RENDERED: JULY 2, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001277-MR

WANDA JONES — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 03-CI-00170

ROBERT BABBAGE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: The Appellant, Wanda Jones, appeals the June 8, 2009, trial order and judgment of the Christian Circuit Court, dismissing with prejudice her action to recover real estate from the Appellee, Robert Babbage, following a jury trial. On appeal, Jones asserts that the trial court improperly admitted into evidence documentation which was not properly authenticated and was hearsay,

and further, that the court failed to properly instruct the jury on the law of the case. Following a review of the record, the arguments of the parties, and the applicable law, we affirm.

Jones initially filed this action on February 12, 2003, and it was subsequently dismissed by the trial court on July 2, 2007, due to the expiration of the statute of limitations. That decision was reversed by this Court[1] and remanded to the circuit court by order dated May 30, 2008. Thereafter, a jury trial was conducted on June 1, 2009, and the aforementioned order and judgment in favor of Babbage was entered by the court on June 8, 2009.

The pertinent facts of this case date back to June 8, 1994, at which time Edward W. Babbage, as the executor of the estate of Sally G. Talbot, executed a general warranty deed for certain real property to Jones. The deed in question was retained by Babbage's attorney, Hon. Arnold B. Lynch, was never filed of record in the Christian County Court Clerk's office, and was never actually delivered to Jones.

Lynch testified at trial that he was representing the estate of Sallie Talbot in the deed transaction. Lynch stated that Jones made a down payment in the amount of $1,000 and further stated that it was his understanding that Jones was to pay for the property in full before the deed was to be delivered to her. Lynch stated that he never received any payments from Jones for the property beyond the initial $1,000 down payment, and that accordingly, he never delivered

[1] Case No. 2007-CA-001496.

the deed to Jones. Lynch also testified that all negotiations had occurred between Ralph Jones and Edward Babbage, and that he had not been involved in those discussions.

Apparently, while Lynch was in possession of the deed, Jones took possession of the property and rented it out. In January of 1995, Lynch notified Jones and her husband, Ralph, that they had defaulted on the purchase agreement, and had thirty days to vacate the property. Thereafter, on June 1, 1995, Babbage executed a deed conveying the property to his son, the Appellee, Robert Baggage. On that same date, Edward Babbage also executed a deed conveying the property both to himself, and to Robert Babbage. Both deeds were recorded in the office of the Christian County Court Clerk.[2] Lynch testified that he prepared all three of the aforementioned deeds. Robert Babbage subsequently took full title to the property upon the death of his father, Edward, pursuant to the survivorship clause of the deed.

Lynch also testified at trial concerning the contents of a document which he described as the "memo". Lynch testified that the memo had been located in his Sallie Talbot estate file, and that the document contained notes about alleged details of the transaction between Babbage, Jones, and her husband, Ralph, including detailed specifications regarding the payment terms between the parties, the interest rate to be charged, and who the check would be payable to. According to Lynch, it also stated that Edward Babbage would retain a mortgage on the

[2] Deed Book 519, p. 515, and Deed Book 519, p. 518.

property. Lynch also testified that he did not know who had written the memo, and that the document provided information which was inconsistent with his understanding of the transaction. Babbage moved to admit the memo into evidence, and the trial court admitted the memo over the objection of Jones.

Ralph Jones also testified below, and stated that Lynch had been an attorney for Jones concerning prior real estate transactions. Lynch confirmed that this was accurate. Jones testified that in those transactions, Lynch would prepare the deed and, for an extra fee, retain and record the deed. Jones stated that it was his understanding that Lynch was again his counsel in preparation of the June 8, 1994, deed, but stated that all of his negotiations for the purchase of the property at issue were with Edward Babbage, and did not directly involve any negotiations with Lynch. Lynch, on the other hand, testified that he was not the Joneses' agent with respect to the transactions at issue in this matter. Jones further stated that all consideration for the deed had consisted of cash payments and in-kind contract work for Babbage.

According to Jones, at a meeting in Lynch's office, Edward Babbage had informed Sheila Croney, Lynch's secretary, that the property was bought and paid for, and that Lynch should prepare a deed to Ralph and Wanda Jones. Jones stated that the deed was later executed in Lynch's office, while both Edward Babbage and Croney were present. Jones stated that it was his understanding that Lynch would record the deed as he had done in prior transactions involving the Joneses.

Croney also testified in this matter and confirmed that she had been Lynch's secretary for nearly twenty years. Croney testified that in the past, Jones had retained Lynch to prepare deeds, and that Lynch would, for a small fee, record the deeds and forward the deeds back to Jones. Croney also testified that Edward Babbage had stated at a meeting involving Croney and Ralph Jones that the property was "bought and paid for" and that Lynch should prepare the deed. Croney stated that she later notarized the signatures of Babbage and Jones on the executed deed at Lynch's office. Lynch testified that he was not present for the conversation between Croney, Babbage, and Jones, and could not comment on same.

