

RENDERED: APRIL 14, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001035-MR

JAMES RICKETT; AND
PAUL RICKETT

APPELLANTS

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 94-CI-00696

DANNY RICKETT

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: James Rickett and Paul Rickett have appealed from the final judgment of the Whitley Circuit Court entered on October 30, 2002, which dissolved their partnerships with Danny Rickett and valued and divided certain property among them. Having concluded that the trial court did not abuse its discretion, we affirm.

James, Paul, and Danny are brothers and were

involved in two partnerships that are the subject of this case. James, Paul, and Danny were in a cattle partnership.¹ James and Danny were in an equipment partnership. While Paul was not involved in the equipment partnership, the trial court awarded two pieces of equipment to James and Paul jointly and in equal shares. Both partnerships were oral partnerships.

The cattle partnership was formed in 1992. Prior to 1992, James owned approximately 20 cattle in his individual name, and Danny owned approximately 20 cattle in his individual name. At this time, James and Danny were also partners in an operation which included approximately 20 cattle. In 1992 when Paul became a partner with James and Danny, he purchased enough cattle² to equal the cattle owned at that time by James and Danny. The cattle were held at two locations. Some of the cattle were on Danny's farm, and some were located on rented pasture land in two spots at Meadow Creek.

It is uncontested that James and Danny owned equipment in a partnership, but specifically what equipment is in question.³ Both James⁴ and Danny claimed to own equipment

¹ James and Paul also owned approximately 15 to 20 head of cattle together.

² It is unknown whether Paul purchased cattle equivalent in value or an equal number of head.

³ Paul testified that he was not part of the equipment partnership with James and Danny, but owned equipment individually that was used in the partnership. In Schedule C of the complaint, James acknowledged a list of equipment that he owned jointly with Danny including the following: 230 Massey Ferguson tractor, three-point hitch hay rake, Massey Ferguson square hay baler, bush

individually that was used in the partnership. It was contested whether the three brothers owned two pieces of equipment in equal shares, namely a Supreme Gooseneck flatbed trailer and a 6610 Ford tractor. James and Paul claimed that these two items were Paul's individual property. James and Paul also claimed that some of his individual equipment was used in the partnership and was still on Danny's property.⁵

In 1993 James and Paul asked Danny to dissolve the partnership. According to Danny, James and Paul wanted to sell everything. Danny, however, wanted to keep the cows that he had originally put in the partnership. In November 1993 the three brothers got in a heated argument⁶ over the division of the partnership cattle.

Subsequently, James and Paul filed a complaint in the

hog, two home-made corn wagons, 255 Massey Ferguson tractor, Ford corn planter, home-made back lift boom, set of lever type harrows, and a scissor-type round hay spear.

⁴ In Schedule A of James and Paul's complaint, James lists as his individual property the following: Caterpillar D-3 dozer, 540 Heston round hay baler, set of double plows, 240 Massey Ferguson tractor, set of disc hares, bush hog, corn sprayer, round hay feeder, three trailer axles, two tongues, two cast iron bath tubs, four trailer tires and rims, 2x6 oak boards, electric fence post, four 15 inch truck tires and rims, welded metal frame window cover used to hem cattle, livestock watering faucet, 16 foot metal pipe gate, and 8 foot metal slab gate.

⁵ Besides the flatbed trailer and tractor which were in dispute, Paul listed in Schedule B of the complaint certain property located on Danny's land that he individually owned, including the following: several 55 gallon barrels of hydraulic oil, several rolls of conveyor belt, and a four-foot long piece of steel.

⁶ James and Paul claimed that while they were on Danny's property to divide the partnership cattle, Danny's wife shot at them with a gun.

Whitley Circuit Court on November 18, 1994, to dissolve the partnership, to render an accounting of the partnership assets, and to divide the assets or to distribute the proceeds of any sale of the assets.⁷ They also asked to be restored to their individual property, some of which they claimed was in Danny's possession. James and Paul claimed that Danny had refused to divide the cattle and to divide or to allow any use of the partnership equipment. An injunction was issued against Danny on November 21, 1994, to prevent him from selling any of the cattle or equipment that was considered partnership property. Danny filed an answer and counterclaim on January 21, 1994, requesting a dissolution of the two partnerships, an accounting and liquidation of the partnership assets, and reimbursement for partnership expenses.

