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# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-000984-MR

KIMBERLY THOMAS — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 12-CI-01964

LOUIS THOMAS — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MAZE, NICKELL AND VANMETER, JUDGES.

NICKELL, JUDGE: Kimberly Thomas appeals from a judgment and three orders entered by the Hardin Circuit Court. All four items are associated with a four-day jury trial resulting from a civil complaint filed against her by Louis Thomas, her ex-husband, alleging that more than two decades after their divorce she unduly influenced him to: execute deeds conveying to her a half-interest in three pieces of

property he owned individually; name her as his Attorney-in-Fact pursuant to a Power of Attorney; and, add her name to his single account at the Fort Knox Federal Credit Union from which she transferred more than $21,000 into her own account. After careful review of the briefs, the law and the record, we reverse and remand for a new trial.

## FACTS AND PROCEDURAL BACKGROUND

We could devote pages to a detailed recitation of the facts, but doing so would unduly lengthen this Opinion without benefit. For context, suffice it to say, Louis and Kimberly met in 1976; married in 1978; became parents of a son in 1979; and divorced in 1980. At that point their stories diverge but their paths remain entangled.

According to Kimberly, the divorce was a sham because she and Louis never intended to live apart and never did. She testified they continuously lived together in the marital home which she received in the dissolution decree. She maintained she petitioned for divorce only to prove her devotion to Louis after he became angry with his first wife for seeking an increase in child support despite having received what he perceived to be an overly generous settlement. While Louis was often away from home when Kimberly retired to bed each evening, he was in the marital home each morning with breakfast waiting for her and their son.

Kimberly believed she and Louis remained equal partners[1] in their upholstery shop and storage unit business for which she did clerical work.

In her answer to the complaint, Kimberly denied Louis "was a person of weak understanding, liable to imposition, and unable to exercise deliberate judgment." To the contrary, she described Louis as the dominant personality and partner in their domestic relationship, and claimed he "asserted his dominion and control" over her, "to the point of harassing, and emotionally abusing" her. She maintained any transfer of money occurred at Louis' direction to further the domestic partnership; she was named Louis' Attorney-in-Fact to act on behalf of the partnership and to further the couple's businesses; and, deeds creating joint tenancy (executed by both parties) were designed to give each an "equal 50/50 interest in all the properties acquired during their continued domestic partnership and *de facto* marriage."

In contrast, Louis maintained the divorce was genuine and afterwards he lived in his vehicle for a time. He acknowledged seeing Kimberly often and even traveling with her, but only because he wanted to be near their son. He testified he built a cabin in Breckinridge County where he lived with Rebekah France from 2000 until 2008; France moved out when she "got religion" because

[1] No written partnership agreement was introduced or alleged; the partnership was only implied. After Louis filed the complaint, Kimberly secretly recorded several telephone conversations between herself and Louis. In one of them Louis stated, "I will never, ever, in my life, be in a 50/50 deal except this one. There will never be another 50/50 deal."

they were not married.[2] In 2009, Louis became trapped in his upholstery shop during an ice storm. He called Kimberly, she rescued him, they spent a few days in a motel, and they resumed cohabitating in the original marital home where Kimberly cared for him while he was vulnerable and depressed. A Vietnam veteran, Louis subsequently admitted himself to the hospital where he was diagnosed with Post Traumatic Stress Disorder (PTSD) for which he receives medication and therapy.[3]

At the conclusion of trial, jurors received instructions containing interrogatories; they answered legal questions, and advised the court on equitable matters. The court then rendered findings of fact, conclusions of law and judgment echoing the jury's verdict in which they found: Kimberly did not exert undue influence over Louis regarding two of the deeds (they were not asked about the third); Kimberly and Louis had a partnership or joint venture; Kimberly "did not exercise the utmost good faith in conducting the affairs of the partnership and/or joint venture's bank accounts," thereby breaching her fiduciary responsibility for which Louis should receive $21,000 in compensatory damages; based on the contributions of each party, Louis should receive the upholstery shop in its entirety, but only 75% of the storage unit business with Kimberly receiving the

[2] Kimberly knew nothing about the cabin until she discovered a tax bill in the mail. She also knew nothing about France.

