

RENDERED: AUGUST 22, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001087-MR

GARY L. HILL, EXECUTOR OF THE
ESTATE OF CHESTER HILL

APPELLANT

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NOS. 08-CI-00048 AND 09-CI-00258

DARLA BURRIS; LORI S. LEE;
ANGELA C. DEAN; PEOPLE'S
EXCHANGE BANK OF BEATTYVILLE,
KENTUCKY, INC.; BANK OF COLUMBIA;
THE FIRST NATIONAL BANK OF COLUMBIA,
A SUBSIDIARY OF ALBANY BANCORP, INC.;
WELLS FARGO BANK, N.A.; UNITED CITIZENS
BANK OF SOUTHERN KENTUCKY, INC.;
AND TERRY HARVEY

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

CAPERTON, JUDGE: Gary Hill, Executor of the Estate of Chester Hill, appeals from the judgment entered by the trial court on July 26, 2012, in favor of the Appellees. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm.

The facts of this appeal were heard before the trial court during a bench trial held on January 11, 2012. Thereafter, the trial court entered its findings of fact, conclusions of law, and judgment in favor of Appellee, People's Exchange Bank of Beattyville, Kentucky, Inc. The court was presented evidence that Chester Hill was an octogenarian who had Parkinson's disease, was impaired by a stroke, and was vision impaired.¹ Darla Burris, his niece, took care of Hill's finances, drove him around, and helped go through his mail. Burris took care of Hill for seven years. While Burris claimed that Hill had given her a power of attorney, Hill stated that he did not grant her such power. Burris was later imprisoned for forgery based on forging both her mother's and Hill's names on checks.

The court was presented evidence that Burris and Hill went to the bank on five or six occasions for the purpose of obtaining a loan. Lori Lee met with Hill and got information needed for a loan of \$96,000. Part of the proceeds of the loan was used to pay off a vehicle that Hill purchased for Burris. Lee testified that Hill was aware of the transaction taking place and that there was a monthly payment. Hill always responded when asked about the loan, either by nodding his head or saying yes. Both Hill and Burris were present at the closing of the

¹ Hill died during the pendency of this action, but the court was provided with his deposition.

mortgage. Hill signed the HUD statement. After signing, Hill told Lee he was too shaky, could not see well enough to sign the rest of the documents, and directed Burriss to finish signing his name to the documents, which she did. Lee notarized Hill's signature even though Burriss actually signed the documents. Lee did not read the entirety of the documents to Hill but instead went over the key points of the mortgage, including the amount, description of the property, and interest. Lee read the entire HUD statement to Hill.

The court found that Burriss did not have a power of attorney and that Hill understood everything about the closing. The court concluded that Burriss was an authorized agent of Hill and had the express authority to sign all the documents on his behalf. The court found that People's Bank did not act with malice, gross negligence, or fraud towards Hill. Lee did not commit fraud when she notarized Hill's signature, as Hill had expressly authorized Burriss to sign his name, thereby making her his agent. By executing the HUD statement, Hill indicated his desire to go forward with the loan, and his health and vision explain why he authorized Burriss to complete the transaction. Thus, the court awarded a judgment in favor of People's Bank. It is from this final judgment that Hill now appeals.

On appeal Hill argues: (1) People's Bank did not have a valid claim to a mortgage; (2) no evidence of apparent agency existed; (3) the trial court failed to make its own factual findings; and (4) factual issues barred summary judgment. People's Bank disagrees with the arguments raised by Hill and instead urges this Court to affirm the trial court's final judgment.

In reviewing the arguments of the parties, we note that Kentucky Rules of Civil Procedure (CR) 52.01 provides that findings of fact made by the trial court shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to determine the credibility of the witnesses before it. *See* CR 52.01. A factual finding is not clearly erroneous if supported by substantial evidence. *See Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is that which has sufficient probative value to induce conviction in the mind of a reasonable person when taken alone or in light of all the evidence. *Golightly* at 414. The trial court's conclusions of law, reached after making its findings, are subject to an independent, *de novo* review. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). A determination or decision by the trial court is an abuse of discretion if it is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We now turn to the first issue raised by the parties.