On June 21, 1995, this matter was assigned to the Whitley County Master Commissioner, Larry Conley, and hearings were held before Commissioner Conley on October 25, 1995, March 13, 1996, May 30, 1996, July 11, 1996, and August 29, 1996.⁸ All five hearings were transcribed and filed of record, but none of the tendered exhibits was filed with any of the transcripts.

⁷ Prior to that time, 23 head of cattle had been sold.

⁸ During the taking of testimony, Danny's attorney was appointed as a Magistrate Judge for the United States District Court for the Eastern District of Kentucky. Danny hired a new attorney who was given ample time to review the record after rebuttal was complete.

The brothers did not keep specific records of purchases made and cattle kept or sold. Further, there was testimony that they commonly conducted business in cash. Testimony indicated that some of the partnership cattle had calves, that some of the cows and some of the calves were sold, and that some of the cows and some of the calves had died, but no accurate count of increase or decrease in cattle was ever kept. In fact, the three brothers could not agree on how many cattle belonged to the partnership in November 1993 when the partnership problems arose.⁹

All three brothers testified at the hearings.¹⁰ Both James and Paul testified that the partnerships split up because Danny did not pay his part for cattle purchased in the partnership or for the feed for the partnership cattle. They also asserted that Danny used the partnership feed for cattle and horses that he owned outside the partnership. However, they acknowledged that Danny had fed the partnership cattle for the two years after the case was filed. James testified that there was enough hay at Danny's farm to feed the cattle during 1993 and part of 1994. Danny testified that he had spent \$9,000.00 in feeding the partnership cattle over the two years prior to

⁹ James and Paul claimed there were over 100 partnership cattle at this time, while Danny claimed there were only 55 to 60 head remaining.

¹⁰ James's bookkeeper, Ms. Goins, also testified. She is not identified by her first name in the record.

the hearing; however, he had no receipts to support this testimony.

Paul testified that since 1993 Danny had sold partnership cattle without their permission. Danny testified that he had sold one cow and two calves belonging to the partnership prior to November 1993, in order to pay for the pasture expenses. He further testified that James and Paul had refused to pay any of the expenses. The parties agreed that they had divided 14 of the partnership cattle that were located on one portion of the land at Meadow Creek and that ten partnership cattle had been sold.

Danny testified that the last time he counted the cattle prior to the dispute was in the winter of 1992, at which time he believed there were probably 80 to 85 cows and calves. Paul testified that during November 1993, when the disagreement among them occurred, the three brothers had attempted to roundup all the partnership cattle on Danny's property and there were probably 60 to 70 head. Danny testified that between November 1993 and November 21, 1994, the date of the restraining order, he probably made four or five trips to market and sold approximately eight cows each time.

At the time of the hearings in 1995 and 1996, Danny testified that there were probably 40 cows and calves on his land and six cows and seven or eight calves located at Meadow

Creek. He also testified that some partnership cattle had been moved by James and Paul to an unknown location and he was unaware of the number of head.

While Danny testified that the original number of partnership cattle was 55 to 60 head, James testified to a much larger number. He claimed that the original partnership between Danny and him started with 60 to 70 head of cattle, eight of which Danny contributed. He testified that Danny had agreed to pay him for an interest in the cattle that James purchased, but he never did. James testified that on the date of the incident in November 1993, there were 65 to 70 brood cows on Danny's land and 20 head located at Meadow Creek. At this time, the three brothers had already divided 14 head located at Meadow Creek. There were also 30 calves at the two locations, for a total of 130 head. James testified that the three brothers put hay and corn on Danny's farm, but Danny never paid for any of it. James also acknowledged that Danny had sold some cattle and that Danny was holding proceed checks for Paul and him, but James did not know the amounts.¹¹

