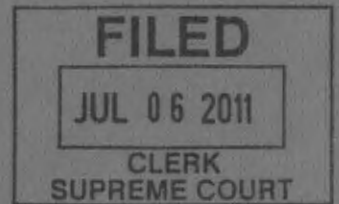


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-SC-000332-D
(COURT OF APPEALS NO. 2009-CA-01092)



KENTON R. SMITH AND SANDRA SMITH,

APPELLANTS

V.

Appeal from the Meade Circuit Court
Honorable Stephen Ryan, Special Judge
Case No. 07-CI-00342

RICHARD WILLIAMS, JEANIE WILLIAMS,
BART STITH, CINDY STITH, JOHN MARK STULL,
PATRICIA STULL, ALVIN CLIFFORD LYNCH, JR.,
DONNA LYNCH, AND ROBERT S. WILLIAMS,

APPELLEES

BRIEF FOR APPELLANTS

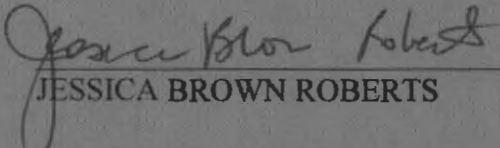


Submitted by,

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CERTIFICATE OF SERVICE

This is to certify that I have on this 5th day of July, 2011, mailed a true and correct copy of the foregoing Brief for Appellants by first-class mail, postage prepaid, to Hon. J. Gregory Joyner, 462 South Fourth Ave., Suite 1730, Louisville, KY 40202, counsel for Appellees, Hon. James P. Grohmann, 455 South Fourth Ave., Suite 1500, Louisville, KY 40202, and to Hon. Stephen P. Ryan, Special Judge, c/o Jefferson Circuit Court, 700 W. Jefferson Street, Louisville, KY 40202. I further certify that the record on appeal was not removed.


JESSICA BROWN ROBERTS

INTRODUCTION

This is an appeal from the Kentucky Court of Appeals' decision in Case No. 2009-CA-01092. The issue on appeal is whether Kentucky's Statute of Frauds, codified in KRS 371.010, prohibits enforcement of an alleged oral agreement not to partition the real estate which is the subject matter of this action.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants believe oral argument would be helpful to the Court in determining the issues and request that the case be set for oral argument.

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COUNTERSTATEMENT OF THE CASE

In November 1996, the parties, along with Charles S. Williams (brother to Robert S. Williams and Richard L. Williams) and Timothy W. Smith (brother to Kenton R. Smith) and Katherine P. Smith, his wife, purchased 256 acres of Ohio riverfront real estate located in the Big Bend area of Meade County, more particularly described as follows:

TRACT I: Beginning at a cottonwood on the bank of the Ohio River, corner to H.G. Setzer's line North 3 degrees West 80 poles to a pile of stone at the foot of the hill, corner to Setzer, thence North 63 degrees East with Setzer's line 122 poles to a beech on the top of the hill corner to Setzer, thence North 48 degrees West 82 poles to a pile of stones, two Paw Paws and Walnut in a small drain corner to Alexander, thence South 24 degrees West 50 poles to a sugar tree and dogwood, thence North 63 degrees West 60 poles to a beech, thence West 21 poles to a Gum, thence South 20 poles to a Sassafras, Dogwood and two rocks, thence West 21 poles to a White Oak in the road, thence North 78 degrees West 50 poles to a pile of stone, thence North 68 poles to a beech and poplar; thence North 46 degrees East 106 poles to three Beeches, thence West 43 poles to a Hickory, sassafras and White oak, thence South 33 degrees West 88 poles to a stone, thence South 7½ degrees West 96 poles to a stone near a Honey Locust, thence South 3 degrees West 128 poles to a stone on the bank of the river, thence East with the river 160 poles to the beginning containing approximately 210 acres more or less.

