RENDERED: JANUARY 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002235-MR

GEORGE COFFEY; EVA COFFEY;
DOROTHY DOWNING; LEMUEL COFFEY;
DONNA MASSENGILL; AND DELORIS SMITH — APPELLANTS

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 08-CI-00216

ALONZO ALLEN; JUANITA ALLEN; KAY ALLEN;
LEON ALLEN; DONALD DUNCAN; AND
REBECCA DUNCAN, AS TRUSTEES OF
ST. JOHNS A.M.E. CHURCH — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,[1] SENIOR JUDGE.

KELLER, JUDGE: The Appellants (the Coffeys) and the Trustees of the St. John African Methodist Episcopal Church (the Church) own adjacent tracts of real

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

property. They both claim title to a tract of real property where the Church's parsonage is located (the Parsonage Property). The Coffeys appeal from a judgment of the Wayne Circuit Court awarding title to the Parsonage Property to the Church. For the following reasons, we reverse and remand.

FACTUAL BACKGROUND

This appeal involves three tracts of real property located in Monticello, Kentucky. One tract is owned by the Coffeys (the Coffey Property) and title to that tract is not in dispute. A second tract, which contains the Church's sanctuary (the Sanctuary Property), is owned by the Church and title to that tract is not in dispute. The third tract is the Parsonage Property, which is adjacent to both the Coffey Property and the Sanctuary Property. Title to this tract is in dispute.

George and Dorothy Coffey owned the Coffey Property, which they devised to their children, the Coffeys. Following the devise, the Coffeys claimed they owned the Parsonage Property and brought an action against the Church to quiet title. The Church counter-claimed arguing superiority of title and adverse possession, and a jury trial was held in the Wayne Circuit Court on October 5, 2009.

At trial, the parties presented deeds to their respective tracts. The descriptions in the deeds "overlap" and indicate that each party owns the Parsonage Property. The Coffeys argued at trial that they had superior title to the Parsonage Property because they could trace title to all three tracts to a common owner, L.J. Stephenson, and that the Church could not.

To show that L.J. Stephenson was a common grantor, the Coffeys presented the following evidence with respect to the Sanctuary Property. On June 5, 1905, L.J. Stephenson deeded a tract of real property to Lee Jones. Lee Jones deeded that tract to the Church on July 29, 1905. The Church then built a sanctuary on this tract.

With respect to their deed, the Coffeys presented the following evidence. On July 21, 1904, L.J. Stephenson and his wife deeded property to L.V. Harrison. On April 17, 1905, L.V. Harrison and her husband deeded a piece of that same property to L.G.W. Coffey. L.G.W. Coffey and his wife, Ida Coffey, deeded that property to William Meadows on September 29, 1905. William Meadows died on August 28, 1927. On August 31, 1927, William Meadows's son and heir, Carey Meadows, deeded the property to Sarah Meadows. On April 13, 1949, Sarah Meadows Washam, deeded the property to William E. Peyton and John Thomas Coffey. Finally, on June 29, 1949, John Thomas Coffey and William E. Peyton and his wife, Emma Peyton, deeded the property to George and Dorothy Coffey.

The Church offered the following evidence to support its claim to the Parsonage Property. In November 1942, Clarence McKnight deeded the Parsonage Property to the Church, and the Church built its parsonage on this tract sometime between 1945 and 1946. Clarence McKnight's deed indicates that he obtained the Parsonage Property through a sheriff's sale. Furthermore, the deed indicates that Herbert McKnight previously owned the Parsonage Property but failed to pay taxes, thus the sheriff's sale. We note that, although Clarence

McKnight purchased the Parsonage Property at the sheriff's sale in 1930, his deed was not drafted until May 1942. We also note that the Church could not trace its title to the Parsonage Property back beyond Herbert McKnight.

At the close of all the evidence, the Coffeys moved for a directed verdict on the question of which party had superior record title. The trial court overruled the Coffeys' motion and instructed the jury on the questions of superior record title and adverse possession. The jury returned a verdict for the Church under Instruction No. 3 which read as follows:

> 1. You will find for the Defendant Trustees of the A.M.E. Church if you are satisfied from the evidence as follows:
>
> (a) that the Defendant Trustees of the A.M.E Church ("Church") and its predecessors in title, or those under whom the Church claims, had valid and senior title to all of the land located on High Street next to the A.M.E. Church sanctuary and annex and more accurately described in Deed Book 86, Page 34, claiming to the full extent of the boundaries of 55 ½ feet by 255 feet mentioned therein;
>
> AND
>
> (b) that the correct line between the lands of the Plaintiff and the Defendant A.M.E. Church is the northern boundary of the above-described High Street property, better known as the A.M.E. parsonage property mentioned in the evidence[.]
>
> Otherwise you will find for the Plaintiff.
>
> 2. Nine or more of you may agree on a verdict. If all 12 agree, the verdict need be

> signed only by the foreperson; otherwise it must be signed by the nine or more who agree to it.

