

No. 22-188

ORIGINAL

In The
Supreme Court of the United States

Supreme Court, U.S.
FILED

AUG 26 2022

OFFICE OF THE CLERK

PATRICK J. O'CONNELL,

Petitioner,

v.

JONNA Z. BIANCO,

Respondent.

**On Petition For A Writ Of Certiorari
To The Kentucky Court Of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

This case presents original and exclusive jurisdictional and core proceeding questions for this Court arising under Federal Bankruptcy Codes 28 U.S.C. § 1334, 11 U.S.C. § 362, 11 U.S.C. § 521, 11 U.S.C. § 541, 28 U.S.C. § 157, and the United States Constitution:

1. Why is it not mandatory that Kentucky State Courts follow Federal Bankruptcy Laws?
2. Clearly, under the United States Bankruptcy Code, the United States Bankruptcy Court held original and exclusive jurisdiction over Respondent pursuant to 28 U.S.C. § 1334, Petitioner's Lien pursuant to 28 U.S.C. § 157(K), and the core proceeding pursuant to 28 U.S.C. § 157(b)(1). What jurisdiction did the Kentucky State Court hold?
3. How did the Kentucky State Court, during the time that the Bankruptcy Court held original and exclusive jurisdiction under 28 U.S.C. § 1334, retroactively retain jurisdiction to a time when the Bankruptcy Court held original and exclusive jurisdiction?
4. Is Respondent judicially estopped from her claims against Petitioner since her Bankruptcy Plan was accepted by the United State Bankruptcy Court under 11 U.S.C. § 521?
5. Was the ownership issue of Petitioner's cattle seized by the Jefferson County District Court, where Petitioner obtained an order for the return of his property, within the jurisdictional purview and venue of the Shelby County Circuit Court to decide (*res judicata*)?

QUESTIONS PRESENTED – Continued

6. Were Petitioner's Constitutional Rights violated when the Shelby County Kentucky State Court deprived him of property via an *Ex Parte* verbal motion, without a hearing, that was not within the Shelby County State Court's jurisdictional purview or venue?
7. Does fraud upon the court void all orders and judgments of the Court?
8. Do constitutional due process violations void orders and judgments of the Court?

PARTIES TO THE PROCEEDING

Petitioner is Patrick J. O'Connell

Respondent is Jonna Z. Bianco

DIRECTLY RELATED PROCEEDINGS

1. This case arises out of a case filed in Shelby Circuit Court, in the State of Kentucky, *Bianco v. O'Connell*, 13-CI-00109, on March 5, 2013, in which Judgment was entered on March 21, 2019. At the time Respondent filed this civil suit, Respondent was in an active Chapter 13 Bankruptcy proceeding, Case No. 3:12-BK-05710, that she filed on June 20, 2012 in the United States Bankruptcy Court in the Middle District of Tennessee.
2. This case was certified for direct appeal to the Kentucky Court of Appeals, and an Opinion was entered on December 10, 2021.
3. This case was certified for a Motion for Discretionary Review to the Kentucky Supreme Court, and said Motion was denied on June 8, 2022.
4. There are no other directly related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Patrick J. O'Connell respectfully petitions for a writ of certiorari to review the Judgment of the Kentucky Court of Appeals and the Kentucky Supreme Court.

OPINIONS BELOW

The opinion of the highest state court denying review of the merits appears at Appendix 44 to the petition and is unreported.

The opinion of the Kentucky Court of Appeals appears at Appendix 1 to the petition and is unpublished.

The opinion of the Chief Justice of the Kentucky Supreme Court denying disqualification of State Court Judge Charles R. Hickman appears at Appendix 23 to the petition and is unreported.

The order denying Respondent's Motion to Alter, Amend or Vacate appears at Appendix 21 to the petition and is unreported.

The Findings of Fact, Conclusions of Law and Judgment of the Kentucky State Court appears at Appendix 25 to the petition and is unreported.



JURISDICTION

This case arises under the original and exclusive jurisdiction of the United States Federal Bankruptcy Court pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 362, 11 U.S.C. § 521, 11 U.S.C. § 541, 28 U.S.C. § 157, and the United States Constitution.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 341 provides, in relevant part:

- (a) within a reasonable time after the order for relief in a case under this title, the United States Trustee shall convene and preside at a meeting of creditors.

- (b) The United States Trustee may convene a meeting of any equity security holders.

11 U.S.C. § 362 provides, in relevant part:

- (a)(4) any act to create, perfect, or enforce any lien against property of the estate;
- (a)(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

11 U.S.C. § 521 provides, in relevant part:

- (a) The debtor shall
 - (1) file
 - (A) a list of creditors, and
 - (B) unless the court orders otherwise –
 - (i) A schedule of assets and liabilities;
 - (4) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, surrender to the trustee all property of the estate and any recorded information, including books, documents, records and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title;

11 U.S.C. § 541 provides, in relevant part:

- (a) The commencement of a case under Section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
 - (1) except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
 - (5) any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

28 U.S.C. § 157 provides, in relevant part:

- (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
- (b)(2) Core proceedings include, but are not limited to –
 - (K) determinations of the validity, extent, or priority of liens;

28 U.S.C. § 1334 provides, in relevant part:

- (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
- (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –
 - (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
 - (2) over all claims and causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

42 U.S.C. § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive

relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 333, Section 157 provides, in relevant part:

- (2) Core proceedings include, but are not limited to –
 - (K) determinations of the validity, extent, or priority of liens
- (3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

Article I, Section 8, Clause 4 of the Constitution of the United States provides, in relevant part:

The Congress shall have Power . . . to establish an uniform Rule of Naturalization, and uniform laws on the subject of Bankruptcies throughout the United States. . . .

Article IV, Paragraph 2 of the Constitution of the United States provides, as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

The Fourth Amendment of the Constitution of the United States provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the Constitution of the United States provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the Constitution of the United States provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment of the Constitution of the United States provides as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, Section 1 of the Constitution of the United States provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1871 provides, in relevant part:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

Excessive Fines Clause under the Eighth Amendment of the Constitution of the United States provides, in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Due Process Clause under the Fifth and Fourteenth Amendments of the Constitution of the United States provide, in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;

and

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Revised Statute 376.400 provides, in relevant part:

(1) Any owner or keeper of a livery stable or other business providing for the care of

animals, and a person feeding, grazing, or caring for any animal for compensation, shall, except as provided in subsection (2) of this section, have a lien for one (1) year upon the animal placed in the stable, kennel, or similar facility, or put out to be fed or grazed by the owner, for his or her reasonable charges for keeping, caring for, feeding, and grazing the animal. The lien shall attach whether the animal is merely temporarily lodged, fed, grazed, and cared for, or is placed at the stable or other place or pasture for regular board. The lien shall take priority over a lien created pursuant to KRS 376.420(1).

◆

STATEMENT OF THE CASE

In September of 2010, Respondent Bianco, a resident of Tennessee, delivered 74 Corriente cows and 2 Corriente bulls to Petitioner's farm in Kentucky to pursue a cow/calf share agreement. The agreement between the parties was never reduced to writing. When the one-year mark approached with less than satisfactory results, Petitioner terminated the agreement and verbally instructed Respondent to remove her cattle from Petitioner's property. Respondent kept promising to remove the cattle but failed to do so. In January of 2012, Petitioner instructed Respondent again to remove her cattle, this time in writing. Respondent again failed to do so. On March 6, 2012, Petitioner filed an Agister's Lien on Respondent's cattle pursuant to Kentucky Revised Statute 376.400 and delivered the filed

lien to Respondent via Certified Mail Return Receipt on March 8, 2012.¹ On June 20, 2012, Respondent filed a Chapter 13 Bankruptcy in the Middle District of Tennessee. Petitioner never heard from Respondent again after his Agister's Lien was filed, until this instant lawsuit was filed by her on March 5, 2013.² Respondent was under the original and exclusive jurisdiction of the bankruptcy court under 28 U.S.C. § 1334 and filed her lawsuit without the bankruptcy court's permission or knowledge, seeking return of bankruptcy estate property governed by 11 U.S.C. § 541, a core proceeding under 28 U.S.C. § 157.

On September 21, 2012, the Bankruptcy Court accepted Respondent's bankruptcy plan pursuant to 11 U.S.C. § 521. Respondent did not identify the cattle

¹ Respondent acknowledged receipt of Petitioner's lien and attached it as "Exhibit 14" to her original Complaint.

² Due to the involvement of two separate cases among the parties herein involving two different State Court venues, and in the interest of simplicity, Petitioner will identify each court herein as follows: "State Court # 1" is the Shelby Circuit Court located in Shelby County, Kentucky, and is regarding *Bianco v. O'Connell*, 13-CI-00109. "State Court # 2" is the Jefferson District Court located in Jefferson County, Kentucky. The original civil case between Petitioner and Respondent was filed in State Court # 1, and Respondent later made false animal cruelty accusations against Petitioner and Jennifer O'Connell that caused Petitioner to have misdemeanor criminal charges brought against him and Jennifer O'Connell in State Court # 2 in cases *Commonwealth v. O'Connell*, 15-M-00159 and *Commonwealth v. O'Connell*, 15-M-00160. Those charges were adjudicated in Petitioner's and Jennifer O'Connell's favor.

delivered to Petitioner³, the existence of Petitioner's Agister's Lien (making him a creditor of Respondent), Petitioner's Counterclaim, Petitioner as a creditor, the names of the parties (entities) on the Certificates of Registration for unidentified cattle that she produced to the State Trial Court, nor her cattle partnerships with her ex-husbands (as per her trial testimony) on her schedules as required under 11 U.S.C. § 521.

On March 5, 2013, Respondent filed suit against Petitioner in State Court # 1 seeking the return of Corriente Cattle and the invalidation of Petitioner's Agister's Lien that only the bankruptcy court could decide under 28 U.S.C. § 157(K), making this a core proceeding under 28 U.S.C. § 157(b)(1). Respondent did not seek permission from the United States Bankruptcy Court to bring this suit against Petitioner in State Court # 1, nor did she ever inform the Bankruptcy Court of the cattle, Petitioner's Lien, Petitioner's Counterclaim filed against her or the *Ex Parte* Order Respondent verbally solicited from State Court # 1 (11 U.S.C. § 521). On July 16, 2015, Respondent solicited State Court # 1 via an *Ex Parte* verbal motion, not through her attorney, but by personally calling the Judge at his home under the cover of darkness, to assist her in removing Petitioner's personal property

³ Respondent's testimony at the trial of this matter was that the cattle delivered to Petitioner were valued at "far more" than \$100,000.00. It is implausible to believe that Respondent "forgot" to add these cattle to her bankruptcy schedules.

belonging to him and Jennifer O'Connell.⁴ This *Ex Parte* Order allowed Respondent to transport Petitioner's and Jennifer O'Connell's cattle (the same cattle that were under the jurisdiction and venue of State Court # 2) out of the State of Kentucky and into Tennessee with no bond or inventory provided to the Court. Petitioner was never afforded a hearing on the *Ex Parte* Order, even when his attorneys tried numerous times to schedule them, resulting in a clear violation of Petitioner's due process right. This was done while Respondent was under the original and exclusive jurisdiction of the United States Bankruptcy Court (28 U.S.C. § 1334), without seeking its permission to do so, and utilizing State Court # 1 that held no legal jurisdiction to even hear Respondent's claim. Petitioner brought Respondent's bankruptcy to the attention of State Court # 1 for the first time in March of 2015 in his Motion to Dismiss (which was ignored by State Court # 1 and never ruled upon). Respondent's bankruptcy was put before State Court # 1 sixteen other times in motions and hearings, all which State Court # 1 disregarded. State Court # 1 admitted in a December 28, 2015 recorded hearing that it did not have jurisdiction over the case because of the bankruptcy but continued to issue rulings and orders as if it did. State Court # 2 dismissed the charges against Petitioner and Jennifer O'Connell, with prejudice, and both Petitioner

⁴ Jennifer O'Connell was not a party to the civil case in State Court # 1. State Court # 1 violated Jennifer O'Connell's constitutional rights. She did not have any communications with or any sort of dealings whatsoever with Respondent Bianco until the false charges were levied upon her in State Court # 2 in 2015.

and Jennifer O'Connell obtained a Court Order from State Court # 2 in both of their cases for the return of their property and produced this Order to State Court # 1. Respondent Bianco never once asserted any ownership of the cattle taken from Petitioner and Jennifer O'Connell in any proceedings before State Court # 2. Petitioner had previously provided proof of his and Jennifer O'Connell's ownership of the cattle seized from them to State Court # 1 in Petitioner's Motion for Proof of Ownership he filed in March of 2015, to which Respondent never responded – a judicial admission from her. In another violation of Petitioner's due process rights, State Court # 1 prohibited testimony at the trial that would have addressed the *Ex Parte* verbal motion or how it came about, or how Respondent came into possession of Petitioner and Jennifer O'Connell's cattle. The very same cattle that Respondent judicially admitted in her Appellate Brief were not a part of the case! State Court # 2 found ownership of those cattle vested with Petitioner and Jennifer O'Connell and delivered to them an Order entitling Petitioner and Jennifer O'Connell to the return of their property. To date Petitioner and Jennifer O'Connell are still deprived of their personal property which remains in Respondent's possession in Tennessee producing documented live healthy calf crops every year since 2015.



