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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001729-MR

KENNETH WATTS

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 11-CI-00235

SONYA HENRY; AND SONYA HENRY
IN HER CAPACITY AS ADMINISTRATRIX
OF THE ESTATE OF AGNES ALENE LOWRY,
JEFF LOWRY AND ROY DON LOWRY

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Kenneth Watts appeals from a final judgment following a jury trial on conversion and the denial of his motion for a judgment notwithstanding the verdict.

Watts appeals on the following issues: (1) the Estate's¹ claim was barred by the statute of limitations; (2) the Estate failed to prove an essential element of conversion; (3) the jury instructions were fatally flawed; (4) the amount of the damage award was inconsistent with the evidence of conversion from Agnes Alene Lowry; (5) the trial court erred by wrongfully admitting hearsay evidence; (6) the trial court erred by wrongfully admitting opinion evidence; and (7) punitive damage instructions were flawed and the award of punitive damages was not supported by the evidence.

In 2006, Agnes Alene Lowry, known as Alene, was in her mid-eighties, a widow and living alone in a house on one of her two farms. She had three children, Darlene Brock, Sonya Henry and Donnie Lowry. Donnie had two sons, Jeff Lowry and Roy Don Lowry.

Alene's children filed a disability petition pursuant to Kentucky Revised Statutes (KRS) 387.530, alleging she was unable to take care of her personal or business affairs. During the pendency of the petition, Alene was permitted to sell one of her farms for \$363,000, which was deposited with the court pending the outcome of the disability proceeding. A trial was held and the jury found Alene was not disabled. On February 9, 2007, the petition was dismissed.

Subsequently, Alene deposited the proceeds of the sale of her farm with Farmers Bank in Nicholasville, Kentucky. On July 2, 2007, Alene obtained a \$100,000 endorsed cashier's check from this account.

¹ We refer to the appellees, Sonya Henry, individually and in her capacity as Administratrix of the Estate of Agnes Alene Lowry, Jeff Lowry and Roy Don Lowry, collectively as the Estate.

At some point, Donnie obtained the cashier's check from Alene. Although there was evidence Donnie had possession of the check, there was no proof as to how or when Donnie came into possession of it.

On November 19, 2007, the \$100,000 cashier's check was deposited into the real estate escrow account of Watts Realtors and Auctioneers, Inc., which was controlled by real estate agent Kenneth Watts. Watts used \$81,000 from this check to purchase a home on Stephens Drive in Nicholasville with his name listed on the deed. Watts then returned the balance of the check to Donnie. After the closing, Donnie immediately moved into the Stephens Drive house.

On April 11, 2008, Alene's daughter Darlene filed another disability petition after Alene fell in her home. Darlene was appointed as her mother's emergency guardian and Alene went to live in Darlene's home. Following a disability trial, Alene was adjudged totally disabled. Darlene was subsequently removed as guardian and indicted based upon exploiting her mother out of \$71,000.

Sonya was unable to serve as Alene's guardian due to her own health issues and Donnie was disqualified for having a prior felony conviction. Therefore, the Commonwealth of Kentucky was appointed to serve as Alene's guardian and placed her in a nursing home.

While Alene was in the nursing home, she repeatedly told Sonya that she wanted to live in her house in town. Sonya knew Donnie was living in a house on Stephens Drive in Nicholasville and investigated who owned the house. When

she learned property records indicated Watts owned it, she visited him and inquired as to whom owned the house. Watts said that he owned it and Donnie was renting. Donnie remained living at the Stephens Drive house until his death on April 1, 2009.

On January 13, 2010, Alene died and on January 28, 2010, Sonya was appointed Administratrix for the Estate. After being given an accounting and final settlement of the assets comprising Alene's guardianship estate by the Commonwealth of Kentucky, Sonya suspected money was missing from the Estate. On December 16, 2010, Sonya obtained copies of Alene's bank records. On December 20, 2010, Sonya discovered that on July 2, 2007, a \$100,000 cashier's check had been issued by the Farmers Bank payable to Alene. She also learned that on November 19, 2007, this check was deposited into the real estate escrow account of Watts Realtors and Auctioneers, Inc. Sonya further discovered a large portion of these proceeds had been used by Watts to purchase the Stephens Drive house. Sonya demanded Watts return the money. Watts refused.

