[Cite as *Eland v. Cleversy*, 2006-Ohio-3416.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

SHARON ELAND,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2005-L-072**
- vs -	:	
JAMES CLEVERSY, SR.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 04 CVF 807.

Judgment: Affirmed.

Werner G. Barthol, 7327 Center Street, Mentor, OH 44060 (For Plaintiff-Appellant).

Michael P. Germano, Centre Plaza South, 35350 Curtis Boulevard, #530, Eastlake, OH 44095 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Sharon Eland appeals from the judgment of the Painesville Municipal Court, which adopted a magistrate's decision, finding against appellant on her breach of contract action. We affirm.

{¶2} Appellant and appellee divorced in 1992, but had an on-again off-again relationship from 1992 through 1998. In May 1998, appellant and appellee were living

together at appellant's home and decided to take out an $18,000 credit line, primarily to pay mortgage arrearages and other bills. The credit line was secured by a mortgage on appellant's residence. Appellee co-signed the note.

{¶3} The evidence presented established appellant almost immediately transferred the full amount of the credit line into her bank account. The evidence also established that this money was used primarily to pay off bills incurred by appellant and to catch up on mortgage payments owed by appellant.

{¶4} The parties exhausted the credit line, and appellant subsequently restructured the note several times. The payments on the credit line were consistently in arrears.

{¶5} The parties' relationship soured and appellee moved out of appellant's residence. Appellant then paid off the credit line by taking an additional mortgage.

{¶6} Appellant sued appellee alleging she and appellee had an oral contract for appellee to pay one-half of the debt and interest owed on the credit line. The matter was tried before a magistrate who found appellant had failed to prove the existence of an oral contract. Appellant objected to the magistrate's decision. The trial court overruled appellant's objections and adopted the magistrate's decision. Appellant filed a timely appeal, raising two assignments of error for our review:

{¶7} "[1.] THE TRIAL COURT ERRED AS A MATTER OF LAW BY IMPROPERLY SHIFTING THE BURDEN OF PROOF TO PLAINTIFF-APPELLANT REQUIRING HER TO PROVE THAT DEFENDANT-APPELLEE WAS A PRINCIPAL

MAKER RATHER THAN AN ACCOMODATION MAKER OF THE CREDIT LINE AGREEMENT."

{¶8} "[2.] THE TRIAL COURT'S FINDING THAT PLAINTIFF-APPELLANT, PURSUANT TO R.C. 1303.14, WAS NOT ENTITLED TO CONTRIBUTION FROM DEFENDANT-APPELLANT FOR MONIES AND INTEREST SHE PAID TOWARD THE BENEFICIAL CREDIT LINE AGREEMENT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶9} We address appellant's assignments of error together.

{¶10} In her first assignment of error, appellant argues the trial court erred because it shifted the burden to her to prove appellee was a principal maker of the credit line, rather than an accommodation maker. In her second assignment of error, she argues the trial court's judgment was against the manifest weight of the evidence as she was entitled to contribution under R.C. 1303.14.

{¶11} The difficulty for appellant lies in the fact that she did not plead a cause of action alleging appellee was liable to her for contribution under R.C. 1303.14. She pleaded only a cause of action for breach of oral contract. Appellant made no mention of the applicability of R.C. 1303.14 until she filed her objections to the magistrate's decision.

{¶12} Further, Civ.R. 15(B) provides:

{¶13} "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in

the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

{¶14} Appellant never moved to amend her complaint to conform to the evidence as required by Civ.R. 15(B); thus appellant has waived any claim she may have had in this action for contribution under R.C. 1303.14.

{¶15} Furthermore, a thorough review of the record indicates that the trial court did not lose its way when it decided that appellee was not obligated to appellant on the equity loan. The witness testimony at trial was contradictory at best with appellant's recollection serving her better interest and appellee's recollection serving his better interest. This conflicting testimony must be examined in conjunction with the other evidence presented to the trial court: the distribution of the money, the control of the funds, the lack of any signed agreement between appellant and appellee, the decision not to add appellee's name to the residence secured by the loan, and the failure to

produce any corroborating testimony to support appellant's position. Clearly the trial court's decision is supported by the overwhelming evidence in favor of appellee.

{¶16} For these reasons, appellant's assignments of error are without merit, and the judgment of the Painesville Municipal Court is affirmed.

DONALD R. FORD, P.J., concurs,

WILLIAM M. O'NEILL, J., dissents with Dissenting Opinion.

WILLIAM M. O'NEILL, J., dissenting.

{¶17} I must dissent, for I believe the majority and the trial court have missed very obvious claims that are before us for review.

{¶18} In simple terms, appellee-ex-husband signed an $18,000 promissory note to bail his ex-wife out of financial distress. The loan was secured by a mortgage on the ex-wife's home, thereby clearly indicating the ex-husband did not even own the roof under which he lived. The following day, he used the proceeds of the loan on his ex-wife's house to purchase a much-needed jet ski with an approximate value of $6,200. After the break-up of the relationship, he left with the jet ski, and somehow suggests that his payment of $3,100 to his ex-wife represents "buying out" her half of the toy? I

don't get it. He bought the toy for $6,200, with her money…and then gave her half of her money back…and kept the toy!

{¶19} In addition, the majority misinterprets Civ.R. 15 when it suggests there has been a waiver in this matter. In her objections to the magistrate's findings, appellant-ex-wife clearly raised the question of contribution and R.C. 1303.14, and, thus, the matter was clearly before the trial court for review. As the rule states, when issues not raised in pleadings are tried "by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." There is no requirement in such a scenario that the pleadings be amended where the issue was tried by "implied consent of the parties."

{¶20} Finally, the joint liability statute is clear on its face.

{¶21} "R.C. 1303.14 Joint and several liability; contribution.

{¶22} "(A) Except as otherwise provided in the instrument, two or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.

{¶23} "(B) Except as provided in division (E) of section 1303.59 of the Revised Code or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

{¶24} "(C) The discharge of one party having joint and several liability by a person entitled to enforce the instrument does not affect the right under division (B) of this section of a party having the same joint and several liability to receive contribution from the party discharged."

{¶25} The statute is clear on its face and its application to the acknowledged facts of this case is equally clear. The parties went to the bank and BOTH SIGNED A NOTE establishing an $18,000 debt. The appellee-ex-husband was a contributing party to both acquiring the debt and spreading its dollars into the wind. As such, he is liable to his former wife for contribution, for that is what joint and several liability is all about.

{¶26} It is a manifest miscarriage of justice to permit one maker of a debt to ignore his contribution to the payment of the debt when called upon to do so by a joint co-maker. The trial court misinterpreted the law. The appellee-ex-husband owed contribution toward the $18,000 debt that was paid by the appellant-ex-wife.