TRACT II: Beginning at a pile of rock marked W.W.S. in Pennis line, thence South 78 East 51 poles to a White Oak, thence East 21 poles to a Sassafras and Dogwood and two rocks marked W.W.S. and A.C.S., thence North 20 poles to a Sassafras and Gum, thence East 21 poles to a Beech, thence North 13, West 93 poles to a linn and beech, thence North 23, East 46 poles to a beech and Dogwood, thence with a line of J.B. Alexander to Anderson's corner, three beech, thence South 46, West 106 poles to a beech and poplar in deep hollow, thence South to the beginning, containing 46 acres.

BEING the same property conveyed to Richard L. Williams and Jeanie Williams, his wife, by deed dated November 26, 1996, and recorded in Deed Book 391, Page 212, in the Office of the Meade County Clerk.

AND BEING the same property conveyed to Kenton R. Smith and Sandra Smith, his wife; Bart H. Stith and Cindy B. Stith, his wife; John Mark Stull and Patricia K. Stull, his wife; Alvin C. Lynch, Jr., and Donna Lynch, his wife; Timothy W. Smith and Katherine P. Smith, his wife; Charles S. Williams, single; and Robert S. Williams, single, by deed dated November 26, 1996, and recorded in Deed Book 391, Page 217, in the Office of the Meade County Clerk.

THEREAFTER, Charles S. Williams, single, quitclaimed his interest in the above-described property to Richard L. Williams and Jeanie Williams, his wife; and Robert S. Williams, single; by quitclaim deed dated May 8, 1998, and recorded in Deed Book 407, Page 477, in the Office of the Meade County Clerk.

THEREAFTER, Timothy W. Smith and Katherine P. Smith, his wife, conveyed their interest in the above-described property to Kenton R. Smith and Sandra Smith, his wife, by deed dated June 28, 2007, and recorded in Deed Book 528, Page 277, in the Office of the Meade County Clerk.

The property was purchased for \$200,000.00, with all the parties signing a note in this amount.¹ Each couple, Robert S. Williams, and Charles S. Williams owned a 1/8th interest in the property. The owners consisted of an attorney (Appellant Kenton Smith), a civil engineer (Timothy Smith), a bank president (Appellee Bart Stith), timber buyers (Appellees Richard Williams and Robert S. Williams), and the owner of a construction company (Appellee John Mark Stull). Meade County Bank financed the full purchase price of the real estate, and all parties to the transaction signed the note.

Subsequent to the purchase of the property, the property was timbered. Appellee Richard Williams and his brothers' timber business took one-half of the proceeds from the sale of the timber. The remaining proceeds were applied to the note. The remaining

¹The property was initially deeded by the grantors to Richard Williams and Jeanie Williams, who then deeded the property to the rest of the parties.

balance of the note, approximately \$40,000.00, was divided equally among the parties pursuant to their respective interests.

In May 1998, Appellees Richard Williams, Jeanie Williams, and Robert S. Williams exchanged real estate with Charles S. Williams for his one-eighth interest in the property when the brothers' timber business was dissolved.

All went well for the initial eleven years. In the summer of 2007, Appellant Kenton Smith learned of drug use and activity on the property, specifically the use of methamphetamine on the property by Appellees Bart Stith, Mark Stull, Richard Williams, and Clifford Lynch.² Appellant Kenton Smith was at the time the elected Commonwealth Attorney for the 46th Judicial District of Kentucky consisting of Meade, Breckinridge and Grayson Counties. Appellant Sandra Smith is an elementary school teacher in the Meade County School System. Appellants took steps to protect their interest and their family, including moving all personal property off the real estate and not traveling to the property unaccompanied. They began negotiating with the parties to sell their interest in the real estate, making a buy/sell offer of \$4,000.00 per acre, based upon a third party offer to purchase the real estate for \$1,000,000.00. Appellees refused to buy or sell.