REASONS FOR GRANTING THE PETITION

The Kentucky State Courts have acted outside of their jurisdiction and are attempting to write their own precedents over Federal Bankruptcy Laws and the United States Constitution. Article I, Section 8, of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies" making it the Supreme Law of the Land. If this Court does not grant Petitioner's writ, it opens the door for a dangerous overreach of the State by allowing it to essentially nullify federal bankruptcy laws in the state of Kentucky. It would give bankruptcy filers the right to avoid and circumvent federal bankruptcy courts and federal bankruptcy laws in Kentucky and deny those harmed by their actions the right to due process. Adherence to federal bankruptcy laws is not optional or at a lower court's discretion. It is mandatory. Neither the State Court, nor the Kentucky Appeals Court recognized their lack of original and exclusive jurisdiction that the United States Bankruptcy Court held over this case pursuant to 28 U.S.C. § 1334, the core proceeding pursuant to 28 U.S.C. § 157(b)(1) and 28 U.S.C. § 157(K), the automatic stay pursuant to 11 U.S.C. § 362, property of the estate pursuant to 11 U.S.C. § 541, and debtors duties pursuant to 11 U.S.C. § 521.

I. LACK OF JURISDICTION

FIRST AND FOREMOST, the United States Bankruptcy Court held original and exclusive jurisdiction over Respondent. Since the bankruptcy court

did hold original and exclusive jurisdiction under the United States Bankruptcy Laws, then what authority did State Court # 1 possess to hear and rule upon Respondent's complaint? Under the Bankruptcy Code, the filing of a bankruptcy petition creates a bankruptcy estate composed of all the debtor's legal or equitable interests in property. 11 U.S.C. § 541(a)(1). Pursuant to 28 U.S.C. § 1334, "upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession and is placed in the custody of the bankruptcy court." *Mueller v. Nugent*, 184 U.S. 1, 14 (1902). "The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits." *Robertson v. Howard*, 229 U.S. 254, 259-260 (1913); *Wells v. Sharp*, 208 F. 393 (1913); *Galbraith v. Robson-Hilliard Grocery Co.*, 261 F. 853 (1914). "When this jurisdiction has attached, the court's possession cannot be affected by actions brought in other courts." *White v. Schloerb*, 178 U.S. 542 (1900); *Murphy v. Hofman Co.*, 211 U.S. 562 (1909); *Dayton v. Standard*, 241 U.S. 588 (1916).

Respondent Bianco filed for Chapter 13 bankruptcy protection on June 20, 2012, thus placing her estate, including ALL her assets, under the original and exclusive jurisdiction of the United States Bankruptcy Court (28 U.S.C. § 1334). Respondent Bianco filed her suit against Petitioner on March 5, 2013, in State Court # 1, seeking return of claimed estate property (Corriente cattle) and the invalidation of

Petitioner's Agister's Lien. Only the bankruptcy court had the authority to decide the validity of that lien pursuant to 28 U.S.C. § 157(K), making this a core proceeding under 28 U.S.C. § 157(a)(1). Respondent had no standing to sue Petitioner in State Court # 1, and State Court # 1 had no jurisdiction to hear the case. Once a bankruptcy petition is filed, the State Court "loses all jurisdiction over the case, and being without jurisdiction, its subsequent proceedings and judgments are not simply erroneous, but absolutely void." *Kern v. Huidekoper*, 103 U.S. 485 (1880). A bankruptcy court has jurisdiction over proceedings "arising under," "arising in," or "related to" a Title 11 case. 28 U.S.C. § 1334(b), and 157(a). Further, Petitioner's Agister's Lien on Respondent's property, and its validity thereof was vested solely within the power of the bankruptcy court to decide, as was Petitioner's Counterclaim against Respondent for damages. *Isaacs v. Hobbs Tie T. Co.*, 282 U.S. 734 (1931) (citing *Ex Parte City Bank of New Orleans*, 3 How. 292 (1845); *Houston v. City Bank of New Orleans*, 6 How. 486 (1848); *Ray v. Norseworthy*, 23 Wall. 128 (1874); *In Re Wilka*, 638 N.W.2d 245 (S.D. 2001), *supra*; *Nisbet v. Federal Title T. Co.*, 229 F. 644 (1915)). "The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors." *Isaacs v. Hobbs Tie T. Co.*, 282 U.S. 834 (1931). Finally, the Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 333, Section 157, establishes two broad categories of proceedings: "core proceedings" and "non-core proceedings." For "all core proceedings arising under title

11, or arising in a case under title 11, under § 157(a) or § 157(b)(1), permits bankruptcy judges to ‘hear and determine’ the proceedings and to ‘enter appropriate orders and judgments.’” *Celotex Corp. v. Edwards*, 514 U.S. 300, 321 (1995). Petitioner’s filing of his Agister’s Lien and Counterclaim demanded that these issues as core proceedings could only be heard by the Bankruptcy Court. Pursuant to 28 U.S.C. § 157(b)(2)(K) of the Bankruptcy Code, “determinations of the validity, extent, or priority of lien” falls exclusively to the Bankruptcy Court. “It is the bankruptcy court’s responsibility to determine whether each claim before it is core or non-core.” *Executive Benefits Insurance Agency v. Arkison*, No. 12-1200, 573 U.S. ____ (June 9, 2014).

Although Petitioner raised the issue of Respondent’s bankruptcy to State Court # 1 on no less than seventeen different occasions by both motions and hearings, State Court # 1 disregarded the fact that it did not have jurisdiction and never had jurisdiction over the subject matter of the case before it. In fact, State Court # 1 admitted without question that it held no jurisdiction at a hearing before it that occurred on December 28, 2015⁵, yet continued to act without jurisdiction as a trespasser to the law. “A judge will be subject to liability only when he has acted in the “clear

⁵ State Court # 1 admitted at the December 28, 2015 hearing that it held no jurisdiction from the date this case was filed on March 5, 2013. It also admits all its previously written orders were void, so it would “just write new ones.” Any such exercise of jurisdiction by a state court is void and of no effect. *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940). A court that never had jurisdiction cannot now have jurisdiction.

absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349 (1978) (citing *Bradley v. Fisher*, 13 Wall. 335, 351, 355-357 (1871)). State Court # 1's orders and judgments are *void in ab initio* (including the *Ex Parte* Order issued by it on July 16, 2015, giving possession of Petitioner's and Jennifer O'Connell's personal property (cattle) to Respondent with no jurisdictional authority to do so. Proof of ownership of those cattle were previously provided to State Court # 1 in March of 2015 in Petitioner's Motion for Proof of Ownership, to which Respondent never filed a response to and State Court # 1 never addressed. That property was jurisdictionally vested in State Court # 2's venue of which found that Petitioner and Jennifer O'Connell were the rightful owners. Further, State Court # 1 continually stated that the ownership of Petitioner's and Jennifer O'Connell's cattle would be determined at trial, and Respondent was unable to prove any ownership. Without ownership, State Court # 1 had no jurisdiction. 11 U.S.C. § 362(a) precludes a state court from entertaining or exercising jurisdiction over any action which is filed against a debtor subsequent to the debtor's filing of a bankruptcy petition. "Any such exercise of jurisdiction by a state court is void and of no effect." *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940). This is *not* one of the typical reported cases in which a complaint is filed prior to the filing of a petition in bankruptcy. Here, by contrast, the underlying state court action *itself* was filed at a time when a stay order was already in effect. Thus, State Court # 1 did not acquire valid jurisdiction over the action initially, and therefore could not re-write void

orders it had previously written. Since Respondent's action was void from the date it was filed, it could not be validly revived thereafter. *Raikes v. Langford*, 701 S.W.2d 142 (Ky. Ct. App. 1986) (citing *Kalb v. Feuerstein*).

II. JUDICIAL ESTOPPEL AND FRAUD

SECOND, this Court should grant Petitioner's writ to address the bankruptcy judicial estoppel matter. Judicial estoppel was brought to State Court # 1's attention in Petitioner's Motion to Dismiss filed on March 12, 2015, during Motion Hour on April 25, 2016 by Petitioner's counsel, and again in a second Motion to Dismiss filed by Petitioner's counsel on February 24, 2017. State Court # 1 issued a ruling directly conflicting with United States Supreme Court rulings on the judicial estoppel matter. Respondent is judicially estopped from pursuing her claim against Petitioner.

On March 6, 2012, Petitioner filed an Agister's Lien on Respondent's property (cattle) and delivered notice of such to Respondent on March 8, 2012 (which Respondent acknowledges receiving and attached as an Exhibit to her original Complaint). At the time Respondent filed her Chapter 13 Bankruptcy petition in the Middle District of Tennessee on June 20, 2012, Respondent was fully aware of the potential for a pending cause of action involving Petitioner, and she purposely omitted any mention of Petitioner or Petitioner's Agister's Lien in her Chapter 13 petition, schedules, or statement of financial affairs. It is noteworthy that

Respondent listed several potential causes of action in her Schedule B, Section 21, but failed to mention Petitioner or Petitioner's lien. Respondent also failed to list the claimed Corriente cattle valued at "far more than \$100,000.00" (per her trial testimony) as an asset, the potential cause of action with Petitioner, her business entities she owned, or her business partnerships with her ex-husbands (also per her trial testimony) in her petition. Respondent also failed to list Petitioner as a secured creditor in her bankruptcy petition.

The doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8, 120 S.Ct. 2143, 147 L.Ed. 164 (2000)). The purpose of the doctrine is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749-50, 121 S.Ct. 1808 (citations and internal quotation marks omitted).