On February 28, 2011, the Estate filed suit against Watts for theft and conversion. The final amended complaint alleged Watts and Donnie "formed a civil conspiracy and agreed to work together in concert to improperly, tortiously, and unlawfully appropriate and obtain the \$100,000.00 cashier's check owned by Agnes Alene Lowry with the intent to benefit themselves and deprive Ms. Lowry of the money."

At trial, the Estate put forth the theory that Donnie stole the check, took advantage of his mother's diminished capacity to obtain the check, or was authorized to have the check only for the purpose of purchasing a home for Alene, for them to share in Nicholasville. Then Watts converted the check by either directly, or as part of a conspiracy with Donnie, using Alene's check knowing it was stolen, had not been gifted or was only to be used for a specific purpose, and instead used it or retained it for an unauthorized purpose. The Estate presented evidence regarding Alene's competency and intentions in making any possible gift to Donnie, as well as whether Watts took money belonging to Alene or interfered with her rights regarding such money.

Before deliberations, the jury was instructed on the elements necessary for a valid inter vivos gift which include a competent donor, the intention to make the gift and the gift being irrevocable. The jury was required to answer a series of interrogatories to establish conversion, starting with whether it found by clear and convincing evidence that Alene intended to make a complete, irrevocable, and unconditional gift to Donnie of \$100,000. If it answered "no" to this question, it was to proceed to answer in turn whether: Watts took or received money belonging to Alene, intentionally exercised control over the money inconsistent with the rights of Alene, the interference was serious, a demand was made for the money and refused, Watts had no right or privilege to receive and retain the money, what amount would fairly compensate the Estate for the

conversion and, considering the relevant factors, whether and what amount of punitive damages would be appropriate.

The jury determined that: Alene did not make a valid gift to Donnie, Watts converted Alene's money and awarded the Estate compensatory damages of \$81,000 and punitive damages of \$100,000. A judgment conforming to the jury verdict was entered. The trial court denied Watts's motion for judgment notwithstanding the verdict, new trial and to alter, amend or vacate the judgment. Watts timely appealed.

(1) Statute of Limitations:

Watts argues the trial court erred by applying the two-year limitation period of KRS 413.125 "for the taking, detaining or injuring of personal property" as tolled by Alene's disability and should have instead applied the one-year limitation period of KRS 413.140(1)(i), (j) for recovery of stolen property or damages which would bar the Estate's claim. He argues the cause of action could not be tolled because the essential facts supporting the Estate's claim were known and knowable by Sonya, Jeff and Roy Don based on the information they had before Alene died.

While the Estate's 2011 action originally contained claims for both theft and conversion, the trial proceeded solely on conversion based on Watts using Alene's check for his own purposes to purchase a house for himself. "[A]ny wrongful exercise or dominion over chattels to the exclusion of the rights of the owner, or a withholding of them from his possession under a claim inconsistent with his rights,

constitutes a conversion.” *Joseph Goldberger Iron Co. v. Cincinnati Iron & Steel Co.*, 153 Ky. 20, 154 S.W. 374, 375 (1913). KRS 413.125 applies to claims for conversion. *Madison Capital Co., LLC v. S & S Salvage, LLC*, 765 F.Supp.2d 923, 932 (W.D. Ky. 2011). Therefore, the two-year statute of limitations applies. The question is whether the Estate’s claim was timely filed pursuant to it, considering the period of Alene’s incompetency.

KRS 413.170(1) provides as follows:

If a person entitled to bring any action mentioned in KRS 413.090 to 413.160, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first, allowed to a person without the disability to bring the action after the right accrued.

