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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000336-MR

JAMES M. BREEDLOVE AND
JANICE BREEDLOVE, HIS WIFE — APPELLANTS

V.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
CIVIL ACTION NO. 01-CI-00124

CITY OF EDDYVILLE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: This is an appeal from the circuit court's grant of summary judgment sustaining the City of Eddyville's special assessment liens on five subdivision lots purchased by James and Janice Breedlove. The circuit court ruled that Eddyville's assessment ordinance was properly enacted and the resulting encumbrances enforceable even though when the Breedloves bought the lots the city had neglected to comply with a self-imposed notice requirement to file a copy of the ordinance with the Lyon

County Clerk. On appeal, the Breedloves repeat the lack-of-notice argument which we reject. They also argue that summary judgment was improper, insisting that an issue of fact exists as to whether Eddyville's city clerk misinformed their attorney about the existence of the unpaid assessments because their attorney's title opinion did not show the unpaid city assessments, and he testified in discovery that he customarily called the city clerk to check for unpaid city taxes or assessments when certifying a title for property located in the city. But because there is no evidence that the attorney ever contacted the city clerk to ascertain the status of the special assessments and because his statements concerning his routine business practice would be inadmissible at trial, there was no genuine issue of material fact. The summary judgment was proper. We affirm.

THE FACTUAL BACKGROUND

The Breedloves already owned lots numbered 29, 30, 31, and 32 of the Sarah Lane Subdivision in the City of Eddyville, Lyon County, Kentucky, when they bought lots numbered 21, 23, 25, 28, and 36 in 1996. Before buying the lots in 1996, they hired G. L. Ovey, Jr., a local attorney, to perform a title examination. Ovey certified the title, subject to a $7,000 mortgage to the Bank of Lyon County and other exceptions

and reservations as stated in his letter to the Breedloves, dated June 26, 1996. Ovey certified that there were no properly recorded mechanics' liens, lis pendens notices, or any other encumbrances found recorded in the Lyon County Clerk's office, the Lyon County Sheriff's office, or the Lyon Circuit Clerk's office. The opinion letter makes no reference to a search of the tax bills or assessment records affecting the property which might have existed in the Eddyville City Clerk's office.

The Breedloves bought the lots on July 3, 1996, for $22,000. The bank's mortgage was paid from the closing and released. No other funds were withheld from the proceeds of the sale. About a month after the closing, Ovey sent the Breedloves an updated title opinion letter confirming that their deed had been properly recorded with the county clerk; and the bank's mortgage had been released. The final certification adopted by reference the remaining exceptions from the original title certification.

Back in 1994, Eddyville had levied a street and sewer assessment on the lots in the Sarah Lane Subdivision. The city held its first public hearing for Ordinance 1-24-94A to levy the special assessment on October 12, 1993. The Ordinance itself was read before the Eddyville City Council, first, on January 24 and, again, on February 7, 1994. Notice of it was also published in the local newspaper, the *Herald Ledger*, on

March 23, 1994. The Ordinance stated that a copy of it "shall be filed with the County Clerk of Lyon County, Kentucky." This filing was not accomplished until six years later, March 23, 2000.

On December 7, 1999, Eddyville Mayor Jerry Peek sent a letter to the Breedloves informing them that the assessment for street and sewer improvements affecting lots numbered 21, 23, 25, 28, and 36 was unpaid. The amount due for the assessments was $14,803.15. Since the Ovey's title certificate did not reveal the unpaid assessments and the Breedloves had assumed the previous owners had paid them, they refused to pay the city.

Eddyville responded to the Breedloves' refusal to pay by imposing a "statutory lien" on the lots. The city cited Ordinance 1-24-94A, KRS 76.172, and KRS 107.160 as its authority to impose such a lien. The lien was filed in the Lyon County Clerk's office on April 3, 2000; and it affected all of the lots the Breedloves bought in 1996.

PROCEEDINGS IN LYON CIRCUIT COURT

The Breedloves filed suit in Lyon Circuit Court on July 2, 2001. In their complaint, they alleged that Ordinance 1-24-94A was void or voidable; that the "statutory lien" was also void or voidable; and that the city, acting through its mayor, had slandered the Breedloves' title to the property.

