RENDERED: SEPTEMBER 18, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000776-MR

EARL RAY COMBS — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 07-CI-00176

DENZIL MULLINS; CONNIE MULLINS; STELLA COMBS SHEPHERD; EDWARD SHEPHERD; JO ANN COMBS; NANCY COMBS HURT; STEVE HURT; AND LEECO, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Earl Ray Combs appeals from an order by the Perry Circuit Court dismissing his claim for an interest in property. After a careful review of the record, we are bound by precedent to affirm.

On August 11, 1934, Earl Ray was born to Herman Combs and Ershel Smith, two teenagers living in Floyd County, Kentucky. According to the record, these individuals were never married. Herman later fathered three additional children.[1]

Herman died intestate on September 20, 1975, and was survived by all four of his children. At the time of his death, Kentucky Revised Statute (KRS) 391.090(2) prohibited an illegitimate child from inheriting from his father. Accordingly, all property owned by Herman descended to only his three youngest children. Approximately thirty-one years later, these children conveyed a portion of the real property to Leeco, Inc.

In 1977, the Kentucky Supreme Court held KRS 391.090(2) unconstitutional. *See Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1977) (*Pendleton II)*. Over thirty years after Herman's death and the decision in *Pendleton II*, Earl Ray filed a complaint in Perry Circuit Court for his interest in his father's property. Herman's remaining children and Leeco moved to dismiss Earl Ray's complaint, asserting that *Pendleton II* (holding KRS 391.090 unconstitutional) did not have retroactive effect on the devolution of a title before April 26, 1977, except for those cases involved in pending litigation at that time. The circuit court dismissed Earl Ray's complaint, and he timely appealed that decision.

[1] The record does not provide information related to Herman's marriage producing the three younger children. Nonetheless, because no one claims otherwise, it is presumed that these children were born in wedlock.

In *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), the United States Supreme Court held that statutes discriminating against illegitimate children were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In accordance with *Trimble*, the Kentucky Supreme Court struck down KRS 391.090. Declaring KRS 391.090 invalid, the Court held:

> Insofar as it declares the invalidity of KRS 391.090 this opinion shall have no retroactive effect upon the devolution of any title occurring before April 26, 1977 (the date of the *Trimble* opinion), except for those specific instances in which the dispositive constitutional issue raised in this case was then in the process of litigation.

Pendleton II, 560 S.W.2d at 539.

This Court recently applied the retroactive effect of *Pendleton II* in *Turner v. Perry County Coal Corp*., 242 S.W.3d 658 (Ky.App. 2007). In *Turner*, a case factually similar to the case at hand, our Court held that the decision regarding retroactivity in *Pendleton II* applied to Turner's case and concluded that the state's interest in finality provided justification for barring this type of claim. *Turner*, 242 S.W.3d at 661.

Relying on *Reed v. Campbell*, 476 U.S. 852, 106 S.Ct. 2234, 90 L.Ed. 2d 858 (1986), which was decided after the Kentucky Supreme Court rendered *Pendleton II*, Earl Ray argues that courts cannot "develop a hard and fast rule regarding retroactivity" without violating the Equal Protection Clause of the Fourteenth Amendment. He argues that *Reed* requires an analysis into finality

weighed against the "interest in preventing the deprivation of the equal protection of its laws." Earl Ray reasons that *Pendleton II*'s decision regarding retroactivity "serves to further perpetuate the discrimination against illegitimate children that existed during the time that KRS 391.090 was still in effect [and that t]his pattern of jurisprudence should not be allowed to continue unaltered." According to his argument, a *Pendleton II* analysis, *i.e.,* one establishing a firm date for the application of retroactivity, results in a violation of his federal equal protection rights and "unjustifiably strip[s] [him] of his right to inherit from his father." Consequently, he argues that because the Kentucky Supreme Court did not have the benefit of the *Reed* decision prior to rendering *Pendleton II*, *Turner's* reliance on *Pendleton II* was in error.

While the Court in *Turner* did consider *Reed*, it found it distinguishable. Regarding *Reed*, the Court concluded "that the state's interest in finality provides justification for barring [Appellant's] claim." *Turner*, 242 S.W.3d at 661.

