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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000513-MR

RAY KIER AND TERRI KIER — APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 02-CI-00542

LAWRENCE STEPHENS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Ray and Teri Kier appeal an action to quiet title involving a boundary dispute with their neighbor, Lawrence Stephens, who brought the original suit. The Kiers allege three errors as the basis for their appeal. After reviewing the record, we find the three issues were not preserved. There was no request for review pursuant to Kentucky Rules of Civil Procedure (CR) 61.02 for

substantial error. For the reasons discussed below, we affirm the decision of the trial court.

The Kiers and Stephens own adjoining properties located along Jellico Creek in Whitley County. Stephens brought an action to quiet title over his land. At issue initially were 6.1 acres of land and the question as to where the proper boundary line existed between the two properties. These parties stipulated proper ownership of their respective lands as per their deeds.

Before trial commenced, Stephens sought to join all possible interested parties. He filed an amended complaint naming fifteen additional defendants and demanded they come forward with any claims of interest they may have in the disputed land. There is no mention on the record as to what interest, if any, these fifteen joined defendants may have had in the Stephens property. Ten of the fifteen responded by relinquishing any interest they might have had, while the court entered a default judgment on four of the five joined defendants whom were served yet failed to respond. The record is silent as to whether one Nadine Baird, the remaining fifteenth joined defendant and who failed to respond, was ever properly served. However, neither counsel made an objection to proceeding to trial in her absence.

Just before the trial began, the judge held a pretrial bench conference concerning his possible recusal. He told the attorneys that he once represented a client in an action against Teri Kier. The attorney for the Kiers, however, stated that the judge would not have to decide on the matters anyway since he believed

the case to be a jury issue and both parties agreed the judge's recusal would therefore not be necessary. The matter then progressed to trial and, absent any objections, the judge impaneled a jury. The jury subsequently settled the boundary dispute in favor of Stephens.

The Kiers allege three grounds for reversal. They first allege that Stephens failed to establish title to his property. Secondly, they argue that the trial court judge erred in holding a jury trial. Finally, they argue that the court failed to properly bring all necessary parties before it. Although the Kiers argue that these issues were preserved, none of these issues were properly preserved at trial.

Unpreserved issues are not in themselves fatal. The appellate court may still review unpreserved issues pursuant to CR 61.02 which addresses substantial error. The rule states:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

The Kentucky Supreme Court held in *Childers Oil Co., Inc. v. Adkins,* 256 S.W.3d 19, 27 (Ky. 2008), that:

> So even without specific objection, it is clear that Childers may invoke CR 61.02 and claim palpable error if its substantial rights have been affected and a manifest injustice has resulted from the error. In light of *Cobb*, it appears that the task of the appellate court in review under CR 61.02 is to determine if (1) the substantial rights of a party have been affected; (2) such action has

> resulted in a manifest injustice; and (3) such palpable error is the result of action taken by the court.

The Kiers have not requested review pursuant to CR 61.02; however, we will undertake this review to determine if any substantial rights of a party were affected and if the action taken by the court resulted in a manifest injustice. In *Burns v. Level,* 957 S.W.2d 218, 222 (Ky. 1997), the Kentucky Supreme Court, quoting *Carrs Fork Corp. v. Kodak Min. Co.,* 809 S.W.2d 699 (Ky. 1991), stated: "[i]n applying [CR 61.02], palpable error must result from action taken by the Court rather than from an act or omission by the attorneys or litigants." *Id.* at 701. "'Palpable' is defined as easily perceptible, plain, obvious and readily noticeable. Black's Law Dictionary (6th ed. 1995)." *Burns,* 957 S.W.2d at 222.

In analyzing each of the three errors alleged by the Kiers for palpable error, we start with their first allegation: Stephen's failure to establish the title to his property. It is a long-standing rule that a plaintiff in a quiet title action has the burden to establish his paper title and trace it back to the Commonwealth. Kentucky Revised Statute(s) (KRS) 411.120; *White Log Jellico Coal Co. Inc., v. Zipp*, 32 S.W.3d 92 (Ky. App. 2000); *Kephart v. Rucker*, 379 S.W.2d 244 (Ky. 1964). However, as stated previously, the two parties stipulated before trial that each have proper ownership of their properties as per their individual deeds. The main issue was the location of the boundary line separating the two properties, not whether Stephens actually owned the whole of his land like in many other quiet title actions. A stipulation limiting an issue in a boundary dispute to the

determination of the correct location of a line is valid and a court is bound by the stipulation in absence of some reason to invalidate it. See *Baker v. Reese*, 372 S.W.2d 788 (Ky. 1963). This stipulation settled the issue of title and thereby left the boundary dispute as the remaining issue needing resolution.

The second issue concerns the court adjudicating the dispute by way of a jury trial. Quiet title actions "have historically been properly triable in equity before a chancellor, and it is within the discretion of the court whether questions of fact will be submitted to a jury." *Gibson v. Central Ky. Natural Gas Co*., 321 S.W.2d 256, 257 (Ky. App. 1959); *Chenault v. Eastern Kentucky Timber & Lumber Co*., 119 Ky. 170, 83 S.W. 552, 553 (Ky. App. 1904); KRS 411.120. However, in cases of equity where the judge has impaneled a jury sua sponte, absent both a motion for and an objection against by either party, the jury is advisory only and the parties are not said to have consented to the jury. *Emerson v. Emerson*, 709 S.W.2d 853, 855 (Ky. App. 1986); *Averitt v. Bellamy*, 406 S.W.2d 410, 412 (Ky. 1966). Thus, a party must demand a jury trial in an equitable action or else a jury will be considered advisory only. *Emerson*, 709 S.W.2d at 855.

The case at hand is peculiar however, due to the events of the pretrial bench conference. The judge impaneled a jury because the Appellant told him it was a jury issue. All parties agreed to a trial by jury and no objection was made upon the judge's impaneling one. Though such a statement by the Appellant that an issue is a jury issue may not constitute a proper demand for a jury trial as

provided by CR 38.02,[1] we do not believe these circumstances amount to manifest injustice, or a reversible error. Furthermore, "[t]he actual position and identity of a boundary . . . [is] exclusively a question of fact for the consideration and determination of [a] jury, and not the court." *Bell v. Stearns Coal & Lumber Co.*, 247 S.W.2d 32, 33 (Ky. 1952). Therefore, though quiet title actions are properly tried before a chancellor or the court, boundary disputes are properly tried before a jury. Despite this action being brought to quiet Stephens' title, that issue was stipulated, leaving the action properly tried as a boundary dispute before a jury. We find no miscarriage of justice in the trial court's submitting this boundary dispute to a jury.

Finally, there is no palpable error regarding the Kiers last alleged error that all indispensable parties were not before the court. CR 19.01 makes clear that (1) a person should be joined as a party in an action if that person has a related interest to the subject of the action and (2) disposition of the action in that party's absence would impair that party's ability to protect that interest. The Kiers allege that Nadine Baird is an indispensable party since she has a possible interest in the outcome of the litigation and her absence would impair her ability to protect her possible interest. First, there is nothing noted on the record as to whether she has any interest at all to make her "indispensible." Therefore, this does not pass the first element of the test. Secondly, CR 19.02 grants the trial court discretion in

[1] CR 38.02 states that, "[a]ny party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue."

deciding "whether in equity and [in] good conscience the action should proceed among the parties before it . . . absent [an indispensible party]." Therefore, given the uncertainty of any claim of Baird, we do not believe the trial court abused its discretion in proceeding without Baird's appearing before the court.

Thus, for the foregoing reasons we affirm the decision of the Whitley Circuit Court.

ALL CONCUR.

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