

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000550-MR

KIMBERLY DIANE ROARK
AND GREGORY ROARK,
HER HUSBAND

APPELLANTS

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 07-CI-00326

LINDA HATFIELD; RICKY HATFIELD,
HER HUSBAND; MARY HOGG;
AND COY HOGG, HER HUSBAND

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, NICKELL, AND WINE, JUDGES.

LAMBERT, JUDGE: This is an appeal from a summary judgment in which the Letcher Circuit Court reformed a deed to provide a right of way exception across

land conveyed by the deed. Having considered the record and the parties' arguments, we affirm the circuit court's decision.

At its essence, this action is a dispute between three sisters over the division of property that once belonged to their father, Clarence Huff. In 2002, Huff transferred a tract of real property in Letcher County to his daughter, Linda Hatfield. The deed was subsequently recorded in the Letcher County Court Clerk's office. Huff had owned this property since it was conveyed to him in 1954. The 2002 deed transferred a fee simple interest in the property to Linda, but her interest was subject to a life estate reserved for Huff. Huff died intestate on February 13, 2005. After Huff's death, Linda and her husband, Ricky, split the property into separate tracts and conveyed the newly divided tracts to themselves, and to her two sisters, Kimberly Roark and Mary Hogg. Kimberly's 10.03-acre lot was the only tract that included improvements, which consisted of a mobile home, log house, barn, drilled well, and septic system. Mary's tract was 7.08 acres, and Linda's two noncontiguous tracts measured 24.57 acres and 2.35 acres. The only public road to the property ended at the entrance to Kimberly's tract.

On August 23, 2007, Kimberly and her husband, Gregory, filed a complaint against Linda, Ricky, Mary, and Mary's husband, Coy Hogg.¹ In the complaint, Kimberly alleged that their father had conveyed his property to Linda as his agent, and it was as his agent that Linda divided the property between the sisters after his death. Kimberly claimed that Linda did not equitably divide the

¹ In the interest of clarity, we shall only refer to Kimberly, Linda, and Mary in the remainder of the opinion.

property because she failed to take into account Huff's earlier conveyances of real property to Linda and Mary, which Kimberly described as advancements.

Kimberly further argued that Linda wrongfully divided the tract of land conveyed to Kimberly by a roadway that benefitted Linda and Mary. Finally, Kimberly alleged that Linda breached her fiduciary duties, all necessitating a re-division of the property. In addition to her claims related to the division of the property, Kimberly sought permanent injunctive relief to prevent Linda and Mary from using the roadway dividing her tract of property.

In their answer to the complaint, Linda and Mary denied that Linda was an agent for Huff or that she was under any duty or understanding regarding the division of the property he once owned, specifically stating that the property had been conveyed to Linda in fee simple. They also disputed that the 1989 conveyances were advancements. Finally, they stated that the right of way at issue was the only means of access to their tracts of land, and that this right of way had always been used by the family. In conjunction with the answer, Linda and Mary filed a counterclaim regarding the ownership of the fifteen-foot wide right of way. They requested that Kimberly be permanently enjoined from denying them access to their property via the right of way.

The following year Linda and Mary moved the circuit court, and were granted permission, to file an amended counterclaim based upon what they described as a mutual mistake in the deed. They contended that the mutual mistake related to the fifteen-foot wide right of way conveyed to Kimberly. In the

amended counterclaim, Linda and Mary detailed the hiring of Whitaker Surveying, LLC, to survey the property, including the fifteen-foot wide road that crossed the property and provided a right of way to the entire property. Whitaker Surveying provided the legal description of the right of way to Linda for use in the deed preparation. The survey detailed two rights of way, one over Kimberly's property and one over Mary's property. These provided the means of access both to Mary's tract and to Linda's two tracts. However, Wayne Bowling, the attorney who prepared the deeds for the conveyances, mistakenly believed that the rights of way were to be conveyed in Kimberly's and Mary's respective deeds, not excepted or reserved for Linda and Mary's benefit.²

Similarly, Kimberly filed an amended complaint in which she continued to dispute the necessity of the right of way through her property.