Further, 11 U.S.C. § 521(1) requires debtors to file "a schedule of assets and liabilities." "It is well settled that causes of action are among the assets that must be disclosed on a debtor's schedules." *Browning Mfg. v. Mims (In Re Coastal Plains, Inc.)*, 179 F.3d 197, 207-08 (5th Cir, 1999). "Statements in bankruptcy schedules are executed under penalty of perjury and, when offered against a debtor, are eligible for treatment as judicial admissions." *In Re Hoffman*, 605 B.R. 560, 566

(Bankr. N.D. Ga. 2019) (citing *In Re Vanguard Airlines, Inc.*, 298 B.R. 626, 635 (Bankr W.D. Mo. 2003)). Petitioner's Agister's Lien was undoubtedly known to Respondent when she filed her bankruptcy petition, but her schedules and statement of financial affairs make no mention of it. Submission of bankruptcy papers is very important and Respondent signed and certified their truth under penalty of perjury. Respondent's failure to schedule Petitioner's Agister's Lien, his position as a creditor, the asset at the heart of his Lien, or its value, qualifies as a "prior position" which is inconsistent with Respondent's pursuit of a recovery from Petitioner. "The bankruptcy court's approval of a payment plan from the bankruptcy estate based on a party's assertion of a given position constitutes acceptance of the position for purposes of judicial estoppel." *Tyler v. Fed. Express Corp.*, 420 F.Supp.2d 849, 856 (W.D. Tenn. 2005) (confirmation of Chapter 13 plan which omitted cause of action constitutes acceptance of the debtor's contrary position).

In the proceedings in State Court # 1, there is absolutely no question that Respondent knew the factual basis of the undisclosed potential claim against Petitioner when she filed her bankruptcy petition. "The rationale for . . . decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy] is that the *integrity of the bankruptcy system depends on full and honest disclosure by debtors of all their assets*. The courts will not permit a debtor to obtain relief from the bankruptcy

court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding." *In Re Coastal Plains, Inc.*, 179 F.3d at 209 (quoting *Rosenshein v. Kleban*, 918 F. Supp. 98, 104 (S.D.N.Y. 1996)). Thus, the Respondent's knowledge of a potential claim against Petitioner and her motive to conceal it, and the asset, in her bankruptcy proceeding mandates applying judicial estoppel in this adversary proceeding.

In addition, Respondent did not make any type of "constant affirmative actions" to disclose her potential claim against Petitioner. She did not inform the Trustee at her § 341 meeting, even when questioned about other causes or potential causes of action. There exists no evidence from which one may infer a good faith mistake or inadvertence by Respondent. A debtor "should not be allowed to duck his bankruptcy court disclosure obligation, then 'fess up' without consequence once exposed by his adversary." *Scoggins v. Arrow Trucking Co.*, 92 F. Supp.2d 1372, 1376 (S.D. Ga. 2000). In addition, the Supreme Court has held that a litigant is bound by the errors and omissions of his or her attorney. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386 8 L.Ed.2d 734 (1962).

Respondent signed her petition under penalty of perjury. By doing so, she certified she had no claim against Petitioner, nor did she own any other cattle. It was her responsibility to verify the accuracy of the information contained in her schedules and statement of financial affairs and she "had the duty to carefully consider all of the questions posed and to see that they

[were] completely and correctly answered.” *Warsco v. Saylor (In Re Saylor)*, 339 B.R. 190, 193 (Bankr. N.D. Ind. 2006). Therefore, “under these uncontested facts, Respondent may not avoid the consequences of her misrepresentation by blaming her bankruptcy attorneys.” *In Re Johnson*, 345 B.R. 816 (Bankr. W.D. Mich. 2006).

Finally, Respondent and her counsel have committed and continue to commit fraud upon the court, playing fast and loose with their gamesmanship, by the following means: (1) Respondent circumvented her own attorneys and personally contacted State Court # 1 Judge Hickman at home and verbally solicited an *Ex Parte* motion and order from that Court. Respondent provided no proof whatsoever, did so in the dark of the night, fraudulently telling Judge Hickman that Petitioner’s and Jennifer O’Connell’s cattle were Respondent’s, while the cattle were under the jurisdiction and venue of State Court # 2; (2) fraudulently informed State Court # 1 at a hearing on August 6, 2015 that ALL of Petitioner’s and Jennifer O’Connell’s cattle in Respondent’s possession belonged to Respondent, including the beef cattle; (3) fraudulently informed State Court # 1 at a hearing on April 25, 2016 that SOME of Petitioner’s and Jennifer O’Connell’s cattle in Respondent’s possession belonged to Respondent, contrary to her August 6, 2015 judicial admission; (4) stated under oath during deposition testimony in May of 2016 that she (Respondent) was ENTITLED to Petitioner’s and Jennifer O’Connell’s cattle; (5) could not match ANY of Petitioner’s and Jennifer O’Connell’s

cattle to records she (Respondent) produced at trial as her evidence of ownership; (6) judicially admitted in her Appellee Brief filed with the Kentucky Court of Appeals that Petitioner's and Jennifer O'Connell's cattle were not part of this civil case. All these actions by Respondent were nothing shy of perpetrating fraud upon the courts.

"Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered." *Bronson v. Schulten*, 104 U.S. 410 (1881). "This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning there has existed alongside the term a rule of equity to the effect that under certain circumstances, one of which is after discovered fraud, relief will be granted against judgments regardless of the term of their entry." *Marine Insurance Co. v. Hodgson*, 11 U.S. 332 (1813); *Marshall v. Holmes*, 141 U.S. 589 (1891). "This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. *United States v. Throckmorton*,

98 U.S. 61 (1878). "But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,'" *Pickford v. Talbott*, 225 U.S. 651, 657 (1912), "they have wielded the power without hesitation." "Whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away." *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 245 (1944). "Every element of fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments." *Marshall v. Holmes, supra*. This is not simply a case of a judgment obtained with the aid of a witness – here, even if this Court considers nothing but Respondent's sworn admissions, this Court will find a deliberately planned and carefully executed scheme to defraud the state and the bankruptcy courts. "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." *Hazel-Atlas Co. v. Hartford-Empire Co., supra*. Here we have a case in which undisputed evidence filed with the state courts in a bill of review proceeding reveals such fraud on those Courts as demands, under settled equitable principles, the interposition of equity to devitalize the 2019 judgment despite the expiration of the term at which that judgment was finally entered.

III. SUPREMACY CLAUSE

THIRD, this Court should grant Petitioner's writ based on the Supremacy Clause and the violations of Petitioner's Constitutional rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

The Supremacy Clause, or, Article VI, Paragraph 2, is the most important guarantor of national union. It assures that the Constitution and Federal Laws and treaties take precedence over state law and binds all judges to adhere to that principle in their courts. Article I, Section 8, of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies." "The Supremacy Clause, on its face, makes federal law 'the supreme law of the land' even absent an express statement by Congress." *Pliva, Inc. v. Mensing*, 564 U.S. 604 (2011). Both State Court # 1 and the Court of Appeals have failed to proceed according to the "law of the land," by ignoring the fact that the federal bankruptcy court held original and exclusive jurisdiction over Respondent's original complaint and the core proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(1) respectively. The Kentucky State Courts # 1 and # 2 blatantly abandoned their obligation to adhere to the Supremacy Clause and the laws governed under it in an attempt to nullify federal laws and the right to due process. Both State Court judges had no constitutional, statutory, or jurisdictional authority to act in the manner they did by acting outside the law, thus resulting in a clear violation of Petitioner's rights.

IV. CONSTITUTIONAL VIOLATIONS

Under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, Petitioner is guaranteed safeguards against unreasonable search and seizure, double jeopardy, Petitioner's right to face his accuser, excessive fines, and procedural due process, and ultimately provides that no State shall "deprive any person of life, liberty, or property, without due process of law." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2059-60, 147 L.Ed.2d 49 (2000).

On July 16, 2015, State Court # 2 seized Petitioner's and Jennifer O'Connell's personal property (cattle) at the urging of Respondent. Petitioner had previously provided State Court # 1 with proof of his and Jennifer O'Connell's ownership of the seized cattle on March 12, 2015. Petitioner and Jennifer O'Connell were then subjected to misdemeanor criminal proceedings initiated by Respondent, upon which they prevailed, and State Court # 2 awarded him and Jennifer O'Connell the return of their property. However, State Court # 1 violated Petitioner's and Jennifer O'Connell's constitutional rights and procedural due process when it gave possession of Petitioner's and Jennifer O'Connell's property (cattle) to Respondent via her *Ex Parte* verbal motion, which Respondent Bianco has judicially admitted were not part of this case. State Court # 1 further allowed Respondent to transport Petitioner's and Jennifer O'Connell's cattle out of the State of Kentucky, before either State Court # 1 OR State Court # 2 held ANY hearings, thus forcing Petitioner to suffer

“cruel and unusual punishment” by forcing him to defend his ownership of property that had already been determined to belong to him and Jennifer O’Connell in State Court # 2 (*res judicata*). Respondent never intervened in the State Court # 2 proceedings to assert any ownership interest in Petitioner’s and Jennifer O’Connell’s seized property given to her by State Court # 1. Further, State Court # 1 repeatedly denied Petitioner his right to a hearing on the *Ex Parte* verbal motion, and presently continues to allow Respondent to retain possession of, and profit from, the reproduction of Petitioner’s and Jennifer O’Connell’s cattle since July of 2015 at a present value grossly disproportionate to State Court # 1’s void judgment against Petitioner.

A. FOURTH AMENDMENT

“State Courts, in appropriate cases, are not merely free to – they are bound to – interpret the United States Constitution. In doing so, they are *not* free from the final authority of the United States Supreme Court.” This principle was enunciated in *Cohen v. Virginia*, 6 Wheat. 264 (1821). The Fourth Amendment states that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .” *Arizona v. Evans*, 514 U.S. 1 (1995). Further, in *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560 (1971), the Court determined that there had been a Fourth Amendment violation because the initial complaint, upon which the arrest warrant was based, was insufficient to support an independent judicial

assessment of probable cause. *Id.* at 568. Finally, in *Illinois v. Gates*, 462 U.S. 213 (1983), the Court indicated that “where an informant provides information about certain criminal activities but does not specify the basis for his knowledge, a finding of probable cause based on that information will not be upheld unless the informant is ‘known for [his] unusual reliability.’” *Id.* at 233 (citing *United States v. Sellers*, 483 F.2d 37, 40 n. 1 (5th Cir. 1973)). That did not happen here. Petitioner’s cattle were seized by Louisville Metro Police based on an unsworn verbal statement from Respondent that they were “hers.” Respondent provided no proof of ownership to any authorities to support her claim – she merely stated that she was “entitled” to Petitioner’s cattle and, later in her Appellee Brief, judicially admitted that Petitioner’s and Jennifer O’Connell’s cattle that are currently in her possession were not part of this case! In later deposition testimony of the lead detective present that night, the detective stated that “no investigative background check” was ran on Respondent prior to the seizure to determine her credibility as required under the Fourth Amendment.

B. FIFTH AMENDMENT

The Civil Rights Act of 1871 guarantees “a federal forum for claims of unconstitutional treatment at the hands of state officials,” and the settled rule is that “exhaustion of state remedies in *not* a prerequisite to an action under [42 U.S.C. § 1983].” *Heck v. Humphrey*, 512 U.S. 477, 480, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (quoting *Patsy v. Board of Regents of Fla.*, 457

U.S. 496, 501, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982)). The Court further concluded that a property owner has an actionable Fifth Amendment taking claim when the government takes his property without paying for it. "The property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time." *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019). "The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." That principle was confirmed in *Jacobs v. United States*, 290 U.S. 14, 54 S.Ct. 26, 78 L.Ed. 142 (1933). Although *Jacobs* concerned a taking by the Federal Government, the same reasoning applies to takings by the States. "The availability of any particular compensation remedy. . . cannot infringe or restrict the property owner's federal constitutional claim." Petitioner's and Jennifer O'Connell's property was seized and removed from them by a state actor—a Louisville Metro Police Detective, without just compensation or the ability to present his case before either of the State Courts. Not only was Petitioner's and Jennifer O'Connell's property seized and removed from them by a Louisville Metro Police Detective, but it was also then given to Respondent by the State Court # 1 Judge, Charles R. Hickman, under an *Ex Parte* verbal motion that Petitioner was repeatedly denied a hearing on! Petitioner was also denied his right to ask questions of Respondent at trial, yet she judicially admitted

in her Appellee Brief that Petitioner's cattle were not hers and were not part of this case!