Although a majority of this panel agreed with Earl Ray's arguments and would overrule *Turner* under a *Reed* analysis, *Turner* is a prior published opinion of the Court. Accordingly, this case was ripe for *en banc* review. Upon consideration of this matter by the entire Court, the Court was split on the issue. While the votes were close, a majority of the Court considering whether to overrule *Turner* refused to do so. Accordingly, this panel is bound by *Turner* and *Pendleton II*; therefore, we will apply this precedent to the case at hand.

Because Herman died intestate in 1975, before the *Pendleton II* decision was rendered, title to his property properly passed to his legitimate children on that date. In other words, "title to his real estate immediately vest[ed] in his heirs at law[.]" *Turner*, 242 S.W.3d at 660 (quoting *Rose v. Rose*, 296 Ky. 18, 22, 176 S.W.2d 122, 124 (1943)). Consequently, Earl Ray, having been born out-of-wedlock, did not inherit an interest in the real property at issue upon his father's death. Thus, while the result is harsh, the trial court properly dismissed Earl Ray's complaint as a matter of law under binding precedent.

LAMBERT, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS BY SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. In 1977, the United States Supreme Court held that intestate succession statutes which prohibited illegitimate children from inheriting from their fathers were unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment. *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed.2d 31 (1977). The Kentucky Supreme Court acknowledged this decision in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1977) (*Pendleton II*),[2] but stated that *Trimble* would not be given retroactive application prior to its rendition date of April 26, 1977. The imposition of an arbitrary cutoff date of the sort established by

[2] Cecil Pendleton, the illegitimate son of Cornelius Pendleton, filed suit in Fayette Circuit Court in the early 1970s to establish his claim to real estate owned by his father. The first opinion of Kentucky's highest court, *Pendleton v. Pendleton*, 531 S.W.2d 507 (Ky. 1975) (*Pendleton I*), was vacated by the United States Supreme Court, 431 U.S. 911, 97 S.Ct. 2164, 53 L.Ed.2d 220 (1977). *Pendleton II* was the resulting opinion on remand.

Pendleton II, however, was explicitly rejected by the United States Supreme Court. *Reed v. Campbell*, 476 U.S. 852, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986). The issue now before us involves further interpretation of this line of cases.

I. Illegitimate Children's Right to Inherit.

In *Trimble*, the United States Supreme Court held that statutes discriminating against illegitimate children, such as KRS 391.090, were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. As a result, the Kentucky Supreme Court subsequently struck down KRS 391.090 in *Pendleton II*. However, in declaring KRS 391.090 invalid, the court stated:

> Insofar as it declares the invalidity of KRS 391.090 this opinion shall have no retroactive effect upon the devolution of any title occurring before April 26, 1977 (the date of the *Trimble* opinion), except for those specific instances in which the dispositive constitutional issue raised in this case was then in the process of litigation.

Pendleton II, 560 S.W.2d at 539.

The imposition of an arbitrary cutoff date, of the sort established by *Pendleton II*, was explicitly rejected by the Supreme Court in *Reed*. In *Reed*, an intestate father died four months prior to *Trimble*, and the administration of his probate estate was pending when *Trimble* was rendered. Subsequently, an illegitimate daughter asserted a claim to the estate. The Texas courts denied relief on the basis that *Trimble* had no retroactive effect.

The Supreme Court reversed, holding that such facts, a pending court case and a prior decision that the inheritance statute was unconstitutional, required that "[t]he interest in equal treatment protected by the Fourteenth Amendment . . . specifically, the interest in avoiding unjustified discrimination against children born out of wedlock . . . should therefore have been given controlling effect." 476 U.S. at 856, 106 S.Ct. at 2238. In reaching this decision, and specifically addressing the relevance of *Trimble's* rendition date, the Court noted:

> Although the administration of [the decedent's] estate was in progress on that date, the court refused to apply *Trimble* because appellant's claim was not asserted until later. Thus, the test applied by the Texas court resulted in the denial of appellant's claim because of the conjunction of two facts: (1) her father died before April 26, 1977, and (2) her claim was filed after April 26, 1977.
>
> There is nothing in the record to explain why these two facts, either separately or in combination, should have prevented the applicability of *Trimble,* and the allowance of appellant's claim, at the time when the trial court was required to make a decision. At that time, the governing law had been established: *Trimble* had been decided, and it was clear that § 42 was invalid. The state interest in the orderly administration of [the decedent's] estate would have been served equally well regardless of how the merits of the claim were resolved. In this case, then, neither the date of his death nor the date the claim was filed had any impact on the relevant state interest in orderly administration; their conjunction similarly had no impact on that state interest.

476 U.S. at 856, 106 S.Ct. at 2237-38.

The Court did, nevertheless, recognize states had some ability to restrict illegitimate children's inheritance rights:

> The state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, of course, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted. After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the probate process.

476 U.S. at 855-56, 106 S.Ct. at 2237. Notably absent, however, from the Supreme Court's listing of permissible bars to an illegitimate child's right to inherit was *Trimble's* rendition date of April 26, 1977.

In *Reed*, as in *Trimble*, the special requirements which a state could impose on an illegitimate child's right to inherit were limited to those associated with proving paternity or the timely assertion of claims. *See Reed*, 476 U.S. at 855, 106 S.Ct. at 2237; *Trimble*, 430 U.S. at 772 n. 14, 97 S.Ct. at 1466 n. 14 (stating "[e]vidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The States, of course, are free to recognize these differences in fashioning their requirements of proof"). Thus, special proof requirements, of the type enunciated in KRS 391.105(1)(b) permitting an illegitimate child to inherit from or through the father, based on an adjudication of paternity either before the father's death or after the father's death "based on clear and convincing proof[,]" may be constitutionally permissible.[3] *See generally* Carolyn S. Bratt, *A Primer on Kentucky Intestacy*

[3] KRS 391.105 was enacted in 1988. 1988 Kentucky Acts (Ky. Acts) ch. 90, § 3.

Laws, 82 Kentucky Law Journal (Ky. L. J.) 29, 70-76 (1993-94) (discussing the inheritance rights of out-of-wedlock heirs). Further, "generally applicable limitations on the time and the manner in which claims may be asserted" are permissible. *Reed*, 476 U.S. at 855, 106 S.Ct. at 2237. Such generally applicable limitations are, of course, the subject of KRS Chapter 413.

Next, the application of general limitations on the right to enforce a claim for inheritance was thoroughly examined in *Wood v. Wingfield*, 816 S.W.2d 899 (Ky. 1991). In *Wood*, the Kentucky Supreme Court addressed the "appropriate statute of limitations faced by an illegitimate heir claiming an interest in an estate," noting that "an illegitimate child has exactly the same rights to inherit as does a legitimate child[.]" *Id.* at 900. In my view, this decision established "generally applicable limitations on the time and the manner in which claims may be asserted[,]" as permitted by *Reed*. 476 U.S. at 855, 106 S.Ct. at 2237.

The *Wood* court carefully described the concept that, under Anglo-American law, "upon the death of an intestate, real property vests immediately in those persons entitled to inherit same from the decedent. The administrator of the decedent's estate has little or nothing to do with real property." 816 S.W.2d at 902. In explanation, the court stated that

> title to real estate owned by an intestate passes directly to the heirs by virtue of KRS 391.010. This is true whether those heirs are legitimate or illegitimate.[4] Title to the intestate's real estate vests in the persons designated by

[4] In *Wood*, the intestate decedent died one month after the effective date of *Trimble*. Thus, *Wood* is arguably distinguishable on its facts from the *Pendleton* cases and *Turner*. In these latter cases, the decedents died prior to April 1977.

> KRS 391.010 as a matter of law upon the death of the decedent. On the other hand, title to personal property must first pass through administration, and does not descend directly to the statutorily designated heirs as does real property. While we would prefer to treat both real and personal property similarly, we cannot ignore the plain difference between the two types of properties and the method by which the property descends to the heirs.

