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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001125-MR
AND
NO. 2000-CA-001185-MR

CLAUD PORTER, EXECUTOR OF THE WILL OF
FRED C. FARMER, DECEASED
AND THELMA FARMER — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 98-CI-00666

CHRISTINE MORGAN; HERSCHEL MORGAN
AND SHERRY G. MORGAN — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING
** ** ** ** **

BEFORE: DYCHE, JOHNSON, AND McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal brought by Claud Porter, executor of the will of Fred C. Farmer, deceased, and Thelma Farmer challenging a jury verdict awarding damages for trespass to the owner of the surface estate, Christine Morgan, for the estimated cost of plugging oil wells and reclaiming the surface property, even though the wells had not actually been plugged, nor the property reclaimed by the surface owner. This is also a cross-appeal by Herschel and Sherry Morgan, husband and wife,

from the trial court's ruling granting a directed verdict dismissing their claims for trespass damages for oil well plugging and surface property reclamation.

On February 7, 1939, F.B. Nation executed an oil and gas lease which included the lands now owned by Christine Morgan and Herschel and Sherry Morgan which are now the subject of this litigation. The lease was operated by Fred C. Farmer, or his father, from shortly after that time until Fred's death. All the wells that were drilled on the property were drilled prior to 1960. Christine acquired the surface property and a one-quarter interest in the oil and gas rights by deed dated March 24, 1942.

The lease was never a large producer of oil, and the last production that was sold from the lease was sold in February 1997. Shortly after that, Fred C. Farmer, who was eighty-seven at the time, died. Following Fred's death, Fred's son, Gary Farmer, made some efforts to produce under the lease; however, those efforts were unsuccessful, and Christine eventually notified Gary and Thelma that she considered the lease terminated and to stay off the premises.

On June 5, 1998, the appellants filed suit in Daviess Circuit Court seeking to enjoin Christine from interfering with their operation of the lease. On June 19, 1998, Christine filed an answer denying the continued existence of the lease and a counterclaim alleging trespass and seeking sums from Thelma and the Estate to plug the wells and reclaim her surface property. Following a motion by Christine, on September 27, 1999, the trial court, pursuant to Civil Rule 19, joined Herschel Morgan and his

wife, Sherry Morgan, as defendants in the case because, as it turns out, they are the owners of a portion of the land which is affected by the oil and gas lease which is the subject of this action. On October 13, 1999, Herschel and Sherry filed an answer and counterclaim which mirrored Christine's answer and counterclaim and likewise sought trespass damages to plug the wells and reclaim their property.

On March 3, 2000, the matter was tried before a jury. Following the presentation of evidence, the trial court determined that Herschel and Sherry were not entitled to recover damages on their counterclaim for trespass because they had knowledge of the condition of their property with respect to the damages caused by the oil operations prior to their purchasing of the property from Christine. The case was then submitted to the jury on the remaining issues. With respect to the issue of the continued existence of the lease, the jury determinated that the lease had terminated and found in favor of Christine. On Christine's counterclaim, the jury found in Christine's favor and awarded her damages of $15,938.60. On March 13, 2000, the trial court entered judgment consistent with the jury's verdict.

On March 13, 2000, the appellants filed a motion for judgment notwithstanding the verdict and a motion for a new trial. On March 20, 2000, Herschel and Sherry filed a motion for a new trial contending that the trial court erred when it granted a directed verdict dismissing their trespass lawsuit. On April 7, 2000, the trial court entered an order denying the motions for

post-trial relief. The parties then filed timely notices of appeal.

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First, the appellants, Claud Porter and Thelma Farmer, contend that KRS 353.180(3) precludes an award of damages to a surface owner for the estimated costs of plugging an abandoned well.

The appellees, Christine, Herschel, and Sherry Morgan, argue that this defense is not available to the appellants because the appellants did not raise the defense in their response to the appellees' counterclaims or in subsequent pretrial filings, and, in fact, did not raise the issue until mid-trial, at which time the appellees objected to the issue being raised. Our review of the record confirms the appellees' claim that this issue was not raised until trial.

CR 8.03 requires a party, in its answer to a claim or counterclaim, to set forth any affirmative defense to the claim or counterclaim. An affirmative defense is "[a] response to a plaintiff's claim which attacks the plaintiff's *legal* right to bring an action, as opposed to attacking the truth of the claim." Black's Law Dictionary 60 (6th ed. 1990). The appellants claim that KRS 353.180(3) precludes the appellees from recovering damages under their claim; this assertion "attacks the plaintiff's *legal* right to bring" their claim, and is an affirmative defense which was required to be raised in their answer pursuant to CR 8.03. In addition, in its "Pretrial Order" entered on July 14, 1999, the trial court directed the party to

"file a memorandum with the court in the record on or before twenty (20) days before trial setting forth a description of the factual situation, and a concise statement of each issue of law and each issue of fact recognized by the party." In their "Trial Brief of the Plaintiffs" filed August 26, 1999, the appellants did not raise KRS 353.180(3) as an issue. We accordingly agree with the appellees that the defense is not preserved and that the defense is unavailable to the appellants because of their failure to plead it. See Ohio Cas. Ins. Co. v. Cisneros, Ky. App., 657 S.W.2d 244, 246 (1983).