¹¹ The highest number of partnership cattle testified to indicates that the partnership owned over 100 cows and 30 calves. Commissioner Conley stated his findings regarding the total number of partnership cattle as follows:

The parties attempted to divide the cattle at one point and managed to divide 14 head. In addition Danny had sold about 10 head out of the group the parties had tried to divide. If the 130 head figure is correct for the highest number of partnership cattle then after that division there would have

Danny testified that James had certain individual property used by the partnership, including a 240 Massey Ferguson tractor, disk tires, and a green bush hog. Danny testified that prior to filing suit, James approached him with an agreement proposal as to the partnership equipment. Under the agreement, James would receive the following equipment: 120 square hay baler, 501 Ford mower, Ford corn sprayer, bush hog, and \$100.00.¹² Under the agreement, Danny would receive the following equipment: a 230 Massey Ferguson tractor, three-point

remained 106 head of partnership cattle. In November of 1994 the parties rounded up the partnership cattle and had 60-70 head or over 90 head depending upon whose testimony is accepted. If the higher figure (90 head) is accepted then the partnership, at the time of the roundup, would have had about the same number of cattle as when it began with the 14 head the parties tried to divide and the 10 head sold by Danny representing the net increase in the herd. If the lower number is accepted the Court notes that the lower number (67) plus the 24 head the parties divided or sold yields a total of 91 which is almost exactly the number of cattle the partnership started with. The discrepancy between the two sets of numbers (90-58) is 32. Based upon the testimony the Court finds that no accounting for the cattle can be more accurate than plus or minus 16 head. Danny Rickett admitted during his testimony on October 25th of 1995 that he had 40 plus head of partnership cattle on his farm plus 6 cows and 3 or 4 calves on [M]eadow [C]reek farm for a total of 53 head of partnership cattle. Fifty-three head of cattle compared with the 58-67 head Danny testified to as the number of cattle rounded up in November of 1994 yields a difference of 5 to 14 head. If the figure of 90 head is accepted as the number of cattle rounded up by the parties and 16 head is subtracted from that the result is 74 head which is within 7 head of the 67 head testified to by Danny. Thus the testimony of each side is within the 16 head margin of error.

¹² Danny testified that Paul was to pay James the \$100.00 because Paul owed Danny \$100.00 as result of the cattle split.

hitch hay rake, disc harrows, and a Ford corn planter. Danny testified that the equipment was exchanged, without transfer of title or receipts. James testified that the agreement between Danny and him regarding the division of partnership equipment never took place. He acknowledged that he had in his possession the items that Danny claimed he received, but he testified that he took the items to prevent a confrontation and that the 501 Ford mower was his individual property, inherited from his father. Paul claimed that he solely owned the flatbed trailer and the cattle trailer that are listed in the trial court's order as to be equally divided between James and Paul. Danny testified that he borrowed money from the Bank of Williamsburg and paid one-third of the cost of both items when they were purchased.

At the time James and Paul filed suit, Danny was in possession of three checks issued by London Farmers Livestock Market in the amount of \$2,325.36, representing two-thirds of the proceeds from the sale of partnership cattle that Danny had previously sold. On March 27, 1996, the parties entered an agreed order stating that these checks were to be combined into one check and reissued to the Clerk of the Whitley Circuit Court. The check was then placed in an interest bearing account on April 4, 1996. On June 7, 1996, another check from Danny's sale of partnership cattle, in the amount of \$7,526.83, was

placed into escrow. On August 6, 1996, the trial court entered an order restraining the parties from selling any additional cattle until the entire case was settled. On September 13, 1996, Danny was ordered to escrow his one-third of the proceeds from the first sale of cattle. If he did not do so, James and Paul were entitled to receive the sum already in escrow, plus interest. On September 30, 1996, the clerk issued a check to James and Paul for \$2,355.70.¹³ On October 1, 1996, Danny filed a motion to correct the September 30, 1996, order, stating that James and Paul sold disputed cattle on September 24, 1996, and that such funds were not escrowed. James and Paul filed a response on October 4, 1996, but the record does not indicate that the trial court ruled on Danny's motion.