[3] Kimberly noticed no signs of PTSD until 2012, after Louis had spoken with a "buddy" about receiving veteran's benefits. She acknowledged writing and signing a statement in support of his claim for PTSD benefits, but only after being told what to write by Louis and his "buddy." Kimberly testified the statement she signed was false.

remaining quarter; and finally, all jointly owned partnership assets should be divided 75% to Louis and 25% to Kimberly.[4]

In its attempt to equitably divide all partnership real estate and assets, the court relied on *Glidewell v. Glidewell,* 790 S.W.2d 925 (Ky. App. 1990) (property should be split between unmarried cohabitants according to each party's financial contribution to item's acquisition as if business partnership being divided). This task was complicated by the absence of any proof of Kimberly's financial contributions in the wake of the trial court denying her motion to amend her counterclaim for harassment and terroristic threatening and denying her motion to amend her pre-trial compliance to reveal the amount of damages being sought on the counterclaim. Because Kimberly listed only the *types* of damages sought, without specifying dollar amounts, the court determined she was noncompliant with its pre-trial order requiring itemization of all damages and prohibited her from offering any proof of her counterclaim.

Consistent with the jury's verdict, the court gave Louis the entirety of the upholstery shop and 75% of the storage unit business. It then gave Louis 75% of the marital home[5]—which was not listed in the complaint as an item to be divided—and 75% of an adjoining tract called "Mammal's Place,"[6] with Kimberly

[4] Both the upholstery shop and the storage unit business are located in Meade County. The upholstery shop was acquired in 1998 and the storage unit business was acquired in 2006.

[5] Kimberly received the marital home in the decree of dissolution. In 2009 she conveyed a half-interest in the property to Louis. It had previously changed hands between them in 1984 and 2006.

[6] Kimberly acquired this tract from the estate of her late father for $7,000. In 2009, when Kimberly conveyed to Louis a half-interest in the lot, its fair market value was $42,000.

receiving the remaining 25% of both. Kimberly's lengthy motion to alter, amend or vacate the judgment was denied by the trial court without explanation.

Kimberly filed a notice of appeal, accompanied by neither a request to stay enforcement of the judgment nor the filing of a supersedeas bond, prompting Louis to seek enforcement of the judgment—a motion to which Kimberly objected. After setting a briefing schedule, the court ordered the Master Commissioner to transfer all interest in the upholstery shop and 75% of the remaining real estate (the storage unit property, the marital home and Mammal's Place) to Louis and transfer the remaining quarter to Kimberly.

On appeal, Kimberly asks us to resolve multiple claims, the first being whether the trial court abused its discretion and caused manifest injustice by denying her request to amend her pre-trial compliance to specify the amount of damages sought on her counterclaim for harassment and terroristic threatening, thereby preventing her from proving her counterclaim. After careful consideration, we answer this question in the affirmative requiring reversal and remand for a new trial. The ruling on this issue set a course in motion requiring reversal for several reasons.

ANALYSIS

We begin by noting Kimberly's brief does not comply with CR 76.12(4)(c)(v). That rule requires:

> [a]n "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references

> to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

The brief for appellant contains no statement of preservation for any of the three arguments raised.

> Compliance with this rule permits a meaningful and efficient review by directing the reviewing court to the most important aspects of the appeal: what facts are important and where they can be found in the record; what legal reasoning supports the argument and where it can be found in jurisprudence; and where in the record the preceding court had an opportunity to correct its own error before the reviewing court considers the error itself.

*Hallis v. Hallis*, 328 S.W.3d 694, 696-97 (Ky. App. 2010).

Additionally, Kimberly asks us to rely on *Wright v. Highland Cleaners, Inc.,* 2005-CA-000413-MR, 2006 WL 1046684 (Ky. App., Mar. 31, 2006) (CR 8.01(2) does not require amount of unliquidated damages to be revealed unless requested in interrogatory), but fails to tell us the opinion is unpublished and does not include a copy of it in the appendix to her brief.

> Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

CR 76.28(4)(c). Louis commented on this flaw in his brief.