Id. at 902-03.

Further, the court also described the elements of adverse possession and the time frame within which an heir must bring a claim to recover real property, stating:

> Since an heir is immediately vested in the real estate upon the death of the decedent, it is our determination that there is no statute of limitations *per se* with respect to that heir's claim since the property is *already* his. KRS 413.010 applies to the "recovery" of real property. In order to recover something, there must first be a taking away, or in real estate terms, an "ouster." The concept of "ouster" arises from the legal principle of adverse possession and it is this analysis which must be applied to coinheritors from an intestate decedent. As stated in *Hannah v. Littrell*, 304 Ky. 304, 200 S.W.2d 729 (1947), quoting from an earlier decision:
>
> > "'In order that one of several cotenants may acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive and hostile character as amounts to an ouster of the other tenants'," 200 S.W.2d at 729.
>
> In *Moore v. Terry*, 293 Ky. 727, 170 S.W.2d 29 (1943) property was jointly held by the intestate's children and her spouse on his curtesy claim. The spouse, in a subsequent suit by the children, claimed he had adversely held the property since the date of death, a period of twenty plus years. The Court held against him,

> stating "where property is jointly occupied, the possession of neither occupant can be deemed adverse to the rights of the other," 170 S.W.2d at 31. There must be an ouster for one joint tenant to gain title against his cotenants by adverse possession.
>
> These principles were again addressed in *Moore v. Gaines*, 308 Ky. 223, 213 S.W.2d 990 (1948). In that case, a granddaughter of the intestate claimed her share in certain real estate against the widow of one of the children of the intestate. The widow claimed full entitlement by adverse possession. The widow had paid taxes, insurance and the like and had performed all repairs on the property. While these acts might signify ownership to third parties, the Court held they were not sufficiently hostile to oust the joint tenant. Once an ouster has occurred sufficient to put an owner on notice that his possessory rights to real estate have been challenged, such as a sale by the other joint tenants to a third party who then takes possession, *Rose et al. v. Ware, et al.*, 115 Ky. 420, 74 S.W. 188 (1903), that owner has a maximum of fifteen years within which to file suit for the recovery of his real estate interest, *see Wilcox, et al. v. Sams, et al.*, 213 Ky. 696, 281 S.W. 832 (1926). **Since the original *right* to the real estate descends to the heir by virtue of KRS 391.010, the only limitations requirement on an omitted heir is to file suit for the recovery of the intestate's real property within fifteen years after there has been an ouster.**

816 S.W.2d at 903-04 (footnotes omitted) (final emphasis added).[5]

Thus, *Trimble*, *Reed* and *Wood* together compel the conclusion that illegitimate children must generally be treated the same as legitimate children for purposes of inheriting under the laws of intestate succession, subject, of course, to proving paternity. Pursuant to these cases, Earl Ray necessarily inherited an

[5] The court in *Wood* also examined the limitations period during which an heir must bring an action to assert a claim for personal property. 816 S.W.2d at 904.

undivided one-fourth of the property upon his father's death in 1975, becoming a cotenant with his half-siblings.[6] Ouster occurred only in 2003, with the purported sale of all the property to the Mullins. Only at this point was Earl Ray on notice that his possessory rights had been challenged. Although an affidavit of descent was filed in 1975, apparently by Herman's legitimate children, such an affidavit does not constitute an affidavit of adverse possession, and did not affect Earl Ray's interest in the property. *Gee v. Brown*, 144 S.W.3d 844 (Ky.App. 2004); *see Sirls v. Jordan*, 625 S.W.2d 106, 108 (Ky.App. 1981) (stating that affidavit of descent is not conclusive proof of heirship, and that purchaser for value took real estate subject to claims of any undisclosed heirs).