On September 17, 1996, James and Paul filed an affidavit stating specifically which partnership cattle they believed were unaccounted for and listing particular cattle they claimed to own individually. In response to this affidavit, Danny filed his affidavit on September 18, 1996, regarding the disposition by him of certain cattle, the death of certain cattle, and the location of certain cattle. On February 6, 1997, James and Paul filed a motion for contempt stating that certain partnership equipment that had been previously ordered

¹³ The order also allowed James and Paul to sell certain cattle they claimed were their own cattle, and Danny was allowed to object at the sale, in good faith, if he believed any head was partnership cattle.

to be placed in plain view was missing. On February 14, 1997, the trial court remanded the matter back to Commissioner Conley for a recommendation. On March 3, 1997, Danny submitted a memorandum to the trial court that outlined various expenses, equipment, land, cattle, machinery, attorney's fees, and court costs. Part III of the memorandum stated as follows:

As testified to at the hearings, Gatliff Coal Company wanted two tracts of land from the parties, one from James Rickett and one from Danny Rickett. The Plaintiff, James Rickett, and the Defendant, Danny Rickett, agreed that Danny would receive \$2,000 from James in exchange for Danny deeding his property to Gatliff and Gatliff deeding its property solely to James. Plaintiff has retained possession of this property and should be ordered to pay the Defendant, pursuant to this agreement, the sum of \$2,000.00 or convey a 1/2 interest in the property James received from Gatliff.

Danny also claimed that James and Paul had not contributed to the expenses of the partnership cattle, including feed, pasture rent, and transportation of cattle for sale from 1993 to 1996.

Commissioner Conley entered his recommended findings of fact, conclusions of law, and judgment on April 4, 1997. Commissioner Conley set forth items of equipment that belonged to each party individually and recommended that, unless the parties could agree on a division, the partnership items owned between James and Danny should be sold by the Master Commissioner at a public auction and the proceeds divided

between James and Danny. Further, he proposed that James be awarded the D-3 bulldozer and Paul be awarded the Ford 6610 tractor as their individual property. Commissioner Conley further recommended that all the cattle be sold and the proceeds divided equally among the parties. Commissioner Conley found that all the partnership cattle were accounted for, and that the escrowed money, \$7,526.83, should be divided equally among the three brothers, except for \$500.00 for his fee and \$280.00 to be awarded to Danny for transporting the cattle to market. He proposed no award to Danny for the upkeep of the partnership cattle. All parties filed exceptions to Commissioner Conley's report; however, the record is unclear as to the ruling on the exceptions.¹⁴

On November 2, 1998, Danny filed a notice stating that the parties could not reach an agreement as to the sale of the property or cattle. James and Paul filed a motion on November 18, 1998, requesting that the case be assigned to a new

¹⁴ On April 14, 1997, James and Paul filed one exception regarding the Heston round hay baler, arguing that it was James's individual property. Danny filed various exceptions including the following: (1) that he should have been awarded \$18,222.42 for James's and Paul's share of the \$25,667.62 he paid for caring for the partnership cattle in 1993 and 1994; (2) that James and Paul still had partnership cattle in their possession; (3) that James and Danny had an agreement as to the division of certain partnership equipment; (4) that certain other equipment was Danny's property; (5) that the 501 Ford mower, hay spear, kerosene drum and pump, Massey Ferguson spare tire and rim, a dolly, a flat-bed trailer, and a goose-neck trailer were omitted from the division of assets; and (6) that the Caterpillar D-3 dozer and the 6610 Ford tractor should have been found to be partnership equipment.