First, Hill argues that People's Bank did not have a valid claim to a mortgage and relies upon Kentucky Revised Statutes (KRS) 446.060(1)² in support thereof. Hill argues that People's Bank did not inform him that the documents were loans, did not read the documents to him, did not require a valid power of

² KRS 446.060(1) states: "When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing."

attorney for any third-party signature, and had the documents improperly notarized and improperly signed by a third party.³

Below, the trial court was presented evidence that People's Bank employee, Lori Lee, discussed the terms of the mortgage with Hill and that Hill understood the terms of the mortgage and requested that Burris sign for him. While there do appear to be discrepancies with the notarization, Hill has not provided this Court with jurisprudence that such problems invalidate the contract. Thus, we decline to reverse on this ground.

As to whether the trial court properly determined that Hill knew what Burris was signing for him and the legal implications thereof, we believe the trial court did not err as discussed *infra*.

Second, Hill argues that no evidence of apparent agency existed, with which People's Bank disagrees. Hill argues that People's Bank acted in bad faith in relying on Burris's representations, particularly where the bank employee admitted that Hill was confused about the nature of the documents, and that he could not read them nor did he personally sign them. Hill's deposition testimony shows unequivocally that he did not give Burris a power of attorney, did not consent to her taking a mortgage out on his property, did not agree to her taking funds from his account, and did not consent to her theft. Further, Burris signed the

³ We note that there was no argument made that the bank violated any statute, regulation, or duty imposed by Kentucky via our jurisprudence beyond the argument that the bank breached its good faith obligation as a fiduciary. Moreover, there was not an argument made that an invalid notary signature vitiated the documents. Instead, at oral argument, Appellee People's Bank asserted that an invalid notary signature would have impacted whether the document was recordable but not the enforceability of the document between the parties.

loan documents and mortgage applications, and the bank employee notarized Burris's signature instead of Hill's signature.

People's Bank argues that Burris was Hill's agent specifically for the purpose of signing the loan documents and the mortgage. People's Bank does not argue that Burris had a written power of attorney from Hill but instead argues that Hill expressly made Burris his agent for the purpose of signing the documents and induced Lee into believing that Burris had the authority to do so. Lee testified that at the closing, Hill told Lee he was too shaky to sign the documents and that he could not see them well. Lee asked Hill what he would like to do and he responded that he wanted Burris to finish signing the papers. All the signatures from February 3, 2006, were that of Burris signing for Hill except the HUD document which was signed by Hill. Hill was present in the room while Burris was signing his name. The court concluded that Burris was an authorized agent of Hill and had the express authority to execute all the documents on his behalf. We agree.

“Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *McAlister v. Whitford*, 365 S.W.2d 317, 319 (Ky. 1962), citing Restatement, Second, Agency, Volume I, Section 1, page 7; *Palmer & Hardin v. Grand Lodge K. of P. of Kentucky*, 121 S.W. 678 (Ky. 1909).

There is no doubt that a principal is liable for the acts of his agent acting within the scope of his authority. *Strader's Adm'rs v. President & Directors of Lexington Hydraulic & Mfg. Co.*, 146 Ky. 580, 142 S. W. 1073. An agent is one who acts for, or in the place of, another by authority from him, or who undertakes to transact some business or manage some affair for him by authority from him, and to render an account of what he has done. *Jeffrey Co. v. Lockridge*, 173 Ky. 282, 190 S. W. 1103. The principal is bound by the contract of his agent when at the time it was made the agent acted within the limits of his express authority, or the scope of his implied authority. *Dark Tobacco Growers' Cooperative Association v. Garth*, 218 Ky. 391, 291 S. W. 367.

Hatcher-Powers Shoe Co. v. Kirk, 233 Ky. 19, 24 S.W.2d 903, 905 (1930).

Actual authority is granted to the agent by the principal.⁴ A trial court may find actual authority if “there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.”

Terbovitz v. Fiscal Court of Adair County, Ky., 825 F.2d 111, 116 (6th Cir.1987)

(*overruled on other grounds*) (internal citation omitted). *See also* Restatement

(Third) of Agency § 2.01 (2006) (When an agent acts with actual authority, the

agent has the power to bind the principal or to “affect the principal's legal relations

with third parties.) Apparent authority is created when the *principal* holds out to

⁴ This Court has distinguished between implied and apparent authority:

Implied authority is actual authority circumstantially proven which the principal actually intended the agent to possess and includes such powers as are practically necessary to carry out the duties actually delegated.

Estell v. Barrickman, Ky.App., 571 S.W.2d 650 (1978). Apparent authority on the other hand is not actual authority but is the authority the agent is held out by the principal as possessing. It is a matter of appearances on which third parties come to rely. *Estell v. Barrickman*, *supra*.