The two instructions on adverse possession, Instruction Nos. 4 and 5, were left blank by the jury.

On October 14, 2009, the trial court entered a judgment consistent with the jury's verdict. Following the entry of the judgment, the Coffeys filed a motion for judgment notwithstanding the verdict and alternatively a motion for a new trial, and the trial court denied these motions in an order entered on November 9, 2009. Thereafter, the trial court entered an amended judgment noting that it inadvertently stated in the October 14, 2009, judgment that the "Plaintiffs'" title to the Parsonage Property shall be quieted instead of stating that the "Defendants'" title to the Parsonage Property shall be quieted. This appeal followed.

ANALYSIS

Before reaching the merits of the appeal, we note that the Coffeys' do not specifically state in their brief how they preserved the alleged errors. Furthermore, they do not specifically designate where in the record any such preservation occurred. *See* Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v). It is not the burden of the Court to search the record to find proof of the Coffeys' claims or to try to otherwise locate where the issues were preserved. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). Under such circumstances, we are authorized to strike the brief entirely, refuse to consider those claims that do not comply with the rule, or review the non-compliant allegations of error for manifest

injustice rather than considering them on the merits. *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006); *Elwell v. Stone*, 799 S.W.2d 46, 47-48 (Ky. 1990). In this case, we choose not to do so, and we address the Coffeys' arguments below.

On appeal, the Coffeys make two arguments. First, the Coffeys argue that the trial court erred in denying their motion for a directed verdict on the issue of superior record title. Second, the Coffeys contend that the trial court erred in submitting to the jury an instruction on the issue of which party had superior record title to the Parsonage Property. Because we agree that the trial court erred when it denied the Coffeys' motion for directed verdict, we also agree that the instruction on the issue of superior record title should not have been submitted to the jury.

1. Advisory Jury

Before we address the Coffeys' arguments, we first address the Church's argument that the parties agreed to try the issue of superiority of record title with an advisory jury. Specifically, the Church contends that the issue of superior record title was properly submitted to an advisory jury and that the trial court properly adopted the advisory jury's findings. We disagree.

"[I]n Kentucky, equitable issues are not triable by juries unless agreed to by the parties." *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 210 (Ky. App. 2009). Adjudication of title to land, as in quieting title, is for the court of equity without a jury. *Tarter v. Medley*, 356 S.W.2d 255, 256 (Ky. 1962). Thus, the issue

of superior record title is an equitable issue that is not triable by a jury unless agreed to by the parties.

The Church contends that, pursuant to CR 39.03, the parties agreed to try the issue of superiority of record title with an advisory jury. CR 39.03 provides the following:

> In all actions not triable of right by a jury the court upon motion or of its own initiative may try an issue with an advisory jury; or the court, with the consent of all parties noted of record, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Therefore, under CR 39.03, we must determine whether the parties expressly consented to the use of an advisory jury or to a trial by jury. *See Emerson v. Emerson*, 709 S.W.2d 853, 855 (Ky. App. 1986) (concluding that when the issue to be tried is equitable, express consent must be obtained before the parties are bound by the jury verdict).

Having reviewed the record, we are of the opinion that the parties consented to a jury trial as provided in CR 39.03. Specifically, during a pretrial conference on September 8, 2009, the following discussion took place:

> APPELLANTS' ATTORNEY: Do you want to empanel an advisory jury or do you want to try it by jury? I don't care. It doesn't make any difference to me.
>
> APPELLEES' ATTORNEY: It's your call Judge.
>
> JUDGE: I'd rather try it by jury. I know all of the parties and the lady that lived across the street.
>
> APPELLANTS' ATTORNEY: You went to school with some of the parties.

> APPELLEES' ATTORNEY: You sure did Judge. You went to school with several of them.
>
> JUDGE: I'd rather have a jury. I'd . . . .
>
> BOTH ATTORNEYS: That's fine.
>
> JUDGE: I grew up around there and I'd rather a jury decide this. I would rather a jury decide this issue.