In 2009, the circuit court granted a partial summary judgment in favor of Linda and Mary on the issues of whether prior conveyances to them were advancements and whether a fiduciary relationship existed, dismissing those theories of Kimberly's case. Those rulings have not been appealed. The remaining issues to be decided were whether the deed should be reformed due to mistake and, if so, whether the reformed deed could be defeated by Kimberly's claim of devaluation.

² The amended counterclaim states that Mary had already acknowledged the mutual mistake and agreed to convey the appropriate right of way for Linda's use and benefit in order to allow her access to her property.

Linda and Mary then renewed their motion for summary judgment on their claim of mistake, which they argued required reformation of the deed. They argued that it would not have been logical for Linda, as the grantor, to convey a right of way over property to the person who was being conveyed the property. Rather, Linda intended to retain the right of way for her own use and for Mary's use. On the other hand, Kimberly argued that her deed was unambiguous, so that extrinsic evidence would be inadmissible to establish the intent of the parties.

In support of their motion, Linda and Mary attached the affidavit of Curtis Whitaker, who performed the survey on the property. Mr. Whitaker stated that he prepared the right of way descriptions in order to provide Linda and Mary access to their tracts, not to provide a right of way to the owner to cross her own property. Furthermore, he stated that the right of way through Kimberly's property provided the only means of access to the other tracts, as the old abandoned county road running through the property was overgrown and not fit for travel. Linda and Mary also relied upon the affidavit of attorney Bowling, who acknowledged his mistake in drafting the deeds. He stated that his intention, as well as Linda's, was to except or reserve the right of way for Linda and Mary's benefit, not convey a right of way to the grantee over the grantee's property. By way of explanation, Bowling cited an unclear heading on the document describing the right of way.

The circuit court held a hearing on the remaining issues on September 3, 2009,³ and entered an order granting the motion on February 19, 2010. Finding

³ The certified record does not contain a recording of the hearing.

that no disputed issues of material fact existed, the circuit court concluded that attorney Bowling made a mistake in drafting the deed to Kimberly and that her deed should be reformed to except or reserve the right of way for the benefit of Linda and Mary. The circuit court also concluded that because the conveyance to Kimberly was a gift, only a unilateral mistake was required in order to establish a claim for reformation of a deed. Additionally, the court determined that a mutual mistake between the parties existed, which was established by Kimberly's suit to void the right of way. Finally, the circuit court found no evidence had been presented to support Kimberly's contention that the right of way devalued her land or that it was unnecessary. The court succinctly stated its holding as follows:

There are no facts that plaintiffs have presented or can present to this Court that will prove there was no mistake by the scrivener; that will prove there was no gift; that will prove there was not a unilateral mistake on the part of the grantor, Linda Hatfield; that will provide that there was not a mutual mistake on the part of all the parties. Defendants prevail under each of these theories based upon the undisputed facts and the law of this case.

The court ultimately dismissed Kimberly's complaint, ordered her to execute a deed of correction to convey the right of way to Linda and Mary, and to remove any barrier from the right of way that restricted travel on it. This appeal follows.

In her brief, Kimberly presents two arguments. First, Kimberly argues that because the deed to her property was unambiguous, any evidence concerning the intention of the parties was extrinsic and should not have been considered. Rather, the deed should have been strictly enforced according to its

express terms. Second, she argues that disputed factual issues exist concerning the intention of the parties in the preparation of the deeds, which should have been decided by trial rather than by summary judgment.

Our standard of review from a summary judgment is well settled in the Commonwealth:

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved.

Coomer v. CSX Transp., Inc., 319 S.W.3d 366, 370-71 (Ky. 2010) (footnotes and internal quotations omitted).

