RENDERED: OCTOBER 3, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-001242-MR

CECIL O. SEAMAN — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 04-CI-00363

BALLINSWOOD FARM, INC.;
WILLIAM J. MURPHY; AND
ALLISON MURPHY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, Cecil O. Seaman, appeals from a judgment of the Bourbon Circuit Court in favor of Appellees, Ballinswood Farm, Inc., and its owners, William and Alison Murphy, in this action for conversion and claim for boarding fees. Because we conclude that the jury instructions were erroneous, we reverse and remand for a new trial in accordance with this opinion.

In January 2004, Appellant and Appellee, William Murphy, entered into an oral agreement whereby Appellant would board twenty of his horses at Appellees' farm at a reduced per diem rate of $17 for yearlings and $18 for mares[1]. Appellant contends that the reduced rate was in consideration for the number of horses he was boarding. Appellee, on the other hand, maintains that the reduced rate was in exchange for allowing Appellees to be the exclusive consignor of the horses at any future sales while the horses remained on the farm. Nevertheless, the agreement was not reduced to writing.

Throughout the summer and early fall of 2004, Appellant apparently became concerned about the care of his horses and made several complaints to Appellees. At the Fasig Tipton sale in October 2004, Appellant expressed his concerns to William Murphy. Murphy evidently became angry and told Appellant to remove his horses from the farm. Appellant thereafter contacted Liberty Farms who agreed to board the horses but could not take them until they had available stalls in mid-November. In addition, Appellant contacted Warrendale Sales about consigning the horses in the Keeneland January 2005 sale. The record indicates that on November 3, 2004, Warrendale Sales electronically registered eleven of Appellant's horses for the January sale.

At some point thereafter, Appellees learned that Appellant had consigned the horses with Warrendale Sales. As a result, they determined that Appellant's effort to secure another consignor was a breach of the parties' oral

[1] The standard per diem board rate was $24.

contract. Appellees then recalculated Appellant's board bill and assessed a $37,205 penalty. The penalty was the result of Appellees' recalculation of all of Appellant's board bills at the standard $24 per diem rate, retroactive to February 2004. Appellees declared the right to possession of the horses and denied Appellant access until his account was paid in full.

Appellant retained attorney William Dykeman who, on November 23, 2004, sent Appellees a letter claiming that their actions constituted conversion and demanding the immediate release of Appellant's horses. In the letter, Appellant offered to pay immediately $22,316.58, which he claimed was the undisputed amount due for boarding incurred since the last billing period. In addition, Appellant agreed to permit a lien for any disputed amount to attach to the horses. However, the letter specifically advised, "any per diem charges accruing after November 23, 2004, are disputed and will not be paid." Appellees rejected Appellant's offer and continued to condition relinquishment of the horses upon payment of the full board bill, including the penalty.

In December 2004, Appellant filed a five-count complaint in the Bourbon Circuit Court against Appellees claiming negligent treatment of the horses[2]; fraud and bad faith; conversion; conversion causing damage; and violation of the Consumer Protection Act, KRS 367.170. In response, Appellees filed a counterclaim alleging breach of the oral contract and nonpayment of the board bill. Other parties asserting security interests in the horses, specifically Fifth Third

[2] The negligence claim was subsequently bifurcated.

Bank and the United States Department of Agriculture, were brought into the case as well.

Shortly after filing his complaint, Appellant filed a motion for possession of the horses, so that they could be registered and sold at the January Keeneland sale. The trial court granted the motion on the condition that Appellant post a surety bond in the amount of $128,466.48, in accordance with KRS 376.100. Appellant was unable to post the bond and the trial court eventually ordered the horses sold. The horses were sold on June 3, 2005, in a court-approved auction at Ballinswood Farms. The proceeds were escrowed pending further proceedings.

The case went to trial on March 20, 2006. At the close of Appellant's proof, the trial court granted a directed verdict against Appellant on his claims of fraud and bad faith, unfair, misleading or deceptive practices pursuant to KRS 367.170 et seq., and all claims for punitive or exemplary damages. At the close of all evidence, the jury rendered a verdict against Appellant on his conversion claims against Appellees. Further, the jury found in favor of Appellees on their counter-claim for boarding fees, and awarded $90,000. The trial court entered a judgment accordingly. Appellant filed a motion to alter amend or vacate, which was denied. This appeal followed.

