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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000447-MR

JEFFREY MARK NEUBAUER APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TRACI BRISLIN, JUDGE
ACTION NO. 15-CI-03886

KAREN MARIE NEUBAUER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

DIXON, JUDGE: Jeffrey Neubauer ("Jeff") appeals from the Fayette Circuit Family Court's November 21, 2017, order following Karen Neubauer's motion concerning certain personal property, and the court's February 13, 2018, order denying the parties' motions to alter, amend, or vacate this order. Finding no error, we affirm.

From approximately 2005 until 2015, Jeff was the head basketball coach for Eastern Kentucky University, where Karen was also employed. In 2015, Jeff became the head basketball coach at Fordham University in New York. The parties planned to sell their large marital residence in Madison County, Kentucky, and move to a much smaller apartment in New York together. In preparation for this move, the parties sold most of their home furnishings in a yard sale. Karen moved to Lexington to continue working and prepare the home for sale. Karen hired realtor Amanda Marcum to assist in the sale of the house. After Jeff relocated to New York, but prior to Karen joining him full-time, Jeff met another woman and informed Karen that the other woman was his soul mate. Jeff asked for a divorce via FaceTime and Karen subsequently filed the petition for dissolution of marriage in the fall of 2015.

The parties mediated a final settlement in March 2016. Jeff was given possession of the parties' marital residence at that time. Both parties noted there were still possessions in the house that each of them wanted and provided in their agreement that each party could retrieve certain personal belongings from the marital residence. However, when Jeff arrived at the house to retrieve the possessions he desired—including photographs of his teams, rings from his prior teams, baseball cards, and some coins—he discovered these items were either destroyed, not where he expected to find them, or missing.

The parties' divorce was made final in May 2016. In the fall of 2016, Karen began reaching out to Jeff, the realtor she had hired, her counsel, and Jeff's counsel through her counsel to retrieve her remaining possessions from the parties' marital residence. Karen made a list, which was revised a few times, concerning the gist of the items she intended to retrieve from the house prior to it being cleaned out for sale. Unbeknownst to Karen, Jeff fired realtor Amanda Marcum and hired a new realtor, Helen Fardo. He also engaged a friend of his, Amanda Bennett, to remove and dispose of the remaining items in the house. Meanwhile, Karen was still arranging to retrieve her items from the house. On October 25, 2016, Jeff's counsel emailed Karen's counsel that the house had been sold and Karen needed to sign a quitclaim deed for the closing. Karen was also informed that no items were in the house.

In March 2017, Karen filed a motion for return of, or compensation for, her missing personal property that was left in the house, which she was unable to retrieve, and requested attorney's fees for having to file same. She listed numerous items and assigned them values that she recalled paying, or approximate replacement costs based on internet searches. Her motion was heard on October 12, 2017. Karen testified on her own behalf. Jeff was represented by counsel but did not attend; rather, he submitted his deposition testimony and called two

witnesses to testify on his behalf: realtor Fardo and Bennett, the person who "cleaned out" the house.

Karen testified regarding her strategy for removing items from the house and the items she left behind when she lost access to the house, which included items that were either too large to move—such as the treadmill, bar stools, Jager machine, and the like—or breakable, such as the china and crystal. She also submitted photographs depicting many items from the list in her motion. She testified that the items not depicted in the photographs were either behind the closed doors of cabinets or in the small pile of items set aside in the corner of the three-car garage. Karen testified that she had not been in the house since before mediation.

Jeff testified that the last time he was in the house was the night following the parties' mediation. He acknowledged that there were items in the house at that time, although he asserted that he believed all the items of any value, or that either he or Karen wanted, were removed from the house. He could not recall whether any of the items Karen listed in her motion were in the house.

Bennett testified Jeff contacted her to remove items from the house in early August. She claimed that he later requested she postpone her "cleaning" for a couple of weeks to give Karen an opportunity to remove any additional items. Bennett said she removed items in September, including the scooter—which she

later returned to Karen—formal dresses, the treadmill, televisions, two barstools, and the grill, which she sold for a total of $400, and a box of shoes, ten to twelve plates, and a few other things which she claimed she donated to the Salvation Army and Goodwill. Bennett said the place was a mess and she saw broken glass from picture frames in the office, which she did not clean up. She also saw a desk, but it was too large to move, so she left it behind as well. Bennett admitted she did no cleaning per se but, instead, only removed items from the house to sell or donate. Bennett claimed that there was not much left in the house at the time and that there was "nothing good left." Bennett testified she saw neither china nor crystal in the house.