While the defense is not properly preserved, we will, nevertheless, briefly address this issue on the merits. KRS 353.180 provides, in relevant part, as follows:

> (1) No person shall abandon or remove casings from any oil or gas well, either dry or producing, without first plugging the well in a secure manner approved by the department and consistent with its administrative regulations. Upon the department's plugging of an abandoned well in accordance with the requirements of this subsection, the department may sell, by sealed bid, or include as part of compensation in the contract for the plugging of the well, all equipment removed from that well and deposit the proceeds of the sale into the oil and gas well plugging fund, established in KRS 353.590(9).
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> . . . .
>
> (3) If a person fails to comply with subsection (1), any person lawfully in possession of land adjacent to the well or the department may enter on the land upon which the well is located and plug the well in the manner provided in subsection (1), and may maintain a civil action against the owner or person abandoning the well, jointly or severally, to recover the cost of plugging the well. This subsection shall not apply to

> persons owning the land on which the well is situated, and drilled by other persons.

The appellants contend that because subsection (3) specifically provides a procedure for an adjacent landowner to maintain a cause of action against an oil and gas lessee, and because the subsection further specifically states that the subsection does not apply to the surface landowner, then it follows that a surface landowner does not have a cause of action against a lessee if the lessee abandons a well and refuses to cap the well. We disagree.

KRS 353.180(3) provides a statutory cause of action in favor of an adjacent landowner to recover the cost of capping a well if the adjacent landowner first caps the well pursuant to subsection (1). While the subsection specifically excludes a surface owner from its provisions, this does not preclude a surface owner from maintaining a suit under some other legal theory. As we interpret the statute, the last sentence of the subsection was included so as to make clear that a landowner *need not* cap the well at his own cost prior to maintaining a cause of action. Under this interpretation, subsection (3) is adverse to the appellants' position that a surface owner may not sue for damages if an oil lessee abandons a well and refuses to cap the well.

Further, KRS 446.070 provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

Legislation pertaining to plugging abandoned wells appears in KRS 353.180(1) and predecessor statutes, which hold that one who abandons a well or removes casings from the well must plug it. A statutory duty to plug has existed since the turn of the century, and construction of earlier statutes is stated in Clarke v. Blue Licks Springs Co., 184 Ky. 827, 213 S.W. 222 (1919). Pro Gas, Inc. v. Har-Ken Oil Co., Ky., 883 S.W.2d 485, 487 (1994). It follows that if a lessee violates KRS 353.180(1), then KRS 353.180(3) does not bar a surface owner from bringing a cause of action for damages sustained by reason of the violation.[1]

In conjunction with the above argument, the appellants also contend that the wrong measure of damages - the cost of plugging the wells and reclaiming the land - was submitted to the jury whereas the proper measure of damages, because the appellees sued under a trespass theory, was the diminution in the fair market value of the surface property.

The appellees' theory of the case was clearly that the injury caused by the appellants' trespass was a temporary, as opposed to a permanent, injury. If the injury to property caused by the trespass is temporary, the appropriate award of damages is the cost to return the property to its original state. Ellison v. R & B Contracting Inc., Ky., 32 S.W.3d 66, 69 (2000). However, it is now clear that the reduction in the fair market value of the property caused by the trespass serves as a cap on

[1] We recognize that the appellees' counterclaim did not rely upon KRS 353.180(1) and KRS 446.070 but, rather, relied upon a trespass theory. However, we similarly conclude that KRS 353.180(3) does not bar a trespass lawsuit.

the amount the land owner may recover. Ellison at 70. Hence in this case, the jury instructions should have included an instruction requesting the jury to decide how much the fair market value of the property had been reduced as a result of the trespass, and if that amount was less than the cost to plug the wells and reclaim the surface, the damage award should have been so limited. Ellison at 71.