In this case, the parties agreed to a trial by jury instead of an advisory jury during the September 8, 2009, pretrial conference. Additionally, the trial court empanelled a jury and the case was tried with a jury. Thus, the jury was not an advisory jury.

2. Directed Verdict

Having concluded that the jury was not an advisory jury, we next turn to the Coffeys' argument that the trial court erred in denying their motion for a directed verdict. The standard of review of a denial of a motion for directed verdict is as follows:

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. App. 1985).

The Coffeys contend that the trial court erred in denying their motion for directed verdict on the issue of superiority of record title because the Church failed to trace their title back to a common grantor or to the Commonwealth. We agree.

It is well settled that a party "seeking to establish title must sustain his claim either by record title or adverse possession; . . ." *Gabbard v. Lunsford*, 308 Ky. 836, 215 S.W.2d 985, 986 (1948). Record title to land may be shown by proof that the land comes from the Commonwealth or by tracing title back to a common source with the opposing party. *Noland v. Wise*, 259 S.W.2d 46, 48 (Ky. 1953). If a defendant files a counterclaim asserting title and asking that his title be quieted, both parties must prove their respective claims, although the burden is on the plaintiff to establish his title as a condition precedent to recovery. *Vogler v. Salem Primitive Baptist Church*, 415 S.W.2d 72, 74-75 (Ky. 1967).

In this case, the Coffeys met their burden by tracing their title back to a common grantor, L.J. Stephenson. Specifically, the Coffeys presented a deed reflecting that on July 21, 1904, L.J. Stephenson and his wife deeded property to the Coffeys' predecessor in title, L.V. Harrison. The Coffeys presented another deed reflecting that on June 5, 1905, L.J. Stephenson deeded a tract of real property to the Church's predecessor in title, Lee Jones. The only licensed land surveyor that testified at trial was Al Cross. Mr. Cross testified that the properties from L.J. Stephenson to the parties' predecessors in title were adjacent to each other and that the parties' common grantor was L.J. Stephenson. Mr. Cross also testified that the Coffeys' predecessors in title acquired their property from L.J.

Stephenson prior to the Church's predecessor in title. Thus, Mr. Cross testified that, in his opinion, the Coffeys had superior record title.

Unlike the Coffeys, the Church did not trace its title back to a common grantor or to the Commonwealth. Instead, the Church only traced its title back to Herbert McKnight and the tax sale in 1930. Therefore, even if we draw all reasonable inferences from the evidence in favor of the Church, we can reach no other conclusion than that the Coffeys had superior record title to the land. Accordingly, we conclude that the trial court erred in denying the Coffeys' motion for directed verdict on the issue of superior record title.

3. Jury Instructions

Given our conclusion that the trial court should have granted the Coffeys' motion for a directed verdict on the issue of superior record title, we also conclude that the trial court erred when it submitted the instruction on that issue to the jury. Thus, the question becomes whether the error here of including that instruction merits a new trial. We believe that it does.

The soundness of a jury instruction is a question of law we review *de novo*. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). Instructions are meant to guide jurors during their deliberations and assist them in reaching the correct verdict. "If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial

unless they are calculated to mislead the jury." *Ballback's Adm'r v. Boland-Maloney Lumber Co.*, 306 Ky. 647, 652-53, 208 S.W.2d 940, 943 (1948).

Accordingly, the question becomes whether the error here of including the instruction on superior record title is of such a prejudicial nature that it merits a new trial. As stated in *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 276-77 (Ky. App. 2006):

> "In this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial . . . ." *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997). "It is only in a case which is clear and free of all doubt on the point that an instruction which is erroneous can be said by the court to have been without prejudicial effect on the minds of some of the jurors." *Southeastern Greyhound Lines v. Buckles*, 298 Ky. 681, 684, 183 S.W.2d 965, 966 (1944). We also note that when we "cannot determine from the record that the verdict was not influenced by the erroneous instruction, the judgment will be reversed." *Prichard v. Kitchen*, 242 S.W.2d 988, 992 (Ky. 1951).

Because the jury left Instruction Nos. 4 and 5 on adverse possession blank, it is unclear whether or not the jury addressed these instructions after finding that the Church had superior record title under Instruction No. 3. Therefore, we cannot determine from the record whether or not the verdict was prejudiced or influenced by the erroneous instruction on superiority of record title. Thus, we reverse and remand to the trial court for a new trial on the issue adverse possession only.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the Wayne Circuit Court and remand for a new trial on the issue of adverse possession.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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