

RENDERED: SEPTEMBER 30, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000937-MR
AND
NO. 2004-CA-000990-MR

DAVID R. HARROD

APPELLANT/CROSS-APPELLEE

APPEAL & CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROBERT B. OVERSTREET, SPECIAL JUDGE
ACTION NO. 96-CI-01651

BUTLER & ASSOCIATES, P.S.C.

APPELLEE/CROSS-APPELLANT

OPINION AND ORDER

(1) REVERSING AND REMANDING APPEAL NO. 2004-CA-000937-MR

(2) DISMISSING AS MOOT CROSS-APPEAL NO. 2004-CA-000990-MR

** ** *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: David R. Harrod brings this appeal from a
December 31, 2003, judgment of the Franklin Circuit Court.

Butler & Associates, P.S.C. (PSC) brings Cross-Appeal No. 2004-
CA-000990-MR from the same December 31, 2003, judgment. We

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

reverse and remand Appeal No. 2004-CA-000937-MR and dismiss as moot Cross-Appeal No. 2004-CA-000990-MR.

Harrod is an accountant who was employed by PSC or its predecessor from 1984 to 1989. In 1989, Harrod acquired an ownership interest in PSC and further executed an employment contract with PSC. The 1989 employment contract contained a covenant not to compete as pertains to the clients of PSC. The "client list protection" provision of the 1989 contract provided that in the event of Harrod's termination of employment or transfer of his ownership interest in PSC, he would not perform any accounting services for clients of PSC for a period of three years from the date that his employment or ownership interest in PSC terminated.

In 1990, Harrod sold his interest in PSC to Harold Butler,² the majority owner of PSC and further executed a new employment contract with PSC dated October 1, 1990. The 1990 employment contract also contained a covenant not to compete as pertains to the clients of PSC. The language in this covenant was similar to the 1989 contract covenant, except for the language regarding the term of the covenant. The new contract provided that Harrod would not perform accounting services for clients of PSC for a period of three years from the date of execution of the contract.

² Harold Butler died while this litigation was pending and his deposition had not been taken prior to his death.

On November 15, 1995, more than five years after the execution of the 1990 employment contract, Harrod terminated his employment with PSC. Harrod took the position that the covenant not to compete as pertains to the clients of PSC had expired during the term of the contract on or about October 1, 1993.

In November 1996, PSC filed a complaint in the Franklin Circuit Court seeking reformation of the 1990 employment contract between Harrod and PSC, as it pertained to the client list protection provision of the covenant of PSC upon the basis of mutual mistake. The matter was heard by the court without a jury, and on December 31, 2003, the court entered its findings of fact, conclusions of law and judgment in favor of PSC. Therein, the court found that there was a mutual mistake in the 1990 employment contract, thus entitling PSC to the reformation of the contract. Specifically, the court concluded:

That there was [a] mutual mistake as aforesaid in the wording of the client list protection provision contained in the October 1, 1990, employment contract with Harrod in that "from the date of this contract" was incorrectly substituted for "from the date employment terminates",[sic] and said employment contract client list protection provision is reformed to provide in said provision "from the date employment terminates" instead of "from the date of this contract."

That the plaintiff is entitled to reformation as demanded in the complaint and enforcement of the October 1, 1990, employment contract with Harrod as reformed,

and thereby entitled to recover of Harrod the sum of \$159,825 for the clients taken by Harrod with him upon his termination, and appropriate prejudgment and post judgment interest thereon and costs.

These appeals follow.

Appeal No. 2004-CA-000937-MR

Harrod contends the circuit court committed reversible error by considering affidavits as substantive evidence at trial. We agree and further conclude the trial court committed additional errors in these proceedings that warrant reversal of the judgment.

PSC requested a trial by jury in its complaint. In April 2003, PSC filed a motion to set the case for jury trial. By order entered September 22, 2003, the trial court scheduled the case for a jury trial on November 17, 18, and 19, 2003. On October 16, 2003, Harrod filed a motion to strike PSC's jury trial demand. Additionally, on October 29, 2003, Harrod filed a *motion in limine* specifically seeking to exclude all parole evidence, including the affidavit of Harold Butler.³ Although a hearing was scheduled on Harrod's *motion in limine* prior to trial, this Court can find no record that the hearing occurred or that a ruling was ever made on the motion. Additionally, it

³ Harold Butler's affidavit was filed of record on October 1, 1997, as an exhibit to PSC's response to Harrod's motion for summary judgment, which was subsequently denied. Butler's affidavit was dated October 1, 1997.

appears from the transcript of the trial conducted on November 17, 2003, that the court did conduct a pretrial hearing whereupon the court concluded that the action would be tried by the court without a jury. On November 19, 2003, the court entered an order dated November 17, 2003, providing the case would be tried by the court without a jury. The order further contained language that the parties had agreed the case would be submitted to the court based "upon the pleadings, affidavits and depositions" filed in the court record. However, Harrod refused to sign this order and further stated his objection to consideration by the court of any affidavit of any party or person during the court trial on November 17, 2003.