Eddyville's answer denied the allegations in the complaint and discovery proceeded.

The Breedloves eventually moved for a partial summary judgment. Their motion asserted that Eddyville had failed to comply with the requirements of the ordinance, that neither the ordinance nor statutory lien were recorded at the time the Breedloves purchased the lots, and that the statutory authority cited for the lien was inapposite. In response, Eddyville claimed that failure to file the Ordinance was an oversight and not fatal, the Breedloves had actual notice of the assessments, and reference to inapplicable statutes did not invalidate the lien.

The circuit court granted summary judgment in favor of Eddyville on all issues and dismissed the complaint. The circuit court found that: first, the Ordinance was valid and was effective at the point of its publication in the *Herald Ledger*; second, the statutory lien was valid; and third, the Breedloves had notice, even if it was merely inquiry notice, of the assessments. The Breedloves filed a motion to alter, amend, or vacate the court's order and a motion for finding of facts; and, on January 15, 2003, both motions were denied. This appeal follows.

THE ISSUES ON APPEAL

The crux of the Breedloves' appeal focuses upon a lack of notice to them. They concede that they had actual knowledge of the assessments affecting the lots in the subdivision—as evidenced by James Breedlove's presence at the October 12, 1993, public hearing when Ordinance 1-24-94A was first presented. But they insist that they cannot be found liable for the payment of the overdue assessments because they did not have notice of the unpaid assessments on these lots. They argue that since the City did not record its lien in the Lyon County Clerk's office until 2000, they had no way of knowing about the encumbrance for unpaid assessments on these lots. They also argue that Eddyville's delay in filing the ordinance with the County Clerk invalidated it and that the statutory lien ultimately recorded by Eddyville was invalid because it cited the wrong statutes as authority. Finally, the Breedloves contend that a factual issue exists which precludes summary judgment: whether the City Clerk misled Ovey when he called the clerk's office in the course of his title examination to check on any unpaid city taxes or assessments. On all these points, we disagree.

THE STANDARD OF REVIEW

It is well-settled that summary judgment "is to be cautiously applied and should not be used as a substitute for

trial."[1] On appeal, the record must be "viewed in a light most favorable to the party opposing the motion for summary judgment."[2] Summary judgment should only be affirmed "where the movant shows that the adverse party could not prevail under any circumstances."[3] The party opposing summary judgment can only succeed if the party presents "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[4]

Summary judgment was granted to the non-moving party in this case. Although the Breedloves made the motion for partial summary judgment, the circuit court awarded summary judgment in favor of Eddyville. The Breedloves argue that this was an abuse of the court's discretion since the City never brought its own motion for summary judgment. But, "[a] court may grant a summary judgment for the non-movant where there are no genuine issues of fact."[5] This practice is sound "where overruling the movant's motion for summary judgment necessarily requires a determination that the non-movant is entitled to the

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[1] Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 483 (Ky. 1991).

[2] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

[3] *Id.*

[4] Steelvest, *supra*, at 482; Kentucky Rules of Civil Procedure (CR) 56.

[5] Kurt A. Phillips, Jr., Kentucky Practice, Rules of Civil Procedure Annotated, vol. 7, Rule 56.03, cmt. 11 (1995).

relief asked."[6] We believe that in this case, overruling the Breedloves' motion would have resulted in such an outcome. Therefore, we do not believe the circuit court abused its discretion by awarding the City summary judgment.

EDDYVILLE'S ORDINANCE IS VALID

The Breedloves argue that the circuit court erred as a matter of law by concluding that Ordinance 1-24-94A was validly enacted. The pertinent language of the ordinance is as follows:

> THIS ORDINANCE SHALL BE EFFECTIVE upon its second reading and passage and publication; at which time there shall be mailed by certified mail to each affected property owner in the described area a Notice of Determination to Proceed with the project as well as the fair basis of assessment to be utilized, the estimated cost to the property owner, and the ratio of costs each property owner bears to the total cost of the entire project.
>
> BE IT FURTHER ORDAINED that upon publication of the ordinance, a copy of the same shall be filed with the County Clerk of Lyon County, Kentucky.

