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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002075-MR

HOWARD BILLITER
AND MABEL BILLITER

APPELLANTS

v. APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, JUDGE
ACTION NO. 98-CI-00244

THE ESTATE OF
DOROTHY HOLBROOK

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Howard and Mabel Billiter appeal from a judgment by the Magoffin Circuit Court awarding damages for permanent and temporary trespass to the estate of Dorothy Holbrook. Although we find no error on most of the points raised by the Billiters, we agree that the trial court erred in its calculation of damages

for permanent and temporary trespass. Hence, we affirm in part, reverse in part, and remand for entry of a new judgment.

Holbrook and the Billiters own adjacent tracts of real property in Salyersville, Magoffin County, Kentucky. On October 14, 1998, Holbrook filed a complaint seeking to quiet the Billiters' title. Based on a survey conducted by Randall Ousley, Holbrook alleged that a commercial building constructed by the Billiters partially encroached onto her property. She further alleged that the Billiters had placed two mobile homes either wholly or partially on other portions of her property. In her complaint and subsequent amended complaint, Holbrook sought injunctive relief directing the Billiters to remove the encroachments.

Dorothy Holbrook died on May 25, 2000, and her estate was substituted as a party. In early 2001, Holbrook submitted the matter to the trial court for a determination of the location of the boundary. The Billiters presented no evidence. In a judgment entered on June 27, 2001, the trial court found that the Ousley survey accurately reflects the boundary between the Billiters' and Holbrook's tracts. The court directed that the Billiters remove the encroaching mobile homes immediately. However, the court also found that the commercial building permanently encroaches on Holbrook's property and cannot be

removed. The court reserved a determination of damages for later adjudication.

Discovery on the issue of damages continued sporadically for some time thereafter. On September 16, 2002, the trial court entered a judgment to Holbrook for damages in the amount of \$53,100.00. However, the trial court subsequently set aside that judgment following a motion by the Billiters. Eventually, both parties submitted expert proof of damages to the trial court. On September 4, 2003, the trial court entered a judgment in favor of Holbrook for damages totaling \$43,300.00. This amount reflected damages for permanent trespass of \$20,500.00 and for temporary trespass totaling \$22,800.00. The Billiters now appeal from this judgment.

The Billiters first argue that Holbrook's action was barred by the fifteen-year statute of limitations set out in KRS 413.010 and by adverse possession. In its order entered September 4, 2003, the trial court found that the Billiters had maintained two mobile homes on Holbrook's property for at least eighteen years. But as noted above, Holbrook filed her complaint on October 14, 1998. The statute of limitations was tolled as of that time and any period of adverse possession was broken well before the fifteen-year period had elapsed.

The Billiters concede this point in their reply brief, but assert that there was no evidence offered to the trial court

concerning when the limitations period began to run. However, as the party seeking title through adverse possession, the Billiters had the burden of proving every element of the claim.¹ Likewise, the statute of limitations is an affirmative defense which the Billiters also bore the burden of proving.² Because the Billiters presented no evidence supporting their adverse-possession claim or their statute-of-limitations defense, Holbrook's claim was not barred.

The Billiters next argue that the trial court erred by failing to submit the issue of damages to a jury. They further assert that the trial court erred by awarding damages to Holbrook for trespass even though she never sought monetary damages in her complaint. Both of these arguments are patently without merit. The record reflects that on August 21, 2003, the trial court entered an agreed order submitting the issue of damages. No request for a jury trial appears in the record. Likewise, the agreed order establishes that the issue of damages was tried by the express or implied consent of the parties. In light of the agreed order and in the absence of any timely objection by the

¹ Phillips v. Akers, 103 S.W.3d 705, 709 (Ky.App. 2002).

² CR 8.03. See also Lynn Mining Co. v. Kelley, 394 S.W.2d 755, 759 (Ky. 1965).

Billiters, the trial court properly amended the complaint to conform to the evidence.³

Finally, the Billiters contend that the trial court applied the wrong standard for determining damages for temporary and permanent trespass and the damages awarded to Holbrook were excessive. After reviewing the record, however, we find that the Billiters never objected to the measure of damages used by the trial court. Consequently, we must conclude that the Billiters have waived any objection to the trial court's method of calculating damages.

