

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000744-MR

STEVEN CAMPBELL

APPELLANT

v.

APPEAL FROM OWSLEY CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 07-CI-00151

ROSE HALE

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

DIXON, JUDGE: Appellant, Steven Campbell, appeals from a judgment of the Owsley Circuit Court awarding Appellee, Rose Hale, a one-half equitable interest in real-estate and personal property accumulated by the parties during their cohabitation. Finding no error, we affirm.

The parties herein met in 1995, while Rose was married to Steven's uncle. In 1996, following the death of Rose's husband and Steven's separation from his wife, Steven moved into Rose's home in Loveland, Ohio. At that time, Steven owned no real estate and his personal property consisted of his clothes, a car, and \$10,000 from a certificate of deposit. By mid-1997, Rose and Steven had become romantically involved and began living together as a couple. Steven's monthly income of \$4,200 and Rose's monthly income of between \$2,200 and \$2,500 were combined in a joint account.

In the summer of 1998, after visiting Rose's family in Booneville, Kentucky, the parties began discussing the possibility of buying property together in Owsley County. They met with a local realtor who showed them two tracts of land, one being the property located on Buck Creek. While still in Ohio, Rose and Steven agreed to purchase the Buck Creek property at a price of \$104,000, and devised a plan to make money on the property by possibly selling coal, timber, tobacco, as well as breeding and selling various animals.

At trial, the parties testified that they intended to purchase the property together. However, because of Rose's credit problems, the bank holding the mortgage would not allow her name to be placed on the deed. Consequently, only Steven's name was placed on the mortgage and deed. However, it is undisputed that mortgage payments and other expenses on the property were paid from the parties' joint account. Rose continued to deposit her monthly benefit

checks into the account and also contributed \$35,000 she received from the sale of her Loveland, Ohio home.

Just as they had discussed, Rose and Steven engaged in the business of breeding and selling various animals. They brought with them from Ohio a female Labrador puppy and within six months had acquired a male to begin a breeding business. Over the years, the parties bred and sold hundreds of puppies, as well as raised and sold peacocks, guineas, horses, and cattle.

In 2002, the parties agreed to purchase a second tract of land, referred to at trial as the Clifty Church property, for \$12,000, in part with funds from their joint account. They subsequently sold some timber on the property and applied the proceeds to the mortgage.

In August 2007, the parties' relationship ended and Steven instituted a forcible detainer action to evict Rose from the property home. On October 23, 2007, Rose filed a conversion action in the Owsley Circuit Court to recover the value of her interest in the parties' real property, as well as many items of personal property. Following a bench trial, the trial court entered judgment on March 27, 2009, finding that Rose was entitled to a one-half (1/2) interest in the real estate and a one-half (1/2) interest in certain items of personal property. In so doing, the court concluded:

[T]here has been ample testimony by both parties that the parties intended and attempted to purchase the Buck Creek Property together and have both their names on the deed and that they used joint funds to make payments on the Clifty Church property as well as to make

improvements on the Buck Creek property. Both testified that their monthly benefit checks were routinely deposited into their joint checking account during the ten years they were cohabitating and that numerous items of personal property were purchased and bills were paid from those funds. Rose testified as to the parties' plan to make money from raising various animals which Steve admitted was formed prior to the move to Buck Creek, and although he testified that the parties made no money from raising animals because of the costs involved, he admitted that they sold all their cattle and that Rose raised and sold hundreds of Labrador puppies with his assistance over the course of 8 years. The Court is of the opinion that there has been sufficient proof shown that the parties entered into a joint venture in which they purchased both the Buck Creek property and the Clifty Church property together and that they intended and attempted to make money selling tobacco, timber, and coal and by breeding and selling various animals.

On April 6, 2009, Steven filed a motion to alter, amend or vacate the trial court's judgment. However, before the motion was ruled on, Steven filed a notice of appeal in this Court. As a result, the trial court ruled that it lacked jurisdiction to entertain the motion to alter, amend or vacate, and stayed further proceedings. Steven thereafter filed a notice of withdrawal of his motion and the case proceeded in this Court.

