RENDERED: OCTOBER 6, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000224-MR
AND
NO. 2016-CA-000371-MR

CAROLYN MILES
(now Hilton) APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 13-CI-00687

DIANNE M. LYVERS F/K/A
DIANNE M. CLARK, AND JOSEPH
GARY CLARK APPELLEES/CROSS-APPELLANTS

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, JOHNSON AND TAYLOR, JUDGES.

ACREE, JUDGE: This appeal is from litigation that determined the parties' respective rights to ownership of certain real property. After a jury trial, the Nelson Circuit Court entered a judgment dismissing Appellant Carolyn Miles'

claim to said property and ordering the release of a Life Tenancy Agreement she had filed with the Nelson County Clerk. Carolyn appeals that portion of the judgment.

The current owners of the real property in question, Appellees Joseph Gary Clark and Dianne Lyvers (formerly Clark), take issue with a part of the judgment describing their testimony. Gary and Dianne filed a timely cross-appeal seeking reversal and instructions on remand that the language be removed from the judgment.

As to the appeal, we reverse and remand the case for a new trial because the circuit court erred in prohibiting the introduction of relevant evidence and in failing to instruct the jury regarding estoppel. In addition to finding no merit in the cross-appeal, it is rendered moot by our decision on the direct appeal; we shall dismiss the cross-appeal by separate order entered contemporaneously with this opinion.

FACTS AND PROCEDURE

Carolyn and Dianne are sisters. By all accounts, they were close. Carolyn, the elder by ten years, was also more financially secure. From her home in Florida, Carolyn offered Dianne and Dianne's husband, Gary, financial support and advice on occasion; she took Dianne on vacations and gave her expensive gifts.

Dianne and Gary live in Nelson County, Kentucky, on land devised from Gary's ancestors. Gary spent much of his childhood on the farm, and it has special meaning to him. Dianne and Gary intend for the land to eventually pass to their children.

Tragedy visited Dianne and Gary in April of 2005 when their son, Luke, died in an automobile accident. Carolyn travelled to Kentucky for the funeral and to support her sister. Lacking the wherewithal, Gary and Dianne allowed Carolyn to pay Luke's funeral expenses of $5,787.00. Whether Carolyn made this payment as consideration for Diane's and Gary's conveyance of real property to Carolyn was the factual question the circuit court instructed the jury to answer.

Dianne and Gary claim this payment was a loan they repaid by a check on October 5, 2008, Luke's birthday, in the amount of $5,500.00. Carolyn said the $5,500.00 was reimbursement for advancing the costs of some vacations.

Carolyn testified at trial that she offered to pay Luke's funeral expenses in exchange for four acres of the land located on Dianne's and Gary's farm. She testified Dianne rejected that offer, but counter-offered that Carolyn could instead have a one-acre tract. Carolyn stated that there was never any discussion that the funeral expense payment was intended to be either a gift or a loan.

Dianne's and Gary's testimony conflicted with that offered by Carolyn. They said that at no point did Carolyn ever express any connection between her payment of Luke's funeral expenses and a desire to acquire any of their property. They also denied reaching any agreement with Carolyn as to conveying a one-acre tract of land in exchange for Carolyn's payment of Luke's funeral bill. In fact, they said there never was a discussion of any *quid pro quo* related to Luke's funeral expenses or anything else Carolyn had done.

The fact is, and Dianne and Gary do not dispute, that Carolyn undertook great expense to improve the subject property. After Carolyn returned to Florida in the Spring of 2005, and before she returned to Kentucky in September 2006, Dianne went to local planning and zoning officials to acquire a Zoning Compliance Permit for construction of a "Conventional detached single-family dwelling." Dianne signed the application on July 6, 2006, and it was approved on July 26 of the same year.

Appended to this application is a survey showing where the structure was to be built and the need to extend the drive Dianne and Gary already used to access their residence. Dianne also assisted Carolyn in negotiating with adjoining property owners to acquire road-frontage property necessary to create a legal lot under applicable zoning regulations. Carolyn also engaged a surveyor to establish the boundaries of the one-acre tract upon which the house was being built.

With nothing further to document a mutual understanding of why Carolyn would construct a residence on Dianne's and Gary's property, Carolyn began construction of a sizeable home.

