

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-000224-MR

BERNARD S. FINEMAN AND  
CHERYL P. FINEMAN

APPELLANTS

v. APPEAL FROM SPENCER CIRCUIT COURT  
HONORABLE CHARLES R. HICKMAN, JUDGE  
ACTION NO. 05-CI-00105

ANDREW MCCULLOUGH AND  
DEFELICIA MCCULLOUGH

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: Bernard S. and Cheryl P. Fineman appeal the Spencer Circuit Court's order dismissing their cross-claim against Andrew and DeFelicia McCullough, which alleged that the McCulloughs defaulted on a promissory note to the Finemans. After a careful review of the record, we affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In 2003, the McCulloughs executed a promissory note, a mortgage and security agreement, and another separate security agreement in favor of the Finemans. The promissory note provided that the McCulloughs would pay \$79,176.75 in principal, plus accrued interest, to the Finemans, and that payment on the note was secured by a mortgage and security agreement, as well as a separate security agreement. The note further stated that the final payment on the note would be due on September 30, 2005. The mortgage and security agreement provided that the McCulloughs were pledging real property that they owned in Spencer County to secure the promissory note. Furthermore, the separate security agreement stated that the McCulloughs were pledging a security interest in all of their personal property and fixtures in order to induce the Finemans into making the loan.

The McCulloughs allegedly defaulted on the note. As part of a lawsuit containing claims not presently before us involving the Finemans, the McCulloughs, and others, the Finemans filed a cross-claim against the McCulloughs. In their cross-claim, the Finemans alleged that the McCulloughs defaulted on the promissory note they had executed in the Finemans' favor and that the McCulloughs owed the Finemans \$75,386.73 as of September 30, 2005, plus interest accruing from that date at a rate of sixteen percent per annum.

The McCulloughs responded to the Finemans' cross-claim by asserting that there was no consideration for the promissory note. Specifically, the McCulloughs contended that "any transaction between Cheryl P. Fineman and the McCulloughs was in the nature of a gift for which no consideration lies to support a Note or a Mortgage."

The Finemans moved for partial summary judgment, contending that the McCulloughs' claims that the money was a gift and that there was no consideration to support the note, mortgage, or separate security agreement were contradicted on the face of those documents. Further, the Finemans alleged that under the parol evidence rule, any prior agreements providing that the money was a gift merged into the note, mortgage, and security agreement at the time that those documents were executed.<sup>1</sup>

The Finemans also moved for a protective order, asking the court to prohibit the deposition of Cheryl Fineman because the deposition may have a detrimental effect on her health. In this motion, the Finemans suggested that interrogatories be used as a substitute form of discovery. With this motion, the Finemans submitted a letter from Cheryl Fineman's primary care physician explaining that she suffered from arthritis, fibromyalgia, depression, anxiety, and memory problems. The doctor expressed his concern that the issues in the case may "exacerbate her depression and anxiety, triggering a return of her severe panic attacks."<sup>2</sup> Further, the doctor explained that he was "highly concerned with the accuracy of her memory to the details of" the events in this case, explaining that when he sees her, her memory "is very unreliable as to details of tests, test results, medications, and previous doctor visits." The court thereafter denied the Finemans' motion for a protective order and ordered Cheryl Fineman to be deposed.

Cheryl's deposition was scheduled, but her counsel subsequently asked opposing counsel to reschedule the deposition because Cheryl's counsel had to go to a funeral on the day the deposition was scheduled. Opposing counsel agreed to reschedule

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<sup>1</sup> There does not appear to be an order ruling on the Finemans' motion for partial summary judgment in the record.

<sup>2</sup> We note, however, that it was the Finemans who filed this lawsuit and brought the issues before the court.

the deposition and made arrangements for the rescheduled deposition to take place at a handicapped-accessible church next door to his office to accommodate Cheryl. However, the day before the rescheduled deposition was to be held, the Finemans' attorney notified opposing counsel that Cheryl would not attend the deposition. No explanation was given for her failure to appear, and the circuit court did not excuse her from the deposition.

Thereafter, the McCulloughs moved to dismiss the Finemans' cross-claim on the basis that Cheryl had failed to appear for her deposition after the court had ordered her to submit to be deposed. The circuit court granted the McCulloughs' motion to dismiss, reasoning that Cheryl Fineman's failure to appear at the rescheduled deposition was willful and in bad faith on the part of the Finemans. Therefore, the circuit court dismissed the Finemans' cross-claim against the McCulloughs, struck the mortgage and security agreement from the public record, and released any collateral under the separate security agreement.

The Finemans now appeal, arguing that: (1) the parol evidence rule applies and renders extrinsic evidence inadmissible; and (2) the circuit court abused its discretion by ordering Cheryl Fineman to be deposed.

## II. ANALYSIS

### A. CLAIM CONCERNING THE PAROL EVIDENCE RULE

The Finemans first contend that the parol evidence rule applies to the note, mortgage, and separate security agreement, and that extrinsic evidence is inadmissible.

Under the parol evidence rule,

where a written instrument is clear and complete in itself it must be interpreted according to its terms and legal import without the influence of or variation or contradiction by extrinsic parol evidence. Any oral understanding by the parties to the contract was merged in the writing so that evidence of the understanding cannot be used to change or show any intent different from that expressed in the instrument.