The alleged conversion by Watts took place on November 19, 2007, when the check was deposited into the escrow account and its proceeds were used to purchase the Stephens Drive property in Watts’s name. The disability judgment entered on November 21, 2008, which declared Alene to be of unsound mind, related back to the filing of the disability petition on April 11, 2008. Therefore, the statute of limitation would be tolled between April 11, 2008, and Alene’s death on January 13, 2010. The Estate’s suit was filed on February 28, 2011. About five months elapsed between the alleged conversion and when Alene’s determined disability began. Approximately thirteen more months elapsed between Alene’s death and the filing of the Estate’s suit. As these periods collectively constitute less than two years, the suit was timely filed.

(2) Proof of Conversion

Watts argues the Estate failed to prove that he either conspired to misappropriate money from Alene or knew the cashier's check had been misappropriated or stolen from her. He also argues he obtained good title to the check because it was endorsed by Alene and could be cashed by the bearer.

The Estate was not required to establish a conspiracy to prove conversion by Watts under the facts. The information on the face of the check established it was owned by Alene and the circumstances by which Watts obtained the check from Donnie and the manner in which Watts used the proceeds of the check were sufficiently suspicious to raise a factual question as to whether Watts misappropriated the check either when he used it to purchase property for himself or when he failed to return the proceeds as requested by the Estate.

While Watts claimed Donnie gave him the check to purchase the Stephens Drive home through the closing attorney, Donnie was not named as the payee on the check. Additionally, no paper trail was created memorializing this gift.

Watts admitted he was not allowed to deposit someone else's check into his escrow account and then use the proceeds for himself, but he argued that after the money was deposited he became authorized by Donnie to use a portion of the check for himself. However, the jury was entitled to disbelieve this explanation. It was undisputed that Watts concealed the source of the funds he used to purchase the house from Sonya.

Once Sonya demanded the money back on behalf of the Estate, Watts was on notice that the money was not Donnie's to give. Therefore, the conversion could have occurred when Watts continued to retain the proceeds of the check and exercised control over them inconsistent with Alene's rights.

As the case did not proceed on theft, the Estate did not have to establish Watts or Donnie stole the check. The Estate was able to properly establish misappropriation of the check and retention of Alene's money.

(3) Jury Instructions

Watts argues the jury instructions were fatally flawed because they did not contain his requested interrogatory concerning the alleged conspiracy. The jury interrogatories adequately stated all the necessary elements to establish conversion. *See Kentucky Ass'n of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 632 n.12 (Ky. 2005). Because a conspiracy did not have to be established for the Estate to recover, there was no requirement that the jury be given and answer an interrogatory on conspiracy.

(4) Damage Award

Watts argues the damage award was inconsistent with the evidence of conversion from Alene and, therefore, he is entitled to a new trial. He argues the damage award of \$81,000 (the price of the house) could not be for a conversion from Alene because Alene's check was for \$100,000. Instead, it could only be an award for a conversion from Donnie because he returned the balance of the check

to Donnie. He alleges error because there was no conversion claim at trial made by Donnie's estate.

Watts cannot avoid damages for conversion simply because the jury did not award the entire amount of the check Watts deposited. The evidence was sufficient to establish that Watts took money belonging to Alene and exercised and retained control over a large portion of that money inconsistent with the rights of Alene. The jury could reasonably believe Watts permanently converted only part of the money belonging to Alene. This award was consistent with the evidence.

(5) Hearsay Evidence

Watts argues hearsay evidence was improperly admitted at trial, requiring that we reverse and remand for a new trial. The trial court determined it would not exclude hearsay statements by Alene and Donnie because it would be impossible to try the case without these statements and the use of these statements would benefit both parties.