Furthermore, we cannot find that the trial court's method of calculating damages was clearly erroneous.⁴ However, we agree with the Billiters that the trial court's calculation of the amount of damages for permanent trespass was clearly erroneous. The trial court based damages on the fair market value of the portion of Holbrook's land occupied by the

³ CR 15.02. See also Nucor v. General Electric Co., 812 S.W.2d 136, 145 (Ky. 1991).

⁴ The Billiters assert that the correct measure of damages for permanent trespass is the difference in fair market value of the real estate just before and after the injury. Island Creek Coal Co. v. Rodgers, 644 S.W.2d 339, 345 (Ky.App. 1982). While the trial court's method of calculating damages might not have mirrored this standard precisely, the Billiters do not argue that the measure of damages applied by the trial court was unreasonable under the circumstances. Moreover, as noted below, the Billiters's expert applied the same standard as the trial court in reaching his estimate of the amount of damages.

Billiters' commercial building. Holbrook's appraiser, Dixon Nunnery, found the fair market value of the property to be \$3.00 per square foot, or \$20,500.00 for the entire area. The Billiters' appraiser, Paul Brown, found the fair market value to be \$1.90 per square foot or \$4,700.00 for the entire area.

But Nunnery and Brown did not place a value on the same amount of land. Nunnery determined the fair market value of a strip of land 16.5 feet wide by 415 feet long - essentially extending the Billiters' tract into Holbrook's tract by 16.5 feet along its entire length.⁵ In contrast, Brown based his valuation on a strip of land measuring 16.5 feet wide by 150 feet long - the length of only the front tract on which the Billiters' commercial building encroaches.⁶ Thus, Nunnery's valuation includes some 4,372 square feet more than Brown's.

We conclude that the trial court's inclusion of this additional area was clearly erroneous. The court separately compensated Holbrook for the temporary trespass on the back lot. By also awarding damages for permanent trespass along the entire length of both lots, the court compensated Holbrook twice for the same injury.

⁵ 16.5 feet x 415 feet = 6,847 square feet x \$3.00 per sq. ft = \$20,542.50.

⁶ 16.5 feet x 150 feet = 2,475 square feet x \$1.90 per sq. ft. = \$4,702.50.

The trial court accepted Nunnery's valuation of \$3.00 per square foot, which we cannot find to be clearly erroneous. Based on this value, the correct amount of damages for permanent trespass to the front lot was \$7,425.00.⁷ On remand, the trial court must enter a new judgment in this amount.

As for damages for temporary trespass, both Nunnery and Brown calculated damages based on the monthly fair rental value of the 1½ mobile home lots which encroached onto Holbrook's property. Nunnery, however, stated that the fair rental value on the lots was \$100.00 per month, while Brown set the fair rental value at \$50.00 month at the beginning of the encroachment and \$70.00 per month at current. Although Brown's calculation of the fair rental value is more detailed and seems better supported, we cannot say that the trial court clearly erred by accepting Nunnery's valuation.⁸

Nevertheless, we agree with the Billiters that the trial court's calculation of damages for temporary trespass was flawed in one respect. Both Brown and Nunnery calculated damages based on a period of temporary trespass lasting eighteen years. After accepting Nunnery's conclusions about the reasonable rental value of the mobile home lots, the trial court added an

⁷ 16.5 feet x 150 feet = 2,475 square feet x \$3.00 per sq. ft. = \$7,425.00.

⁸ CR 52.01.

additional year, representing the time between Nunnery's deposition and the court's final judgment. However, in its June, 2001 order, the trial court had directed the Billiters to remove the mobile homes. Furthermore, Holbrook testified in her deposition that the Billiters removed one of the mobile homes shortly after that order was entered. Therefore, while the evidence of record might support an award of damages for temporary trespass of slightly less than eighteen years, it did not support an award of damages for more than eighteen years. On remand, the trial court shall enter a new judgment for these damages in the amount of \$21,600.00.⁹

Accordingly, the September 4, 2003 judgment of the Magoffin Circuit Court is affirmed in part, reversed in part, and remanded for entry of a new judgment as set forth in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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⁹ \$100.00 x (18 x 12 =) 216 = \$21,600.00.