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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2002-CA-001592-MR

GREGORY S. BILLITER and
ELANA J. BILLITER — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 99-CI-00845

BILLY R. MILLER;
WANDA MILLER; and
LARRY DAVID BILLITER — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: PAISLEY and TACKETT, Judges; HUDDLESTON, Senior Judge.[1]

HUDDLESTON, Senior Judge: Gregory Billiter and his wife, Elana Billiter, appeal from a Pike Circuit Court judgment voiding a November 1997 deed (the Billiter deed) under which Gregory claims title to the property (a portion of "the old Ross Miller

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

place) at the center of this dispute. Pursuant to that judgment, Gregory shall not "inherit any portion of the property described in that deed by virtue of being an heir of Marie Billiter pursuant to the Affidavit of Descent . . . ." Having found that Gregory "had notice of an unrecorded deed to Raymond [Miller (the Miller deed)]," the court declared the Miller deed "to be superior thus vesting title in and to the Defendants [Appellees]."

Our standard of review in this context is well established. Because this case was tried before the court without a jury, its factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . . ."[2] If a factual finding is supported by substantial evidence, it is not clearly erroneous.[3] Substantial evidence is "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.[4] However, Gregory and Elena are essentially arguing that

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[2] Ky. R. Civ. P. (CR) 52.01; Cole v. Gilvin, Ky. App., 59 S.W.3d 468 (2001).

[3] Cole, id. at 472-473.

[4] Id. at 473.

the court misapplied the law to the facts, a matter which is reviewed de novo.[5]

In reaching its decision, the circuit court summarized the relevant facts as follows:

> 1. Ross Miller[,] who owned property on Cowpen [Creek,] had several children and deeded his property to them. All of those children except Marie Billiter and Raymond Miller sold their parts and the property came to be owned by [Marie and Raymond], her brother. [Marie and Raymond] then divided the property between themselves. In 1963 they divided that tract with Marie getting the [upper tract] and Raymond getting the [lower tract]. Raymond, thinking that Marie would outlive him and having no objects of his bounty [nearer], deeded his property to [Marie] but continued to live on his part.
>
> 2. [Marie's] health started to fail sooner than Raymond's and so[, she] deed the property back to Raymond on June 7, 1994[,] [by deed] of record in Deed Book 765, Page 525. But[,] that deed was not recorded until February 18, 1999. That deed would have left

[5] Bob Hook Chevrolet-Isuzu, Inc. v. Transportation Cabinet, Ky., 983 S.W.2d 488, 490 (1998).

intact the division between [Marie and Raymond], brother and sister, of the old Ross Miller place.

3. Before Raymond [] recorded his deed[,] Marie[] died in March of 1997. [Her husband], Luther Billiter[,] and six children surviv[ed] her. See Affidavit of Descent of record in Deed Book 744, Page 95.

4. The Defendant, Gregory S. Billiter, [is] one of those children and [he] had been living on Marie's part of the old place for many years. On April 30, 1997[,] [by deed] of record in Deed Book 736, Page 667, he [acquired] a portion of the Marie Billiter property which adjoined the Raymond Miller tract. The validity of that deed is not in dispute but its boundaries with the Old Raymond Miller property are and that will be discussed hereafter.[6]

5. In the meantime[,] [Gregory] prepared a deed from the Marie Billiter heirs to himself for Raymond's old property, which Marie had deeded back to

[6] Gregory did not appeal the court's determination that "the correct boundary line between the property of the parties hereto is as shown on Luke Hatfield's map dated July 31, 1999, and runs as the 'line claimed by Billiter' on that map from where the maple tree fell on the north side of Cowpen Creek to the mulberry tree in a straight line." Accordingly, further discussion of that issue is unnecessary.

Raymond but which Raymond had not then recorded. Luther Billiter [Gregory's father] signed that deed [the Billiter deed], dated November 6, 1997[,] of record in Deed Book 756, Page 188 and recorded July 20, 1998, but none of the other children did. That deed therefore gave paper title to Gregory[] [of] a 7/12ths interest in the property, his dad's half and [] 1/12th by inheritance from his mother, Marie Billiter.

6. As to the 5/12th interest of the Marie Billiter estate not conveyed to [Gregory], the recording by Raymond Miller of his deed [the Miller deed] on February 18, 1999 vested in him their interests.

7. The deed to Gregory[], the one that conveyed paper title to 7/12ths, [by deed] of record in Deed Book 756, Page 188, covered the old Raymond Miller place.