Commissioner¹⁵ and a new hearing be held. The trial court entered an order on December 21, 1998, assigning the case to Domestic Relations Commissioner Cathy E. Prewitt.¹⁶

On June 18, 1999, the trial court entered an order, following a motion dated April 8, 1999, filed by James and Paul, requiring certain partnership equipment be sold by the Master Commissioner, and the proceeds escrowed.¹⁷ The order stated as follows:

IT IS ORDERED AND ADJUDGED that the following equipment shall be sold by the Master Commissioner of the Whitley Circuit Court, after August 1, 1999, unless the parties enter an Agreed Order to another form of public sale,

FURTHER IT IS ORDERED that the equipment to be sold is as follows:

230 Massey Ferguson tractor . . .
255 Massey Ferguson tractor . . .
Heston Round Hay baler . . .
Catapiller bull dozer . . .
3 point hitch Massey Ferguson Hayrake . . .
Bushhog . . .
2 row Ford Corn Planter . . .
Gooseneck cattle trailer . . .
6610 Ford Tractor . . .

¹⁵ The record is unclear as to why Commissioner Conley was no longer handling the case at the time it was assigned to Commissioner Prewitt. The only explanation in the record is a reference in a motion filed by James and Paul on January 29, 1997, indicating that Commissioner Conley had "resigned".

¹⁶ On February 8, 1999, Danny's counsel withdrew from the case and Danny was given ten days to employ new counsel. James and Paul filed a motion on March 4, 1999, stating that Danny had failed to hire counsel and requested the trial court adopt Commissioner Conley's 1997 findings, as well as their exceptions to those findings.

¹⁷ Danny objected to the motion by response filed on April 9, 1999.

Circle M Supreme flatbed trailer . . .
120 Massey Ferguson square hay baler . . .
3 point hitch 24 disc Massey Ferguson
hare[.]

FURTHER IT IS ORDERED that the
equipment shall be sold by the Master
Commissioner at its present locations[.]

On November 2, 1999, Danny filed a motion to vacate the trial court's order of sale. On November 16, 1999, the trial court denied Danny's motion and made the order of sale final and appealable. Danny filed a second motion to alter, amend, or vacate the order of sale on November 24, 1999, arguing that the partnership cattle in James's and Paul's possession should be sold if the partnership equipment was to be sold. Danny argued that James and Paul had partnership cattle in their possession worth at least \$15,700.00, and had an unknown number of calves. Further, he argued that James and Paul had sold at least five head of cattle for \$37,500.00 before they filed the lawsuit and one head after the order of sale, but that they had only escrowed approximately \$300.00. He further argued that it was improper to sell equipment prior to a determination of what equipment was in fact partnership equipment and what equipment was owned by him individually.

Nothing else transpired in this case until March 15, 2002, when the trial court entered a notice to dismiss for lack of prosecution. James and Paul filed their motion to submit on

March 20, 2002, to which Danny did not object. On April 8, 2002, the trial court ordered the parties to submit briefs and at that time the case would stand submitted. On September 27, 2002, Commissioner Prewitt filed her proposed judgment in the case. On October 2, 2002, James and Paul filed exceptions, and on October 8, 2002, they supplemented their exceptions. On October 9, 2002, Danny filed objections to James's and Paul's exceptions, but filed no exceptions of his own. The trial court overruled the exceptions,¹⁸ confirmed, and adopted Commissioner Prewitt's report, and made it a part of the order by reference. The trial court then entered its final judgment on October 30, 2002,¹⁹ and stated as follows:

1. Danny Rickett is awarded the 230 Massey Ferguson tractor, three-point hitch hayrake, disc harrow, corn planter, D-3 Caterpillar dozer and 255 Massey Ferguson tractor, as a part of the agreement to divide assets.
2. James Rickett is awarded the corn sprayer, 501 Ford mowing machine, the

¹⁸ The order overruling James's and Paul's exceptions indicates that the trial court "heard arguments of counsel," but is unclear if a hearing was held. The court docket indicates that a hearing was set for October 14, 2002, during the trial court's regular motion hour; however, there is no transcript or tape of the hearing before this Court for review.