Carolyn testified at trial that she and Dianne had many discussions regarding Carolyn's acquisition of the one-acre tract. But Dianne claimed she made it clear to Carolyn that Gary would never sell off a part of the ancestral farm. According to Dianne, Carolyn then proposed a "life tenancy" arrangement wherein Carolyn would occupy the property during her lifetime with the property reverting to Dianne and Gary upon Carolyn's death. Dianne and Gary agreed. Specifically, Gary testified at trial that he had no objection to Carolyn building a residence upon a one-acre tract, and that he and Dianne agreed that Carolyn could live there during her lifetime, after which the property would pass to Dianne and Gary or their heirs or devisees. Dianne likewise testified that it was their intention that Carolyn have a life estate.

Carolyn remained in Kentucky during most of the construction and served as her own general contractor. She performed a large portion of the construction labor herself. Carolyn moved into the partially-constructed house in the fall of 2008. Carolyn testified at trial that the residence was large and that she spent a "fortune" on the construction. She also introduced into evidence pictures of the house largely completed.

On October 5, 2008, Dianne tendered an unmemoed check to Carolyn for $5,500.00. Carolyn negotiated the check. Dianne testified that because she had finished school, and as her household finances had stabilized, she and Gary believed it their obligation to pay for their son's burial and to settle that debt to Carolyn. Dianne testified there could be no misunderstanding by Carolyn that the $5,500.00 check – written on Luke's birthday – was for anything other than repayment of the funeral expenses Carolyn had advanced in 2006.

Carolyn disagreed. She testified the $5,500.00 check was repayment for monies she had advanced to Dianne for several family vacations and to cover a cold check written by Gary. She reiterated that her payment of Luke's funeral expenses was never intended as a loan to Dianne.

In 2009, Dianne petitioned for divorce from Gary. Still, there was no written document memorializing the agreement among Carolyn, Dianne, and Gary as to the residence Carolyn had constructed. Fearful that the home she built would be included in her sister's marital estate, Carolyn drafted an agreement entitled, "Life Tenancy Agreement." She dated the agreement September 23, 2006, even though it was certainly drafted and signed in 2009 or 2010. The Agreement acknowledged that Dianne and Gary had obtained a building permit to construct a residence; that Carolyn agreed to pay all property taxes associated with the

construction; and that Gary and Dianne agreed to give Carolyn an easement on their existing road. The Agreement also contained the following:

> Both parties agree that at any time during or after the completion of the construction, Carolyn Miles may have the option of accepting a deed of one acre of land on which the house is constructed and retaining the road easement for a consideration of the sum of ONE and 00/100 dollar ($1.00) **OR** keeping this **LIFE TENANCY AGREEMENT** until her death. [Carolyn] agrees to pay the costs of the conveyance of said deed should she choose that option.

Carolyn and Dianne acknowledged their signatures on the Agreement. Dianne's children – Rebecca and Justin – witnessed the Agreement and acknowledged their signatures. However, Dianne, Rebecca, and Justin all stated they failed to read the document before signing. Gary's signature appears on the Agreement, but he claims it was a forgery. The jury, after hearing expert testimony and examining the signatures, found the signature was not a forgery.

Carolyn filed the Agreement in the Nelson County Clerk's office on January 4, 2010. Sometime thereafter, Carolyn requested that Dianne and Gary execute a deed conveying to Carolyn title to the one-acre tract upon which her house was constructed. Dianne and Gary refused to do so.

Dianne and Gary stipulated that in October 2012, Carolyn "received a copy of a survey plat of the property in question which she had previously commissioned, subdividing the approximately one acre tract upon which she had

constructed her residence and providing for an access easement thereto, and presented the survey plat to [Dianne and Gary] for review and signature. The[y] refused to sign the survey plat." (R. 140).

On December 10, 2013, Carolyn filed suit against Dianne and Gary. The complaint alleged only breach of contract and sought, alternatively, specific performance of the contract or damages. Dianne and Gary filed an answer and counterclaim alleging Carolyn's recording of the Agreement constituted a slander upon the title to their farm. In her answer to the counterclaim, Carolyn interposed that she "affirmatively pleads estoppel and laches."