Noncompliance with the rules of appellate practice makes our full and complete review far more difficult and time consuming. Furthermore, when we do not enforce the rules we erode them. When a party fails to comply with the rules, as an appellate court, we have options. *Hallis,* 328 S.W.3d at 696. We may ignore the deficiency and review the alleged errors anyway. We may strike the brief or its offending portions. CR 76.12(8)(a). Or, we may review the issues raised for manifest injustice only. *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990). After great consideration, we choose to review Kimberly's claims to avoid an inequitable result and to achieve a tidier, streamlined trial on remand. The irony of our decision to review claims stemming from noncompliance with trial court orders despite noncompliance with the rules of appellate practice is not lost on us. Counsel is warned such leniency should *not* be expected in the future.

Kimberly's first question is whether the trial court abused its discretion in denying her motion to amend her pre-trial compliance to specify the dollar amount of damages being sought. We believe it did.

On July 5, 2013, the trial court entered a pre-trial order containing the following language:

> On or before 15 days prior to said trial, each party shall file with the Clerk of this Court a list of names and addresses of all witnesses (excepting parties) to be used by them at the trial, *together with an itemized list of all damages proposed to be proven at trial*, and a list of all exhibits proposed to be introduced as evidence, which shall be shown by certificate of attorney. . . . *No other*

> *witnesses may be introduced or damages proven or exhibits received in evidence than those disclosed as above set out, except by agreement* of all parties *or in the sound discretion of the Court for good cause shown.*

(Emphasis added). Trial was scheduled to—and did—begin on February 24, 2014.

On February 7, 2014, Kimberly filed her pre-trial compliance. Under the heading "ITEMIZED LIST OF DAMAGES" appeared the following text:

> 1. Counter-Plaintiff/Defendant, Kimberly Thomas, intends to seek compensatory damages for embarrassment, humiliation and mental anguish related to Counter-Defendant/Plaintiff, Louis Thomas' harassment and terroristic threatening as determined by a fair and impartial jury.
>
> 2. Counter-Plaintiff/Defendant, Kimberly Thomas, intends to seek punitive damages for the wanton, willful, malicious, oppressive, fraudulent, and/or outrageous conduct of Counter-Defendant/Plaintiff, Louis Thomas' harassment and terroristic threatening as determined by a fair and impartial jury as permitted by law.
>
> 3. Counter-Plaintiff/Defendant, Kimberly Thomas, will ask the court in equity and at law to partition the general partnership of the parties dividing all partnership assets equally.

Noticeably absent from Kimberly's list was the dollar amount of damages desired.

Upon learning the trial court expected the "*itemized list of all damages*" to include dollar amounts, defense counsel took immediate action—still eighteen to twenty hours *after* the time for filing the pre-trial compliance had expired—to correct his mistake, tendering a motion and amended pre-trial compliance seeking $100,000 for embarrassment, humiliation and mental anguish,

and $100,000 for wanton, willful, malicious, oppressive, fraudulent and/or outrageous conduct, both related to harassment and terroristic threatening. The amended pleading was ultimately marked as "tendered" but not "filed." Plaintiff's counsel opposed amendment because the window for filing pre-trial compliance had closed.

The motion to amend was argued February 18, 2014. Defense counsel stated he believed he was in compliance with the pre-trial order by identifying the *type* of damages demanded; the order did not expressly require specification of a monetary cap; he did not read the order to require numbers; and, Louis had not requested the amount of unliquidated damages being sought via interrogatories as permitted by CR 8.01(2). Defense counsel explained he understood he was obligated to reveal dollar amounts *only* upon request and receiving no such request, revealed no amounts. He then argued Louis had suffered no prejudice and Kimberly had gained no unfair advantage.

The trial court stated it understood Kimberly's dilemma, but it had entered the standard order used by both divisions of the Hardin Circuit Court in all cases with a jury demand—an order succinctly requiring itemization of *all* damages. After confirming Kimberly had never disclosed the amount of damages being sought on the counterclaim—not via deposition and not in response to an interrogatory—the court took the matter under submission and later that day issued a written order forbidding amendment due to noncompliance with the court's pre-trial order and lack of "any assertion as to the monetary damages alleged to be

associated with her Counterclaim during discovery or pre-trial litigation." As a result, Kimberly was prevented from offering any proof on her counterclaim.