*Johnson v. Johnson*, 297 Ky. 268, 178 S.W.2d 983, 985 (Ky. 1944).

Pursuant to KRS 371.030, “[t]he consideration of any writing, with or without seal, may be impeached or denied by pleading.” However, “the plea of no consideration must be supported by clear and convincing evidence.” *McFarland’s Adm’r v. McFarland*, 235 Ky. 283, 30 S.W.2d 958, 960 (Ky. 1930). A plea that consideration is lacking “places the burden of proof on the party making” the plea. *Simpson v. Simpson*, 276 Ky. 223, 123 S.W.2d 816, 817-18 (Ky. 1938).

Nevertheless, “the true consideration of any instrument may be shown by parol [evidence], even without a charge of fraud or mistake.” *Commonwealth, Dep’t of Highways v. Schmehr*, 388 S.W.2d 131, 133 (Ky. 1965). Even though a writing itself may “constitute[] impressive evidence that it incorporates the final and only agreement of the parties, it is an accepted doctrine that extrinsic evidence may be admissible to avoid the apparent agreement. For example, a party may generally introduce extrinsic evidence

of illegality, fraud, duress, mistake, or failure of consideration.” *Johnson v. Dalton*, 318 S.W.2d 415, 417 (Ky. 1958).

Therefore, contrary to the Finemans’ argument, the McCulloughs’ claimed defense of lack of consideration falls outside the realm of the parol evidence rule, and extrinsic evidence is permissible to demonstrate a lack of consideration.

## **B. CLAIM THAT THE DEPOSITION OF CHERYL FINEMAN SHOULD NOT HAVE BEEN ORDERED**

The Finemans next allege that the circuit court abused its discretion by ordering Cheryl Fineman to be deposed. In the circuit court, the Finemans moved for a protective order to prohibit the deposition of Cheryl Fineman due to her health problems, and the Finemans suggested in their motion that the McCulloughs could obtain the information they wanted by deposing Bernard Fineman or by propounding interrogatories upon Cheryl. Pursuant to CR<sup>3</sup> 26.03, upon a motion for a protective order, a court may, to protect a party from undue burden, order “that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery.” CR 26.03(1)(c).

We review the denial of a motion for a protective order for an abuse of discretion. *See Hoffman v. Dow Chemical Co.*, 413 S.W.2d 332, 334 (Ky. 1967). The Finemans had the burden of convincing the circuit court to prohibit Cheryl’s deposition from being taken. *Id.* at 333. Through the course of the proceedings in the circuit court, it became apparent that Cheryl needed to answer questions concerning whether the money, which the McCulloughs alleged she had given them as a gift, was actually a gift. Thus, contrary to the McCulloughs’ argument, the deposition of Bernard would not have

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<sup>3</sup> Kentucky Civil Rule.

shed any light on this allegation, as the McCulloughs alleged it was Cheryl, rather than Bernard, who had given them the gift.

We note that we are sympathetic with Cheryl Fineman's health problems. However, her testimony was the crux of this case, and if she did not testify, the McCulloughs would have essentially been denied their right to present a defense. As the plaintiffs, when the Finemans filed this lawsuit, they agreed to submit to the rules of the court, and it is only fair to allow the McCulloughs to present a defense to the Finemans' allegations.

As for the Finemans' allegation that the circuit court should have allowed Cheryl to answer interrogatories rather than order her to be deposed, Cheryl's doctor's note did not state that she was incapacitated and incapable of submitting to a deposition. Rather, the note largely focused on her memory problems. In the Finemans' motion for a protective order, they suggested that she could answer interrogatories as a substitute for her deposition. However, Cheryl's memory problems would have affected her ability to answer interrogatories, just as it would have affected her ability to answer questions in a deposition. Therefore, the circuit court did not abuse its discretion in denying the Finemans' motion for a protective order.

Finally, after the circuit court denied the motion for a protective order, Cheryl Fineman nevertheless failed to appear for her deposition, which had been scheduled at a church that was handicapped accessible, in order to accommodate her. Moreover, it appears that she failed to give a reason for her failure to appear for her deposition. Under CR 37.02(1), "[i]f a deponent fails to be sworn or to answer a question

after being directed to do so by the court in the judicial district in which the deposition is being taken, the failure may be considered a contempt of that court.” Further,

[i]f a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . . (c) An order striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

CR 37.02(2).

The circuit court found Cheryl’s failure to appear for her deposition to be willful and in bad faith on the part of the Finemans. We “may not disturb the findings of the trier of fact where they are supported by the record.” *Nowicke v. Central Bank & Trust Co.*, 551 S.W.2d 809, 811 (Ky. App. 1977).

In the present case, because Cheryl failed to appear for her deposition after being ordered to do so, and she provided no explanation for her failure to appear, the record supports the circuit court’s finding that her failure to appear was willful and in bad faith. Therefore, pursuant to CR 37.02, we cannot say that the circuit court erred when it dismissed the Finemans’ cross-claim against the McCulloughs.

Accordingly, the order of the Spencer Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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