Watts argues the following statements of Alene and Donnie as related by others should have been excluded as hearsay because they did not qualify for any hearsay exception in Kentucky Rules of Evidence (KRE) 803(3): (1) Sonya's testimony that Alene told her that she had a "house in Nicholasville"; (2) Marty Lowry's testimony about whether Donnie made any statements about the Stephens Drive house:

Not to me. He didn't say anything to me. The only thing he said to me was that the house . . . that his mom put the money up for them to have the house to live in town. I'm

not sure. . . . I was thinking and I'm not sure about this, when Roy Don is on the stand, I thought when Roy Don was at the foot of the bed, he looked at Roy Don and he said, Roy Don don't let . . . and he was referring to Kenny I think. . . . Pretty much. He said, don't let that weasel SB get my money and mama's house . . . our house . . . our house and our money. And Roy Don said, I don't know. I don't even remember what he said about it.[;]

(3) Michael Brock Jr.'s testimony that Donnie told him that Watts "owed him a substantial amount of money" and that the "property would be deeded back to him from Mr. Watts after his mother died"; and (4) Preston Veal's testimony that Donnie "told me that he had, essentially his mother had paid \$100,000 to buy this house on Stephens Drive and Ken was going to try to beat him out of it and he wanted to know if I could help him"

Hearsay evidence is not admissible unless it qualifies for an exception. KRE 802. While the Estate was placed in a difficult position of trying to prove its case when two of the four people involved in the transfer of Alene's certified check to Watts were deceased, this cannot justify the use of hearsay statements. *See Kentucky Bar Ass'n v. Craft*, 208 S.W.3d 245, 263, 265 (Ky. 2006). Therefore, we examine KRS 803(3) to determine if it could justify the admission of these statements.

KRE 803(3) provides a hearsay exception as follows:

Then existing mental, emotional, or physical condition.
A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or

belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The “memory or belief” clause of KRE 803(3) requires that hearsay evidence be excluded if it is being used to prove the act, event, or occurrence that generated the memory. This is a codification of *Shepard v. United States*, 290 U.S. 96, 105-106, 54 S.Ct. 22, 26, 78 L.Ed. 196 (1933), which distinguished between hearsay evidence regarding state of mind related to future intentions which is admissible, from hearsay evidence regarding state of mind related to past events which is not because it would virtually eliminate the exclusion of hearsay. *Moseley v. Commonwealth*, 960 S.W.2d 460, 461-62 (Ky. 1997).

Numerous statements the trial court admitted should have been excluded because they were statements of memory and belief used to prove the fact remembered or believed. Sonya’s testimony that Alene told her that she had a “house in Nicholasville” was used to prove Alene owned or should have owned this house, or believed she purchased this house, rather than unconditionally gifted Donnie with the check. Similarly, Marty’s testimony that Donnie stated “his mom put the money up for them to have the house to live in town” and Veal’s testimony that Donnie stated “his mother had paid \$100,000 to buy this house on Stephens Drive” were statements of memory or belief being used to prove Alene paid for the Stephens Drive house for her own or Donnie’s use. Brock’s testimony that Donnie stated Watts “owed him a substantial amount of money” was a statement of

memory or belief being used to prove Watts owed Donnie, possibly for the purchase of the house.

There is no other hearsay exception which would allow admission of these statements. The statements by Donnie cannot be admitted under KRE 801A(b)(5), as admission statements offered against Watts as statements made by a coconspirator in furtherance of the conspiracy because the Estate has failed to show these statements were made in furtherance of a conspiracy. *Monroe v. Commonwealth*, 244 S.W.3d 69, 76 (Ky. 2008). Donnie's statements attributing the money to purchase the house to Alene and claiming he owned the house and Watts owed him money showed a break-down in any conspiracy and did not in any way assist or advance the objectives of the supposed conspiracy that Watts and Donnie would both benefit from converting Alene's money. *Id.* at 77. Therefore, all these statements should have been excluded as hearsay not qualifying for any exception.

However, other statements that Alene and Donnie made were properly admissible under KRE 803(3) as to their then existing states of mind so long as they were relevant. *See Bratcher v. Commonwealth*, 151 S.W.3d 332, 348-49 (Ky. 2004). Watts appears to characterize all of Alene's statements about having a house "in town" as being excludable as past remembrances of buying a house in town. However, Alene made numerous statements about her future intent and plan to buy a house and move to town before the Stephens Drive house was purchased and made statements about her desire to move into her house in town after the

house was purchased. Because these statements were about her intent and plans for the future, they were admissible under KRE 803(3), “because declarations of present intent cast light upon future as opposed to past events.” *Crowe v. Commonwealth*, 38 S.W.3d 379, 383 (Ky. 2001).