8. The Defendants now assert that [Gregory's] deed from the Marie Billiter heirs [the Billiter deed], recorded first, is of no worth because [Gregory and Elena (the Billiters)] had notice of Raymond Miller's prior unrecorded deed. That is hard to refute given the fact that on April 30, 1997, [by

> the Billiter deed of record in] Deed Book 736, Page 667, being the deed whereby he [acquired] the [property] on which he had been living, over on the old Marie Billiter side of the line, runs . . .” from the fence to Raymond Miller’s line, thence with the said Miller line, to a creek, thence with the creek to the beginning.” That certainly puts [Gregory and Elena] on notice or at least provides them [with] sufficient information to put them on inquiry that would have led to its discovery upon a search. [Gregory’s] sister, testifying [on] his behalf, said that she was pretty sure that [Gregory] would have known of the earlier deed.[7] Raymond Miller lived on the property at the time of the deed [and was] going back and forth between the home[] of a woman he had married in Floyd County and his home. That is certainly sufficient to put anyone on notice of a deed.

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[7] Although Gregory takes issue with this characterization of his sister’s testimony, the court did not rely solely upon this factor in reaching its determination, nor do we. When asked whether Gregory would have known that Raymond owned the property in question, Gregory’s sister replied: “I guess. I can’t speak for what Steve knows.” In response to being asked whether “. . . everybody knew that Raymond had a deed for it,” she said: “I assume so.” Although the quoted language is not decisive, the court’s interpretation is not inappropriate when viewed in context.

> 9. The Defendants, Billy R. Miller and Wanda Miller, [acquired] a portion of the Raymond Miller tract in 1999 [by virtue of a] deed of record in Deed Book 768, Page 665.

Citing Turner v. McIntosh,[8] the circuit court correctly observed that "[a]n unrecorded deed is valid and must prevail over a subsequent deed if the subsequent [g]rantee knew or had notice of its existence prior to its purchase, or had information sufficient to put him on inquiry that would have led to its discovery upon a search; such information is deemed equivalent to notice." Again relying upon Turner, the court further concluded that "where facts and circumstances suggest the necessity of investigation and such investigation would have led to [the] discovery of an unrecorded deed[,] information is legally sufficient to constitute notice."

Applying these principles to the facts presented, the court voided the Billiter deed based on its finding that Raymond's possession of the property and the reference thereto in the Billiter deed constituted information sufficient to put Gregory on inquiry notice of the prior unrecorded Miller deed.

[8] Ky., 379 S.W.2d 470, 472 (1964), citing, in turn, Hurley v. Hackney, 202 Ky. 452, 260 S.W. 16 (1924).

On appeal, Gregory and Elana argue that Gregory had neither actual nor constructive notice of Raymond's unrecorded 1994 deed when he recorded his deed in 1998. They do not challenge the finding that Raymond lived on the property at issue during the relevant time frame.[9] Rather, they contend that this fact "did not put [Gregory] on constructive notice that [Raymond] owned the property on July 20, 1998, the date [Gregory] recorded his deed, because [Raymond's] use and possession of the property had continued after he had deeded the property to Marie in 1993." Consequently, any search resulting from knowledge of Raymond's possession would have produced the 1993 deed from Raymond to Marie, leading to the conclusion that "Raymond's possession was inconsistent with record title or color of title."

In their view, the instant case is distinguishable from Turner "due to the nature, timing and circumstances" of Raymond's possession of the subject property. Because Raymond did not testify that Gregory was aware of the unrecorded deed, "there is simply insufficient proof that [Gregory] had actual knowledge of the unrecorded deed." According to Gregory, his explanation of the descriptive language contained in his deed is

[9] Raymond has apparently lived in a trailer located on the property and maintained a garden there since 1994. He also allowed Gregory and Elena to raise a garden on a portion of the property.

"credible, upon reviewing the two (2) prior deeds in the chain of title to the April 30, 1997 deed from Luther Billiter, Jr." as this Court "is certainly aware of the common mountain practice"[10] of utilizing a property description from an earlier deed in the chain of title.

In response, the appellees contend that "possession of land, when exclusive and not shared with the record title holder is notice to the world of every legal and equitable right that the possessor has in it, putting all persons on inquiry as to the nature of the claims of the occupant." Under their reasoning, since Gregory and Elena recorded a deed referencing Raymond's property line and knew he was living in a mobile home on the property, they were required to inquire further and "such inquiry would have led to the discovery of the unrecorded deed."

During the proceedings below, the court heard testimony from the parties and their respective witnesses which, if believed, constitutes substantial evidence to support its factual findings. Although the testimony is conflicting on collateral points,[11] "[i]t is within the province of the fact-

[10] On cross-examination, Gregory testified that: "Plain and simple, we just took the deed my dad had and went to an attorney, and he typed the same thing up."