Appellant first argues that the trial court erred in ruling that attorney Dykeman's November 23, 2004, demand letter to Appellees was inadmissible. In fact, the trial court initially indicated that the legal opinions and conclusions had to

be redacted before the letter could be deemed admissible. However, ruling on Appellant's motion in limine prior to trial, the trial court stated:

> The Court has determined, however, that Plaintiffs' demand letter, in its redacted form, is admissible solely as impeachment evidence of Mr. William Murphy. If Plaintiff so decides, during his questioning, to ask Mr. Murphy if he ever received a demand for return of the horses and he denied receiving such a demand, Plaintiff may use the redacted form of the demand letter in order to impeach him. Outside of this narrow purpose, Plaintiff's demand letter, in either form, is inadmissible.

Appellant contends that an essential element of his conversion claim was that he demanded his property and the demand was refused. Thus, he argues that in deeming the demand letter inadmissible, the trial court not only denied the jury the ability to properly review a crucial component of his conversion claim, but also denied it the opportunity to assess his efforts to settle the manner and mitigate damages for everyone involved. Appellant believes that Appellees' rebuff of his demand letter evidenced the bad faith and intentional acts they committed for the purpose of collecting a sizable "penalty."

Clearly, the trial court properly found that the unredacted letter not only contained Dykeman's legal advice to Appellant, but also made numerous legal conclusions as to Appellee's conduct that were simply inadmissible. Furthermore, since Dykeman was not a witness at trial, even the unredacted version constituted hearsay, as it was offered to prove the truth of the matters asserted therein; i.e., that Appellant made a specific demand for his horses and Appellees' refusal to return them constituted conversion. KRS 801(c). *Cf. Davis*

*v. Fischer Single Family Homes, Ltd*., 231 S.W.3d 767, 776 (Ky. App. 2007). Thus, the trial court did not err in refusing to admit the letter into evidence.

However, even assuming, *arguendo*, that the unredacted version of the demand letter was admissible, we are unable to conclude that any error in its exclusion prejudiced Appellant or affected the outcome of the trial. CR 61.01. The fact that a demand was made was never disputed by any party. Appellant himself testified that he made a specific demand on November 23, 2004. Thus, the error, if any, must be deemed harmless. *Id*.

Appellant next contends that the trial court erred in ruling that he could obtain possession of the horses only by posting a surety bond pursuant to KRS 376.100. Appellant claims that in his motion for possession, he specifically agreed "not to sell, encumber or transport said horses without an order of [the] Court and the proposed boarding farm will agree to subordinate any lien to which it may become entitled." Appellant argues any agister's lien on the horses was not possessory and he was entitled to possession without a bond. We disagree.

KRS 376.400 provides:

> Any owner or keeper of a livery stable, and a person feeding or grazing cattle for compensation, shall have a lien for one (1) year upon the cattle placed in the stable or put out to be fed or grazed by the owner, for his reasonable charges for keeping, caring for, feeding, and grazing the cattle. The lien shall attach whether the cattle are merely temporarily lodged, fed, grazed, and cared for, or are placed at the stable or other place or pasture for regular board. The lien shall take priority over a lien created pursuant to KRS 376.420(1).

In addition, KRS 376.410 provides:

> Any person in whose favor a lien provided for in KRS 376.400 exists may, before the District Court of the county where the cattle were fed or grazed, by himself or agent, make affidavit of the amount due him and in arrears for keeping and caring for the cattle, and describing as nearly as possible the cattle so kept by him. The court shall then issue a warrant, directed to the sheriff or any constable or town marshal of the county, authorizing him to levy upon and seize the cattle for the amount due, with interest and costs. If the cattle are removed with the consent and from the custody of the livery stable keeper or the person feeding or grazing them, the lien shall not continue longer than one (1) year from and after the removal, nor shall the lien in case of such removal be valid against a bona fide purchaser without notice at any time after the removal. The warrant may be issued to a county other than that in which the cattle were fed or grazed, and the lien may also be enforced by action as in the case of other liens.

Appellant argues, without citation to any authority, that when he sent the November 2004 letter demanding possession of his horses and offering a lien on any disputed board amount, Appellees' right to an agister's lien terminated by operation of law because the horses were no longer "put out to be fed or grazed by the owner," but were being held unlawfully by Appellees. To follow Appellant's logic, however, would render KRS 376.400 meaningless as an agister's lien which would be defeated by any simple demand for possession of the property at issue. We do not believe this was the intent of the legislature.