A pre-trial conference occurring the Friday before trial began on Monday started with Kimberly's request that the court reconsider its ruling on her motion to amend her pre-trial compliance. Defense counsel argued the court's ruling was tantamount to dismissing her counterclaim; Louis had incurred no prejudice since he received the original pre-trial compliance and the amended version (with dollar amounts) simultaneously; the court's order did not explicitly require a pecuniary amount; the jury instructions she tendered sought $100,000 in damages on each allegation; the sanction imposed for a mistake must be commensurate with the error committed; and CR 16(2) allows a court to modify a pre-trial order to avoid manifest injustice. Louis stood on his previously filed written objection.

The court recognized the seriousness of its ruling and that its practical effect was dismissal of the counterclaim, but emphasized litigation cannot proceed without numbers, the circuit court's standard order had been entered, and there had been no previous disclosure of the amount being sought at any time during the case. Thereafter, the court denied the motion to reconsider. As a result of this single ruling, no evidence of the counterclaim was permitted which caused a cascading effect of other decisions by trial counsel—including offering no evidence of Kimberly's financial contribution to the acquisition of property—a factor subsequently used by jurors and the court in dividing property and assets.

We disagree with the trial court's handling of this issue. In other words, we deem its ruling "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The pre-trial order required "itemization" of all damages, but nowhere did it specify how itemization was to occur, nor did it require specification of the amount of damages being demanded.

We respect a court's inherent authority to enforce its orders and "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Rehm v. Clayton*, 132 S.W.3d 864, 869 (Ky. 2004) (quoting *Landis v. North American Co*., 299 U.S. 248, 254-55, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936)). We even acknowledge requiring a party to reveal its asking price is not novel—especially since it may prompt settlement. *LaFleur v. Shoney's, Inc.,* 83 S.W.3d 474, 477 (Ky. 2002). But here, the court attempted to enforce an order containing ambiguous language—an ambiguity identified with precision by defense counsel both on paper and during argument on the motion to amend and the subsequent motion to reconsider.

Kimberly's counsel argued he believed he was in compliance with the court's order by designating the *types* of damages sought. The court apparently intended the parties to specify all damages demanded by both *type* and *amount,* but never conveyed that intention in its order.[7] The court even stated it understood

[7] In the unpublished case of *Wright*, a panel of this Court reversed a trial court's dismissal of an action due to a party's failure to itemize damages where no interrogatory was propounded requesting same and the pre-trial order did not require itemization of monetary damages. We deem *Wright* instructive, but not controlling since damage amounts were revealed in *Wright*.

counsel's reading of the order differed from its own interpretation, but never identified the phrase or term in the order requiring a party to reveal a number.

The trial court believed revealing damage amounts increased the likelihood of settlement—but that belief was tempered by other comments made by the court—specifically, that these parties had settled on nothing, seemingly making revelation of a dollar amount less critical in this particular case. The court was also trying to prevent surprise, ensure trial progressed smoothly and maintain a level playing field—all laudable goals, but not at the expense of Kimberly's counterclaim, especially in light of an ambiguously-worded order. As events unfolded, this single ruling set a precarious course for the remainder of trial.

The Hardin Circuit Court may have used this "standard" order for some time without difficulty, but now that an ambiguity in its wording has been exposed, the order should be revised to state with clarity exactly what is meant—perhaps that *parties file an itemized list of all damages, identifying both type and amount, proposed to be proven at trial.* For the reasons expressed, we must reverse and remand for a new trial in which Kimberly may pursue her counterclaim, if still desired, with knowledge that she is expected to reveal her valuation of the counterclaim.

The error resulting from this issue, was compounded by rulings that followed, such that reversal is required for multiple reasons. On remand, another ruling will likely change because a new discovery timetable will apply and

Kimberly can timely move to amend her counterclaim, if amendment is still desired. On January 22, 2014, Kimberly had moved to amend her counterclaim to seek dissolution of the general partnership and partition by sale of all its assets with a full accounting of all rents and revenues.[8] Alternatively, she sought partition by sale of all jointly-held real estate claiming it could not be divided and she no longer wanted to be in a partnership with Louis. She also sought to add several new claims—stalking, assault, menacing, violation of domestic violence/protective orders, harassing communications and slander. Further, she sought to expand her initial claims of terroristic threatening and harassment. The court denied the motion to amend because new claims could not be added less than thirty days before trial. Assuming Kimberly still deems this amendment desirable, and seeks to amend the counterclaim in a timely fashion, it will squarely place a request for partition of all partnership assets before the trial court—a request missing from the first trial when the counterclaim was effectively dismissed and Louis had not alleged a partnership nor requested partition.