¹⁹ Commissioner Prewitt did not propose findings on the following equipment in question: 240 Massey Ferguson tractor, set of disc tires, bush hog, round hay feeder, three trailer axles, two tongues, two cast iron bath tubs, four trailer tires and rims, electric fence post, oak boards, welded metal frame, livestock watering faucet, metal pipe gate, metal slab gate, several fifty-five gallon barrels of hydraulic oil, several rolls of conveyor belt, four-foot long piece of conveyor belt, and fence stretchers and accessories. Neither commissioner made proposed findings on the trailer tires and rims and the truck tires and rims.

bushhog, 550 Heston round baler, and the 120 Massey Ferguson square baler, and the \$100.00 cash, which items are already in his possession.

3. James and Paul Rickett are awarded in equal shares the Supreme Gooseneck trailer, Gooseneck cattle trailer and 6610 Ford Tractor.
4. The total value of the cattle at the date this case was filed was \$27,026.83 and each party is entitled to one-third of the total amount. Danny Rickett is awarded the sum of \$7,526.83 held in escrow by the Clerk and Danny Rickett is further awarded judgment against James Rickett and Paul Rickett, jointly and severally, for the sum of \$1,482.11, representing the remaining share of the value of cattle held by James Rickett and Paul Rickett at the date of dissolution of the partnership. The balance of these funds is awarded to the plaintiffs in equal shares.
5. The expenses of maintenance of partnership cattle paid by Danny Rickett for the period of 1993 to 1996 being \$10,650.00, judgment is hereby awarded to Danny Rickett against James Rickett and Paul Rickett, jointly and severally, for two-thirds (2/3) of this amount, being \$7,100.00.
6. Danny Rickett is awarded judgment against James Rickett in the sum of \$2,000.00 for proceeds from the sale of land.
7. All judgments awarded in favor of Danny Rickett shall bear interest at the rate of 8.0% per year from the date this case was filed on November 18, 1994, through the date of judgment and thereafter at 12.0% per year until paid.

8. Plaintiffs are not entitled to prejudgment or post-judgment interest because they violated the Court's Order by failure to sell the cattle and escrow the proceeds.

On November 5, 2002, James and Paul filed their motion to alter, amend, or vacate the trial court's final judgment, stating that the trial court adopted a decision detrimental to them from a Commissioner who had not heard any of the evidence or observed any witness. James and Paul claimed that certain evidence had been lost and the trial court's decision was not supported by law or fact. Danny objected to the motion. The trial court overruled the motion to alter, amend, or vacate on May 18, 2004. This appeal followed.

Because this case was tried upon the facts without a jury, upon review the trial court's findings "shall not be set aside unless clearly erroneous[.]"²⁰ Findings of fact are not clearly erroneous if supported by substantial evidence.²¹ Substantial evidence is "'evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable [people]'" [citation omitted].²² In this case, hearings were held before a Master Commissioner, who later

²⁰ Kentucky Rules of Civil Procedure (CR) 52.01.

²¹ Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998).

²² Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1991).

submitted proposed findings. The transcript of the hearings and the record was then submitted to a Domestic Relations Commissioner, upon request of James and Paul, who then submitted proposed findings.

In its consideration of a Commissioner's report, a trial court "may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions."²³ "[T]he clear language of the rule allows the trial judge complete discretion as to the use of a commissioner's report."²⁴ In this case, the trial court exercised its discretion by accepting Commissioner Prewitt's recommended order in its entirety. Pursuant to CR 52.01, "[t]he findings of a commissioner, to the extent that the court adopts them, shall be considered the findings of the court."

It is impossible in this case for this Court to conduct an adequate review of the evidence since the record on appeal does not include any of the exhibits from the hearings held in this case. While the designation of record filed by the Whitley Circuit Court Clerk lists "a folder containing exhibits from hearings," these exhibits were never made part of the record and are not attached to the transcripts of the hearings at which they were entered. This Court did not receive such an

²³ CR 53.06(2).