Appellant Kenton Smith did not want to be in a position of suing his brother in a partition action. Therefore, the brothers swapped property: Timothy Smith traded his

²See deposition of Bart Stith, p. 15, wherein he states that he was aware of methamphetamine use on the property. See also affidavit of Kenton Smith wherein he states that Bart Stith admitted, after a confrontation, that Mark Stull, Clifford Lynch, and Richard Williams used methamphetamine and that Bart Stith used methamphetamine on the property in the presence of one or more of the partners. (TR 53.) See deposition of Richard Williams at page 7 wherein he "can't recall" if methamphetamine had been used on the property.

interest in the property to Appellants in exchange for their shares of stock in Bull Creek Hunting Club, Inc. (a corporation whose primary asset is hunting land; Appellees Richard Williams, John Mark Stull, and Bart Stith were the other stockholders). Timothy Smith also paid additional funds, or “boot,” to Appellants of \$13,900.00.

Seeing no other way out of their predicament, Appellants then instituted a partition action pursuant to KRS 389A.030 in the Meade Circuit Court to sell the real estate.

Appellees filed an answer and pled five affirmative defenses, none of which include the alleged oral buy-sell agreement at issue in this appeal. (TR 23.)³ Appellants initially filed a motion for summary judgment in September 2007. (TR 28.) Appellees failed to file any affidavits in opposition to the motion for summary judgment. (TR 38.)

Appellees were granted until December 31, 2007, to complete discovery. (TR 40.) After completion of discovery, Appellants again moved the trial court for summary judgment pursuant to CR 56 in February 2008. (TR 55.) Appellees defended against the motion by filing a Motion for Leave to File Counterclaim, Leave to File a Third-Party Complaint, and For Order Recusing Plaintiffs’ Counsel from the Case. (TR 66.) Appellees also filed a Response to Appellants’ Motion for Summary Judgment and Order of Sale. (TR 74.)

For the first time, Appellees argued that an oral buy-sell agreement between the parties should be enforced, and Appellants’ only remedy if they “want[ed] out” was to sell back to the group for what they “had in it,” initially \$5,300.00 (or one-eighth the amount left on the

³The Kentucky Court of Appeals noted that in Appellee’s fifth affirmative defense, they allege that the parties orally agreed that “acquisition of subject property was for pleasure and enjoyment in lieu of being for pecuniary reasons and for profit.” This claim is a different claim from one alleging that an oral buy-sell agreement existed.

note after the property was timbered). Appellees argued that an alleged, but unproven, oral buy-sell agreement prohibited partition of the real estate.

The trial court overruled Appellees' Motion for Leave to File Counterclaim and Third Party Complaint and overruled Appellees' Motion to Recuse Appellants' Counsel. (TR 153-157.) The case was then referred to the Master Commissioner of the Meade Circuit Court. The Master Commissioner made a Recommendation Regarding Motion for Summary Judgment. The Commissioner, after a careful review of the file, found that the only issue of material fact that remained in the case was that of divisibility. The Commissioner found that any alleged buy-sell agreement was barred by the Kentucky Statute of Frauds, KRS 371.010. (TR 158-162.) The trial court entered an Order Adopting the Master Commissioner Report in Full, and granted Appellees a hearing on the issue of divisibility. (TR 198-200.) Appellees filed a motion to alter, amend, or vacate said Order Adopting Master Commissioner Report in Full, which was denied by the trial court. (TR 258-259.) Appellees then withdrew their claim that the property was divisible. (TR 313-314.) Upon withdrawal of the claim that the property was divisible, the Court entered a Judgment and Order of Sale. Appellees appealed to the Kentucky Court of Appeals in a matter of right appeal. 2009-CA-001092-MR. The Court of Appeals, relying upon Midwest Mutual Ins. Co. V. Wireman, 54 S.W.3d 177 (Ky.App.2001), and Bullock v. Young, 252 Ky. 640, 67 S.W.2d 941, 946 (1933), ruled that the Statute of Frauds was inapplicable to Appellees' defense to the partition action. The Kentucky Court of Appeals reversed the decision of the Meade Circuit Court and remanded the matter for the court's consideration of whether an oral buy-sell agreement existed and the

effect thereof on the disposition of the property at issue. Appellants filed a motion for discretionary review of the Court of Appeals' decision, which was granted, seeking reversal of the decision of the Kentucky Court of Appeals and affirmation of the decision of the Meade Circuit Court.