Mill Street Church of Christ v. Hogan, 785 S.W.2d 263, 267 (Ky. App. 1990).

others that the agent possesses certain authority that may or may not have been actually granted to the agent. *See Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky. App. 1990) (“It is a matter of appearances on which third parties come to rely.”) Moreover, “[i]t is a rule, universally acknowledged, that the declarations of an agent are inadmissible to prove the fact of agency or that he was acting within the scope of his authority in a particular transaction.” *Galloway Motor Co. v. Huffman's Adm'r*, 281 Ky. 841, 137 S.W.2d 379, 382 (Ky. 1939).

The court below was presented testimony that Hill asked Lee to allow Burris to finish signing the documents on Hill’s behalf and in his presence. The court concluded that such actions made Burris Hill’s agent for the sole purpose of executing the documents on his behalf. We cannot say that this was in error given our jurisprudence on agency; accordingly, we decline to reverse on this ground.

Hill next argues that the trial court failed to make its own factual findings and instead used verbatim People’s Bank trial memorandum as its final judgment. People’s Bank disagrees and explains that its trial memorandum was 27 pages compared to the 4-page final judgment; thus, any reliance on their memorandum underwent substantial editing. The Kentucky Supreme Court addressed a similar issue in *Bingham v. Bingham*, 628 S.W.2d 628 (Ky. 1982):

The sole question before us is whether, under the present facts, the trial court's adoption of proposed findings of fact and conclusions of law tendered by counsel at the direction of the court sufficiently complies with the requirements of CR 52.01.

CR 52.01 states, in pertinent part:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon ...

When confronted by this issue in *Kentucky Milk Marketing & Anti-Monopoly Comm. v. Borden Co.*, Ky., 456 S.W.2d 831 (1969), we stated:

We do not condemn this practice (of permitting attorneys to draft findings of fact and conclusions of law) in instances where the court is utilizing the services of the attorney only in order to complete the physical task of drafting the record. However, to the extent that the court delegates its power to make findings of fact and draw conclusions this is not good practice. 456 S.W.2d at 834.

Our concern here, as in *Milk Marketing, supra*, is that the trial court does not abdicate its fact-finding and decision-making responsibility under CR 52.01. However, the delegation of the clerical task of drafting proposed findings of fact and conclusions of law under the proper circumstances does not violate the trial court's responsibility.

Careful scrutiny of the record reveals that the court was thoroughly familiar with the proceedings and facts of this case. The record indicates the trial judge prudently examined the proposed findings and conclusions and made several additions and corrections to reflect his decision in the case. This is not an instance where detailed, lengthy, contradictory findings of fact and conclusions of law were filed by counsel for no other purpose than to “unduly enlarge, confuse, compound and expand ... (the) record.” *Milk Marketing, supra* at 835.

As distinguished from the facts in *United States v. Forness*, 125 F.2d 928 (1942), there was no verbatim or mechanical adoption of proposed findings of fact and conclusions of law in the present action. There has been no showing that the decision-making process was not under the control of the trial judge, nor that these findings and conclusions were not the product of the deliberations

of the trial judge's mind. The evidence adduced at trial clearly supports the findings of fact and conclusions of law announced by the court and in the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility under CR 52.01, they are not to be easily rejected.

Bingham at 629-30.

Sub judice, the final judgment states “COMES the Defendant, Peoples [sic] Exchange Bank of Beattyville, Kentucky, Inc., and for its trial memorandum states as follows:.” While this is troubling, a detailed review of the final judgment reveals substantial editing compared to the submitted trial memorandum. We believe such to be evidence that the decision-making process was under the control of the trial court and that the order reflected the careful deliberations of the court. *See Bingham, supra*. Therefore, we decline to reverse on this ground.

Next, Hill argues that factual issues barred summary judgment. In support thereof, Hill argues that the loan documents were not properly notarized and cannot be considered valid and binding. Specifically, Hill argues that People’s Bank breached its fiduciary duty by failing to disclose material facts affecting the loan transaction, failing to ensure that only Hill or an appropriate designee signed the mortgage, and that People’s Bank improperly notarized the signature of Burris as if it were Hill’s signature. We disagree.

First, we note that only two summary judgments were granted, one to Appellee, United Citizens Bank of Southern Kentucky, Inc. (UCB), which appears to be on non-contested factual grounds, and the other to Appellee, The First

National Bank of Columbia, a subsidiary of Albany Bancorp, Inc. n/k/a First & Farmers National Bank (hereinafter “First & Farmers”) on a statutory ground discussed *infra*. Hill argues that UCB was not entitled to summary judgment as the documents were not properly notarized.