In support of their argument, the Breedloves focus on the second paragraph of the ordinance requiring that the document be filed with the Lyon County Clerk. Because Ordinance 1-24-94A was not filed for six years after its enactment, the Breedloves claim it was invalid. They also cite

[6] *Id.*; *see also*, Storer Communications of Jefferson County, Inc. v. Oldham County Board of Education, 850 S.W.2d 340 (Ky.App. 1993); Green v. Bourbon County Joint Planning Commission, 637 S.W.2d 626 (Ky. 1982).

to Helm v. Citizens to Protect Prospect Area, Inc.[7] for the proposition that "[a] local legislative body to enact a valid ordinance must observe all legal requirements, including those they impose upon themselves."[8]

The circuit court disagreed with the Breedloves' contention, holding that the ordinance was valid. Specifically, the court held:

> The Ordinance was enacted under KRS 91A.200-.290, which deal with the procedures of financing [improvements]. If a city decides to proceed with an improvement by a special assessment, it is required to adopt an ordinance describing the nature of the improvement, its scope, the cost, the basis of the assessments, and the financing method. Upon passage of this ordinance, the city must publish the ordinance and send by certified mail a notice of the determination to proceed with the improvement, the fair basis of assessment, and the estimated cost to each owner. KRS 91A.260[.] All of these steps were adhered to by the City of Eddyville. Thus, it is valid under the statutes. Further, the Court finds that he [sic] ordinance went into effect as soon as it was recorded in the local newspaper. Even though a copy of the ordinance was filed years after its publication, the Court finds that it was still valid and in effect. The language of the ordinance does not indicate that recording is a requirement to the time upon which the ordinance will be effective.

[7] 864 S.W.2d 312, 314 (Ky.App. 1993).

[8] *Id.*

We agree with the circuit court's assessment. The pertinent portion of the ordinance plainly states that the ordinance will be effective "upon its second reading and passage and publication." The evidence indicates that the City adhered to all of those requirements of enactment. Although the ordinance was not filed for record with the county clerk in a timely manner, we do not believe this delay was fatal to its effectiveness. So we affirm the circuit court's decision with regard to this issue.

REFERENCE TO INAPPOSITE STATUTES DID NOT INVALIDATE THE LIEN

The Breedloves argue that the statutory lien filed by the City was invalid because the statutes referred to in the lien were inapplicable. The circuit court held that the lien was valid "inasmuch as it is based upon KRS 91A and Ordinance 1-24-94A," despite the fact that KRS 76.172 and KRS 107.160, the statutes expressly referred to in the lien, did not apply.

We agree with the circuit court. The statutes relied upon by the City in imposing its lien were immaterial since they were "not applicable to a city the size of Eddyville" and referred to "procedures significantly different than those used to enact Ordinance 1-24-94A." However, we believe this mistake was harmless; merely referring to the incorrect statute does not

necessarily invalidate the lien. This is especially true since there is other statutory authority—specifically, KRS 91A—to support the City's imposition of the lien. Therefore, although the wrong statutes were cited, the lien itself was valid. Therefore, we affirm on this issue.

THE ATTORNEY'S OFFICE CUSTOM DOES NOT MAKE A FACT ISSUE

The Breedloves argue that summary judgment was erroneous because a genuine issue of material fact exists. Specifically, they point to the allegedly conflicting testimony of Ovey and Pamela Pruiett, the City Clerk of Eddyville. In his deposition, Ovey claimed it was his custom, habit, and practice to check not only with the Lyon County Clerk's Office but, also, with City Hall while performing title searches in order to ensure property was not burdened by encumbrances. Pruiett testified that Ovey never contacted her office regarding the existence of encumbrances on the Breedloves' lots. Because of this testimony, the Breedloves claim summary judgment in favor of the City was improper because there exists an issue of fact as to whether the City Clerk misinformed the title examiner about the existence of unpaid special assessments.

Ovey's deposition contained the following line of questions and answers:

> Q. Did your [title] opinion identify or recite any title encumbrances that

would have been asserted at that time by the City of Eddyville affecting these four [sic] lots?

A. It did not.

Q. And what would be your normal practice, Mr. Ovey, to have followed in order to have ascertained whether or not there were any encumbrances asserted by the City of Eddyville at that time?