Fardo testified that she first visited the house in September 2016. At that time, she recalled seeing the scooter and a "small" pile of boxes in the corner of the three-car garage but testified that she paid them no attention as she was concerned with selling the house and not its contents. Fardo recalled that the house was dirty beyond just dust; the kitchen counters were sticky, and the washing machine had a liquid substance on it. Fardo was present when a professional came to clean the house. Fardo testified that she saw no crystal, china, glassware or stemware.

On November 21, 2017, the trial court issued its order awarding Karen a partial amount of what she requested. Both parties filed motions to alter,

amend, or vacate the judgment. Karen petitioned the trial court to rule on her request for attorney's fees, and the trial court did so, denying her request. Jeff argued that Karen had not met her burden of proof and the trial court erred in extrapolating testimony and evidence without a sufficient reliable basis. The trial court also denied Jeff's motion. Jeff now appeals, asserting the trial court erred in improperly extrapolating evidence to award Karen compensation for certain personal property.

The standard of an appellate court's review of a trial court's findings of fact is well-settled.

> The trial court heard the evidence and saw the witnesses. It is in a better position than the appellate court to evaluate the situation. *Gates v. Gates*, [412 S.W.2d 223 (Ky. 1967)]; *McCormick v. Lewis*, [328 S.W.2d 415 (Ky. 1959)]. **The court below made findings of fact which may be set aside only if clearly erroneous**. *Hall v. Hall*, [386 S.W.2d 448 (Ky. 1964)]; CR 52.01, 7 Kentucky Practice, Clay 103. We do not find that they are. They are not 'manifestly against the weight of evidence.' *Ingram v. Ingram*, [385 S.W.2d 69 (Ky. 1964)]; *Craddock v. Kaiser*, 280 Ky. 577, 133 S.W.2d 916 [(1939)]. A reversal may not be predicated on mere doubt as to the correctness of the decision. *Buckner v. Buckner*, 295 Ky. 410, 174 S.W.2d 695 [(1943)]. **When the evidence is conflicting, as here, we cannot and will not substitute our decision for the judgment of the chancellor.** *Gates v. Gates*, supra; *Renfro v. Renfro*, [291 S.W.2d 46 (Ky. 1956)].

Wells v. Wells, 412 S.W.2d 568, 571 (Ky. 1967) (emphasis added). In the case at hand, similar to the question presented in *Wells*, "[w]e do not doubt that the [trial

court] was correct, however, we recognize the very close question which was presented." *Id.*

> And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (internal footnotes omitted). Accordingly, the crux of this case is whether the trial court's findings of fact are supported by substantial evidence. On careful review, we hold that the trial court's findings are supported by substantial evidence. Therefore, we must affirm.

Jeff's argument consists of only tenuous theories with little or no application of the facts to any legal precedence. We will not search the record to construct Jeff's argument for him, nor will we go on a fishing expedition to find support for his underdeveloped arguments. "Even when briefs have been filed, a

reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). Nevertheless, for the reasons discussed below, we discern no error in the trial court's finding that Karen was truthful in her testimony as to the items which were left behind in the house that were rightfully hers and of which she was effectively deprived.

First, we turn to the evidence that supports the trial court's findings. The trial court relied on Karen's testimony and exhibits, including pictures of specific items—such as the photograph of protective china storage bags appearing to have something in them, reasonably thought to be the china Karen never received—to ascertain what items were left in the house, as well as the testimony of Jeff, Fardo, and Bennett that there were, in fact, items in the house after Karen lost access to it. Both Fardo and Bennett recalled seeing in the house some of the items listed in Karen's motion. Although Jeff saw things in the house, he could not recall with any specificity what those items were or were not. Fardo recalled seeing the scooter and a pile of items in the garage but admitted she did not pay them any attention; therefore, she could not say what they were or were not. Although Fardo testified she did not see any china or crystal, no definitive proof was presented that she opened every cabinet and/or box and there was, in fact, no china or crystal in the house when she visited it. Likewise, Bennett's testimony

did not conclusively prove there was no china or crystal in the house. Bennett was vague, evasive, and defensive, and clearly downplayed the contents of the house and their worth.

