

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-001267-MR

HOWARD H. BACK

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT  
HONORABLE KIMBERLY C. CHILDERS, JUDGE  
ACTION NO. 04-CI-00088

JEFFREY ROSS

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; LAMBERT,<sup>1</sup>  
SENIOR JUDGE.

COMBS, CHIEF JUDGE: Howard Harlow Back appeals from an order of the  
Magoffin Circuit Court denying him damages in his suit against Jeffrey Ross.

After carefully reviewing the record and applicable law, we affirm.

In 2004, Back filed a complaint alleging that Ross had breached a  
contract concerning operation of a liquor store and loss of a liquor license. Ross

---

<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

was provided notice through a warning order attorney, but he did not file any responsive pleadings. In October 2006, the Magoffin Circuit Court entered a default judgment in Back's favor and scheduled a hearing to determine damages.

The first hearing was held on February 22, 2008. Back and Ross both testified, and neither presented any witnesses – lay or expert. They provided contradictory information concerning the value of the business and the liquor licenses. The court requested tax return information from Back and business records from Ross in order to have some evidence of the damages that Back may have suffered. The record shows that Ross complied with the court's request but that Back never submitted his income tax records.

In May 2008, the court held a supplemental hearing in which it focused on the ownership of the liquor licenses. Back testified that he had obtained the licenses from the state in 1986. He relinquished them after being convicted of a felony in 1990. He has never owned a liquor license since that time. After his release from prison in 1995, Back owned liquor stores, but the liquor licenses were owned by the managers, including the one owned by Ross.

Back testified that his felony conviction did not prohibit him from owning a liquor license. He told the court explicitly that he wanted the benefits of liquor license ownership without the burdens.

On May 19, 2008, the trial court entered an order holding that Back was not entitled to receive damages from Ross because he failed to provide the

court with proof of income from the contract. Furthermore, because he did not own the liquor license in question, he was not entitled to damages from its loss. Back appeals.

The trial court's order recited four reasons as basis for denying damages to Back: (1) Back did not own the liquor licenses in question and did not have compensable damages resulting from their transfer; (2) Back failed to provide the court proof that he received and reported income from the business; (3) Back failed to prove compensable damages of any kind; and (4) Back is a convicted felon.

Under Kentucky Rule of Civil Procedure (CR) 52.01, we may not disturb the trial court's findings of fact unless they are clearly erroneous. A factual finding is clearly erroneous only if it is not supported by substantial evidence. *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007). Substantial evidence is "that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Id.* Compensatory damages are an issue of fact. *Smith v. Carbide and Chemicals Corp.*, 226 S.W.3d 52, 57 (Ky. 2007).

The trial court's finding that Back did not own the liquor licenses is supported by Back's own testimony. He unequivocally stated at both hearings that he had not owned liquor licenses in many years and furthermore that he did not want the responsibility of owning them. The trial court did not err in this finding.

The record does not reveal any evidence that Back reported income from the business to the IRS or the Kentucky Department of Revenue. Therefore, the trial court did not err in its finding on this point.

Though Back claimed that the business was worth \$300,000, the only evidence presented was his own speculation. Ross provided contradictory testimony. According to Kentucky Rule(s) of Civil Procedure (CR) 52.01, the trial court is afforded “due regard” in determining the credibility of witnesses. We will not disturb its finding without substantial probative evidence to the contrary. *O.S., Jr. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983). Nothing in the record substantiates Back’s claims of the business’s value. Therefore, the trial court did not err.

Finally, Back argues that the trial court erred in denying him damages because he is a convicted felon. Kentucky Revised Statutes (KRS) 243.100 only prohibits a person who “has been convicted of any felony” from holding a liquor license “until five (5) years have passed from the date of conviction, release from custody or incarceration, parole, or termination of probation, whichever is later[.]” Though Back did not provide proof that he satisfied this requirement, he was released from prison in 1995 following his conviction in 1990. There is no evidence of a subsequent felony conviction that would bar his ability to apply again for a liquor license.

Back’s status as a convicted felon had no bearing on the issue of damages in this case. Although the court erred on this issue, its error is harmless

because Back failed to establish his entitlement to damages for the reasons previously discussed. At the time of his involvement with Ross, Back did not own the liquor license in question and failed to offer any affirmative evidence of his alleged financial loss to substantiate a damages claim.

Therefore, we affirm the trial court despite its erroneous recitation that Back's status as a felon barred him from damages.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Lowell E. Spencer  
Paintsville, Kentucky