C. SIXTH AMENDMENT

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right is secured for defendants in state as well as in federal criminal proceedings. *Pointer v. Texas*, 380 U.S. 400 (1965). The opportunity for cross-examinations, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process. Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The Court has recognized that cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, *Evidence* § 1367, p. 29 (3d ed. 1940)). The usefulness of cross-examination was emphasized by this Court in an early case explicating the Confrontation Clause: "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used. . . . in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he

gives his testimony whether he is worthy of belief." *Kentucky v. Stincer*, 482 U.S. 730 (1987) (citing *Mattox v. United States*, 156 U.S. 237, 242-243 (1895) and *Kirby v. United States*, 174 U.S. 47, 53 (1899)). "Even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934). "Due process clearly requires that a defendant be allowed to be present 'to the extent that a fair and just hearing would be thwarted by his absence.'" *Id.* at 108. Due process requires that defendant be allowed to attend every critical stage of his trial.

Not only was Petitioner deprived of his personal property, but he was also clearly and repeatedly denied his due process right to face his accuser and attend a hearing regarding the *Ex Parte* verbal order giving Respondent possession of Petitioner's and Jennifer O'Connell's property. That order allowed Respondent to transport Petitioner's and Jennifer O'Connell's cattle out of state before ANY due process hearing was afforded to Petitioner as per his constitutional right. Finally, when Petitioner's then-counsel attempted to address and seek testimony regarding the circumstances surrounding the *Ex Parte* Order at the State Court # 1 trial, or how Respondent came into possession of Petitioner's cattle, State Court # 1 immediately shut Petitioner's counsel down and would not allow any testimony regarding the *Ex Parte* Order or actions

surrounding the taking of Petitioner's and Jennifer O'Connell's property.

D. EIGHTH AMENDMENT

In *Timbs v. Indiana*, 139 S.Ct. 682 (2019), this Court held that "Under the Eighth Amendment, excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) (quoting *Ingraham v. Wright*, 430 U.S. 651, 664, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977)). "Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and 'excessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard is fundamental to our scheme of ordered liberty," with "deep roots in our history and tradition." *McDonald v. Chicago*, 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). "The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment." In *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), this Court held "that civil *in rem* forfeitures fall within the Clause's protection when they are at least partially punitive." When a Bill of Rights protection is incorporated, the protection applies "identically to both the Federal Government and the States." *McDonald*, 561 U.S. at 766 n. 14, 130 S.Ct. 3020.

Here, State Court # 1 failed to proceed according to the "law of the land," or according to written constitutional and statutory provisions when it imposed excessive punitive damages on Petitioner in its Findings of Facts, Conclusion of Law and Judgment. Not only did State Court # 1 impose excessive and disproportionately engrossed damages against Petitioner, it did so AFTER it removed Petitioner's and Jennifer O'Connell's cattle from their custody and gave that custody to Respondent via an *Ex Parte* verbal hearing that Petitioner was denied attendance to. Not only was Petitioner denied his due process hearing regarding the return of his cattle, but State Court # 1 also presently continues to allow Respondent to retain possession of, and profit from, the reproduction of Petitioner's and Jennifer O'Connell's cattle at a present value that is grossly disproportionate to State Court # 1's (void) judgment against Petitioner. State Court # 1 held no jurisdiction to remove Petitioner's and Jennifer O'Connell's property, nor to allow Respondent to remove Petitioner's or Jennifer O'Connell's property from the State of Kentucky. Petitioner's and Jennifer O'Connell's cattle were never in State Court # 1's jurisdictional purview, and their ownership was never in question.⁶ The *Ex Parte* verbal hearing and Order were illegal on their face, and Petitioner and Jennifer O'Connell continue to suffer egregious deprivation of their property by being forced to continue to litigate for

⁶ In Respondent's Appellant Brief, she pleads in the affirmative that Petitioner's and Jennifer O'Connell's cattle were never before the State Court # 1's purview.

the return of their personal property, upon which their ownership has already been determined in a proper court of jurisdictional purview and proper venue – State Court # 2.

E. FOURTEENTH AMENDMENT

Although the claims asserted by Petitioner in his previous filings arise from the same underlying dispute and within the same administrative and statutory framework, Petitioner's claims in this writ are legally and factually distinct. This writ seeks redress for harms stemming from United States Constitutional violations, such that they were procedurally unable to be argued at the State Court level. Petitioner was deprived of his property without due process of law, and he was deprived by the negligent use of governmental power to do so. "The Due Process Clause forbids governmental deprivation of substantive rights without constitutionally adequate procedure." *Cleveland Bd. of Educ. v. Loudermilk*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). "To obtain relief on a procedural due process claim, the Petitioner must establish the existence of (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process." *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993); see also *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). "Ordinarily, due process of law requires notice and an opportunity for some kind of hearing prior to the deprivation of a significant property interest." *Sinaloa*

Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1405 (9th Cir. 1989).

There is no question here that Petitioner has met all three requirements. Petitioner's personal property falls under the protections of the Fourth Amendment of the United States Constitution. Petitioner and Jennifer O'Connell were deprived of their personal property by a governmental entity, Louisville Metro Police Department and State Court # 1 when State Court # 1 allowed Respondent to remove Petitioner's and Jennifer O'Connell's cattle to another jurisdiction without affording Petitioner his due process hearing to answer the allegations propounded against him or to cross examine his accuser.

CONCLUSION

This case must be reviewed to clarify federal bankruptcy laws for the State of Kentucky. It must be made clear that State Courts do not have jurisdiction over the bankruptcy court's original and exclusive jurisdiction. Kentucky Courts do not have jurisdiction over bankruptcy core proceedings. Bankruptcy petitioners cannot be allowed to prevail in their gamesmanship and fraud in the State Courts. The State Court's decisions handed down in this case disregard plain, unambiguous statutory language, are contrary to United States Federal Bankruptcy Laws and prior decisions of the United States Supreme Court and are contrary to long-established precedence of both Kentucky and United

States Supreme Court laws. State Court # 1 never held original or exclusive jurisdiction to hear this matter. Kentucky courts are bound to follow federal laws regarding the United States Codes that govern bankruptcy cases. Respondent made a judicial admission to the Federal Bankruptcy Court, and that Court accepted her admission under penalty of perjury. She was, and is, judicially estopped. Petitioner's constitutional rights have been and continue to be flagrantly violated – he has been deprived of his personal property for over seven (7) years by a court that never held jurisdictional authority to remove his property in the first place.

Wherefore, for the reasons set forth herein, Petitioner respectfully requests this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-0629-MR

PATRICK J. O'CONNELL APPELLANT

v. APPEAL FROM SHELBY
CIRCUIT COURT, HONORABLE
CHARLES R. HICKMAN, JUDGE,
ACTION NO. 13-CI-00109

JONNA Z. BIANCO APPELLEE

OPINION
AFFIRMING

(Filed Dec. 10, 2021)

* * *

BEFORE: CALDWELL, McNEILL, AND TAYLOR,
JUDGES.

TAYLOR, JUDGE: Patrick J. O'Connell, *pro se*, brings this appeal from Findings of Fact, Conclusions of Law and Judgment entered on March 22, 2019, in the Shelby Circuit Court, in favor of Jonna Z. Bianco upon completion of a bench trial.

Background

In 2010, Bianco, a resident of Tennessee, entered into an oral agreement with O'Connell whereby Bianco would provide cattle to O'Connell who would raise and care for them in Kentucky until calves were born and weaned, after which they would be sold and Bianco and O'Connell would split the sales proceeds. The parties

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did not reduce their agreement to writing. Bianco delivered the cattle to O'Connell in Kentucky in 2010.

The relationship between Bianco and O'Connell deteriorated and, in March 2012, O'Connell filed what purported to be an agister's lien under Kentucky Revised Statutes (KRS) 376.400.¹ O'Connell sent Bianco

¹ Kentucky Revised Statutes (KRS) 376.400 provides in relevant part as follows:

(1) Any owner or keeper of a livery stable or other business providing for the care of animals, and a person feeding, grazing, or caring for any animal for compensation, shall, except as provided in subsection (2) of this section, have a lien for one (1) year upon the animal placed in the stable, kennel, or similar facility, or put out to be fed or grazed by the owner, for his or her reasonable charges for keeping, caring for, feeding, and grazing the animal. . . .

(2) Any person who has agreed to provide feed or care for an animal for compensation may, in lieu of the lien provided for in subsection (1) of this section, cause the animal to be sold if:

(a) The owner of the animal is at least forty-five (45) days in arrears on his or her payment for the care and feeding of the animal, and the animal is in the possession of the person or business providing for the care of the animal;

(b) The proposed sale is published in one (1) or more newspapers and qualified pursuant to KRS Chapter 424, with a publication area in the locale where the person providing care for the animal is located and the locale where the owner of the animal was last known to reside; and

(c) Written notice of the sale is sent by certified mail, return receipt requested, or registered mail, to the owner of the animal, addressed to such person at his or her last known address, and to all

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a letter informing her of the lien, but she did not respond. Soon after, at least some of the calves born while in the possession of O'Connell were stolen. O'Connell did not inform Bianco of the theft. More cattle were later stolen and, again, O'Connell did not inform Bianco of the theft. O'Connell ultimately sold some cows but did not share any of the sales proceeds with Bianco.

In March 2013, Bianco filed this action, *pro se*, in Shelby Circuit Court. While inartfully drafted, the complaint appears to assert a claim for breach of contract and conversion of Bianco's cattle by O'Connell. O'Connell filed an answer and counterclaim, but did not seek a more definite statement of the claims asserted by Bianco. The answer filed by O'Connell did not question the court's jurisdiction or assert the statute of frauds as a defense.² O'Connell's counterclaim against Bianco asserted a breach of contract.

The case slowly meandered its way to a two-day bench trial held in May 2018. On March 22, 2019, the court issued extensive findings of fact, conclusions of law and judgment. After noting that the parties did not

lien holders of record with the Kentucky Secretary of State and the local county clerk's office, at least ten (10) days before the sale is conducted.

² See KRS 371.010(7) ("No action shall be brought to charge any person . . . [u]pon any agreement that is not to be performed within one year from the making thereof . . . 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[.]").

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agree on even “the most basic elements of their agreement” and had failed to provide “virtually any documentation,” the court found the agister’s lien was invalid and unenforceable because O’Connell had not complied with the requirements of KRS 376.400. Record (R.) at 787. Finding Bianco’s testimony generally more credible than O’Connell, the court concluded that the parties had never agreed that O’Connell would be reimbursed for his expenses and that his “only compensation in the deal would be his 50% share of the proceeds upon the sale of the calves.” R. at 789. The court concluded O’Connell breached the oral agreement and converted the cattle by selling them pursuant to an invalid lien. The court also agreed with Bianco’s assertion that O’Connell was negligent in his duty to care for the cattle by selling “a large portion of the herd and failing to safeguard them which resulted in the 63 calves and a dozen cows being stolen in two separate thefts.” R. at 790. The court ultimately awarded Bianco \$103,200 (86 cows x \$1,200 per cow) in damages. The court also awarded Bianco \$25,000 in punitive damages.

On April 1, 2019, Bianco filed a timely motion to alter, amend or vacate under Kentucky Rule of Civil Procedure (CR) 59.05, asking the court to award her additional damages, including the value of the calves born after the cattle were delivered to O’Connell. On April 4, 2019 – thirteen days after the judgment was entered, O’Connell served his own CR 59.05 motion, which was untimely and not considered by the court.