Again, however, the appellants failed to preserve this issue. The trial court's July 14, 1999, pretrial order directed that "[p]roposed written instructions shall be tendered to the Court twenty (20) days before trial, with leave to amend." The appellants' August 26, 1999, trial brief did not include a proposed instruction limiting their liability for trespass damages to the diminution in the fair market value of the appellants' property. Moreover, the appellants do not as required by CR 76.12(4)(c)(iv), cite us to their objection to the relevant jury instruction, nor do they cite us to their tendering of an instruction limiting their liability to the diminution in the fair market value of the surface property. In order to preserve this error for our review, the appellants should have complied with the trial court's pretrial order and submitted timely proposed instructions, or at least tendered an appropriate instruction at trial. Ellision at 72-73. This argument is accordingly not preserved for our review. Id.; Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 416 (1998); CR 51(3).

Next, the appellants contend that there was no evidence on which to find the devisee of Fred C. Farmer, Thelma Farmer, had abandoned the oil and gas lease. This argument is summarized by the following excerpt from the appellants' brief:

> The illogic of the verdict in this regard is most clearly manifested when the Court considers the logical implications of the verdict. If an oil and gas lease is abandoned then it ceases to exist as a valid lease immediately upon that abandonment. If Fred C. Farmer abandoned the lease, then the lease no longer existed at the time of his death and there was nothing for Mrs. Farmer to abandon. If, however, the factual finding is that Mrs. Farmer abandoned the lease, then the lease had to exist and be valid for her to be able to abandon it.

In compliance with the appellants' obligation under CR 76.12(4)(c)(iv) that they cite this Court to the record showing that the issue was properly preserved for review, the appellants cite us to their motion for judgment notwithstanding the verdict. Failure to timely object to an argument assertedly not supported by evidence is a waiver of the alleged error. Sanford Const. Co. v. S & H Contractors, Inc., Ky., 443 S.W.2d 227, 237 (1969). Raising questions concerning the sufficiency of the evidence for the first time in a motion for a judgment notwithstanding the verdict or for a new trial is not timely. Bartley v. Loyall, Ky. App., 648 S.W.2d 873, 874 (1982). This issue is not preserved for appellate review.

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In their cross-appeal, Herschel and Sherry Morgan contend that the trial court erred when it granted a directed

verdict in favor of Claud Porter and Thelma Farmer and dismissed their trespass claim.

When considering either a motion for a judgment notwithstanding the verdict or a motion for a directed verdict "the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991). On appeal the appellate court considers the evidence in the same light. Further, the trial court is precluded from entering a directed verdict if disputed issues of fact exist upon which reasonable men could differ. LaFrange v. United Services Auto. Association, Ky., 700 S.W.2d 411 (1985).

First, it is useful to give a brief history of the surface property at issue in the cross-appeal in juxtaposition with the procedural history of this case. On November 5, 1979, Christine and her husband, Gus, now deceased, sold a 16.35 acre portion of their land to their son Robert L. Morgan. On January 8, 1998, the 16.35 acre tract was sold by Robert L. Morgan to his nephew, Darrell L. Morgan, and his wife. On June 5, 1998, Claud Porter and Thelma Farmer filed their suit against Christine Morgan. On January 25, 1999, the 16.35 acre tract was conveyed to Herschel and Sherry. On September 17, 1999, Christine filed a motion to add Herschel and Sherry as indispensable parties. On September 27, 1999, the trial court entered an order adding Herschel and Sherry as defendants in the case. On October 13,

1999, Herschel and Sherry filed their answer and cross-claim. The cross-claim sought damages from the cross-appellees based upon a theory of trespass.

Following the completion of trial testimony and prior to the submission of the case to the jury, the trial court dismissed Herschel and Sherry's cross-claim on the basis that they had knowledge of the condition of the 16.35 acre tract with respect to the damages caused by the oil operations prior to their purchasing of the property. We disagree with the trial court that such prior knowledge is relevant to the recovery of damages in a continuing trespass case, and therefore reverse.

"A trespasser is a person who enters or remains upon land in the possession of another without the possessor's consent." (Emphasis added.) Bradford v. Clifton, Ky., 379 S.W.2d 249, 250 (1964). Based upon the facts of this case, the cross-appellees' trespass was clearly a continuing trespass. "If a trespass is continuing, any person in possession of the land at any time during its continuance may maintain an action for trespass." 87 C.J.S., Trespass § 30 (2000).

Following Herschel and Sherry's purchase of the property, we discern no bar to their maintaining an action for trespass against the cross-appellees. Their prior knowledge of the trespass and the damage caused by the oil operations to the property is not a bar to their right to bring a trespass lawsuit based upon the continuing trespass. We reverse the trial court's grant of a directed verdict in favor of the cross-appellees, and remand for additional proceedings consistent with this opinion.

For the foregoing reasons the judgment of the Daviess Circuit Court is affirmed in part and reversed and remanded in part.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harry L. Mathison
King, Deep and Branaman
Henderson, Kentucky

BRIEF FOR APPELLEE:

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