As the litigation proceeded and the case was set for trial, Dianne and Gary abandoned their counterclaim. They also moved *in limine* for two restrictions on Carolyn's presentation of her case. The first motion sought the circuit court's order that Carolyn be required to elect between the alternative remedies of specific performance and damages; the second would prohibit Carolyn's introduction of proof of her costs expended in constructing the home, should Carolyn elect specific performance. The court granted the first motion and Carolyn elected specific performance, whereupon the second motion as granted.[1]

[1] On the docket sheet for January 8, 2016, the circuit court simply wrote "Rulings made on motions in limine." (R. 145). To determine what those rulings were, the reviewing court must look to the motion itself where, next to the respective argument headings there are handwritten comments. As to the motion for election of remedies there appears next to the argument heading: "specific performance [followed, apparently, by the judge's signature, and the date]

Notwithstanding these rulings, we note that Carolyn's pre-trial statement alleged damages of $315,023.75 for surveying, paid labor, and materials of construction, along with $13,600.50 as the value of her personal labor.

Carolyn's trial brief re-asserted the issue of estoppel, arguing that the jury could believe from the evidence that she relied on misrepresentations, leading her to substantially improve Gary's and Dianne's property, but that Gary and Dianne never intended to convey the property to Carolyn either in fee or as an estate for life. Consistent with that argument, and consistent with the evidence presented, Carolyn offered two jury instructions on promissory estoppel.[2] (R. 177, 178).

1/8/16." (R. 129). As to the motion prohibiting Carolyn's introduction of proof of damages, there is only the word "sustained." (R. 130). Carolyn challenges only the second order.

[2] Those instructions were as follows:

[PLAINTIFF'S PROPOSED] INSTRUCTION NO. 5

You will find for the Plaintiff if you are satisfied form clear and convincing evidence as follows:

1. That when the Defendants agreed and represented that the Plaintiff would have full ownership of the one acre tract in return for payment of the funeral expenses, they intended for her to rely on that agreement;
2. That the Plaintiff would not have paid the funeral expenses and constructed the home on the property if she had not in fact relied upon their agreement;
3. That the Defendants made that representation without the intention of giving the Plaintiff a deed to the one acre tract.

If you are so satisfied from the evidence, mark "Yes", otherwise mark "No".

[PLAINTIFF'S PROPOSED] INSTRUCTION NO. 7

You will find for the Plaintiff if you are satisfied from clear and convincing evidence as follows:

1. That when the Defendants agree and represented that the Plaintiff would have a life estate in the one acre tract in return for payment of the funeral expenses, they intended for her to rely on that agreement;

The circuit court specifically stated on the record that the parties had tendered instructions and to the extent those instructions differed from the court's instructions the parties had preserved those issues for appellate review. The circuit court declined to instruct the jury as to equitable estoppel. Its reasoning is not contained in the record.

The jury was given two interrogatories directed toward the issues of consideration and the genuineness of Gary's signature on the Agreement. Those interrogatories, with the jury's answers, were as follows:

INSTRUCTION NO. 2

> Do you believe from the evidence that the plaintiff, Carolyn Miles paid the funeral expenses of Luke Clark based upon an agreement that the plaintiff would be allowed to construct a residence on the land owned by the defendants?
>
> _____ YES _X_ NO

INSTRUCTION NO. 3

> Do you believe from the evidence that the defendant, Joseph Gary Clark, signed the Life Tenancy Agreement?
>
> _X_ YES _____ NO

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2. That the Plaintiff would not have paid the funeral expenses and constructed the home on the property if she had not in fact relied upon their agreement;
3. That the Defendants made that representation without the intention of deeding the Plaintiff a life estate in the one acre tract.

If you are so satisfied from the evidence, mark "Yes", otherwise mark "No".

In light of the jury's verdict, the circuit court held that, absent valid consideration, the Agreement was unenforceable. It dismissed Carolyn's breach of contract claim by judgment entered January 27, 2016. In that judgment, the circuit court included the following:

> The Court notes that, in the course of these proceedings, both of the Defendants testified, and acknowledged under oath, that it was never their intention to disturb the Plaintiff's occupancy and quiet enjoyment of the residence she constructed on the property in question, as long as the Plaintiff shall live.