Appellees had a valid agister's lien pursuant to KRS 376.400 for unpaid board, although the amount owed was certainly in dispute. The lien was properly perfected and was enforced by the issuance of a warrant by the Bourbon

District Court on January 14, 2005. KRS 376.410. The statutory procedure required of a horse owner upon the issuance of the warrant to enforce an agister's lien is set forth in KRS 376.100:

> The owner or claimant of property against which a lien has been asserted, or any other person contracting with the owner or claimant of such property for the furnishing of any improvements or services for which a lien is created by this chapter, may, at any time before a judgment is rendered enforcing the lien, execute before the county clerk in which the lien was filed a bond for double the amount of the lien claimed with good sureties to be approved by the clerk, conditioned upon the obligors satisfying any judgment that may be rendered in favor of the person asserting the lien. The bond shall be preserved by the clerk, and upon its execution the lien upon the property shall be discharged. The person asserting the lien may make the obligors in the bond parties to any action to enforce his claim, and any judgment recovered may be against all or any of the obligors on the bond.

The record indicates that although Appellees were asserting a lien in the amount of $113,857 (as of the time of the February motion for possession), they agreed to a bond amount computed on the discounted per diem rate and without any penalty. Thus, the amount owed by Appellant under Appellee's agreed rate was $64,233.24. As such, the trial court set the bond at $128,466.48. We cannot conclude that the trial court erred in requiring Appellant to comply with a statutorily-mandated procedure to acquire possession of the horses.

Appellant next argues that the trial court erred in denying his motions for partial summary judgment and directed verdict on the issue of conversion. He contends that when Appellees ordered him to remove his horses from the farm,

they materially breached the oral contract and Appellant was thereafter legally entitled to rescind the contract and make other arrangements for his horses. Thus, it is Appellant's position that Appellees' refusal to relinquish possession of the horses unless he paid a penalty was a wrongful exercise of dominion and control over his property and amounted to conversion as a matter of law. *State Auto Mutual Insurance Company v. Chrysler Credit Corporation*, 792 S.W.2d 626 (Ky. App. 1990).

With regard to the denial of partial summary judgment, we agree with the reasoning of the trial court:

> Plaintiff contends, in his introduction, that "a contract was never formed which permits Defendants to consign his horses in exchange for a reduced per diem boarding charge." Yet, Plaintiff, in the very next sentence, supports and argues the complete opposite of the preceding statement. The Court has to start from the point that the parties agree that there was actually an agreement as well as the terms under which the agreement was formed in order for the Court to give a legal opinion as to the validity and rights that follow. Any attempt to do otherwise is an advisory opinion, which is improper. "Courts of Kentucky do not render advisory opinions." [*Livingston County Farm Supply, Inc. v. Spencer*, 593 S.W.2d 76 (Ky. 1979)].
>
> Furthermore, Plaintiff's arguments in support of his motion are simply not grounds for granting summary judgment. As previously noted, summary judgment is only proper when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. [*Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991)].

Furthermore, inasmuch as Appellant believes that there are no disputed facts and Appellee's refusal of his demand for possession of his horses constituted conversion, the jury was entitled to believe otherwise. Appellees claimed that at the time of demand, Appellant owed substantially more than he offered to pay in the demand letter. Alison Murphy testified that since January 2004, Appellant had never paid a board bill in full. Appellant disputes such claim and introduced evidence that all parties understood he would not pay his bill in full until after the fall 2004 sale. Nonetheless, there was undeniably a disagreement as to how much Appellant owed Appellees, and whether Appellees possession of the horses constituted conversion. As such, Appellant was not entitled to a directed verdict.

Appellant's next claim of error concerns the trial court's refusal to permit him to testify at trial as to the market value of the horses. Relying on pre-rule case law, Appellant argues that he did not intend to testify as an expert, but rather as a lay witness testifying about the value of his personal property. *See* Robert Lawson, *The Kentucky Evidence Law Handbook,* § 6.10[6] (4th ed. 2003). Appellees respond that this issue is moot since the jury found against Appellant on his conversion claim, thus eliminating the issue of damages. However, as will be discussed herein, because we find that the conversion instruction was erroneous, the issue may again present itself on remand.