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Before the trial court ruled on Bianco's CR 59.05 motion, O'Connell filed this appeal. O'Connell then discharged his counsel and sought to disqualify the trial judge. While that disqualification motion was pending before the Chief Justice, O'Connell continued to file documents raising new arguments, including that Bianco lacked standing and the court lacked jurisdiction.

In December 2019, the Chief Justice denied O'Connell's motion to disqualify the circuit court judge. O'Connell continued to file documents repeating his insistence that, among other things, the circuit court lacked jurisdiction. On February 12, 2020, the circuit court denied Bianco's CR 59.05 motion. O'Connell then filed an amended notice of appeal.³

Procedural Irregularities and Deficient Appellant's Brief

Before addressing the arguments raised by O'Connell, this Court must first address the significant procedural irregularities below and serious deficiencies with O'Connell's brief. CR 59.05 provides that "[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment."

³ Briefing and the resultant issuance of this Opinion were delayed significantly due to the appeal having to be stayed until the trial court ruled on Jonna Z. Bianco's Kentucky Rules of Civil Procedure (CR) 59.05 motion.

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A timely CR 59.05 motion tolls the thirty-day period to file an appeal under CR 73.02(1)(e).

But O'Connell served his CR 59.05 motion thirteen days after the trial court's findings of fact, conclusions of law and judgment was entered. Therefore, his CR 59.05 motion was untimely. *See Commonwealth v. Steadman*, 411 S.W.3d 717, 726-27 (Ky. 2013). In fact, at a hearing on May 9, 2019, O'Connell's then-counsel admitted the CR 59.05 motion was untimely. In addition to being fatally tardy, O'Connell's CR 59.05 motion and his subsequent idiosyncratic post-judgment filings (many of which do not facially seek relief and do not fall under any accepted rules governing post-judgment filings) contain new arguments which should have been raised prior to the issuance of a final judgment. *See Ford v. Ford*, 578 S.W.3d 356, 365 (Ky. App. 2019) ("As the evidence was *available* to Paula and *could* have been presented to the trial court before it rendered the judgment at issue, it was not properly included as part of Paula's CR 59.05 motion.").

Accordingly, O'Connell's CR 59.05 motion and subsequent post-judgment filings did not present a proper basis for the trial court to re-examine, or amend, its judgment. Thus, the issues first raised in the post-judgment filings were not properly preserved for appellate review. Simply put, even *pro se* parties cannot wait until after the entry of a final judgment to raise non-jurisdictional arguments which could have been raised at or before trial. *See Ford*, 578 S.W.3d at 366 (declining to consider on appeal arguments first made via CR 59.05 motion); *Florman v. MEBCO Ltd. P'ship*, 207

S.W.3d 593, 607 (Ky. App. 2006) (“The scope of review is limited to the theory or theories upon which the case was tried. The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court.”) (internal quotation marks, citations, and footnote omitted).

In this case, O’Connell’s post-judgment filings were even more problematic since he had already filed a notice of appeal before submitting most of them. “[I]t is the law in Kentucky that, with certain narrowly circumscribed exceptions, the circuit court is divested of jurisdiction over a case when a notice of appeal is filed[.]” *Young v. Richardson*, 267 S.W.3d 690, 695 (Ky. App. 2008). The situation here does not facially fall within those narrow exceptions. So, the untimely filings did not afford the circuit court a proper mechanism to issue any orders pertaining to the issues involved in this appeal – indeed, any such orders would have been nullities. *Id.* at 696. “It is axiomatic that two courts cannot exercise jurisdiction over the same issue at the same time.” *Id.* at 697.

In short, the proper avenues to seek post-judgment relief are narrow and tightly circumscribed. Parties disappointed by a final judgment are not free to then submit untimely, haphazard filings raising a laundry list of grievances which they could have raised earlier. Instead, issues must be properly presented to the trial court at a proper time via a proper motion. Because O’Connell’s post-judgment submissions were

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untimely and irregular, the non-jurisdictional issues first raised therein and in his brief are not proper grounds for appellate relief.

In addition, as concerns his brief, O'Connell's has failed to comply with the requirements of CR 76.12. First, his brief exceeds the 25-page limit imposed by CR 76.12(4)(b)(i). There are only 25 numbered pages in the brief, but the three-page statement of the case is numbered using Roman numerals such that the argument section which follows the statement of the case begins with Arabic numeral one. In other words, his brief is 28 substantive pages long.

Second, the three-page-long statement of the case section of O'Connell's brief contains no citations to the record, even though CR 76.12(4)(c)(iv) requires "ample references" to the record.⁴ We have held that citations to the record must "permeate both the Statement of the Case and the Argument[.]" *Clark v. Workman*, 604 S.W.3d 616, 619 (Ky. App. 2020). Finally, O'Connell's brief contains numerous incorrect assertions as to how his arguments were preserved for review, as we will discuss throughout this Opinion.

We are cognizant that O'Connell is proceeding *pro se*. But "[a]ll of the rules for preparing a brief before this Court are contained in CR 76.12 or rules cited therein. Lack of a legal education is not an impediment to following these rules." *Hallis v. Hallis*, 328 S.W.3d

⁴ Similarly, Jonna Z. Bianco's two-page-long counterstatement of the case unfortunately contains no specific citations to the record, in plain contravention of CR 76.12(4)(d)(iii).

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694, 696 (Ky. App. 2010). O'Connell's *pro se* status "does not exempt him from the rules. He is bound by the same rules of appellate procedure as his opposing counsel and any other party before this court." *Koester v. Koester*, 569 S.W.3d 412, 415 (Ky. App. 2019).

CR 76.12(8)(a) provides that a brief may be stricken for failure to comply with any substantial requirement of CR 76.12. Similarly, CR 73.02(2)(a) provides that an appeal may be dismissed for failure to comply with appellate rules. *Ford v. Commonwealth*, 628 S.W.3d 147, 153-54 (Ky. 2021). We decline to strike O'Connell's brief or dismiss the appeal. Instead, we will take O'Connell's preservation citations at face value without independently scouring the over 1,100-page record or video footage of the two-day bench trial to determine if an issue was properly preserved elsewhere. Where the citations in O'Connell's brief do not show that the issue was actually or properly preserved below, we have declined to review the argument since O'Connell has not requested palpable error review. See *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008).

The Trial Court Had Subject Matter Jurisdiction and O'Connell Waived Any Lack of Particular Case Jurisdiction

O'Connell's first main argument is that the trial court lacked subject matter jurisdiction. The precise contours of O'Connell's meandering argument are difficult to discern, but we construe it as an assertion that the circuit court lacked jurisdiction because Bianco

had a pending bankruptcy petition during some of the time this case was pending in circuit court.

We begin by noting that the parties have not provided a complete record of Bianco's bankruptcy petition in the record below. However, it appears undisputed that she had a pending Chapter 13 bankruptcy petition at the time she filed this action but that petition was dismissed in 2015, well before the trial in this case.

O'Connell states he preserved this jurisdictional allegation multiple times. But he cites only to one occurrence before trial, his motion for proof of ownership. However, that motion makes *no mention whatsoever* of bankruptcy or any lack of court jurisdiction.⁵

Were this a nonjurisdictional issue, that would foreclose further review. But precedent holds that "since subject matter jurisdiction concerns the very nature and origins of a court's power to do anything at all[,] it cannot be born of waiver, consent or estoppel[,] and may be raised at any time." *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422,

⁵ In a later section of his brief, Patrick J. O'Connell mentions his December 2015 motion to return to status quo. That motion argues that Bianco's then-pending bankruptcy petition triggered the automatic stay, and "actions taken by the parties, or this court, since the automatic stay came into effect are voidable." R. at 320. However, it appears that Bianco's bankruptcy petition was soon thereafter dismissed so the trial court deemed moot O'Connell's motion to return to status quo. Under the facts of this case, since he did not raise the pending bankruptcy proceedings until they had nearly ended, O'Connell failed to afford the circuit court adequate time to address the automatic stay issue.

430-31 (Ky. App. 2008) (internal quotation marks and citations omitted). That rule is proper because “a judgment entered by a court without subject matter jurisdiction is void.” *Id.* at 430.

However, we construe O’Connell’s brief to actually raise an argument that the trial court lacked particular case jurisdiction. As we have explained:

Subject matter jurisdiction concerns the very nature of the court’s creation under constitutional provisions. Particular case jurisdiction is a subset of subject matter jurisdiction in that a court that lacks subject-matter jurisdiction over an action will also always lack particular-case jurisdiction, [but] a court can have proper subject-matter jurisdiction over an action, but nonetheless lack particular case jurisdiction[.]

Id. at 429 (internal quotation marks and citations omitted). In other words, “‘subject matter’ does not mean ‘this case,’ but ‘this kind of case.’” *Gordon v. NKC Hosps., Inc.*, 887 S.W.2d 360, 362 (Ky. 1994) (citing *Duncan v. O’Nan*, 451 S.W.2d 626 (Ky. 1970)).

The Shelby Circuit Court is a trial court of general jurisdiction possessing the authority to resolve the claims at issue (this kind of case). *See Hisle*, 258 S.W.3d at 432 (explaining the wide jurisdiction of Kentucky circuit courts). Thus, the trial court had subject matter jurisdiction over the claims here.

The gist of O’Connell’s argument is really that the trial court did not have the ability to decide *this*

particular case because all legal proceedings involving Bianco should have been automatically stayed during the pendency of her bankruptcy petition. But, unlike subject matter jurisdiction, particular case jurisdiction is waived if not timely asserted. *See Goodlett v. Brittain*, 544 S.W.3d 656, 660 (Ky. App. 2018). A party waits too long by not raising particular case jurisdiction arguments. *T.C. v. M.E.*, 603 S.W.3d 663, 682 (Ky. App. 2020) (“Particular case jurisdiction can be waived by a party who fails to object early enough in the proceedings.”). Consequently, O’Connell waited too long to assert his particular case jurisdiction argument(s). The issue was waived.

O’Connell Failed to Timely and Adequately Preserve His Statute of Frauds Argument

O’Connell argues at length that the parties’ oral contract violates the statute of frauds. He cites three times where he preserved the argument, but none of the three suffices. First, he claims the issue was preserved when his wife (who originally was named as a defendant) filed a motion to be dismissed. It is unclear how a motion made by O’Connell’s wife alone preserves the issue for O’Connell but, regardless, the motion to dismiss contains *no* reference to the statute of frauds.

Second, O’Connell states the issue was preserved by “oral arguments at Motion Hour on February 22, 2018[.]” Appellant’s Brief at 8. But O’Connell fails to cite to where, specifically, the statute of frauds was discussed at that hearing. It is not this Court’s job to

review an entire hearing of indeterminate length to see if an issue was raised. It was O'Connell's duty to provide a pinpoint citation to *exactly* where he raised the statute of frauds argument. Nonetheless, our review of the hearing record reflects that the issue was not raised before the trial court at this hearing.⁶

Finally, O'Connell argues the matter was preserved by his "Judicial Notice of Adjudicated Facts." Appellant's Brief at 8. That document is null as it was filed well after the trial and does not fall within the narrow range of cognizable post-trial motions.

Moreover, CR 8.03 lists the statute of frauds as an affirmative defense which must be specifically pled. O'Connell did not raise the statute of frauds in his answer, so he waived it – even if he belatedly tried to raise it later. See *Bowling v. Kentucky Dep't of Corr.*, 301 S.W.3d 478, 485 (Ky. 2009) ("failure to assert timely an affirmative defense waives that defense and precludes its consideration by the trial court and this Court."); *Rose v. Ackerson*, 374 S.W.3d 339, 345 (Ky. App. 2012) (holding that raising an affirmative defense via a "post-trial submission is both untimely and inadequate" to preserve it).