ARGUMENT

THE COURT OF APPEALS ERRED IN RULING THAT APPELLANTS WERE NOT ENTITLED TO JUDGMENT AND ORDER OF SALE AS A MATTER OF LAW

Appellants' is a partition action for the sale of jointly-owned real estate pursuant to KRS 389A.030. KRS 389A.030 provides in pertinent part:

When two (2) or more persons other than tenants by the entirety in residential property actually occupied by them as a principal residence share title to real estate in such manner that a conveyance by them jointly would pass a fee simple title, any one or more of them may bring an action for the sale or division thereof in the Circuit Court in the county in which the land, or the greater part thereof, lies, making parties defendant those owners who have not joined as Plaintiffs. . . . **The case shall be tried without a jury.** (Emphasis added.)

It is undisputed that the parties to this action share fee simple title to real estate and that Appellants brought an action for the sale of the real estate in the Circuit Court of appropriate jurisdiction.

Summary judgment is proper "where the Movant shows that the adverse party could not prevail under any circumstances." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hospital v. Rose, Ky., 683 S.W.2d 255 (1985). However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." Hubble v.

Johnson, Ky., 841 S.W.2d 169, 171 (1992). The circuit court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” Steelvest, supra. “The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.” Id. The standard of review on appeal of a summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996)(citations omitted).

The deed to the parties is absolute on its face and granted each couple or individual a one-eighth interest in the real estate. Any of the parties had the right at any time pursuant to KRS 389A.030 to petition the Circuit Court for sale of the real estate. No genuine issue of material fact exists and the trial court correctly granted summary judgment in favor of Appellants and ordered the sale of the real estate.

**EVEN ASSUMING THE TRUTHFULNESS OF APPELLEES’
ALLEGATIONS, AS A MATTER OF LAW, AN ORAL
BUY-SELL AGREEMENT HAS NOT BEEN ESTABLISHED**

Appellees claim that the parties are bound by an alleged oral “buy-sell agreement.” The record does not support Appellees’ claim. The evidence before the trial court regarding the alleged buy-sell agreement is as follows:

In his deposition, Bart Stith alleged that there was a meeting but that he could not recall who was there. (Deposition of Bart Stith, p. 7, 10.) None of the wives were at the meeting. (Deposition of Bart Stith, p. 8.) Appellant Stith alleged “one of the big things was what happens if you want out, and it was discussed about the Bull Creek property, the

situation there as well . . . If you get out, you can get out for what you've got in it."

(Deposition of Bart Stith, p. 7.)

When questioned about the buy-sell agreement at his deposition, John Mark Stull stated, "You get out for what you got in it." (Deposition of John Mark Stull, p. 6.)

Timothy Smith in his first affidavit stated that "it was stated to [him] that the same 'sell back' terms applied to [the Bend] property that applied to the Bull Creek property," that is "if anyone wanted out of the club/group, then they were to sell their interest back to the remaining club/group for what they 'had in it.'" (Affidavit of Timothy W. Smith, TR 69-71.) However, Timothy Smith filed a second affidavit clarifying the statements contained in the first affidavit. In the second affidavit, Timothy Smith stated that Ricky Williams is the person who stated that the same sell-back terms applied to the Bend property as to the Bull Creek property. Timothy Smith clarified that the "agreement" was never formalized and that he could recall no formal meetings wherein all of the owners were present and came to this "agreement." (Affidavit of Timothy Smith, TR 175-176.)

Appellant Sandra Smith filed an affidavit with the Court affirmatively stating that she was never present at any meeting wherein a disposition of the property was discussed. (TR 49.)

Appellant Kenton Smith affirmatively denied any agreement regarding disposition of the property and affirmatively denied any meeting wherein a discussion regarding disposition of the property took place. (TR 52-54.)

No additional affidavits were filed or evidence produced in opposition to Appellant's motion for summary judgment.