Watts’s defense that Alene made a gift to Donnie, which allowed Donnie to make a gift to him, made relevant Alene’s state of mind regarding whether any gift to Donnie was a straight inter vivos gift, or if instead it was a conditional gift or no gift at all. *See Bray v. Commonwealth*, 68 S.W.3d 375, 381-82 (Ky. 2002). Alene’s stated intention to buy a house in town and her requests for help in having Donnie find an appropriate house can be used to infer that her intent remained the same when she obtained a cashier’s check from a portion of the proceeds from the sale of her first farm and Donnie used that check to purchase a house they had viewed. *See Rogers v. Commonwealth*, 60 S.W.3d 555, 558-59 (Ky. 2001).

Brock’s testimony that Donnie stated the “property would be deeded back to him from Mr. Watts after his mother died” qualified for the KRE 803(3) exception because it was about Donnie’s then existing state of mind about his intent and plan for future ownership of the property. This statement was relevant to establishing a conspiracy between Watts and Donnie to convert Alene’s money and could establish an agreement that Donnie was or should be the real owner of the house but for some reason needed to avoid being known as the owner while his mother was alive.

Marty's testimony that Donnie said "Roy Don . . . don't let that weasel SB [Watts] get my money and mama's house . . . our house . . . our house and our money" was also admissible under the present state of mind exception because it concerned Donnie's then existing fear or anguish regarding his current belief that in the future Watts would try to wrongfully obtain ownership of the house and his plan to enlist Roy Don's help in preventing this outcome. Veal's testimony that Donnie stated "Ken [Watts] was going to try to beat him out of [the Stephens Drive house] and he wanted to know if I could help him" also concerned Donnie's present fear and the plans he was trying to make to defeat Watts from assuming permanent ownership of the house. Other statements Donnie made regarding the paperwork he had to establish his ownership or right to regain ownership of the house also related to and were relevant to show a possible conspiracy between Watts and Donnie that was in the process of breaking down now that their interests had diverged.

We also note Watts used numerous hearsay statements to establish his defense. The absence of Donnie's hearsay statements to defense witnesses would have seriously limited Watts's ability to present a defense.

We now consider whether the wrongful admission of the specific hearsay statements regarding statements of memory and belief to prove facts remembered or believed was harmful to Watts in light of all the other evidence properly admitted at trial. "The test for harmless error is whether there is any reasonable

possibility that absent the error the verdict would have been different.” *Crane v. Commonwealth*, 726 S.W.2d 302, 307 (Ky. 1987).

Having thoroughly reviewed the trial evidence, we determine the admission of these hearsay statements was harmless in light of the overwhelming evidence that Alene did not gift Donnie with the check and Donnie did not gift Watts with the property. The evidence established a highly suspicious set of circumstances in which Watts placed Alene’s check in his escrow account and then used proceeds from that check to buy a house for himself. Despite Watts’s awareness that Donnie had a felony conviction for larceny and Watts’s own experience as a sophisticated businessman as a realtor and owner of rental property, Watts never made any attempt to verify that Alene’s check was Donnie’s to give, asked Donnie to write his own check with proceeds from the certified check or created any paper trail to memorialize a gift from Donnie to himself. Watts never disclosed the gift when Sonya and Jeff asked him about who owned the house, would not give either the property or money back when confronted by Sonya about the cashier’s check and there is no indication he disclosed receipt of this alleged gift to anyone until after this suit was filed.

Watts’s actions were also consistent with an inference that he did not consider himself the owner of the property until after Donnie died. Unlike Watts’s other rental properties, Watts did not view the property prior to purchase. He did not make any repairs or improvements to the Stephens Drive property or begin depreciating it until after Donnie died.