²⁴ Halley v. Halley, 573 S.W.2d 354, 356 (Ky.App. 1978).

envelope. In fact, all parties acknowledge in their briefs that the exhibits are not in the record. It was James's and Paul's duty, as appellants, to ensure the exhibits were included in the record.²⁵ The record shows that on March 20, 2002, James and Paul filed a motion for the trial court to enter a judgment in the matter and acknowledged that transcripts of the hearings had been filed and that two Commissioners had reviewed the case. The final transcript was filed of record on August 29, 2001, almost one year prior to this motion being filed. Obviously James and Paul knew before Commissioner Prewitt reviewed the file, over one year later, that the exhibits were not attached to the transcripts of the hearings. When the appellate record does not include evidence presented, we must presume that the missing evidence supported the judgment of the trial court.²⁶ In this case, the evidence contained in the exhibits was the most specific proof offered by the parties as to information necessary to identify and to value the partnership property and to make an equitable distribution thereof. This Court has devoted many hours to reviewing the pleadings and the trial transcripts in an attempt to understand the evidence and issues

²⁵ Burberry v. Bridges, 427 S.W.3d 583, 585 (Ky. 1968).

²⁶ Miller v. Commonwealth, Dept. of Highways, 487 S.W.2d 931, 933 (Ky. 1972). See also Caden v. Commonwealth, 242 S.W.2d 409, 412 (Ky. 1951) (stating that the only time this presumption does not arise is "where the omitted portions of a record were not considered by the trial court or did not influence the decision, and are not necessary to be regarded by us on review" [citation omitted]).

in this case, and based on the record before us, we conclude that the trial court's findings were not clearly erroneous and it did not abuse its discretion in its final ruling in this case.

Three of James's and Paul's arguments before this Court concern whether the trial court abused its discretion in its valuation and division of (1) partnership cattle, (2) partnership equipment, and (3) partnership expenses. First, James and Paul argue that the trial court's findings as to the number of cattle in the partnership at the time the case was filed was totally contrary to the evidence. However, in reviewing the transcripts of the case, there is conflicting testimony as to who had possession of the partnership cattle at the time of the filing of the case. To the extent the evidence is conflicting, a trial court's decision must "be upheld if correct upon any ground manifested in the record" [citations omitted].²⁷ James and Paul testified that Danny sold some of the partnership cattle, but they did not know how many head. Danny testified that James and Paul had moved some cattle off his land, but he did not know how many. Thus, based on this speculation by all parties, the trial court used its discretion

²⁷ Cavalier Advertising Service v. Hudson, 262 Ky. 282, 90 S.W.2d 28, 33 (1936).

to try to assign a number of cattle held by the parties within the testimony provided.

James and Paul assert that there was no testimony about the value of the remaining partnership cattle. Thus, the trial court had to determine a value of these cattle without assistance of the parties. However, they want this Court to find error in the trial court's valuation of the cattle. "Based on the lack of evidence, the findings of the [trial court] are not contrary to law. Indeed, the [trial court] appears to have done a credible job in [its] accounting for the partnership in view of the records presented."²⁸

Our review of the division of the partnership equipment is the same. The parties provided conflicting testimony as to whether any of the partnership equipment had been divided and whether certain pieces of equipment were actually partnership property rather than owned by one of the parties individually. "Determination of the rights of the parties is complicated because no formal written partnership agreement was entered into."²⁹ "'While the interest of each partner is not established by competent testimony, in the absence of such evidence each partner will be presumed to have

²⁸ Pendleton v. Strange, 381 S.W.2d 617, 620 (Ky. 1964).

²⁹ Id. at 617.

an equal interest'" [citations omitted].³⁰ The trial court used its discretion in hearing the evidence presented as to the equipment and made its decision on division based on its belief of Danny's testimony that a partial agreement had been reached. Again, there is no evidence of record as to the current values of the equipment, as acknowledged by James and Paul. Thus, we cannot say that the trial court abused its discretion in placing values on the equipment in order to equitably divide it.

As to partnership expenses, James and Paul argue that the trial court's award to Danny of \$7,100.00 for maintenance of the partnership cattle³¹ was not supported by any competent record of evidence. Specifically, James and Paul argue that there was no evidence as to what the reasonable rental value of the pasture was, or the reasonable rental value of Danny's equipment. A member of a partnership is entitled to reimbursement from the other members,³² as partners are jointly liable for all debts and obligations of the partnership.³³ Again, without the necessary testimony, the trial court had to

³⁰ Pendleton, 381 S.W.2d at 619.