We begin by noting that this case was tried by the circuit court sitting without a jury. It is before this Court upon the trial court's findings of fact and conclusions of law and upon the record made in the trial court. Accordingly, appellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning*

Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Golightly*, 976 S.W.2d at 414; *Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982); CR 52.01. The trial court's conclusions of law, however, are subject to independent *de novo* appellate determination. *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999); *Morganfield National Bank v. Damien Elder & Sons*, 836 S.W.2d 893 (Ky. 1992).

On appeal, Steven first argues that the trial court erred in failing to require Rose to prove the elements of conversion, instead treating the matter as a breach of implied contract case. Citing to *Kentucky Association of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626 (Ky. 2005), Steven points out that conversion is an intentional tort, requiring proof that: (1) the plaintiff has legal title to the converted property; (2) the plaintiff has the right to possess the property at the time of the alleged conversion; (3) the defendant exercised dominion and control over the property in a manner that deprived the plaintiff of the right to use and enjoy the property; (4) the plaintiff demanded return of the property and the defendant refused; (5) the defendant's action was the legal cause of the plaintiff's loss of the property; and (6) the plaintiff suffered damages by the loss of the property. Steven contends that although Rose asserted a claim for conversion, she

failed to prove any of the necessary elements and, in fact, cannot prove that she had legal title to any property.

In her complaint, Rose alleged that Steven converted her equitable interest in the real estate as well as her interest in the personal property. However, the record clearly establishes that the issue in the case became whether Rose acquired an equitable interest in the claimed property since she could not establish a legal interest or title. In fact, the entire bench trial focused on whether the parties' actions of combining financial resources and engaging in business activities were evidence of a joint venture. A review of the eight-hour bench trial reveals that conversion, the elements thereof and its applicability herein, was not raised by either party at any time. Specifically, at no point did Steven object to the issues and evidence being considered. Rather, the trial focused solely upon whether a joint venture between the parties existed. Thus, regardless of whether the claim of joint venture was raised in the pleadings, it was tried by the implied consent of the parties and, as such, shall be considered as having been raised in the complaint. CR 15.02. *Nucor Corporation v. General Electric Company*, 812 S.W.2d 136, 145 (Ky. 1991).

Steven further complains that the trial court's judgment is devoid of any findings of fact or conclusions of law with respect to the conversion claim, thus indicating that the court did not consider the issue. However, it is well-settled that a trial court must be given the opportunity to rule in order for an issue to be preserved for appellate review.

We would note that Steven raised the issue in his motion to alter, amend or vacate. Nevertheless, as previously noted, the motion was withdrawn prior to the court's consideration. Thus, because the trial court did not rule on the issue in its judgment and Steven did not properly seek additional or amended findings of fact pursuant to CR 52.02 and CR 52.04, we are precluded from addressing the issue. *Crain v. Dean*, 741 S.W.2d 655, 658 (Ky. 1987); *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

Next, Steven argues that Rose was collaterally estopped from claiming ownership to any of the property herein based upon statements she made in her bankruptcy petition that she had no legal or equitable interest in any real or personal property. Steven points out that although he raised the collateral estoppel defense in both a motion for summary judgment and during the bench trial, the trial court did not rule on the issue. Again, however, it was incumbent upon Steven to seek a ruling on the issue. His failure to do so precludes our review herein. *Crain* 741 S.W.2d at 658.

We likewise find no merit in Steven's claim that Rose failed to prove that the parties were engaged in a joint venture. Steven contends that the parties' relationship was nothing more than a "romantic liaison" that resulted in cohabitation without the benefit of clergy. Further, he argues that their various activities while living on the Buck Creek property simply amounted to "hobbies," not endeavors intended to make money. We disagree.