Another issue raised by Kimberly pertains to the marital home—a piece of property divided by the court even though not identified as an item of interest in the complaint. Louis mentioned only three deeds in the complaint and asked only

> [f]or a Declaratory Judgment that [Kimberly's] interest in the herein above described property be determined to be null and void, the deeds reflecting the transfer be

[8] Kimberly ultimately withdrew this request when objecting to the court's instructions.

> rescinded, and that the said property be restored to [Louis.]

He did not seek partition of anything—certainly not the marital home—nor did he allege a partnership with Kimberly—he denied a partnership existed. It was only Kimberly, through her answer, who alleged a domestic partnership existed as an affirmative defense and demanded "the parties' partnership property be partitioned by sale."

In her written objections to the court's proposed jury instructions, Kimberly confirmed she did not agree to "partitioning of the partnership or division of jointly owned assets by the court or by the jury, without the benefit of the opportunity to be heard in a separate hearing and present evidence concerning same." She further stated the marital home should not be a subject of this litigation. Although there was much reference to the one-time marital home as the place Kimberly and Louis lived together after the divorce and after she rescued him from the ice storm, Kimberly never alleged it was partnership property such that it was appropriate for the trial court to partition it. Furthermore, once the counterclaim was effectively dismissed, the only options available to the court were rescission and restoration since that was the only relief requested in the complaint.

We conclude the trial court exceeded its authority in partitioning the marital home because it was not listed in the complaint as a contested item. The trial court may have thought it was doing the parties a favor, but it is not authorized

to take action a party has not requested. In light of Kimberly's subsequent written objection, she clearly did not consent to the court's action such that we could say the complaint was amended to conform to the evidence pursuant to CR 15.02.

Additional rulings are worthy of comment. In a confusing turn of events, jurors found existence of a partnership or joint venture[9] as well as lack of undue influence by Kimberly—two findings consistent with Kimberly's view of the case. While the jury's work should have concluded at that point, they were then asked to partition the partnership property. They tried to do as the court had directed, but the verdict sheets were flawed and after rendering their verdict in open court, they were sent back to the jury room to clarify their verdict. Having jurors answer interrogatories about the percentage of property each party should receive was error because they had heard no evidence of Kimberly's financial contribution to the acquisition of any property. Therefore, they could not compute the part she should receive in the manner directed by *Glidewell,* 790 S.W.2d at 927. Furthermore, under the instructions as worded, "[i]n the absence of evidence as to what each partner contributed, each partner shall be presumed to have an equal interest." Thus, Kimberly should have received no less than fifty percent of the three pieces of real estate listed in the complaint. Instead, she received none of the upholstery shop and only one-quarter of the storage unit business and

[9] In her answer, Kimberly alleged she and Louis had an implied domestic partnership. Neither party ever alleged existence of a "joint venture." It is unclear why this term appeared in the jury instructions given by the trial court.

Mammal's Place. She also received only one-quarter of the martial home, even though it should not have been divided at all. At that point, Kimberly truly lost the case. But, there being no evidentiary support for the jury's decision that Louis was entitled to the entire upholstery shop and three-quarters of the marital home, the storage unit business and Mammal's Place, and therefore no support for entry of the trial court's subsequent judgment echoing the jury's verdict, we cannot allow either to stand. *Southern Ry. Co. v. Kelly Const. Co*., 406 S.W.2d 305, 306 (Ky. 1966). Thus, on retrial, if the jury again finds a partnership and no undue influence, the litigation should end at that point, unless a party has put forth a request for partition.

Finally, in her written objections to the court's jury instructions, Kimberly withdrew her affirmative defense of partnership—a defense she had asserted solely to preclude the allegation of undue influence. She then objected to any instruction on breach of fiduciary duty regarding the partnership since Louis vociferously maintained no partnership existed. This followed on the heels of the trial court having granted a directed verdict on breach of fiduciary duty as it pertained to the POA—the only claim about breach contained in the complaint. There being no basis for any instruction on breach of the partnership in light of the directed verdict and the lack of a specific claim of breach flowing from the partnership, it was error to so instruct and for jurors to award Louis $21,000 in compensatory damages for such a breach.