Appellees have failed to produce evidence of a written buy-sell agreement. They merely allege that at some point in time, some of the parties had a discussion about “getting out for what you got in it.” By Appellee Bart Stith’s own admission, none of the wives were present at any alleged meeting. Such evidence is insufficient, taken in the light most favorable to Appellees, to prevent the sale of the real estate. Further, if there was such an agreement, why have two parties to the transaction swapped property to divest themselves of their interest in the real estate rather than sell back to the rest of the group for “what they have in it?” Appellants were clearly entitled to judgment as a matter of law, and the Kentucky Court of Appeals incorrectly remanded the matter to the trial court for consideration of whether an oral buy-sell agreement existed. At a minimum, Appellees had the burden in the trial court of coming forth with some affirmative evidence that all the parties to the transaction agreed to the alleged oral buy-sell agreement. There can be no agreement if some of the parties, i.e. the wives or Appellant Kenton Smith, were never a party to any alleged agreement.

**ENFORCEMENT OF THE ALLEGED PAROL BUY-SELL
AGREEMENT IS PROHIBITED BY KRS 371.010**

Even if sufficient evidence of an alleged oral buy-sell agreement was presented to the trial court to overcome a motion for summary judgment, enforcement of any alleged oral buy-sell agreement is otherwise prohibited by KRS 371.010, Kentucky’s Statute of Frauds.⁴

⁴ The purpose of requiring a writing is to assure certainty of the essential terms thereof and to avoid controversy and litigation. Walker v. Keith, Ky., 382 S.W.2d 198 (1964). The statute is designed for the prevention of perjuries in actions growing out of alleged loose parol guaranties. Deposit Bank of Carlisle v. Stitt, 107 Ky. 49, 53 S.W. 950 (1899).

KRS 371.010(6) states in pertinent part:

No action shall be brought to charge any person . . .[u]pon any contract for the sale of real estate, or any lease thereof for longer than one year . . . unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith[.]

Assuming that Appellees have come forward with enough evidence to prove an “agreement,” the agreement alleged by Appellees is at best an oral option to purchase the real estate, which clearly comes within the purview of the Statute of Frauds. Appellees desire the Court to further interpret such an agreement as a waiver of the right to bring an action of partition. An oral agreement between tenants in common whereby each agrees not to bring action of partition against the others is void, since the right to bring partition is an interest in real property. 72 Am.Jur.2d Statute of Frauds §52, p. 584, citing Casolo v. Nardella, 275 App.Div. 502, 90 N.Y.S.2d 420 (3d Dep’t 1949).

Appellees claim that KRS 371.070 is inapplicable to this case as they are raising the oral contract as a defense and not seeking enforcement of the buy-sell agreement. Contrary to Appellees’ assertions, they are seeking enforcement of a parol buy-sell agreement to stop the sale of the subject real estate. Appellees are clearly taking “action” to enforce the alleged oral agreement. Appellants are the parties against whom enforcement of the contract is sought and are the parties entitled to the protections of the Statute of Frauds. 73 Am.Jur.2d Statute of Frauds § 484, p. 172. The effect of precluding the sale of the real estate is enforcement of the parole contract, which is clearly prohibited by KRS 371.010.

Appellees did not raise this issue as an affirmative defense to Appellants’

complaint. Rather, it was attempted to be raised in the Counterclaim⁵ of Appellees, i.e. as an “action” to enforce the alleged parol agreement. However, even if this Court considers the claim to be a defense to Appellants’ partition action,

[a]n unexecuted oral contract which is within the statute can no more be made the basis of a defense than the subject of an original action, if the result is the direct or indirect enforcement of the contract. Clearly, the defense of the statute will not be allowed when by so doing it becomes an instrument for perpetrating fraud.

73 Am.Jur.2d Statute of Frauds §433, p. 111, citing Terry v. Terry, 264 Ky. 625, 95 S.W.2d 282 (1936)(other citations omitted).