A. Well, first of all, I would check with the Lyon County Clerk's Office, which is the office where all documents that affect title, transfer of the property, et cetera, should be filed. And it was customary, when I was in private practice, that these properties in the city limits, that we would call the city hall, check taxes and things of that nature, see if there was any back taxes owed, present taxes owed, or any encumbrances.

Q. Okay. Would assessments against lots be something that would be reflected in a title opinion as an exception to the title opinion?

A. It should be an exception if it was recorded, definitely, in the clerk's office. When I have been told by the city officials that there's an assessment, put them in a title before.

Q. And this title opinion that you rendered in June of '96 then, would I be correct in understanding that your examination reveals no recorded assessments, liens or encumbrances by the City of Eddyville?

A. That's true.

Q. And would it also reflect that you were not informed or advised by the city of

any liens, assessments, or encumbrances other than ad valorem taxes?

A. Let me just basically state, I do not recall specifically.

Q. I understand.

A. I mean, it's been '96. You know, I can't tell you that I called at 11:01 to city hall and talked to a particular clerk. All I can testify to is that it was my custom, and habit, and practice to do so.

Q. Okay.

A. And had I been informed, based upon that custom of calling, that there was an assessment, I would have, in all likelihood, included that in that title.

. . .

Q. And you don't have any reason to think that your normal practice and custom that you've described would have been deviated from with regard to this particular title opinion. Is that correct?

A. I don't know why it would've of [sic].

Q. And had you been advised of any encumbrance, or assessments, or liens, those would have been reflected in your title opinion?

A. In all likelihood. But I'm still of the opinion that it might not have been required. But I would, in all likelihood, would have done that.

A careful reading of Ovey's deposition testimony reveals that he never affirmatively stated that he, nor anyone

from his office, called City Hall to determine whether there were any outstanding city tax bills or unpaid special assessments owing on the property purchased by the Breedloves. At best, Ovey candidly attested only to what had been his office custom, stating that it was his "custom, and habit, and practice to do so."

Kentucky courts have long prohibited evidence of "habit" or "custom" evidence from being introduced at trial. The history of this exclusion was recently discussed by the Supreme Court in Burchett v. Commonwealth:[9]

> [H]abit evidence . . . has been inadmissible in Kentucky courts for at least a century.
>
> In Louisville & N.R. Co. v. Taylor's Adm'r, it was held: "[N]either side can give in evidence what the custom or practice of either of the parties is. The question is not what they were accustomed to do, but what they did at the time in controversy." This reasoning was subsequently affirmed decades later in Cincinnati, N.O. & T.P. Ry. Co. v. Hare's Adm'x. In 1990, the General Assembly sought to permit habit evidence when it enacted KRS[10] 422A.0406, which would have created a state counterpart to the federal rule permitting habit evidence. But KRS 422A.0406 was subject to the approval of this Court and, consistent with our longstanding case law, we rejected that legislation, which was subsequently repealed. This judicial aversion to habit evidence [led] Professor Lawson to accurately remark: "The appeals courts of

[9] 98 S.W.3d 492 (Ky. 2003).

[10] Kentucky Revised Statutes.

> Kentucky have not looked with favor upon evidence of habit. Such evidence has consistently been declared to be inadmissible under Kentucky law."[11]

The Burchett Court perpetuated the prohibition against the introduction of habit evidence, stating:

> While habit evidence has an intuitive appeal, close scrutiny reveals numerous difficulties with its use. These difficulties do more than suggest that the correct course is not to allow such evidence. The most glaring problem is that the introduction of habit evidence violates KRE[12] 403. Questions of admissibility start with KRE 401, which permits evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that a person had a "regular" or "routine" practice of performing some action would meet the requirement of KRE 401. And all relevant evidence, including evidence of a routine practice, is admissible, unless otherwise prohibited. *See* KRE 402. But "relevant[] evidence may be excluded if its probative value is substantially outweighed by [1] the danger of undue prejudice, [2] confusion of the issues, . . . or by [3] considerations of undue delay, . . ." *See* KRE 403. Habit evidence implicates all three of these impermissible results.[13]

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[11] *Id.* at 494, 495 (citations omitted).