⁶ We note that O'Connell's reply brief does not dispute Bianco's assertion in her brief that the statute of frauds was not addressed at the February 22, 2018, hearing. Like the trial court, we must question O'Connell's credibility when this type of misrepresentation is made to this Court.

**O'Connell Has Not Shown Where He
Adequately Preserved His Arguments
Regarding the Trial Court's Findings of Fact**

O'Connell argues the trial court's findings of fact are not supported by the evidence. That section of his brief contains multiple sub-arguments but he has not shown where he adequately preserved any of them.

He first asserts he preserved the arguments in his CR 59.05 motion but, as previously discussed, that motion was an untimely nullity. Second, he asserts he preserved it in his response to Bianco's timely CR 59.05 motion, which was narrowly focused on her alleged entitlement to additional damages for calves. O'Connell's overly broad response could properly have addressed only the merits of the discrete issues raised in Bianco's CR 59.05 motion; it was not a fresh opportunity to raise new issues (especially since it was filed after expiration of the ten-day period for seeking CR 59.05 relief and after O'Connell had already filed his notice of appeal). More importantly, O'Connell has not cited this Court to any errors made by the trial court during the two-day bench trial, and how they were preserved. In sum, O'Connell has not shown that he preserved the many issues contained in this section of his brief.

As noted, this is an appeal from a bench trial. Accordingly, our standard of review is governed by CR 52.01. Under CR 52.01, the trial court is required to make specific findings of fact and state separately its conclusions of law relied upon to render the court's judgment. Further, those "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard

shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR 52.01. A trial court’s decision is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). “Substantial evidence” is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [people].” *Id.* Furthermore, parties have a right to have matters before trial courts “adjudicated from the evidence of record[.]” *Skinner v. Skinner*, 249 S.W.3d 196, 201 (Ky. App. 2008). While deferential to the lower court’s factual findings, appellate review of legal determinations and conclusions of law from a bench trial is *de novo*. *Sawyers v. Beller*, 384 S.W.3d 107, 110 (Ky. 2012).

The court conducted a two-day trial and considered considerable evidence. Ultimately, the court had to weigh the credibility of the testimony of O’Connell versus that of Bianco. The trial court found Bianco to be more believable. As the finder of fact, the trial court had *extremely* broad discretion to determine witness credibility:

Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses because judging the credibility of witnesses and weighing evidence are tasks within the *exclusive province of the trial court*.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (internal quotation marks, footnotes, and citations omitted) (emphasis added).

Without getting into the minutiae of O'Connell's argument, the trial court had the discretion to give more credence to evidence favoring Bianco than evidence favoring O'Connell. Indeed, the trial court explicitly noted that its decision hinged on its credibility determinations. Based on the evidence, the trial court made extensive findings of fact. We conclude that the trial court's findings are supported by substantial evidence and not clearly erroneous. Those findings will not be disturbed on appeal. *See Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967) ("The trial court heard the evidence and saw the witnesses. It is in a better position than the appellate court to evaluate the situation. . . . When the evidence is conflicting, as here, we cannot and will not substitute our decision for the judgment of the chancellor.").

O'Connell also argues on appeal that the trial court erred by awarding Bianco damages for conversion, alleging her complaint did not raise such a claim. He similarly argues the award of punitive damages was improper. Again, in addition to his failure to show where either issue was properly preserved, he has not shown an entitlement to relief. Generally, "a judgment should grant whatever relief a party may be entitled to, provided, however, that it must have at least some discernible relationship to the controversies in issue or be consonant with what is specifically pleaded and

proved.” *Nagle v. Wakefield’s Adm’r*, 263 S.W.2d 127, 130 (Ky. 1953).

Bianco’s *pro se* complaint was not artfully drafted. However, the complaint does set forth Bianco’s understanding of the parties’ agreement, the delivery of the cattle to O’Connell, O’Connell’s alleged failure to respond to Bianco’s requests for information and the general deterioration of the parties’ relationship such that Bianco believed it was “clearly the intent of Defendant [O’Connell] to steal all of the cattle belonging to Plaintiff [Bianco][.]” R. at p. 6, ¶ 30 of Complaint. CR 8.01(1) only requires “a short and plain statement of the claim showing that the pleader is entitled to relief” and CR 8.06 provides that “[a]ll pleadings shall be so construed as to do substantial justice.” So, even a complaint “couched in general and conclusory terms” may be sufficient. *KentuckyOne Health, Inc. v. Reid*, 522 S.W.3d 193, 197 (Ky. 2017). Also, CR 8.06’s “‘liberal construction’ rule,” means a pleading will be “judged according to its substance rather than its label or form.” *McCollum v. Garrett*, 880 S.W.2d 530, 533 (Ky. 1994).

Thus, we agree with Bianco that her complaint at least minimally alleges the elements of conversion.⁷

⁷ As we have noted:

In Kentucky, a claim of conversion consists of the following elements:

- (1) the plaintiff had legal title to the converted property;
- (2) the plaintiff had possession of the property or the right to possess it at the time of the conversion;

Similarly, the complaint contains allegations of malice sufficient to support an award of punitive damages, given its assertions that O'Connell intentionally and maliciously deprived Bianco of her cattle and the proceeds from the sale thereof. The judgment thus has "at least some discernible relationship to the controversies in issue[.]" *See Nagle*, 263 S.W.2d at 130.

Moreover, O'Connell did not file a motion for a more definite statement under CR 12.05, nor has he shown where he objected at trial to presentation of evidence on any issues not encompassed by the complaint. That lack of objection is crucial because CR 15.02 provides that "[w]hen 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." And O'Connell should have known before trial that Bianco was asserting a claim for conversion and was seeking punitive

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- (3) the defendant exercised dominion over the property in a manner which denied the plaintiff's rights to use and enjoy the property and which was to the defendant's own use and beneficial enjoyment;
 - (4) the defendant intended to interfere with the plaintiff's possession;
 - (5) the plaintiff made some demand for the property's return which the defendant refused;
 - (6) the defendant's act was the legal cause of the plaintiff's loss of the property; and
 - (7) the plaintiff suffered damage by the loss of the property.

Jones v. Marquis Terminal, Inc., 454 S.W.3d 849, 853 (Ky. App. 2014).

damages as she explicitly said so in her pretrial memorandum (R. at 674, 676) and itemization of damages (R. at 660-61). We thus find no error in the trial court's award of damages.

**O'Connell Has Not Shown
A Due Process Violation**

Finally, O'Connell argues the trial court violated his right to due process when the court issued an *ex parte* order in July 2015 which permitted the authorities in Jefferson County to transfer cattle from O'Connell's custody to Bianco's. However, while there may have been some testimony at trial about these cattle, the due process issue was not otherwise raised at trial and thus has not been properly preserved for consideration in this appeal. And, the trial court noted that neither party referred to these cattle in their proposed findings tendered to the court after the trial. At the hearing on Bianco's motion to alter, amend or vacate, O'Connell raised the issue, but the court declined to extend any relief in its order entered February 12, 2020.⁸

Kentucky appellate courts "have long endorsed a rule that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal" because "[w]hen

⁸ As previously noted, O'Connell untimely served a motion to alter, amend or vacate pursuant to CR 59.05, which was not considered by the trial court. The due process issue was raised in this motion, but was not considered by the court due to its untimeliness.

a trial court never has the opportunity to rule on a legal question presented to an appellate court, an appellant presents a different case to the appellate court than the one decided by the trial court.” *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 852 (Ky. 2016) (internal quotation marks, citations, and footnotes omitted). Again, the scope of our review “is limited to the theory or theories upon which the case was tried[,]” *Florman*, 207 S.W.3d at 607 (internal quotation marks and citation omitted), even for constitutional arguments. See *Sneed v. University of Louisville Hospital*, 600 S.W.3d 221, 228 (Ky. 2020) (declining to review an equal protection argument which was not preserved for appellate review). Because O’Connell has not shown where he preserved his due process argument, we decline to address it on the merits, nor is it a basis for reversal. *Jones v. Livesay*, 551 S.W.3d 47, 52-53 (Ky. App. 2018).

For the foregoing reasons, the Shelby Circuit Court’s Findings of Fact, Conclusions of Law and Judgment entered March 22, 2019, is affirmed.

ALL CONCUR.

BRIEFS FOR
APPELLANT:

Patrick J. O’Connell,
Pro Se
Louisville, Kentucky

BRIEF FOR
APPELLEE:

Preston Scott Cecil
Natalie Lile
Frankfort, Kentucky

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COMMONWEALTH OF KENTUCKY
53RD JUDICIAL CIRCUIT
SHELBY CIRCUIT COURT
CIVIL ACTION NO.: 13-CI-00109

JONNA Z. BIANCO

PLAINTIFF

ORDER

P.J. O'CONNELL

DEFENDANT

(Filed Feb. 12, 2020)

This matter comes before the Court on Plaintiff Joanna Bianco's Motion to Alter, Amend, or Vacate the Court's Findings of Fact, Conclusions of Law, and Judgment. The Court notes that the Supreme Court of Kentucky issued an Order Denying Disqualification from this Court presiding over this action which was entered by the Shelby Circuit Clerk on January 23, 2020.

The Court hereby **OVERRULES** Bianco's Motion to Alter, Amend or Vacate the Court's Findings of Fact, Conclusions of Law, and Judgment and relies on the rulings and reasoning set forth therein. The Court has done it's best to render rulings which are supported by the preponderance of the evidence in a situation rife with lack of documentation, strongly conflicting positions, courses of action which defy reason, and serious credibility issues.

The Court declines to remove any of the cattle taken from Jefferson County, Kentucky by law enforcement there which were transported by Bianco to Tennessee. This issue was the subject of testimony at the court trial, but was not discussed in the parties'

proposed findings. The Court is unable by the preponderance of the evidence to determine any specific cow or bull of the lot which were taken to Tennessee which may belong to O'Connell. The most competent and compelling evidence about the cattle taken to Tennessee was from Bianco who could trace many of the cows as being a member of the Corriente cattle originally entrusted to O'Connell or the offspring from the original herd, and therefore belong to her. The Court declines to randomly and arbitrarily select an unknown number of cattle from the cattle taken to Tennessee and award them to O'Connell, as the Court cannot by a preponderance of the evidence determine which animals should be separated out as potentially being owned by O'Connell. As stated above, the Court has done it's best to render decisions which are supported by the preponderance of the evidence.

It is SO ORDERED this 12 day of February, 2020.

This Order is final and appealable, there being no cause for delay.

/s/ Charles R. Hickman
CHARLES R. HICKMAN, JUDGE
Shelby Circuit Court

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Supreme Court of Kentucky
FROM THE 53RD JUDICIAL CIRCUIT
SHELBY CIRCUIT COURT, DIVISION 1
CASE NO. 13-CI-00109

JONNA Z. BIANCO

PLAINTIFF

v.

PATRICK J. O'CONNELL, ET AL. DEFENDANTS

ORDER DENYING DISQUALIFICATION

(Filed Jan. 23, 2020)

This matter is before the Chief Justice upon the certification of the Clerk of the Shelby Circuit Court of the affidavit of Defendant, Patrick J. O'Connell, which seeks to disqualify the Honorable Charles R. Hickman, 53rd Judicial Circuit, Division 1, from presiding in the above-styled action.

Upon review, it is ORDERED that Defendant has failed to demonstrate any disqualifying circumstance that would require the appointment of a special judge under Kentucky Revised Statutes (KRS) 26A.020.

The request is denied without prejudice of any party to seek appellate review after entry of a final judgment.

The Clerk of the Shelby Circuit Court shall place a copy of this order in the record of this case and shall serve copies on parties or their counsel.

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Entered this 13th day of December 2019.