Robert Babbage also testified in this matter. Babbage stated that he had actual knowledge of the deed at issue from his father, Edward Babbage. He testified that Edward Babbage was the party directly involved with the negotiations with Ralph Jones for the purchase of the property. Babbage also testified that his father did not consummate the transaction because the Jones had failed to pay the consideration for the deed.

Following the close of evidence, Jones tendered instructions to the trial court. Those instructions stated the requirements for the deed to be valid, and specifically stated that it must identify the grantee, and adequately describe the property to be conveyed and delivered to Jones. Jones tendered instructions also addressed the issue of delivery of the deed by providing as follows: "A Deed is delivered when possession of the Deed is given to the Grantee or their Agent with

the intent to pass title to the property. An attorney is an agent for his client and an agency can be established by the course of conduct of the parties involved."

The trial court rejected the instructions tendered by Jones and instead provided the following instructions to the jury, "Do you believe from the evidence that Edward Babbage's conduct regarding the deed in question amounted to delivery of the deed with intent to pass title to Wanda Jones?" After being so instructed, the jury deliberated and answered "No". It is from that verdict that Jones now appeals to this Court.

Jones raises two arguments on appeal. First, Jones asserts that the trial court erred in allowing the document described as a "memo" to be admitted into evidence, arguing that it was not properly authenticated, and was hearsay. Jones asserts that pursuant to KRE 901, the memo at issue was not properly authenticated, as the only testimony concerning the memo came from Lynch, who admitted that the document was not in his handwriting, that he did not know whose handwriting it was, and that he did not know how the document came to be in his file. Further, Lynch stated that the document itself did not even explain the transaction as he understood it to have occurred. Accordingly, Jones argues that Babbage failed to present evidence supporting a finding that the memo was a memorialization of the agreement between Jones and Babbage.

In response, Babbage argues that the memo was properly authenticated, and was properly introduced as a relevant business record from Lynch's file. Alternatively, Babbage asserts that even if the court's admission of

the memo was in error, that error is harmless and insufficient grounds for reversal. We cannot agree.

In reviewing this issue, we note that a trial court's finding of authentication is reviewed for abuse of discretion. *See Johnson v. Commonwealth*, 134 S.W.3d 563 (Ky. 2004). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000). Our law is clear that one who produces evidence has the burden to make a prima facie showing of authentication to the trial court. *S.D.O. v. Commonwealth*, 255 S.W.3d 517 (Ky.App. 2008). This identification process requires a demonstration of the integrity of the evidence, a showing that the item at issue is what its proponent claims it to be. *See* KRE 901 and *Rogers v. Commonwealth*, 992 S.W.2d 183 (Ky. 1993).

Simply put, we cannot find that Babbage met that burden in this instance. The only evidence at all about the memo came from Lynch, who was unaware as to the author of the document, the time it was written, or how it came to be in his file. Further, Lynch himself stated that the document did not accurately describe his understanding of the transaction at issue. These facts, when considered cumulatively, are insufficient to establish a prima facie showing of authentication pursuant to KRE 901.

Jones also asserts that the memo should have been excluded by the court on hearsay grounds. Jones argues that the document was an out of court

writing submitted by Babbage to prove the terms of the transaction between Edward Babbage and the Jones. Jones further argues that the document meets none of the exceptions to the hearsay rule, and that accordingly, it should not have been admitted into evidence.

In response, Babbage argues that the memo was not hearsay, as it was not introduced to prove the truth of its terms, but rather to disclose a relevant business record from Lynch's file. We disagree. Clearly, the purpose of introducing the record was to support Babbage's version of what occurred between the parties. Accordingly, it was hearsay pursuant to KRE 801(c), and as it did not meet any applicable exceptions, and should have been excluded.

As noted, Babbage argues that the admission of the evidence, even if in error, was harmless. We note that in *Matthews v. Commonwealth*, 163 S.W.3d 11, 20 (Ky. 2005), our Kentucky Supreme Court defined the standard for determination of harmless error by stating, "If upon consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held non-prejudicial." In the matter *sub judice*, the memo was the only documentary evidence which directly contradicted their version of the negotiations and agreement between themselves and Edward Babbage.