[12] Kentucky Rules of Evidence.

[13] Burchett at 496.

The issue was further discussed by this Court in Thomas v. Greenview Hospital, Inc.[14] In Thomas, the appellant argued that information regarding hospital "routine" was erroneously admitted into evidence. The appellant asserted that such evidence was habit evidence and, therefore, was inadmissible under Burchett and KRE 403. In determining the extent to which habit evidence must be excluded, we defined "habit" as "an individual person's specific regular or consistent response to a repeated situation,"[15] and "custom" as "the routine practice or behavior on the part of a group or organization that is equivalent to the habit of an individual."[16] We further held that Kentucky's prohibition against the introduction of habit evidence "excludes both personal habit and custom or business routine practice in proving conforming conduct."[17] However, we concluded that custom evidence is admissible if it can be shown that the evidence is "relevant for purposes *other than* to prove conforming conduct on a specific occasion . . ."[18]

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[14] 127 S.W.3d 663 (Ky.App. 2004).

[15] *Id*. at 669.

[16] *Id.*

[17] *Id.* at 670.

[18] *Id.*

Ovey's testimony, therefore, is the type of evidence excluded by our courts under KRE 403 as "habit" or "custom" evidence. His testimony merely reveals that when he was in private practice, it was his business custom to call City Hall when completing a title search. As we held in Thomas, this evidence must be excluded at trial.[19] But is it enough to survive a motion for summary judgment?

Several jurisdictions have held that "genuine issues of material fact" only include "evidence or statements that would be admissible on the trial and have probative force" and that only this evidence "may be considered in ruling on a motion for summary judgment . . . ."[20] In Bombard v. Fort Wayne Newspapers, Inc., the United States Court of Appeals for the Seventh Circuit held that the evidence relied upon by the party opposing summary judgment "must be competent evidence of a type otherwise admissible at trial."[21] Likewise, in Hartsel v. Keys,[22] the United States Court of Appeals for the Sixth Circuit reasoned that "the plaintiff must present 'evidence on which the jury could reasonably find for the plaintiff.'"[23] Therefore, the

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[19] *Id.* at 670, 671.

[20] 73 AmJur2d Summary Judgment § 50 (2001).

[21] 92 F.3d 560, 562 (7th Cir. 1996).

[22] 87 F.3d 795, 799 (6th Cir. 1996).

[23] *Id.*

Court held that "hearsay evidence may not be considered on a motion for summary judgment."[24]

Although we agree with the Breedloves that Ovey's testimony could potentially present a genuine issue of material fact which might preclude summary judgment, the testimony is inadmissible. As the Courts held in Bombard and Hartsel, evidence relied upon by the party opposing summary judgment must be admissible in court. We are persuaded by the reasoning of these courts. We hold that in Kentucky, evidence that would otherwise be inadmissible at trial cannot be relied upon in opposing summary judgment. To constitute a "genuine issue of material fact," evidence must be of the sort that could be admitted at trial.

Since evidence of Ovey's business custom would not be admissible at trial, we conclude that there is no genuine issue of material fact with regard to the allegedly conflicting testimony of Ovey and Pruiett that would require reversal of the summary judgment.

For these reasons, the decision of the Lyon Circuit Court awarding the City of Eddyville summary judgment is affirmed.

DYCHE, JUDGE, CONCURS.

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[24] *Id.*

KNOPF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: While I agree with the reasoning and the result of the majority opinion, I write separately to add an additional point. The trial court and the majority both find that Breedlove was on inquiry notice of the 1994 ordinance enacting the assessment. As pointed out in the trial court's opinion, Breedlove received actual notice of the assessment, at least as it related to the property which he owned at the time. However, there was no evidence that Breedlove could have determined that any assessment was owed on the lots which he acquired in 1996. At the very least, the extent of Breedlove's actual notice of any assessments against those properties was an issue of fact.

However, this issue of fact was not material and did not preclude summary judgment. Even if the assessments were not filed of record prior to 1999, the City notified Breedlove of the assessments in December of 1999 and filed the assessment ordinance with the county clerk on March 23, 2000. Thus, the lien filed by the City on April 3, 2000, complied with the requirements of KRS 91A.280 and was valid.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
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