky. App. 1979). However, before the trial court can reach a judgment, it “shall find the facts specifically and state separately its conclusions of law thereon...” CR 52.01. When a trial court fails to make findings of fact, the proper remedy is to vacate the judgment and remand the matter so that the trial court can make the required findings. *Standard Farm Stores v. Dixon*, 339 S.W.2d 440, 441 (Ky. 1960). For the reasons set forth below, we must vacate the trial court’s judgment and remand this matter for additional findings of fact and conclusions of law.

In its initial judgment, the trial court found that the evidence did not support a finding that the conveyances were fraudulent. In doing so, the court noted that Puckett’s RCr 11.42 motion, standing alone, was not sufficient to give notice to David that Puckett would be filing a malpractice claim against him. Furthermore, the court noted that the gap in time between the filing of Puckett’s RCr 11.42 motion and the conveyances as well as the fact that both conveyances occurred before Puckett’s acquittal, militated against a finding of fraudulent conveyance.

In its second judgment, the court appears to have found that the conveyances were fraudulent because David lied in his deposition regarding the

number of malpractice claims that had been made against him. However, we note that those claims arose from civil litigation, not criminal litigation. Furthermore, three of those claims had been disposed of by dismissal or settlement before the conveyances; therefore, the conveyances could not have been made in contemplation of any debts that might have resulted from three of the four claims. Although the fourth malpractice claim was filed approximately two and a half months before the first conveyance, the court does not address how, or if, the existence of that claim caused it to change its judgment. As noted above, the court in its initial judgment stated that Puckett's RCr 11.42 claim would not, by itself, give David notice of a potential malpractice claim. In its second judgment, the court does not explain how the existence of three resolved malpractice claims and one active malpractice claim, all of which arose from civil actions, would have put David on notice that Puckett's RCr 11.42 motion would result in a malpractice action.

Finally, we sympathize with the court's frustration and justifiable grave concern regarding David's failure to tell the truth during his deposition. However, David's prevarication, in and of itself, does not support the court's ultimate judgment. Therefore, we must remand this matter to the trial court so that it can make additional findings of fact and conclusions of law. In doing so, the court should note that we are not advising the court whether its ultimate judgment was correct. We are simply holding that the court must make additional findings of fact and conclusions of law before entering a final judgment.

CONCLUSION

For the foregoing reasons, the Jefferson Circuit Court's judgment is vacated and this matter is remanded for additional findings of fact and conclusions of law consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

George R. Carter
Louisville, Kentucky

BRIEF FOR APPELLEE:

Bill V. Seiller
Louisville, Kentucky