[11] Raymond's former wife, to whom he was married from 1991 until 2000, testified that she was unaware of the 1994 deed by virtue of which Raymond claims ownership of the subject property. She further testified that she lived with Raymond on

finder to determine the credibility of witnesses and the weight to be given the evidence."[12] Beyond that, the parties are in agreement regarding the sequence of events which prompted the instant litigation as outlined by the court with the debate focusing on the "race-notice issue." Accordingly, the dispositive question becomes whether Raymond's possession of the subject property coupled with Gregory's implicit acknowledgement of same, i.e., adoption of the call to "Raymond Miller's line" in his subsequent deed, constitutes information sufficient to put him on inquiry that would have led to discovery of the prior unrecorded deed.

Gregory acknowledges that he failed to make inquiry despite being aware that Raymond was in possession of the property when he recorded his deed, arguing that to do so would have been an exercise in futility. In relying upon the fact that he did not have "actual" knowledge of the prior unrecorded

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the property for one year before returning to her house in Betsy Lane. According to her, Raymond kept the home and furnishings located on the property, traveled back and forth between the two homes and maintained a garden on the property. Raymond testified that he did not recall mentioning the 1994 deed to her at the time.

[12] Cole, supra, n. 2, at 473.

deed and arguing that his explanation regarding the deed description is "credible,"[13] Gregory misconstrues applicable law.

In Turner, Kentucky's highest Court concluded, in relevant part, that viewing a recorded lease which had been executed by the holder of a prior unrecorded deed to the tract of land in question and which included a mention by date of that deed constituted sufficient notice of the contents of the lease.[14] Thus, the grantees [including Turner] were not bona fide purchasers for value without notice.[15]

Beginning its analysis with the excerpt adopted by the circuit court, the Turner Court then engaged in the following analysis which is equally applicable here:

> We believe it is abundantly clear that appellants [Gregory and Elena], when they purchased [acquired] the two interests, had sufficient knowledge to place them on such inquiry as would have led upon investigation to the discovery of McIntosh's [Raymond's] prior deed conveying to him the same interests. The evidence is clear that appellant,

[13] Whether this practice is common in a particular geographic area is not the relevant question. Contrary to Gregory's implicit assertion, we are neither required nor permitted to treat him any differently than other citizens of the Commonwealth because of a local custom.

[14] Turner, supra, n. 8, at 473.

[15] Id.

Turner [Gregory], knew S.E. Clair had negotiated to sell the two interests to McIntosh [Raymond was in possession of the property as indicated by his mobile home and garden], although S.E. Clair [Raymond had not recorded his deed and did not claim that Gregory was aware of its existence] claimed the transfer did not take place. Appellants [Gregory and Elena] maintain this was not enough information to prompt further probing upon their part. On the other hand, there were other facts and circumstances that should have alerted them [the deed description]. This pertinent statement appears in 92 C.J.S. Vendor and Purchaser § 326, pp. 233-234:

> So, where the vendor [grantor] presents conveyances to himself which are prima facie valid, and assures the purchaser [grantee] that his title is perfect, it has been held that the latter is under no duty to investigate further, *in the absence of facts and circumstances suggesting* the necessity of investigation; but where such circumstances exist, the purchaser [grantee] is not justified in relying on the vendor's [grantor's] statements.

It is the general rule that whatever puts a party on inquiry amounts "amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding."[16] Possession of land by a third party [Raymond] has been held to constitute sufficient information to put a subsequent grantee on inquiry.[17]

To have the effect of notice, however, the possession must be of such a character that the "attention of the purchaser [grantee] is at once called to it;" the possession and occupation must be "inconsistent with the title upon which the subsequent purchaser relies."[18] Such is the case here. Whether a subsequent grantee (Gregory) had actual notice or sufficient information to put him on inquiry that would have led to the discovery of the unrecorded deed is "purely a factual matter" for the court to resolve.[19]

Because there is substantial evidence to support the circuit court's finding that the call to Raymond's property line

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[16] Everidge v. Martin, 164 Ky. 497, 175 S.W. 1004, 1008 (1915)(citation omitted).

[17] Leslie v. First Huntington Nat'l Bank, 301 Ky. 145, 191 S.W.2d 204, 208 (1945)(citation omitted).

[18] Id. (citation omitted).

[19] See OAG 83-276 and the cases cited therein.

in the Billiter deed and/or Raymond's possession of the subject property constituted sufficient information to put Gregory on inquiry that would have led to discovery of the Miller deed upon a search, we are bound by that finding. Further, we agree that imposing such a burden on someone in Gregory's position is not unreasonable given the circumstances.

In summary, the circuit court's resolution of the notice issue is both equitable and consistent with governing precedent, including Turner. Accordingly, its judgment is affirmed.

ALL CONCUR.

| BRIEF FOR APPELLANTS: | BRIEF FOR APPELLEES: |
| --- | --- |
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