For all the reasons set forth above, we reverse and remand for a new trial.

VANMETER, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING AND FILING SEPARATE OPINION:

I fully agree with the result of the majority opinion, but I write separately to emphasize several additional points. As an initial matter, I fully agree with the majority's conclusion that Kimberly's brief consistently fails to include "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." CR 76.12(4)(c)(v). "Compliance with this rule permits a meaningful and efficient review by directing the reviewing court to ... where in the record the preceding court had an opportunity to correct its own error before the reviewing court considers the error itself." Furthermore, this Court is under no obligation to scour the record on appeal to ensure that an issue has been preserved. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003).

However, the trial court's denial of Kimberly's motion to amend her pre-trial compliance was clearly preserved, as evidenced by its written order dated February 19, 2014. Therefore, that issue is properly presented for review on appeal. Similarly, Kimberly fails to identify where she preserved her objection to the jury instructions, as required by both CR 76.12(4)(c)(v) and CR 51(2) and (3).

Nevertheless, on February 28, 2014, Kimberly filed written objections to the jury instructions, which included an objection to any interrogatories concerning the partition of assets owned by the partnership. Despite Kimberly's failure to fully comply with the rules for appellate briefs, I must agree with the majority that this issue is adequately preserved for our review.

While I agree with the majority that the trial court abused its discretion in denying Kimberly's motion to amend her pre-trial compliance, I do not entirely agree with the majority's reasoning. To begin, I disagree with the majority's suggestion that the pre-trial order was ambiguous. The order expressly required parties to submit "an itemized list of all damages proposed to be proven at trial…" The most reasonable interpretation of this order would require a listing of both the type and the amount of all damages.

However, in *LaFleur v. Shoney's Inc.*, 83 S.W.3d 474 (Ky. 2002), our Supreme Court held that a trial court has the discretion to allow a plaintiff to supplement her answers upon a showing that the increase in the amount of unliquidated damages claimed does not prejudice the defendant. *Id.* at 480. In this case, the trial court incorrectly concluded that the deadline in its pre-trial order was controlling, without considering its discretion or whether the amendment would prejudice Louis. Under the circumstances, I agree with the majority that the trial court abused its discretion by denying Kimberly's motion to amend her pre-trial compliance.

I also agree with the majority that the trial court erred by instructing the jury on partition of the partnership property. I would also point out that, about a month before the trial, Kimberly attempted to file an amended complaint seeking, among other things, dissolution of the domestic partnership and partition of the partnership property. The trial court denied that motion by order entered January 28, 2014. The trial court's ruling led her to believe that partition would not be an issue at trial. Nevertheless, the jury instructions directed the jury to divide the equity in the partnership property based upon the parties' respective contributions. Furthermore, the trial court also allocated a 75% interest in the former marital residence to Louis, even though he had never sought partition of that property. Under the circumstances, I agree with the majority that the jury instructions were so flawed that this matter must be remanded for a new trial. However, I would note that both parties will have the opportunity to amend their claims prior to trial.

Finally, I do not believe that the instruction allowing the jury to find either a partnership or a joint venture was necessarily improper. A joint venture is an informal partnership, usually limited to a single transaction in which the participants combine their money, efforts, skill, and knowledge for gain, with each sharing in the expenses and profits or losses. *Roethke v. Sanger*, 68 S.W.3d 352, 364 (Ky. 2001) (citing *Eubank v. Richardson*, 353 S.W.2d 367, 369 (Ky. 1962)). The distinction between a partnership and a joint venture is largely a matter of circumstances rather than substantive law. Moreover, I believe that the evidence in this case could support a jury finding that the parties engaged in either a traditional

partnership or a joint venture. The definitions of both terms in the instructions were substantially correct. However, if this issue is again submitted to the jury, I would suggest that the instructions clearly direct the jury to determine the existence of either a partnership or a joint venture.

| BRIEFS FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Matthew E. Durham<br>Elizabethtown, Kentucky | Aaron Kemper<br>Alan W. Roles<br>Louisville, Kentucky |