(R. 195). Dianne and Gary, displeased with this language and fearful it would cloud title to their land, filed a CR[3] 59.05 motion to amend the judgment, requesting the circuit court remove its comment. The circuit court denied their motion. This appeal and cross-appeal followed.

In her direct appeal, Carolyn presents two arguments. First, she claims the circuit court erred by prohibiting testimony as to the costs Carolyn expended to construct the house. Second, she claims the circuit court erred in denying her tendered equitable estoppel instructions.

In their cross-appeal, Dianne and Gary argue that the circuit court's inclusion of extraneous language in its judgment was erroneous and the language should be stricken from the judgment.

STANDARDS OF REVIEW

[3] Kentucky Rules of Civil Procedure.

A trial court's decision as to relevancy of evidence under KRE[4] 401 is reviewed for an abuse of discretion. *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 395 (Ky. 2010). Likewise, when the question is whether a trial court erred by failing to give an instruction that was required by the evidence, the appropriate standard for appellate review is again whether the trial court abused its discretion. *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted).

ANALYSIS

A. Relevancy (KRS 401)

Carolyn argues the circuit court erred when it prohibited her from testifying about the substantial sums – in excess of $300,000.00 – she expended to construct her home on Dianne's and Gary's property. We agree.

The motion to exclude evidence was based on KRE 401 – relevance. The circuit court identified no other basis for prohibiting the introduction of that evidence. We agree with Carolyn's argument as to why this evidence is relevant, even while she was compelled to elect a remedy and the remedy she elected specific performance.

[4] Kentucky Rules of Evidence.

Carolyn fully admits that her election of the remedy of specific performance precluded the recovery of damages. She posits, however, that such election did not make the amount of money she invested in the construction of the house irrelevant, for it demonstrated that she would not have invested substantial sums constructing a house on land not owned by her, absent some promise or agreement to eventually obtain either title to the land or a life tenancy.

Subject to certain delineated exceptions, "[a]ll relevant evidence is admissible." KRE 402. Evidence is relevant if it has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. This evidence had a tendency to make the existence of a contract, or at least the existence of a promise to convey property to Carolyn, more probable.

Giving benefit of the doubt to the circuit court in its ruling, our best explanation for the ruling is the circuit court reasoned that the exact dollar amount of Carolyn's construction was irrelevant to the remedy she sought of specific performance. That is not enough.

We also cannot accept Dianne's and Gary's argument that the error is harmless under CR 61.01. The fact that Carolyn was permitted to introduce into evidence multiple photographs of the house has no bearing on the independent assessment of the relevancy of the evidence of her actual costs.

B. Equitable Estoppel

Carolyn also argues that the circuit court erred when it declined to instruct the jury as to the doctrine of equitable estoppel. She contends there was more than ample evidence presented at trial from which the jury could have found in her favor under this doctrine. We agree.

"The trial court must instruct the jury upon every theory reasonably supported by the evidence." *Sargent*, 467 S.W.3d at 203. "Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it." *Id.* (quoting *McAlpin v. Davis Const., Inc.*, 332 S.W.3d 741, 744 (Ky. App. 2011)).

While our courts have been criticized for continuing to embrace offensive promissory estoppel as a substitute for consideration,[5] we have yet to reject it. In 2009, our Supreme Court said:

> The doctrine of promissory estoppel provides as follows:
>
> > "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such

[5] "[C]ourts in Kentucky have recognized promissory estoppel as an independent cause of action. The theory of the action is that 'detrimental reliance becomes a substitute for consideration' in a variety of situations, including the employment context, when 'injustice can be avoided only by giving effect to the [gratuitous] promise.'" Susan Lorde Martin, *Kill the Monster: Promissory Estoppel As an Independent Cause of Action*, 7 Wm. & Mary Bus. L. Rev. 1, 13 (2016). The author, after conducting "[a] review of cases where courts have considered the doctrine of promissory estoppel" expressed concern that "contract rules may be dissolving into tort-type notions of unfairness and injustice." *Id.* at 3.

> action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."
>
> *Meade Constr. Co. v. Mansfield Commercial Elec., Inc.*, 579 S.W.2d 105, 106 (Ky.1979) (quoting Restatement (Second) of Contracts § 90 (Tentative Draft No. 2, 1965)).

Sawyer v. Mills, 295 S.W.3d 79, 89 (Ky. 2009).