Although Karen did not photographically catalog every remaining item in the house—an unreasonable requirement that need not be imposed—her testimony and exhibits, bolstered by the testimony of Jeff and his witnesses, were sufficient to meet her burden regarding the presence of the items remaining in the house. Jeff, on the other hand, did not provide sufficiently overwhelming counter-evidence to compel either the trial court or our court to hold that the items Karen claimed were in the house when she lost possession were not.

Jeff further argues that Karen should have been afforded no credibility because she lied in prior sworn proceedings and lied in the very hearing on her motion, and therefore, everything she said was a lie or unreliable at best. Jeff ignores the fact that it is solely within the trial court's province to determine the credibility of witnesses. The trial court, as the finder of fact, has the responsibility to judge the credibility of all testimony and may choose to believe or disbelieve any part of the evidence presented to it. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Therefore, and contrary to Jeff's argument, the trial court's admission it knew Karen lied about certain things is a non sequitur to

finding Karen lied about everything. The trial court did not clearly err in finding Karen's testimony credible.

While the instant case is not exactly on all fours with the maxim of "unclean hands," we find examination of this principle instructive.

> Under the "unclean hands doctrine," a party is precluded from judicial relief if that party "engaged in fraudulent, illegal, or unconscionable conduct" in connection "with the matter in litigation." *Suter v. Mazyck*, 226 S.W.3d 837, 843 (Ky. App. 2007). "In a long and unbroken line of cases this court has refused relief to one, who has created by his fraudulent acts the situation from which he asks to be extricated." *Asher v. Asher*, 278 Ky. 802, 129 S.W.2d 552, 553 (1939). A trial courts [sic] decision to invoke the equitable defense of the unclean hands doctrine rests within its sound discretion. *See Petroleum Exploration v. Pub. Serv. Comm'n of Kentucky*, 304 U.S. 209, 218, 58 S.Ct. 834, 82 L.Ed. 1294 (1938). The doctrine will not be applied to all misconduct, as when "the plaintiff has engaged in conduct less offensive than that of the defendant." *Suter*, 226 S.W.3d at 843.

Mullins v. Picklesimer, 317 S.W.3d 569, 577 (Ky. 2010). Though the operation of the maxim of "unclean hands" is broad, "there is a reasonable limitation, and the principle is not applicable to all misconduct or to every act smacking of inequity or deceit in relation to the matter in which relief is sought." *Parris' Adm'r v. John W. Manning & Sons*, 284 Ky. 225, 144 S.W.2d 490, 492 (1940). "The doctrine does not repel all sinners from a court of equity[.]" *Id.*

In this case, the trial court made two lists, one with items and corresponding values to be awarded to Karen and the second with items it deemed

sentimental for which Karen was to receive no compensation. Concerning its decision not to award compensation for items on the second list, the trial court concluded:

> While the Court believes that these items were in the residence and that Karen would otherwise be entitled to retrieve them, the Court will not award the value of these belongings. These items were sentimental items to Karen and Jeff would certainly not be desirous of receiving most of these things. However, Jeff also had sentimental items that were previously ordered by this Court to be returned to him. These include, among other things, his championships rings, gold coin, contents of a small safe, and a baseball card collection.
>
> The Court heard testimony regarding Jeff's sentimental items. Karen testified that she had originally broken a picture frame and taken most of the items listed above, felt guilty, and then allegedly returned them to the marital residence in a box that she claimed to place in the garage with other belongings. Jeff could not locate the box (if ever it were even returned to the garage, as Karen claimed) and thus was unable to retrieve items that were sentimental in nature to him. The items were never returned to Jeff's physical possession. While the Court recognizes the almost impossible nature of placing a value on Jeff's sentimental items, it cannot be disputed that some of them (including his valuable baseball card collection and championship rings) were priceless to Jeff. The Court believes that giving Karen the monetary value of the above list would unjustly compensate her for sentimental items she wanted whenever Jeff was not able to locate or retrieve the sentimental items that were important to him. The Court believes that Jeff was deprived of these items by Karen's actions.

Such findings were well within the trial court's discretion and, as such, shall not be disturbed.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Elizabeth A. Hill Lexington, Kentucky	Crystal L. Osborne Jill M. Briscoe Lexington, Kentucky