/s/ John D. Minton, Jr.
CHIEF JUSTICE

Copies to:

Gregory Bartlett, Chief Regional Circuit Judge,
Northern Region
Charles R. Hickman, 53rd Judicial Circuit, Div. 1
Wendy B. Graney, Shelby County Circuit Court
Clerk

App. 25

COMMONWEALTH OF KENTUCKY
53RD JUDICIAL CIRCUIT
SHELBY CIRCUIT COURT
CIVIL ACTION NO.: 13-CI-00109

JONNA Z. BIANCO

PLAINTIFF

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT**

(Filed Mar. 22, 2019)

P.J. O'CONNELL

DEFENDANT

FINDINGS OF FACT

1. The first thing to note in this case is that the parties agree on almost nothing about the parties' contract and what occurred in this action. Their positions and testimony were for the most part contradictory, and many findings will be based on assessments of credibility and what could be pieced together from the evidence presented at the trial of this matter.
2. There was no written contract executed to ever formalize the parties' agreement. Plaintiff Jonna Z. Bianco (hereinafter "Bianco") emailed an agreement to Defendant P.J. O'Connell (hereinafter "O'Connell") however that contract was never signed, and the parties' agreement was oral.
3. Bianco is an owner and a large-scale breeder of Corriente cattle who resides in Lewisburg, Tennessee. Corriente cattle are rodeo cattle, and are used in team-roping and bulldogging, also known as steer wrestling, and Bianco has been a supplier of Corriente stock for use in a multitude of rodeos.

Given Bianco's experience and her livelihood as an owner and breeder of Corriente cattle she is well qualified to offer an opinion on the value of Corriente cattle. In August of 2010, she had placed an ad on Craig's List advertising for sale. a herd of Corriente' cattle for \$450.00 per head. O'Connell, who had leased farm land available to rear a herd of cattle, contacted Bianco, and expressed interest in her herd.

4. O'Connell and Bianco engaged in Several communications and phone calls, and the parties entered into a cow/calf agreement. This agreement was that Bianco would deliver a herd of Corriente cattle to O'Connell in Shelby County, Kentucky, O'Connell would care for the herd, birth and wean the calves from their mothers, and then the calves would be sold, and Bianco and O'Connell would share in the amount realized from their sale.
5. O'Connell contended that the contract was to last for a year, but Bianco indicated that she hoped for a more open-ended agreement, with the expectation that O'Connell would care for and bred the herd through several calving seasons, with the parties splitting the proceeds from the sale of the calves each season.
6. Bianco testified that cows gestate for nine months, and once the calf is born, they are weaned from their mother by about six months. Then the cow would be available to breed again.
7. Bianco testified that she personally selected each cow and bull which she transported to Kentucky. She made a blue binder which contained documentation of the animal's bang tag; any brand

markings, and registration papers. This blue binder was never provided to O'Connell in discovery but did appear at the trial, of this matter.

8. Bianco testified that the Corriente cattle sent to O'Connell were registered livestock, and that it was important to maintain records of what calves belong to which cows, because it is important to track the bloodline of these registered animals. Each animal in the herd had a North American Corriente Association Certificate of Registration. Also, keeping records aids in determining whether a given cow is producing heifers or bulls, which is important to know for future breeding decisions.
9. The first load of cattle arrived the first week of September, 2010 to O'Connell at a farm on Martin Nethery Lane, Shelby County, Kentucky from Tennessee, and multiple loads of cattle were delivered over several days. Bianco did not provide O'Connell with any identifying documentation about the cattle or an inventory of the cattle being delivered to him. The cattle were delivered by Bianco's son, John Ziegler and an assistant.
10. Bianco allegedly emailed O'Connell a written contract to sign on October 5, 2010; however, O'Connell denied ever receiving the document. An email was sent that day, but it is not clear that it had an attachment. A written contract was never executed by the parties. The unexecuted contract had a term from September 7, 2010 to September 6, 2011.
11. Bianco had delivered to O'Connell eighty-four (84) cows and two (2) bulls, for a total herd of eighty-six (86) animals.

12. Bianco testified that all the cows were already bred when they were delivered to Kentucky. O'Connell testified that many of the cows had not been bred, and that he had to breed many of the cows after they arrived in Kentucky.
13. The parties agree that 64 calves were born to the Corriente herd being cared for by O'Connell, however, One calf soon died, leaving 63 calves. The calves were weaned by September, 2011 / early October 2011.
14. O'Connell counted the Corriente cattle as they were unloaded from the trucks when the herd was originally delivered in September, 2010 and kept a tally in a notebook. O'Connell kept other information regarding the cows as they gave birth and weaned their calves. That notebook was provided to detectives from Jefferson County following the theft of cows and was never returned to O'Connell.
15. In October, 2011, the parties' relationship began to deteriorate, and phone calls had given way to only communicating by email.
16. Bianco sent an email to O'Connell on November 22, 2011 stating that she had been unable to reach O'Connell the last couple of weeks, and requested information about the weaned calves, and the well-being of the cows and bulls. (Note: This email asks how the "84 momma cows" and 2 bulls are doing.)
17. O'Connell had informed Bianco a few weeks before Christmas 2011 that he had a buyer in Indiana, Matt Anderson, who was willing to purchase the calves for \$325.00 per head. Bianco thought that a

higher price could be obtained for the calves, at least \$450 per head. Bianco requested that O'Connell take photos of the calves to send to Bianco, for her to use in the marketing of the calves for sale. O'Connell emailed Bianco on December 31, 2011 indicating that his wife was going to aid him in getting Bianco the requested pictures.

18. A succession of emails followed throughout January, 2011, the majority being Bianco repeatedly requesting that O'Connell respond to her, as he had not been responding to any of Bianco's calls, texts, or emails and requesting information on the herd.
19. On January 27, 2012, O'Connell sent Bianco an email wherein he terminated the parties' agreement. O'Connell stated that Bianco needed to reimburse him for his expenses in taking care of the herd, and once those sums had been paid he would return Bianco's cattle to her possession. The amount O'Connell was claiming he was owed in expenses was not set out in his email. As of trial, Bianco had never received any documentation regarding O'Connell's claimed expenses.
20. Bianco responded on March 4, 2012, that she was making arrangements to come retrieve her herd, including the calves, from O'Connell. She indicated that she had buyers for the calves and was concerned that O'Connell had "ill intentions" toward her cattle. Bianco also disagreed with O'Connell's characterization of the parties' agreement, i.e. that the proceeds from the sale of the calves would be fifty-fifty and that he would pay for any expenses out of his half of the sale proceeds.

21. On March 5, 2012, Bianco sent another email, again requesting pictures of the calves; as the buyers she had lined up wanted to see the pictures.
22. It should be noted that O'Connell had moved the herd and Calves from the Shelby County, Kentucky farm where the animals had been delivered in December 2010 when his lease at the Martin Nethery Lane property had expired. The Corriente herd was then being kept farm on Clark Station Road, Fisherville, Jefferson County, Kentucky. Bianco was never informed of the new location where her cattle were being kept.
23. On March 6, 2014 O'Connell recorded a Notice of Furnishing (hereinafter "Lien") with the Shelby County Clerk's Office, which purported to be an agister's lien pursuant to KRS 376.400, et. seq. and sought to secure payment for O'Connell's expenses in taking care of the herd. O'Connell sent a letter dated March 5, 2012, informing Bianco of the Lien, and requesting that he be paid his expenses. (Note: The Lien listed that the herd consisted of 74 cows, 2 bulls, and 64 calves.)
24. At the trial of this matter, the Court ruled that O'Connell's Lien was invalid and unenforceable.
25. The parties had contrary positions regarding how the profits in the cow/Calf agreement would be divided. O'Connell contended that he was to receive 2/3 of the proceeds of the sale of the calves, and Bianco would receive 1/3 of the proceeds. The Court finds Bianco's testimony that the parties were to split the sale of the calves fifty-fifty, and that the parties had no agreement for Bianco to

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pay any expenses incurred by O'Connell in the sale of the cattle herd to be credible.

26. Bianco did not issue any response to the Lien and did not travel to Kentucky to retrieve her herd.
27. On March 15, 2012, O'Connell's wife Jennifer arrived at the Clark Station Road farm in Jefferson County to discover a gate open and all 63 calves of the Corriente herd stolen. O'Connell contacted the Louisville Metro Police Department (LMPD) and made a police report. At no time did O'Connell ever contact Bianco to inform her that all 63 calves had been stolen. (Note: Only the calves were allegedly stolen; and the remainder of the herd remained at the Clark Station Road farm, kept in a different area of the farm than the calves.)
28. The calves represent the whole purpose of the parties' agreement and are the assets to be sold that will generate income for both the parties; that O'Connell failed to inform Bianco that all 63 calves had been stolen, is a fact which seriously undermines his credibility before the Court in this matter. There is no well-intentioned reason to keep this information from Bianco.
29. O'Connell denied that he had sold the calves and testified that they had been stolen.
30. Any argument suggesting Bianco "stole" her calves or was involved in the later cow thefts is patently ridiculous, as she did not know that her cattle were now being kept on a farm in Jefferson County, Kentucky.
31. On May 15, 2012; O'Connell sent Bianco a letter wherein he informed her that pursuant to his Lien

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recorded on March 6, 2012, that he Would be Selling her cattle, and that she had until June 15th to pick up her cows and pay the expenses she owed to O'Connell. The letter was not sent certified mail. (Note: Bianco at this time; was unaware that her cattle were now located at the Clark Station farm in Jefferson County, Kentucky, and O'Connell did not inform her where they were located.)

32. Approximately 11 cows of their Corriente herd, were stolen in a second theft from the Jefferson County farm on May 30, 2012. Allegedly, a lock had been cut off the gate to access these cows. This second theft was reported to LMPD. O'Connell did not inform Bianco of this theft of her cattle either.
33. O'Connell sold sixty of Bianco's herd, including fifty-eight cows and the two bulls. He could provide no documentation or definite information regarding the individual who purchased the cattle, however, he was paid \$24,800.00, which is approximately \$400.00 per head of cattle. (Note: O'Connell contends that the herd delivered consisted of 73 cows, 2 of whom died, and 2 bulls. With all the calves being stolen, then 11 cows being stolen, there remained 60 animals in the herd, all of which he sold.)
34. Bianco testified that the registered Corriente cattle in the herd delivered to O'Connell were worth \$1,200.00 to \$1,600.00 per head when she delivered them to O'Connell.
35. The sale of sixty of Bianco's cattle was not Conducted in conformity with the elements of the agister's lien statute, KRS 376.400. The sale was not published, Bianco was not informed of the date,

place, and time of the sale, and Bianco had never agreed to pay O'Connell the expenses he stated he was owed.

36. Bianco never received any proceeds from the sale of any of the cattle delivered to O'Connell. The Corriente cattle herd and its calves were all in the care and possession of O'Connell when they were either stolen or sold.
37. Bianco brought the current action on March 30, 2013, over a year after O'Connell's invalid Lien had been recorded and mailed to Bianco.
38. Bianco testified that she travelled to Kentucky after the Lien had been filed to pick up her cattle at the Shelby County farm where they had been delivered. However, since the herd had previously been moved, she was unable to locate the herd or O'Connell.
39. In April, 2015, O'Connell had a herd of his cattle stolen from the Clark Station Road farm. A report was made of the theft, and O'Connell made \$75,000.00 insurance claim for loss of this herd. O'Connell testified that none of the cows stolen in this third theft from the Clark Station Road property belonged to Bianco. A description of this herd by Jennifer O'Connell (wife of O'Connell) to obtain insurance stated that it included Corriente and mixed beef cattle breeds.
40. Bianco testified that the Corriente cows delivered to O'Connell had calved before, and the odds of them re-breeding back were very high. No evidence regarding the attrition rate as successive

seasons of breeding occurred was introduced at trial.