Dianne and Gary contend equitable estoppel is not appropriate in this case because Carolyn failed to preserve it for appellate review. They specifically fault Carolyn for supposedly declining to tender a proposed jury instruction on the issue of equitable estoppel. But the record reveals Carolyn tendered two estoppel instructions for the circuit court's consideration. (R. 177-78). While not titled "equitable estoppel," the instructions identify the elements of an estoppel claim. Further, the circuit court acknowledged that, to the extent Carolyn's tendered instructions differed from the circuit court's instructions, she had properly preserved those arguments for appellate review. We see no preservation issue.

Dianne and Gary further argue that equitable estoppel is not appropriate because Carolyn failed to plead it as a ground for relief and failed to raise the issue by a motion or otherwise bring it to the attention of the circuit court. Again, the record indicates Carolyn did "affirmatively plead[] estoppel" in her

answer to Dianne and Gary's counterclaim. (R. 19). Further, Carolyn devoted a substantial portion of her trial brief to the issue of equitable estoppel. (R. 164-66).

We are mindful that Kentucky follows a "liberal construction rule," meaning that pleadings are "judged according to [their] substance rather than [their] label or form." *McCollum v. Garrett*, 880 S.W.2d 530, 533 (Ky. 1994). Furthermore, CR 8.06 emphasizes that: "All pleadings shall be so construed as to do substantial justice." Considering our liberal construction rule and Carolyn's post-complaint filings, including her trial brief and proposed jury instructions, we construe Carolyn's pleadings as sufficiently identifying equitable estoppel as a defensive claim.

Finally, Dianne and Gary argue equitable estoppel is not available because it is simply not supported by the evidence. They claim the first element – a false representation or concealment of material facts – is lacking because there was simply no misrepresentation by either Dianne or Gary that they would convey anything to Carolyn in exchange of her payment of Luke's funeral bill. We are not persuaded.

First, this case does not present the same concern as *Sawyer*, *supra*, whether estoppel can defeat the statute of frauds.[6] That is not an issue here because Dianne acknowledged her signature on a writing expressing the promise

[6] "[I]t is not clear that under Kentucky law promissory estoppel can defeat the Statute of Frauds." *Sawyer*, 295 S.W.3d at 89.

and the jury found Gary had also signed the document despite his protestations to the contrary.

Second, the circuit court was obligated to instruct on every theory of the case if there is evidence to support it. *Sargent*, 467 S.W.3d at 203. The jury could infer from the evidence offered by Carolyn at trial that Dianne and Gary materially misrepresented that they would convey a one-acre tract, whether in fee simple or in life tenancy, to Carolyn, knowing Carolyn would rely upon that representation in constructing a residence on the land, all the while knowing they never intended to actually provide such a deed.

Again, our Supreme Court recently said:

> [t]he doctrine of equitable estoppel extends to real estate, as well as to personal estate, and is founded on the principle that a person who has induced another to believe and act in a certain manner will not afterwards be allowed to injure or prejudice the rights of such other person, because of the acts done under the belief that they were agreed to. The doctrine of equitable estoppel is applied to transactions where it is found that it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit.

Smith v. Williams, 396 S.W.3d 296, 300 (Ky. 2012) (quoting *Young v. Venters*, 18 S.W.2d 277, 278 (Ky. 1929)). Based on the record, there was evidence from which a jury could have found in Carolyn's favor on her claim of equitable (promissory) estoppel.

The circuit court abused its discretion when it declined to instruct the jury on the doctrine of equitable estoppel. Accordingly, we reverse the judgment in this case and remand for a new trial in which the jury is properly instructed on all claims supported by the evidence, including equitable estoppel.

C. Cross-Appeal

As previously stated, our decision on review of the appeal brought by Carolyn renders consideration of Dianne's and Gary's cross-appeal moot. We will dispense with that cross-appeal by separate, contemporaneous order.

CONCLUSION

In the direct appeal, Appeal No. 2016-CA-000224-MR, we reverse the circuit court's January 27, 2016 judgment and remand for a new trial in accordance with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:	BRIEF FOR APPELLEES/CROSS-APPELLANTS:
Michael E. Coen Bardstown, Kentucky	Joseph H. Mattingly III Lebanon, Kentucky