II. *Pendleton v. Centre College* and *Turner v. Perry County Coal Corp.*

If *Trimble*, *Pendleton II*, *Reed* and *Wood* were the only cases touching upon this subject, no further analysis would be necessary. However, several weeks after rendering *Wood*, the Kentucky Supreme Court denied discretionary review and ordered publication of this court's earlier opinion in *Pendleton v. Centre College of Kentucky*, 818 S.W.2d 616 (Ky.App. 1991) (*Pendleton III*). In *Pendleton III*, this court discussed *Trimble*, *Reed*, and *Pendleton II*, without the benefit of *Wood,* in reaching a correct result, but it appended certain dicta which has led to incorrect results. The facts in *Pendleton III* again involved Cecil

[6] To be clear, in my view, the Supreme Court's holding in *Reed* effectively prohibits a Kentucky court from applying the usual rule that distribution of a decedent's estate is governed by the statutes of intestate succession as existed on his or her date of death. *See, e.g., Skinner v. Morrow*, 318 S.W.2d 419, 424 (Ky. 1959).

Pendleton. He was now trying to establish his interest in two tracts of property owned by his father at his 1966 death and sold by the putatively legitimate heirs that same year. As Cecil's action to recover the property was not brought until 1988, the court upheld the trial court's determination that the action was time-barred under KRS 413.010. 818 S.W.2d at 619. This decision comports with the time limits established by *Wood* and reaches the correct result because the sale of the property, *i.e.*, the ouster of the rightful, albeit illegitimate, heir occurred twenty-two years before the action was brought.

Unfortunately, this court appended the gratuitous statement that *Reed* did not affect the non-retroactive rule established by *Pendleton II*, based on the statement in *Reed* that the state's interest in finality could justify denying the belated assertion of claims after the distribution of an estate. 818 S.W.2d at 619. However, this dicta ignores the legal reality that under the laws of intestate succession, real property does not pass through administration, but instead passes directly to the heirs by virtue of KRS 391.010. *Wood*, 816 S.W.2d at 902-03.

Even more unfortunately, sixteen years later, in *Turner v. Perry County Coal Corp*., 242 S.W.3d 658 (Ky.App. 2007), this court relied upon the passage from *Reed* regarding the state's interest in finality and the statement in *Pendleton III* to reach a result which cannot be squared with the decision in *Wood*. In *Turner*, Buck Combs died intestate in 1962. His illegitimate daughter, Betty Turner, was his sole descendant. In 1967, a cousin filed an affidavit of descent identifying various second and third cousins as Buck's heirs-at-law with respect to

certain property Buck owned at his death. No transfers or other proceedings involved the property until 2004, when some of the heirs sold Perry County Coal their undivided interests in the property. Perry County Coal then brought an action to partition the property, and named Betty as a person who might be claiming an interest in the property. The trial court denied Betty's claim and this court affirmed, stating:

> The facts in this case are distinguishable from those in *Reed*. In *Reed*, the illegitimate child's claim was made while the estate remained open in the probate court. Here, the decedent had been dead for over 40 years. [footnote: There was never any settlement of the estate of Buck Combs.] In accordance with the aforementioned language in *Reed*, we conclude that the state's interest in finality provides justification for barring Turner's claim. In short, the rule stated by our supreme court in *Pendleton II* was not changed by the U.S. Supreme Court in *Reed*. *See Pendleton v. Centre College of Kentucky*, 818 S.W.2d 616, 619 (Ky.App. 1990) (*Pendleton III*).

Turner, 242 S.W.3d at 661 (original footnote enclosed in brackets).

Although *Turner* recited the "magic words" concerning the state's interest in finality, the case ignored the Kentucky Supreme Court's holding in *Wood* and the method by which real estate passes to heirs. **In this situation, the state's interest in "finality" is demonstrably illusory.** For example, assuming identical facts except as to legitimacy status, an estranged legitimate heir who was omitted from an affidavit of descent would have fifteen years from any ouster to assert a claim to the real property. *See, e.g., Moore v. Gaines*, 308 Ky. 223, 231, 213 S.W.2d 990, 994 (1948) (holding that an heir was entitled to assert her co-

ownership claim to real property more than **twenty-one years** after the death of her grandfather); *Fordson Coal Co. v. Vanover*, 291 Ky. 447, 164 S.W.2d 966 (1942) (upholding cotenants' claim to an undivided one-fourth interest in property nearly **sixty years** after purported execution of deed). An heir's ability to establish a claim to real estate, after it passes by intestate succession, exists regardless of whether any administration of the decedent's estate occurs following the decedent's death.[7] In fact, in *Wood*, the illegitimate daughter of a father who died one month after the effective date of *Trimble* was permitted to assert her claim to her father's real estate eight years after his death, as well as after the probate estate was closed.