To create the relationship of a joint venture, there must exist a common undertaking in which there is a combination of money, efforts, skill or knowledge, a joint control between the parties in the undertaking, and a sharing of profits or losses derived from the enterprise. *Eubank v. Richardson*, 353 S.W.2d 367, 369 (Ky. App. 1962). In *Huff v. Rosenberg*, 496 S.W.2d 352 (Ky. 1973), our Supreme Court enumerated the elements essential to a joint enterprise, viz: “(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.” *Id.* at 355 (*citing* Restatement (Second) of the Law of Torts, § 491, cmt. c (A.L.I. 1965)). *See also* *Roethke v. Sanger*, 68 S.W.3d 352, 364 (Ky. 2001).

While the trial court herein did not expressly enumerate each factor of the joint venture, its finding that the parties entered into such is clearly supported by the evidence. The evidence presented during the bench trial established that Rose and Steven developed a plan to combine their monies in a joint account, buy the Buck Creek property together, and share in the profits and expenses of the various endeavors they undertook. Steven admitted that it was their intention to purchase the Buck Creek property together until the bank holding the mortgage refused to put Rose’s name on the deed because of her poor credit. Further, Rose gave extensive testimony during the bench trial as to how she and Steven combined their money, efforts, skill, and knowledge for gain, with each sharing in

the expenses and profits or losses. With regard to the Clifty Church property, Steven conceded that the property was paid for partially from the joint account as an investment because they believed that the amount of timber that was on it would pay for the property. Finally, Steven's own testimony provided substantial evidence that the parties had an equal right to a voice in the direction of their endeavors.

We are of the opinion that substantial evidence was admitted to support the trial court's findings that Rose and Steven entered into an informal association, partaking the nature of a partnership, in which they combined their money, efforts, skill, and knowledge for gain, with each of them sharing in the expenses and profits or losses. *Eubank*, 353 S.W.2d at 369. As such, we will not disturb the trial court's findings and conclusions. CR 52.01.

Finally, Steven argues that the trial court erred in assessing the value of the property awarded to Rose. Both parties submitted estimates for what each item of personal property was worth. The trial court noted in its order,

Steven initially gave the figures set forth above as the values of the various items (with the exceptions of the boxes of Rose's clothing), but upon questioning by his counsel, he gave somewhat lower values for some of the items to account for depreciation. The Court has serious concerns about Steve's credibility in light of his testimony about his depression. Specifically, he stated that he was never diagnosed with either manic depression or having suicidal tendencies, but upon reference to his medical records by Rose's counsel, he immediately admitted that he has taken medication for depression and has had suicidal tendencies. The Court therefore believes Steve's initial testimony giving the higher values for the

various items of personal property rather than his lower values given only upon further questioning by his counsel. As for the value of Rose's boxes of clothing, given the parties' finances and the prices of clothing, it is difficult for the Court to believe that Rose left behind clothing worth \$10,000. Steve describes the clothing as junk. The Court has placed a value of \$1,000 on the clothing in question, as it believes that the clothing must have some value and that figure is more in line with the parties financial means.

Steven provides no reasoning or proof to this Court as to how the trial court erred in determining the value of the items in question, and we conclude that its findings are supported by the evidence.

Further, Steven argues that the trial court erred in failing to subtract the amount of the mortgage on the Buck Creek property from the total fair market value of the real estate to determine the amount of equitable market value to be awarded to Rose. Citing to *Motors Insurance Corporation v. Singleton*, 677 S.W.2d 309 (Ky. App. 1984), Steven contends that the measure of damages in a claim for conversion is the fair market value of the property at the time of the conversion.

It is not apparent why the trial court declined to subject Rose's equitable interest in the Buck Creek property to the mortgage. Clearly, the trial court did not analyze the matter as a conversion claim. Regardless, it was incumbent upon Steven to seek a clarification or further findings from the trial court if so desired. His failure to do so precludes review in this Court.

The judgment of the Owsley Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melissa C. Howard
Jackson, Kentucky

BRIEF FOR APPELLEE:

Bill Meader
Booneville, Kentucky