RENDERED: November 25, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-001846-MR

MIKE COMBS and KERMIT WILLIAMS — APPELLANTS

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, JUDGE
ACTION NO. 96-CI-000021

ALFRED EVERIDGE
and EVA EVERIDGE — APPELLEES

AND: Cross-Appeal No. 1997-CA-001901-MR

ALFRED EVERIDGE
and EVA EVERIDGE — CROSS-APPELLANTS

v. CROSS-APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, JUDGE
ACTION NO. 96-CI-000021

MIKE COMBS; KERMIT WILLIAMS;
SIDNEY COMBS; and DONNA WILLIAMS — CROSS-APPELLEES

OPINION
AFFIRMING ON APPEAL AND CROSS-APPEAL

** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; GARDNER and MILLER, Judges.

MILLER, JUDGE. Mike Combs (M. Combs) and Kermit Williams (K. Williams) bring this appeal from a March 3, 1997 judgment of the

Knott Circuit Court. Alfred Everidge and Eva Everidge (Everidges) cross-appeal. We affirm on appeal and cross-appeal.

The Everidges filed this lawsuit against M. Combs, K. Williams, Donna Williams (D. Williams) and Sidney Combs (S. Combs) alleging the operation of a recycling yard (yard) on property located adjacent to their property constituted a permanent nuisance. The yard is operated by M. Combs and K. Williams and is located on land owned by D. Williams and S. Combs. D. Williams and K. Williams are married. S. Combs is M. Combs's father. The case proceeded to trial on February 25, 1997. After the evidence was presented, K. Williams, S. Combs, D. Williams, and M. Combs moved for a directed verdict. Ky. R. Civ. P. (CR) 50.01. The trial court denied same. It also refused to give the jury an instruction on punitive damages. The jury found the yard constituted a nuisance and returned a verdict for the Everidges against M. Combs, K. Williams, D. Williams, and S. Combs. The jury awarded the Everidges $45,000.00 in compensatory damages to reflect the diminution in the value of their property. Thereafter, K. Williams, S. Combs, D. Williams, and M. Combs jointly filed a motion for judgment notwithstanding the verdict (JNOV). CR 50.02. The trial court sustained the motion for JNOV as it related to D. Williams and S. Combs. It overruled same as it applied to M. Combs and K. Williams. The motion for new trial was denied. This appeal and cross-appeal followed.

On direct appeal, M. Combs and K. Williams complain that the trial court erred when it failed to sustain their motion

for directed verdict and for JNOV. Specifically, they claim that the Everidges failed to prove any diminution in the value of their property due to the noise from the yard.[1] The Everidges introduced the expert testimony of a Mr. Stallard Martin (Martin), a certified real estate appraiser from Prestonsburg, Kentucky. Martin testified that the value of the Everidges' property would be decreased by $47,000.00 as a result of the ongoing operations of the yard. He stated that the diminution in value was a result of the noise emanating from the yard as well as its unattractive appearance. During cross-examination, a portion of the inquiry proceeded as follows:

> Q. So are you saying that if this scrap yard was there, but let's say that the end loader that you heard was nowhere to be found, then the diminution in the value of their property would be the same?
>
> A. Yes, if the scenery was there, yes, it would be.

Based on the above exchange, M. Combs and K. Williams conclude that it was unreasonable for the jury to find that the noise from their recycling yard resulted in the diminution in value of the Everidges' property. They allege the jury could only reasonably believe that the entire reduction in the value of the Everidges' property was attributable to the scenery. We disagree.

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[1]We note that a nuisance action may be based on factors other than noise. The instructions in this case, however, allowed the jury to find the recycling yard constituted a nuisance based only upon the noise problem. Those instructions are not at issue in this appeal.

Upon a motion for a directed verdict, the question advanced is whether, based upon the evidence, reasonable minds might differ. Gibson v. Ohio River Towing Company, Inc., Ky. App., 796 S.W.2d 862 (1990). If so, the matter must be submitted to the jury. Id. The considerations governing the decision on a motion for a JNOV are exactly the same as those first presented on a motion for a directed verdict. Cassinelli v. Begley, Ky., 433 S.W.2d 651 (1968). We, therefore, review M. Combs's and K. Williams's complaints regarding the denial of the directed verdict and the JNOV as one argument.

Contrary to M. Combs and K. Williams's argument, we believe Martin's testimony supported the jury's verdict. He initially testified that the value of the Everidges' property decreased by $47,000.00 as a result of the noise level and scenery created by the yard. Although Martin later testified that the diminution in the value of the property would be the same based only on the scenery, the jury was free to believe the former portion of his testimony and to disregard the latter portion. Further, we do not agree that Martin's latter statement compels the interpretation proffered by M. Combs and K. Williams. In sum, we are of the opinion that based on the evidence as a whole, reasonable minds could differ as to the cause of the diminution in value of the Everidge's property. Hence, the trial court committed no error by submitting the case to the jury. Lewis v. Bledsoe Surface Mining Company, Ky., 798 S.W.2d 459 (1990).

On cross-appeal, the Everidges first complain that the trial court erred by denying their request for an instruction on punitive damages. We disagree. Having reviewed the record, we find no evidence to prove that the appellees acted with oppression, fraud, or malice as required under Ky. Rev. Stat. (KRS) 411.184 to support such an instruction. As such, we cannot say the trial court erred by refusing to give the jury an instruction on punitive damages.

The Everidges next argue that it was error for the trial court to enter a JNOV in favor of D. Williams and S. Combs. They maintain that sufficient evidence was presented for a reasonable jury to find said property owners neglected to abate the nuisance in question and, thus, were liable for same. The longstanding rule in Kentucky regarding the liability of property owners in nuisance cases is as follows:

> [A] landowner is not liable for a nuisance on his premises, unless he creates it or it was created by some person for whose actions he is responsible, or unless he neglects to abate it within a reasonable time after it becomes such, or if he had exercised reasonable care, ought to have become aware of its existence. He must see that a nuisance created by his licensee is abated. He may be enjoined from permitting such persons to create a nuisance, and held liable when he permits them to do so. [Citations omitted.] A person is liable if he knowingly permits the creation or maintenance of a nuisance on his premises. [Citations omitted.]

Louisville & N. R. Company v. Laswell, 299 Ky. 799, 187 S.W.2d 732, 735 (1945). As no determination was made that D. Williams and S. Combs fell within one of the exceptions to the rule as set

forth above, we are compelled to affirm the trial court's judgment on this issue.

For the foregoing reasons, the judgment of the Knott Circuit Court is affirmed on appeal and cross-appeal.

ALL CONCUR.

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