³¹ In his brief to the trial court, Danny asked for reimbursement for his payment for feed of \$9,390.00, pasture rent of \$1,187.00, and transportation of cattle to sale of \$280.00.

³² Kentucky Revised Statutes (KRS) 362.345(4)(a).

³³ KRS 362.220(1).

use the record before it to value the reimbursement Danny was entitled to, and we find no abuse of discretion in doing so.

Danny was awarded \$2,000.00 for one-half the value of a piece of real estate that he deeded to Gatliff Coal Company during the partnership, in order for James to receive other property from Gatliff. This issue was not raised in Danny's answer and counter-claim, but was raised in a brief Danny submitted to the trial court prior to its final ruling. There is no evidence of record that James and Paul filed an objection as to this allegation by Danny. "'Except as to a party against whom a judgment is entered by default for want of appearance, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.'"³⁴ This rule of law supports the trial court's award.

The trial court awarded Danny 8% prejudgment interest from November 18, 1994, until the award is paid. James and Paul are incorrect in their argument that this award of prejudgment interest on an unliquidated claim is contrary to Kentucky law. In Nucor Corp. v. General Electric Co.,³⁵ our Supreme Court thoroughly reviewed the issue of prejudgment interest and stated that "[w]hen the damages are 'liquidated,' prejudgment interest

³⁴ Ford v. Gilbert, 397 S.W.2d 41, 42 (Ky. 1965) (citing CR 54.03).

³⁵ 812 S.W.2d 136, 141 (Ky. 1991).

follows as a matter of course[,]" but an award of prejudgment interest on unliquidated damages is within the discretion of the trial court. A liquidated claim is defined as "'[m]ade certain or fixed by agreement of parties or by operation of law'" [citations omitted].³⁶ An unliquidated damage is one that "exist[s] in opinion and require[s] ascertainment by a jury, and which cannot be ascertained or fixed by calculation."³⁷ "Prejudgment interest is limited to the legal rate, found in KRS 360.010, of 8%." "The trial court may award prejudgment interest at any rate up to 8%, or it may choose to award no prejudgment interest at all, but it may not exceed the legal rate of 8%" [citation omitted].³⁸

In the case before us, the prejudgment interest was awarded on an unliquidated claim, and thus, we must determine whether the trial court abused its discretion³⁹ in making an award of prejudgment interest which "is based upon the foundation of equity and justice."⁴⁰ "[E]quity and justice demand that one who uses money or property of another . . . should at least pay interest for its use in the absence of some

³⁶ Nucor Corp., 812 S.W.2d at 141.

³⁷ Simons v. Douglas' Ex'r, 189 Ky. 644, 225 S.W. 721, 724 (1920).

³⁸ Fields v. Fields, 58 S.W.3d 464, 467 (Ky. 2001).

³⁹ Id. (citing Church & Mullins Corp. v. Bethlehem Minerals Co., 887 S.W.2d 321, 325 (Ky. 1992)).

⁴⁰ Id.

agreement to the contrary" [citation omitted].⁴¹ "This principle applies whether or not the amount owed to another is liquidated or unliquidated."⁴² We find no abuse of discretion in the trial court's award of prejudgment interest on this unliquidated claim.

Based upon the evidence of record, we conclude that the appellants' argument for new findings by the trial court to be without merit; the findings of the trial court were not clearly erroneous. Furthermore, James and Paul failed to file a motion for more specific findings and, thus, waived this argument.⁴³

For the foregoing reason, the final judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David O. Smith
Marcia A. Smith
Corbin, Kentucky

BRIEF FOR APPELLEE:

Frank A. Atkins
Williamsburg, Kentucky

⁴¹ Curtis v. Campbell, 336 S.W.2d 355, 361 (Ky. 1960).

⁴² Id. (citing Dalton v. Mullins, 293 S.W.2d 470 (Ky. 1956)).

⁴³ Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).