To paraphrase the United States Supreme Court, any rule applied in accordance with *Turner*, *Pendleton II*, and *Pendleton III* improperly results in the denial of an illegitimate heir's claim, including Earl Ray's, "because of the conjunction of two facts: (1) [his] father died before April 26, 1977, and (2) [his] claim was filed after April 26, 1977." *Reed*, 476 U.S. at 856, 106 S.Ct. at 2237. **Simply put, no state interest exists in imposing the arbitrary rule established by Pendleton II**.[8]

[7] KRS 395.010 provides that "[o]riginal administration shall not be granted after the expiration of ten (10) years from the death of the . . . intestate[.]"

[8] I recognize that the state has an interest in certification of title to real estate. *Fykes v. Clark*, 635 S.W.2d 316, 318 (Ky. 1982); *but see Sirls*, 625 S.W.2d at 108 (holding KRS 382.120 does not invest an affidavit of descent as warranty of title, and recognizing the "legislature anticipated the risk of fraud inherent in such instruments" by creating cause of action for injured persons). *Trimble* and *Reed*, however, prohibit the imposition of an arbitrary barrier which would not be imposed on "legitimate" heirs.

Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command. "[W]hen a theory supporting a rule of law is not grounded on facts, or upon sound logic, or is unjust . . . it should be discarded, and with it the rule it supports." *Vaughn v. Knopf*, 895 S.W.2d 566, 570 (Ky. 1995) (emphasis omitted) (quoting *D & W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 424 (Ky. 1980)). The establishment of April 26, 1977 as a date to bar the claim of an illegitimate heir to his or her father's estate is completely arbitrary. It is illogical given the manner in which real property passes under intestate succession, it serves no legitimate purpose related to the orderly disposition of a decedent's estate under *Reed* or *Wood*,[9] and it is unjust. In my view, a proper analysis of caselaw demonstrates that *Turner* was wrongly decided. To the extent that either *Turner* or *Pendleton III* holds that an illegitimate heir of real property has no claim to the property if his or her father died before April 26, 1977, they should be overruled.[10]

III. Conclusion.

In my view, the Perry Circuit Court's judgment should be vacated, and this matter be remanded to that court for further proceedings, with Earl Ray

[9] The function of the Kentucky Court of Appeals is not "to establish new rules of law or enunciate changes in Kentucky jurisprudence." *Tucker v. Tri-State Lawn & Garden, Inc*., 708 S.W.2d 116, 118 (Ky.App. 1986). Overturning *Turner* would, in fact, do neither; rather, the court would be properly applying decisions of the United States Supreme Court in *Trimble* and *Reed*, and the Kentucky Supreme Court in *Wood*.

[10] One factual difference between the instant case and *Turner* is that Betty Turner was the sole descendant, legitimate or illegitimate, of her father. Thus, the putative heirs did not hold the property as cotenants with her. The decision in *Turner*, however, rested solely on an analysis of *Trimble*, *Reed* and *Pendleton III*.

bearing the burden to prove his paternity by clear and convincing evidence. *See* *Fykes v. Clark*, 635 S.W.2d at 318.

BRIEFS FOR APPELLANT:

Russ Wilkey
Steven D. Wilson
Owensboro, Kentucky

BRIEF FOR APPELLEES, DENZIL MULLINS, CONNIE MULLINS, STELLA COMBS SHEPHERD, AND EDWARD SHEPHERD:

Frank C. Medaris, Jr.
Hazard, Kentucky

BRIEF FOR APPELLEE, LEECO, INC:

Gary W. Napier
Drayer B. Spurlock
London, Kentucky

BRIEF FOR APPELLEES, JO ANN COMBS, NANCY COMBS HURT, AND STEVE HURT:

N/A