Kimberly's first argument addresses whether the deed was ambiguous. She maintains that the deed was unambiguous because the explicit language of the deed did not include any right of way exception, and for this reason the circuit court erred in permitting the introduction of extrinsic evidence concerning the intent of the parties. In support of this argument, Kimberly relies upon *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003), in which the Supreme Court of Kentucky stated the law in relation to settlement agreements:

If an ambiguity exists, the court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written, by evaluating extrinsic evidence as to the parties' intentions. However,

in the absence of ambiguity a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence. [Internal quotations and brackets omitted.]

On the other hand, Linda and Mary contend that case law addressing the reformation of deeds based upon mistake permits the introduction of extrinsic evidence without having to prove an ambiguity exists, because to hold otherwise would preclude a party from proving that a mistake occurred. In other words, the mistake is the ambiguity. They cite to several cases addressing the reformation of a deed, in which no ambiguity is shown, but extrinsic evidence was permitted to show the intent of the parties.

We have reviewed each of the cases Linda and Mary cited, and we agree that Kimberly's reliance upon case law addressing contract interpretation is misplaced here. The proper rule was set forth by the former Court of Appeals in *Whitt v. Proctor*, 305 Ky. 454, 456, 204 S.W.2d 582, 583 (1947):

That courts for a mistake of the scrivener or through mutual mistake of the parties will reform deeds so as to eliminate property not intended to be conveyed or to include property which was omitted but intended to be conveyed, is thoroughly settled and is specifically pointed out in 45 A.J. 616, 617, under the headings of 'Mistake of Scrivener' and 'Mutual Mistake'. The rule has also been declared in many opinions of this court[.]

"It is a well-recognized principle of law that before a written instrument can be set aside on the ground of mutual mistake the evidence must be clear and convincing. A mutual mistake in respect to reformation is one in which both parties participate,

each laboring under the same misconception.” *Karrick v. Wells*, 307 S.W.2d 929, 931 (Ky. 1957) (internal citations omitted). Furthermore, in the case of a gift, as the conveyances were in the present action, only a unilateral mistake must be established: “[W]here property is conveyed as a gift, the transaction is by its very nature unilateral, and the grantee’s intent or conduct (other than acceptance) plays no part in fixing the rights of the parties. Mutuality of mistake as the basis of relief need only be established when there is a mutuality of obligation, as in a contractual relationship.” *Twyford v. Huffaker*, 324 S.W.2d 403, 406 (Ky. 1958).

In this case, Linda and Mary appropriately argued that a mistake existed because the attorney who prepared Kimberly’s deed failed to reserve the right of way for Linda or Mary, and instead conveyed the right of way to Kimberly over her own property. In order to establish this mistake, the circuit court properly permitted them to introduce evidence to show the actual intent of the parties. Accordingly, the circuit court did not commit error by allowing the introduction of evidence from Linda, Mary, their attorney, or the surveyor.

Next, Kimberly argues that the circuit court should not have granted summary judgment because conflicting evidence existed concerning the intent of the parties as well as the availability of other access to the property. Linda and Mary point out that the circuit court found Kimberly had not produced, and would not be able to produce, any affirmative evidence to defeat their theories of the case, and she had certainly not produced adequate evidence to prove that there was other access to the property.

Kentucky case law is clear regarding the relative burdens in summary judgment procedures:

The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001) (footnotes and internal quotations marks omitted). Once Linda and Mary produced extensive evidence concerning the intention of the parties, Kimberly was under a duty to present affirmative evidence supporting her claim that a disputed issue of material fact existed. Her claim that Linda's attorney prepared the deed is simply not enough to establish the existence of a disputed fact regarding the intent of the parties. Furthermore, Kimberly failed to establish any disputed factual issue regarding access to the property. The circuit court found no support in the record for Kimberly's claims that the right of way was not necessary, devalued her land, made the land unusable, or endangered the house. Therefore, the circuit court properly determined that no disputed issues of material fact existed that would necessitate a trial in this matter.

For the foregoing reasons, the summary judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Ronald G. Polly
Whitesburg, Kentucky

BRIEF FOR APPELLEES:

James A. Hubbard
Isom, Kentucky