At trial, each counsel presented oral argument summarizing their respective positions and the court further heard testimony from Harrod. The trial court subsequently entered findings of fact, conclusions of law, and judgment on December 31, 2003, which was corrected by order entered January 9, 2004.

Trials in Kentucky are governed by Ky. R. Civ. P. (CR) 38 and CR 39. CR 38.01 provides for jury trials as a matter of right that are preserved by Section 7 of the Kentucky Constitution or as may be provided for by applicable statute. CR 39.01 provides that a trial shall be conducted by a jury where so demanded unless the parties stipulate otherwise and

consent to a trial by the court sitting without a jury or unless the court on its own initiative finds that a right of trial by jury does not exist under the constitution or Kentucky statutes. In this case, we cannot determine from the record whether the parties consented to a trial by the court or whether the court concluded that the issues raised by PSC did not warrant a jury trial.⁴ Nonetheless, the court conducted a trial without a jury, and our review is limited thereto.

The form of evidence in all trials is governed by CR 43.04 which reads, in relevant part, as follows:

(1) Form of evidence. In all trials concerning alimony or divorce; the enforcement of a lien or the satisfaction of a judgment; judicial sale; surcharge or accounting; settlement of estates; the division of land; or the allotment of dower, the testimony shall be taken by deposition, unless the court by order or by local rule directs the testimony to be heard under oath and orally in open court. In all other trials the testimony of witnesses shall be heard under oath and orally in open court, unless otherwise provided by these rules or by statute, except that the court may upon motion or upon its own initiative, and with due regard to the importance of presenting the testimony of witnesses orally in open court, order the testimony to be taken by deposition upon any issue which is to be tried by the court without a jury.

The rule is clear that in all trials, other than certain equitable actions specifically listed therein, the testimony of

⁴ At oral argument, counsel for both parties acknowledged that the trial court conducted a pretrial conference prior to November 17, 2003, and ruled that the case would be tried without a jury.

witnesses shall be heard under oath and orally in open court. However, the rule does provide an exception in cases which are tried by the court without a jury; whereupon, the court may order the testimony to be taken by deposition. In other words, in any action tried before the court, the testimony of witnesses must be presented under oath and orally in open court or by deposition. No provision is made for the consideration of affidavits as evidence.

In this case, the trial court tried the action without a jury under CR 43.04. In accordance with CR 52.01, the court made findings of fact and conclusions of law. The trial court's judgment specifically stated the court had considered affidavits in reaching its decision. Harrod points out that these affidavits were necessarily used by the trial court in reaching its findings of fact in paragraphs 6, 7, 8, 10, and 11 of the judgment. Harrod also points out that at trial PSC relied solely upon the affidavits of Harold Butler, president and majority shareholder of PSC, and of Samuel Bryant, an employee of PSC.

It is well-established that an affidavit may not be used as substantive evidence at a trial. Commonwealth v. Clark, 225 S.W.2d 118 (Ky. 1949); Markendorf v. Friedman, 133 S.W.2d 516 (Ky. 1939); Cloud v. Middleton, 44 S.W.2d 559 (Ky. 1931); Tunks v. Vincent, 44 S.W.2d 282 (Ky. 1931). An affidavit is

generally inadmissible during trial “because it is not subject to cross examination and would improperly shift the burden of proof to the adverse party.” 3 Am. Jur. 2d Affidavit § 19 (2002). In the case *sub judice*, we are compelled to hold that the admission of the affidavits as substantive evidence constituted reversible error by the trial court. Additionally, we note that the trial court failed to conduct the trial in conformance with CR 43.04, which also constitutes reversible error.

Harrod also urges this court to consider the remaining competent evidence and conclude that the trial court’s finding of mutual mistake was clearly erroneous. We decline to address the merits at this time; rather, this cause is remanded to the trial court for a new trial in accordance with CR 43.04 and CR 52.01, without consideration of affidavits as substantive evidence.

Cross-Appeal No. 2004-CA-000990-MR

PSC argues the trial court committed error by failing to award prejudgment interest. As we have reversed the judgment, we consider this issue moot.

The Court hereby ORDERS Cross Appeal No. 2004-CA-000990-MR DISMISSED as moot.

For the foregoing reasons, Appeal No. 2004-CA-000937-MR is reversed and this cause is remanded with directions for the trial court to conduct a new trial in accordance with CR 43.04 and CR 52.01; Cross-Appeal No. 2004-CA-000990-MR is dismissed.

ALL CONCUR.

ENTERED: September 30, 2005

/s/ Jeff S. Taylor
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT/CROSS-
APPELLEE:

J. Guthrie True
Richard M. Guarnieri
Johnson, True & Guarnieri, LLP
Frankfort, Kentucky

ORAL ARGUMENT FOR
APPELLANT/CROSS APPELLEE:

J. Guthrie True
Johnson, True & Guarnieri, LLP
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE/CROSS-APPELLANT:

Ronald G. Polly
Polly & Smallwood
Whitesburg, Kentucky