Babbage argues that the alleged error in admission was harmless, as the central issue in the case was whether or not the deed was delivered to Jones, and that the admission of the memorandum did not serve to prove or disprove this

issue. We agree. Our review of the memo indicates that it specifically states, "E.W. Babbage is to hold mortgage on propertys (sic) located on corner of 2nd and Lewis only until all money or (sic) paid." It is true that Jones herself never received the deed and the intent of Babbage, in allowing Lynch to retain the deed, is certainly of importance. Nevertheless, holding a mortgage is not retaining a deed. The memo speaks to Babbage's purported intent concerning holding of a mortgage, and as such, is of little importance to the issue of dispute in the matter *sub judice*, i.e. delivery of a deed. We believe that the memo was of little or no influence on the jury's ultimate decision. Accordingly, we find that admission of the memo was harmless error for the aforementioned reasons. Therefore, we affirm.

As her second basis for appeal, Jones argues that the trial court failed to properly instruct the jury. Jones asserts that the instructions given by the court did not accurately reflect Kentucky law on the central issue of the case, namely, whether Jones had a valid deed to the property in question, and particularly, whether or not the deed was delivered to Jones.

Jones argues that Kentucky courts have continually held that there must be delivery of the deed with accompanying intention to pass title in order for the property to pass to the grantee. Jones asserts also that a valid title can be passed by a grantor's deliverance of the deed to a third person as an agent of the grantee. Thus, Jones argues that the court erred in failing to accurately define delivery of a deed to the jury, and that it failed to appropriately instruct on

concepts of agency and constructive delivery. These failures, argues Jones, gave the jury the option to decide in favor of Babbage simply because Jones did not ever have actual possession of the deed, even though, had Lynch in fact been Joneses agent, valid delivery would have been completed.

In response, Babbage argues that the trial court properly instructed the jury. He asserts that the court did not need to provide detailed information about the requirements of a valid deed and the doctrine of agency, and that the purpose of the instruction was instead simply to furnish guidance to the jury in their deliberations. Babbage asserts that as counsel was afforded an opportunity to fully "flesh out" the issue of whether or not Lynch was an agent and attorney for Jones, the instructions, although minimal, were sufficient.

In reviewing this issue, we note that the soundness of a jury instruction is a question of law which we review *de* novo. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). In so stating, however, we do note that our courts have previously held that technically incorrect instructions are not grounds for reversal where the rights of the losing party are not prejudiced. *See Miller v.* Miller, 296 S.W.2d 684, 687 (Ky. 1956), citing *Maupin v.* Baker, 302 Ky. 411, 194 S.W.2d 991, 993 (Ky. 1946)[3].

We note further that correct instructions are essential to an accurate jury verdict, and that the fundamental function of instructions is to tell the jury

[3] Holding that an error in a court's instructions must appear to have been prejudicial to the appellant's substantial rights, or to have affected the merits of the case, or to have misled the jury, or to have brought about an unjust verdict in order to constitute sufficient ground for reversal of the judgment.

what it must believe from the evidence in order to resolve each dispositive factual issue in favor of the party who has the burden of proof on that issue. *See Webster v. Commonwealth,* 508 S.W.2d 33 (Ky. 1974), *cert. denied, Webster v. Kentucky,* 419 U.S. 1070, 95 S.Ct. 657, 42 L.Ed.2d 666 (1974). It is well-recognized that the function of instructions is only to state what the jury must believe from the evidence, and that there should not be an abundance of detail but the jury instructions should provide only the "bare bones" of the question for the jury. *Hamby v. University of Kentucky Medical Center,* 844 S.W.2d 431 (Ky.App. 1992).

Nevertheless, instructions may not be so vague or understated as to obscure the jury's findings, and to ensure a fair trial they must be clear enough to accurately reveal the conclusions of the jury. As our courts have previously held, an instruction should be free of ambiguity and not open to various interpretations by the jury. *Coe v. Adwell,* 244 S.W.2d 737, 740 (Ky. 1951). Additionally, our courts have held that blending separate and distinct legal propositions in the same instruction is bad form and it is much better practice to incorporate each proposition in a separate instruction. *H & S Theatres Co. v. Hampton,* 300 Ky. 677, 190 S.W.2d 39, 40 (1945).

In the matter *sub judice*, it is clear that while the central issue was whether or not the deed was delivered to Jones, a secondary and dependent issue was whether or not an agency relationship existed between Jones and Lynch. The instruction addressed delivery to both the grantee and to an agent of the grantee.

Additionally, the instruction addressed that agency can be established by the course of conduct between the parties. While true that delivery to a grantee and delivery to an agent of the grantee are separate legal propositions, we see no reason that a single instruction can't encompass both of these propositions. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the June 8, 2009, Trial Order and Judgment of the Christian Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Clint Prow
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BRIEF FOR APPELLEE:

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