41. O'Connell seeks compensation for his care of the Corriente herd from October 1, 2011, after he requested that Bianco retrieve her cows, through June 15, 2012 when he sold most of the herd. He seeks \$110.00 per day to care for the heard, for 258 days. No proof of these costs was presented, such as receipts, bills, or invoices.
42. O'Connell testified pursuant to the parties' agreement that Bianco promised to replace any "cull cows"; or cows who failed to calve, however, Bianco never replaced those cows. O'Connell alleges that he should be compensated for the seven cull cows of the herd that he cared for in the amount of \$2,412.50.

CONCLUSIONS OF LAW

The Court notes that the resolution Of this case is difficult, given numerous elements of this action. The parties disagreed about the most basic elements of their agreement. This case lacked virtually any documentation, i.e. no written agreement, no inventory of cattle given to O'Connell (except for the binder of cows that miraculously appeared at trial), no documentation regarding O'Connell's sale of the animals at issue, O'Connell's missing notebook recording the cattle received and the cows produced and weaned, etc. Also, the parties made questionable decisions in the disintegration of their relationship that are simply inexplicable or approaching incredible. Why did Bianco wait a

year to take any action (by filing this lawsuit) to try to obtain her cattle? Why did O'Connell never inform Bianco that all the calves had been stolen? Or where the remnants of the herd were located after the theft? The informality that existed in the parties' business relationship is mystifying given the fact that it was brokered between complete strangers who live hundreds of miles apart and connected via a Craig's List advertisement.

The burden of proof to succeed in a civil cause of action is the preponderance of the evidence standard. The credibility determinations weighed very strongly in this action, given the contradictory arguments by the parties as to the substance of their agreement and the fallout of that agreement. The parties' email communications were helpful in developing a picture of the deterioration of the parties' business relationship, but this case was very much a case of "he said" / "she said".

The parties entered into a cow/calf agreement, wherein Bianco delivered to O'Connell 84 registered Corriente cows and 2 registered Corriente bulls. O'Connell was to care for the herd through their gestational period, and through the weaning of the resulting calves. Once the calves were weaned, the calves would be sold, and the proceeds split fifty-fifty. There was no agreement for Bianco to pay O'Connell's expenses in caring for the cows, as his only compensation in this agreement would be his 50% share of the proceeds from the sale of the calves. The Corriente herd and calves were in the care and possession of O'Connell when: 63 calves were allegedly stolen, on a

separate occasion 12 cows were allegedly stolen, and finally O'Connell filed an invalid and unenforceable Lien to secure payment of expenses (which were never part of the parties' agreement) and sold 60 off Bianco's Corriente herd. O'Connell never informed Bianco of the theft of the 63 calves, which were the income generating sources for the parties' venture, and never informed her that 12 more of her cows were stolen in a separate incidence of theft. The Court cannot find a well-intentioned reason for O'Connell's failure to inform Bianco about these thefts, indeed his silence creates suspicious implications.

The Court also notes that O'Connell was failing to cooperate with Bianco when she was trying to get O'Connell to take pictures of the calves for her to use in marketing the calves for sale. This occurred in the same time period that the emails illustrate that O'Connell was refusing to respond to Bianco by phone, text, or email, and she had even resorted to calling O'Connell's father in an attempt to communicate with O'Connell. O'Connell, who was allegedly very frustrated about not getting his money, was not cooperating with Bianco to forward her pictures and information to aid her in obtaining buyers, for the calves which would generate money for both parties. The Court also notes the contradictory arguments made by O'Connell. O'Connell asserts that Bianco just needed to come get her cattle and her failure to do so cost him money, however, he testified that he would not give Bianco the calves to sell because he feared she would remove them and he would not get paid. (In an email, O'Connell also

told Bianco he would release her cattle when she paid his expenses.) You can't have it both ways.

The premise upon which O'Connell obtained the Lien, and therefore, the alleged authority to sell Bianco's cattle was that O'Connell was owed for his expenses in caring for the herd. The parties' agreement never included Bianco paying O'Connell's expenses, O'Connell would be reimbursed or paid for his expenses, as his only compensation in the deal would be his 50% share of the proceeds upon the sale of the calves. O'Connell has never submitted any documentation to support his claimed expenses. The invalid and unenforceable Lien was used to create an appearance of legitimacy for O'Connell's sale of Bianco's cattle. However, the Lien was invalid and unenforceable, and the sale of Bianco's cattle was not supported by a legal basis and was not legitimate, and O'Connell wrongfully deprived Bianco of her cattle by selling them.

All the foregoing are the ways that O'Connell breached the parties' agreement. O'Connell refused to cooperate in the sale of the calves and he refused to return the herd to Bianco unless she would pay his expenses, which was never a part of their agreement. Also, O'Connell never reported to Bianco two separate thefts wherein over 70 of **Bianco's** animals were stolen; Bianco did not obtain the return of any of her cattle from O'Connell and she never received any portion of the money that O'Connell received for selling her cattle. Bianco would have been unable to retrieve the calves and the herd from December of 2011 onward, as the cattle were moved to a different farm and Bianco

was never informed of this fact and given an update on their current location.

Bianco argues that O'Connell converted the 58 cows and 2 bulls by selling them in June, 2012 pursuant to the invalid and unenforceable Lien, previously discussed herein. A claim of conversion requires proof of the "wrongful exercise of dominion and control over property of another" and damages are awarded for the value of the property at the time it was converted. State Auto Mutual Insurance Co. v. Chrysler Credit Corp., 792 S.W.2d 626, 627-628 (Ky.App. 1990). O'Connell in selling 60 of Bianco's Corriente herd committed conversion of those animals. The animals were undisputedly owned by Bianco. There was no agreement for Bianco to pay O'Connell's expenses, and the Lien was drafted based upon a false premise, i.e. that Bianco had an obligation to pay his expenses and failed to do so. The Lien did not conform to the statutory requirements set forth in KRS 376.400, and was invalid and unenforceable and provided O'Connell no basis to sell Bianco's property, and thereafter, retain all funds received from the sale of her property.

Bianco also alleges that O'Connell was negligent in his duty to reasonably care for and protect the Corriente herd which were in his sole care and possession; and that O'Connell breached this duty by intentionally selling a large portion of the herd and failing to safeguard them which resulted in the 63 calves and a dozen cows being stolen in two separate thefts. The Court agrees with Bianco's assessment.

O'Connell seeks reimbursement for his expenses in caring for Bianco's herd from October, 2011 through June, 2012, with an offset given for the amount he realized in selling 60 animals from Bianco's herd. As stated above, the parties' agreement did not include an obligation for Bianco to pay O'Connell's expenses. (Note: No documentation was submitted supporting the amount claimed.) There is no legal basis upon which to award O'Connell his expenses in caring for the Corriente herd. O'Connell also seeks damages in the amount of \$10,237.50 for the theft loss of the calves, arguing that Bianco failed in her duty to protect those animals. The calves were in O'Connell's sole control and possession when they were stolen from a farm leased by him. Bianco did not have a duty to protect the calves at that juncture, and since O'Connell had moved the calves to a different farm, Bianco was completely unaware of their location when they were stolen. O'Connell also never informed Bianco that they were stolen. Given these facts and circumstances, Bianco did not breach a duty to protect the calves and O'Connell is owed no damages from Bianco for the theft of the calves.

Bianco seeks compensatory damages for O'Connell's breach of contract, conversion, and negligence. Bianco delivered 84 cows and 2 bulls to O'Connell and she seeks damages for her lost herd of Corriente cattle, which she valued at between \$1,200.00 and \$1,600.00 when they were delivered to O'Connell. The Court finds that \$1,200.00 per head is an appropriate valuation of the 86 animals in the Corriente herd delivered

to O'Connell, and Bianco is awarded the sum of \$103,200 (\$1,200 per head x 86 animals).

Bianco argues that the Corriente cows would have created a continuing stream of income through successive breeding seasons from 2011 through 2018; which income was cut off via O'Connell failing to safeguard the animals from theft and his intentional sale of the animals. Bianco testified that the Corriente cows delivered to O'Connell had calved before, and the odds of them re-breeding back were very high. However, there was no evidence regarding the attrition rate, as successive seasons of breeding occurred was introduced at trial. Bianco asks the Court to assume that 63 calves would have been born from the herd every year from 2012 through 2018, and award damages based on evaluation of those calves of between \$550 or \$600 per head. The Court finds it speculative to assume that the herd would have produced 63 calves every year for seven years straight and does not find that this argument for damages should be awarded by a preponderance of the evidence.

Finally, Blanco seeks punitive damages. Punitive damages are awarded wherein:

A plaintiff shall recover punitive damages only upon proving by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud, or malice. KRS 411.184(2).

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Fraud, as defined in the punitive damages statute, "means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant and made with the intention of causing harm to the plaintiff" KRS 411.184(1)(b). The Court finds, that the circumstances, as recounted above, about the invalid and unenforceable Lien, the liquidation of 60 of Bianco's animal's pursuant to the Lien, the failure to inform Bianco that all 63 calves had been stolen, and failure to inform Bianco that 12 other cows had been stolen all illustrates by clear and convincing evidence that O'Connell engaged in intentional misrepresentation and concealment of material facts with the intention of causing harm to the Plaintiff by depriving her of her cattle and to deprive her of proceeds from the sale of her cattle. The Court finds that an award of \$25,000.00 in punitive damages is appropriate given the circumstances of this action.

The Court addressed all the damages and relief requested in their proposed Findings of Fact, Conclusions of Law, and Judgment.

JUDGMENT

Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby ORDERS as follows:

1. O'Connell breached the parties' contract.
2. O'Connell converted Bianco's property.
3. O'Connell was negligent in his duty to care for and safeguard the Corriente cattle herd.

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4. Bianco is hereby awarded compensatory damages in the amount of \$103,200.00.
5. Bianco is hereby awarded punitive damages in the amount of \$25,000.00.
6. Each party shall pay their own attorney's fees.

This Order is final and appealable, there being no cause for delay.

It is **SO ORDERED** this 21 day of March, 2019.

/s/ Charles R. Hickman
CHARLES R. HICKMAN, JUDGE
Shelby Circuit Court

App. 43

**OFFICE OF THE CLERK
SUPREME COURT OF KENTUCKY
Room 209, STATE CAPITOL
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601**

**KELLY STEPHENS
CLERK**

**PHONE 502-564-4720
FAX 502-564-5491
KYCOURTS.GOV**

MEMORANDUM

**TO: PATRICK J. O'CONNELL
FROM: KELLY STEPHENS, CLERK
DATE: 06/08/2022
FILE NUMBER: 2022-SC-0055
13-CI-00109**

PATRICK J. O'CONNELL

V.

JONNA Z. BIANCO

**PURSUANT TO CIVIL RULE 76.30(2)(E), THE
DECISION IN THE ABOVE CAPTIONED APPEAL
HAS BECOME FINAL. PLEASE FILE THE EN-
CLOSED ORDER (IF APPLICABLE) AND NOTE
THE FILING ON THE PROPER DOCKET.**

ENCLOSURES: COPY OF ORDER

**CC: CHARLES R. HICKMAN NATALIE RAE LILE
PRESTON SCOTT CECIL
SHELBY CIRCUIT COURT FILE COPY**

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Supreme Court of Kentucky

2022-SC-0055-D
(2019-CA-0629)

PATRICK J. O'CONNELL	MOVANT
V. SHELBY CIRCUIT COURT	
13-CI-00109	
JONNA Z. BIANCO	RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

(Filed Jun. 8, 2022)

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: June 8, 2022.

/s/ John D. Minton, Jr.
CHIEF JUSTICE