In Terry, decedent’s spouse filed suit to recover her dower and distributable share of decedent’s estate. As a defense, decedent’s children and co-executors sought to enforce an alleged parol antenuptial agreement in which decedent and his spouse each agreed to waive and relinquish his or her marital rights in the property of the other. Terry clearly holds that contracts which are within the statute of frauds can no more be made the basis of a defense than the subject of an original action, if the result is an indirect enforcement of the contract. Terry, 95 S.W.2d 282, 285, citing 25 RCL § 344, p. 701.⁶

Further, the position taken in the Restatement of Contracts (Second) is that where a contract within the Statute of Frauds is not enforceable against the party to be charged by

⁵ Black’s Law Dictionary (Abridged Sixth Edition 1991) defines “counterclaim” as “any cause of action in favor of one or more defendants . . . against one or more plaintiffs[.]”

⁶The Kentucky Court of Appeals in Terry was interpreting Kentucky Statute §470 (enacted in 1892) which provided, “No action shall be brought to charge any person . . . upon any agreement made in consideration of marriage, except mutual promises to marry . . . unless the promise, contract, agreement, representation, assurance or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith[.]” Carroll’s Kentucky Statutes §470. In other words, the 1936 version of the statute is identical to the current version in that it begins, “No action shall be brought to charge any person . . .”

an action against that party, it is not enforceable by a set-off or counterclaim in an action brought by the party to be charged, or as a defense to a claim by the party to be charged. Restatement (Second) of Contracts The Statute of Frauds § 138, p. 353. Thus, Appellants are entitled to the protections of KRS 371.010.

The Kentucky Court of Appeals relied upon Midwest Mutual Insurance Co. v. Wireman, Ky.App., 54 S.W.3d 177 (2001), and Bullock v. Young, 252 Ky. 640, 67 S.W.2d 941, 946 (1933), in determining that the Statute of Frauds applies to actions and not to defenses. Midwest Mutual involved interpretation of an insurance contract. The Kentucky Court of Appeals noted in Midwest Mutual that application of KRS 371.010 to insurance contracts has long been held to be inappropriate. Id. at 181 (citations omitted). Thus, the language in Midwest Mutual regarding an interpretation of the Statute of Frauds is dicta and not the holding of the case. The Kentucky Court of Appeals therefore incorrectly relied upon Midwest Mutual in determining the outcome of the case sub judice.

Likewise, Bullock, 67 S.W.2d 941, is inapplicable to the case at hand. Bullock involves the parole evidence rule as the contract was written but the court allowed parole evidence as to the intent of the parties. It is thus not dispositive of the case sub judice where there is no contract. The Court of Appeals therefore also incorrectly relied upon Bullock to determine the outcome of the case sub judice. Further, Bullock, decided in 1933, pre-dated Terry, which was decided in 1936.

Thus, in determining that KRS 371.010 applies to actions and not defenses, the Kentucky Court of Appeals ignored Terry and prevailing contract law as set forth in the Restatement of Contracts. Terry is clearly binding precedent and dictates application of

KRS 371.010 to the facts of this case.

For the above reasons, KRS 371.010 prohibits enforcement of the alleged buy-sell agreement by Appellees. Appellants are entitled to the protections of a statute that has been in existence since at least 1892 and which has historically applied to defenses. Application of the Statute of Frauds to the facts of this case furthers the purposes of the statute, i.e. prevention of fraud and certainty of the terms of the agreement. It is immaterial whether the party seeking enforcement is named as a Plaintiff or Defendant. The effect of allowing the alleged oral contract to be used as a defense is to prohibit the sale of the real estate, thus enforcing the alleged oral agreement. For this reason, the decision of the Kentucky Court of Appeals should be reversed.

**APPELLEES ARE NOT ENTITLED TO CIRCUMVENT
THE APPLICATION OF KRS 371.010 BY CLAIMING ESTOPPEL**

[E]stoppel is a doctrine of equity, to be invoked when equity demands it. Smith v. Ash, Ky., 448 S.W.2d 51 (1969). Estoppel is:

based upon the principle established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purposes of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in *the perpetration of a fraud*, or in *the consummation of a fraudulent scheme*. It is called into operation to defeat what would be an unconscionable use of the statute, and guards against the utilization of the statute as a means of *defrauding innocent persons* who have been induced or permitted to change their position in reliance upon oral agreements within its operation.