One of the notary certificates does not list a day in the date of April 2007. The other notes were signed by Burriss using Hill’s name and were notarized by Lee and Dean, bank employees, as if Burriss were Hill. From the record it is clear that Lee was employed by People’s Bank, and that People’s Bank was not granted summary judgment but instead had a judgment entered in its favor after a bench trial; thus, we will address Hill’s argument as if it were directed at the court’s judgment entered post-trial. We are unclear as to whether the factual issues and arguments raised by Hill regarding UCB were presented to the trial court. Moreover, it appears that Hill is arguing that UCB employees had the obligation to read the entirety of the documents to Hill prior to the signing of the contract. However, he has not provided any jurisprudence establishing that by failing to do so a binding contract would not exist even if Hill otherwise understood the terms of the contract. Without such jurisprudence, we decline to reverse the grant of summary judgment to UCB.

As to the final judgment, the court below was presented evidence that People’s Bank employee Lee discussed the terms of the mortgage with Hill and that Hill understood the terms of the mortgage and requested that Burriss sign for him. “It has long been held that the trier of fact has the right to believe the

evidence presented by one litigant in preference to another.” *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky.1996), citing *King v. McMillan*, 169 S.W.2d 10 (Ky. 1943). The trier of fact may believe any witness in whole or in part. *Anderson* at 278, citing *Webb Transfer Lines, Inc. v. Taylor*, 439 S.W.2d 88, 95 (Ky. 1968). The trier of fact may also take into consideration all the circumstances of the case, including the credibility of the witness. *Anderson* at 278, citing *Hayes v. Hayes*, 357 S.W.2d 863, 866 (Ky. 1962). We believe that the court properly chose between conflicting evidence in reaching its findings of fact and its judgment.⁵ Accordingly, we find no error.

Last, Hill argues that the trial court erred in granting First & Farmers summary judgment prior to trial on November 22, 2011. First & Farmers argues that summary judgment was properly granted given KRS 355.4-406. We agree.

At issue, KRS 355.4-406 sets forth in part:

(6) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement or items are made available to the customer (subsection (1)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against

⁵ We reiterate that while Hill argues fraud, the court was free to choose between conflicting evidence. “In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation, b) which is false, c) known to be false or made recklessly, d) made with inducement to be acted upon, e) acted in reliance thereon and, f) causing injury.” *Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 361 (Ky. App. 2007), citing *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). “Fraud may be committed either by intentionally asserting false information or by willfully failing to disclose the truth. *Chamberlain v. National Life & Accident Ins. Co.*, 256 Ky. 548, 76 S.W.2d 628, 631 (Ky. 1934). *See also Restatement (Second) of Torts* § 529 (1977), which indicates that stating a mere partial truth can be fraudulent if it is materially misleading.” *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 469 (Ky. 1999). We agree that the trial court could disagree with Hill and find that there was no fraud based on the evidence presented.

the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under KRS 355.4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.

KRS 355.4-406(6).

We note that, “Because statutory interpretation is a question of law, our review is *de novo*; and the conclusions reached by the lower courts are entitled to no deference.” *Commonwealth v. Love*, 334 S.W.3d 92, 93 (Ky. 2011). Our duty as a court is to effectuate the intent of the legislature in construing a statute. *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775, 784 (Ky. 2008), citing *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). “A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Hall, supra* citing *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005). Thus, we ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed. *See Hall* at 784.

Sub judice, the legislature clearly set forth a one-year limitation on the type of action sought by Hill. While we are sympathetic to the plight of Mr. Hill, we cannot deviate from such a clear intention by the legislature.⁶ Accordingly, the trial court properly granted First & Farmers summary judgment on this ground.

⁶ We note that First & Farmers provided the affidavit of Tina Kruienza to the trial court, which First & Farmers argues established that Hill was sent a monthly statement of his account that included a description of the transactions for the specified time period with images of all checks and deposit slips utilized to transact the business of the account. Thus, First & Farmers argues that this triggered the one-year limitation, with which we agree.

Finding no error, we affirm.

ALL CONCUR.

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BRIEFS OF BEHALF OF
APPELLEE, THE FIRST
NATIONAL BANK OF COLUMBIA,
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BANCORP, INC.:

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Bowling Green, Kentucky

ORAL ARGUMENT FOR
APPELLEE, PEOPLE'S
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ORAL ARGUMENT FOR
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