Properly admitted evidence negated Donnie's statements to Watts that Alene gave the check to Donnie as a gift. Witnesses testified Alene frequently retained ownership of her "gifts" and did not intend to give Donnie any further gifts. It also heard evidence that Alene lacked sufficient capacity to make a gift. Additionally, witnesses testified about Alene's statements that she intended to buy a house for herself or a house for her and Donnie to occupy, sought advice in finding such a house and once it was purchased expressed a desire to move into it. This evidence was consistent with Alene either not gifting Donnie with the check or, at most, conditionally gifting it for the purchase of a specific residence with the caveat that she be allowed lifetime residence there, which would prevent Donnie from being able to gift the property to Watts.

The evidence presented at trial regarding Donnie's statements and actions was consistent with an inference of ownership of the Stephens Drive property by Alene or conditional ownership by Donnie. Donnie made improvements to the house and property, and made other preparations for Alene's comfort and care that anticipated her future residence at the house. Donnie was not generous and would never have gifted Watts with the property. Donnie demanded money from Watts in an amount consistent with the remaining balance left on the cost of the Stephens Drive property after deducting the amount Donnie previously borrowed from Watts. Donnie showed witnesses a document which would prove his right to resume ownership of the property but Donnie's ex-wife delivered this document to Watts in exchange for payment. Donnie feared Watts would cheat both him and

Alene out of the house and took steps to enlist the help of his family and others to prevent this future event.

We note many of the statements that should have been excluded were similar to statements that were properly admissible as showing future plans and present fears, which favors a finding of harmless error. *Bratcher*, 151 S.W.3d at 349. Given the overwhelming evidence to support the jury's verdict, we cannot say the results of the trial would have been different without the improperly admitted evidence. Accordingly, we conclude the improper admission of this hearsay evidence was harmless.

(6) Opinion Evidence

Watts argues the opinion evidence of psychologist Dr. Thomas Shurling that Alene was disabled in 2006 was wrongfully admitted where there was a contrary finding by the jury in her first disability trial, making this evidence irrelevant and more prejudicial than probative. We disagree.

Whether or not the first disability jury was convinced by clear and convincing evidence that Alene was disabled is a separate question from whether or not the jury in the conversion case was entitled to receive evidence to determine whether Alene was competent to be a donor of the gift of the certified check in 2007. *See Sroka-Calvert v. Watkins*, 971 S.W.2d 823, 828 (Ky.App. 1998). The evidence provided by Dr. Shurling was relevant to Alene's ability to be a competent donor in 2007 and was not more prejudicial than probative where the jury was informed of the results of the earlier disability trial and it was up to the

jury, after considering all evidence about Alene's mental competency, to form its own opinion about whether she was competent to be a donor.

Additionally, the burden was different in each case; so differing determinations based on the same evidence could still be consistent. In the competency hearing, the Commonwealth had to establish by clear and convincing evidence that Alene was disabled; in the conversion trial, Watts had to establish by clear and convincing evidence that all the elements necessary for an inter vivos gift were present, including that Alene was a competent donor. Therefore, Alene's incompetency had to be proven by clear and convincing evidence in the disability trial, but in the conversion trial, her competency had to be proven by clear and convincing evidence before she could make a gift. Accordingly, there was no error in admitting this evidence.

(7) Punitive Damages

Watts argues punitive damages were inappropriate because the evidence was insufficient to establish he acted with wanton or reckless disregard for Alene or the jury instructions failed to articulate the legally required basis for such an award. Watts is essentially trying to reargue the evidence and how the jury should have weighed it. There was sufficient evidence to support the jury's punitive damages award based upon Watts's concealment and deception after he received the certified check.

"Bare bones" instructions which include the statutorily mandated language of KRS 411.186 and explain that punitive damages are to punish wrongdoing, are

sufficient. *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493 (Ky. 2002) (vacated on other grounds by *Ford Motor Co. v. Smith*, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (2003)). Therefore, because the jury instruction for punitive damages satisfied these requirements, we determine it was proper.

Accordingly we affirm the final judgment of the Jessamine Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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