As has been said, the statute of frauds was designed as a weapon of the written law to prevent *fraud*, while the doctrine of estoppel is that of the *unwritten* law to prevent *like evil*. Each is effective in its appropriate field. Both are essential to prevent *wrongs*. (Emphasis in original.)

Id. at 53, citing 49 Am.Jur., Statute of Frauds § 581, p. 888, 889. Where the Statute of Frauds is clear and unambiguous, equitable relief should only be granted under

the most limited of circumstances, lest the Court run afoul of judicially amending the statute in violation of separation of powers. Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc., 171 S.W.3d 4 (Ky. 2005).

There is no basis in this case for the application of the doctrine of estoppel. Appellant Kenton Smith was not involved in the perpetration of a fraud or the consummation of a fraudulent scheme; there was nothing unconscionable in his conduct; Appellees are not innocent persons; Appellant Smith's conduct cannot be characterized as evil. On the contrary, the Statute of Frauds is designed to prevent just the kind of fraud attempted to be perpetrated on the Court by Appellees. Certainly, Appellant Sandra Smith is entitled to the protection of the Statute of Frauds when there is no allegation in the record that she was ever a party to any agreement to sell her interest in the subject property for "what she had in it."

In essence, Appellees urged the trial court to treat Appellant Kenton Smith differently by virtue of his profession as a lawyer. Appellees claimed that Appellant Kenton Smith was attempting to benefit himself at the expense of his fellow co-owners. When the property is sold, each party will receive his/her respective share of the proceeds of the sale of the real estate. Further, each party is entitled to bid what he/she believes is the fair market value of the property at the sale.

There is no evidence in the record that any party to the transaction instructed Steven R. Crebessa, the attorney who prepared the deed, to include any buy-sell agreement in the deeds or to draft the same at any point thereafter. There is also no evidence in the record that in the thirteen years since the deeds were drafted that Appellees contacted any other

attorney to draft a buy-sell agreement. There is no requirement that a buy/sell agreement must be drafted by an attorney to be enforceable. The agreement simply needs to be in writing. The parties to the transaction had enough real life experience to write a simple buy-sell agreement.

It is important to note that the deeds were drafted and executed prior to the first log being cut off the property. Thus, it is a factual impossibility for Appellant Kenton R. Smith to have drafted the deeds to include an agreement to sell the property for \$5,300.00 (what the parties "had in it") when this figure did not exist until after the property was timbered and thus well after the deeds were prepared.

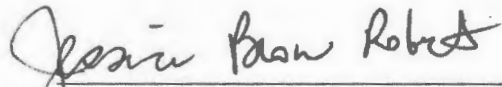
In the Court of Appeals, Appellees cited several cases in support of their proposition that Appellant Kenton Smith is estopped from claiming the protections of the Statute of Frauds. None support the position of Appellees. Midwest Mutual, supra, is a case interpreting the application of the Statute of Frauds to insurance contracts. Clearly, this case does not involve an insurance contract. In Smith v. Ash, supra, the Court held that the doctrine of estoppel did not apply to the facts of that case. Appellees also cited Alagia, Day, Trautwein & Smith v. Broadbent, Ky., 882 S.W.2d 121 (1994). That is a case involving a medical malpractice claim and the application of the statute of limitations and has nothing to do with the Statute of Frauds or doctrine of estoppel.

There is insufficient basis to apply the equitable doctrine of estoppel to this case, particularly given the nature of the wrongdoing by Appellees. Appellees simply cannot circumvent the clear application of KRS 371.010 to this case by claiming estoppel.

CONCLUSION

For the above reasons, the Court of Appeals opinion should be reversed, and the decision of the Meade Circuit Court granting summary judgment and directing judicial sale of the subject property should be affirmed.

Respectfully submitted,



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