We are of the opinion that the trial court thoroughly discussed this issue in ruling on Appellee's motion in limine and we adopt the language of its order herein:

> KRE 701 does not make any distinctions concerning real or personal property as a basis for opinion testimony by a lay witness, but established [sic] two (2) requirements: "(a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." It is the Court's understanding that Mr. Seaman's testimony concerning the value of the horses in question is based upon an appraisal made several years ago sometime in the past by an appraiser and then adding the costs of a stallion season in which the mare was in foal to that value or, if it was a foal, it would be based on the average sale price of the same stallion in a sale for the year in question. As a basis for his testimony, neither of those factors come within the requirements that the opinion must be rationally based on the perception of the witness. This is merely an attempt to use Mr. Seaman as a way to get the prior appraisal before the jury with Mr. Seaman's speculation as to how the horses would be currently valued based on factors that this Court does not find credible. There is simply no rational basis for assuming a mare's value increases by the amount of stud fee paid. The Court will note that, at this point, it is not even aware of whether the figure used is the actual price paid for the stud season, the advertised price for the stud season, or the average price paid by everyone who bred to that stallion that year. This does not appear to be the appropriate case for a lay witness to give an opinion as to the ultimate issue to be decided by the jury, that is, the value of the horses in question. Of course, Plaintiff may testify as to how much he paid for the horses when he purchased them and any success that may have had as a brood mare since he purchased the horses or any other facts of which he has direct knowledge. Plaintiff is prohibited from giving any opinion testimony as to the current market value of these horses.

We have no doubt based on Appellant's knowledge and experience in the horse industry, that he is well-educated on the value of horses. However, it is apparent from the trial court's order, that the concern was not Appellant testifying, but rather the basis and foundation of his testimony. As the trial court determined, Appellant's attempt to bring "current" an obsolete appraisal with speculative assumptions does not meet the test for admissibility under KRE 701.

Finally, Appellant argues that the jury instructions were contrary to law, improper and confusing. First, Appellant contends that the instructions erroneously stated that Appellees committed conversion only if they "intentionally obtained the horses by wrongful act." However, Appellant complains that this case involved Appellees wrongful "retention" of the horses and use of the word "obtained" was confusing and misleading. We disagree. It was undisputed by all parties that Appellees legally gained possession of the horses as a result of the parties' oral boarding contract.

However, we are compelled to agree with Appellant that the conversion instructions, as a whole, was erroneous. Instruction No. 2[3] (Conversion) provided:

> You will find that Defendant Ballinswood Farm, Inc. committed conversion if you find from the evidence that (1) Cecil Seaman had ownership of and right to possess the horses boarded at Ballinswood Farm; (2) Ballinswood Farm, Inc. intentionally obtained the horses by a wrongful act or disposition; and (3) Cecil Seaman`` suffered damages.

[3] Instruction Nos. 3 and 4 were identical with respect to Alison Murphy and William Murphy.

> However, if in retaining the horses Ballinswood Farm, Inc. retained the horses under an assertion of a right to a lien for payment lien [sic], or acted pursuant to authority of law, legal process or court order, you will find that it did not commit conversion.
>
> You are further instructed that pursuant to Kentucky law Ballinswood Farm had a lien on the horses boarded at Ballinswood Farm for all unpaid reasonable charges for keeping, caring, feeding, and grazing of the horses, and that Ballinswood Farm had a right to possess the horses it had a lien on.

We disagree with Appellant that his November offer of payment prohibited Appellees from obtaining a lien on the horses. However, it is clear that the amount owed was in dispute, and that Appellees conditioned relinquishment of the horses upon payment in full, including the assessed penalty. Further, Appellees did not file an agister's lien until January 2005, after the litigation herein commenced.

Nevertheless, by instructing the jury that Appellees had a valid lien and had the right to possess the horses upon which they had a lien, the trial court wholly nullified the instruction. As written, the plain language of the instruction precluded the jury from finding that Appellees committed conversion. As there is no way to discern what a jury might have decided if properly instructed, the case must be reversed.

Finally, we find no merit in Appellant's last claim that the trial court erred in failing to instruct the jury on breach of contract. No cause of action for breach of contract was asserted in Appellant's complaint.

The judgment of the Bourbon Circuit Court is reversed and this matter is remanded for further proceedings consistent with this opinion.

LAMBERT, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTING BY SEPARATE OPINION: I cannot agree that the jury instruction was erroneous. Accordingly, I would affirm.

BRIEF FOR APPELLANT:

William A. Dykeman
Winchester, Kentucky

BRIEF FOR APPELLEES:

Frank T. Becker
Alex L. Scutchfield
Lexington, Kentucky