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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000658-MR

FREIDA JOAN LOVING — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 00-CI-00294

CLYDE WILIAMS COX; JOYCE COX;
AND JAMES JARBOE — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

McANULTY, JUDGE: Freida Joan Loving appeals a judgment of the Whitley Circuit Court entered on March 24, 2003, setting aside a previous judgment of the court that was based on a jury verdict. Loving had sued her neighbors Clyde and Joyce Cox and logger James Jarboe for cutting and removing timber from a disputed piece of land between the Loving and Cox properties. A jury found that the disputed portion of land was within the boundaries of Loving's property and awarded her $5,600 in

damages. The Coxes thereafter filed motions pursuant to CR 52 and CR 59, arguing that the court should set aside the judgment and enter its own findings of fact and conclusions of law, on the grounds that the main issue presented in the case was one of equity and that the role of the jury was therefore purely advisory. The trial court entered a new judgment, dismissing all of Loving's claims against the Coxes and Jarboe and awarding the appellees their costs. The main issue on appeal is whether the trial court erred in setting aside the earlier judgment that reflected the verdict of the jury.

Loving and the Coxes own adjoining properties in Whitley County. The conflict between the neighbors began in May 2000, when the Coxes hired Jarboe to cut and remove some timber from a disputed tract of land situated on the boundary of the two properties. On May 30, 2000, Loving filed a complaint against the Coxes for removing the timber, alleging slander of title, trespass, and conversion. She requested that her title to the real estate in question be quieted, that she be granted compensatory and punitive damages and costs including her attorneys' fees and surveyor's fees, and that a restraining order be entered to prevent any further incursions on the property. In their answer and counterclaim, the Coxes maintained that they owned the disputed property either by deed or by adverse possession. They sought declaratory relief that

they be adjudged the owners of the property. On July 10, 2000, Loving filed a response to the counterclaim in which she denied the Coxes' claims and requested a jury trial. She also made a motion to add Jarboe as a party defendant. Jarboe objected to being made a party, claiming that both the Coxes and Loving had agreed to accept 25 percent of the gross proceeds from the sale of the timber. He further stated that he had received a total of $2,790.55 from the sale of the timber. He asked the court to be allowed to place 25 percent of this amount ($697.64) in escrow pending the outcome of the trial.

Loving responded that she had never hired Jarboe to harvest the timber, nor had she agreed to a 25 percent royalty. She was granted leave to add Jarboe as a party defendant by an order entered on October 2, 2000. She filed an amended complaint which added a claim against Jarboe for trespass, conversion and damages. She again requested that her title to the disputed tract be quieted and for judgment against the defendants jointly and severally for compensatory and punitive damages and for costs including attorneys' and surveyor's fees. On October 10, 2000, Jarboe filed an answer, counterclaim and cross-claim renewing his request that he be allowed to pay the sum of $697.64 to the clerk of the court and be dismissed from the case. He also requested a trial by jury of all issues so triable. The court entered an order permitting Jarboe to place

the money in escrow, but refusing to dismiss him as a party. Loving thereafter filed an answer to the counterclaim again asking for a trial by jury and dismissal of the counterclaim. The Coxes on October 25, 2000, filed an answer to the first amended counterclaim and an answer to Jarboe's cross-claim. On November 9, 2000 the court entered an order giving the parties six months to prepare for trial.

On October 1, 2001, the Court entered an order setting a trial date of December 13, 2001. The parties were ordered to submit jury instructions five days prior to trial. On October 5, 2001, the court entered an amended order stating that there was not to be a jury trial and setting a date for a bench trial instead. Loving filed motions stating that she did not want a bench trial and demanding a jury trial. On April 25, 2002, the Coxes and Jarboe moved to bifurcate the action so that the property line dispute could be resolved before any damages were determined. On May 17, 2002, the court denied the motion to bifurcate. It also denied a motion to consolidate this action with another lawsuit involving the Coxes and their other neighbors.

On June 3, 2002, an order was entered setting the case for trial on October 15, 2002. Although there is no order in the record relating to Loving's motion for a jury trial, it

appears to have been granted because the parties were ordered to exchange jury instructions prior to trial.

A jury trial was held on October 15, 2002. The parties agreed that the disputed boundary line was described in the following passage in the Coxes' deed, but disagreed as to the location of the drain mentioned in that description:

> Beginning on a white oak by the County Road by a branch thence a southern direction to the river: **thence east with the river to the mouth of a drain thence a northern course to an ash**: thence a northeast course with the bluff to a sweet gum: thence northward with a line fence to a stone at the road: thence with the road to the beginning. (Emphasis added)

The location of the boundary depended on where the drain was located because it marked the beginning of the easternmost edge of the Coxes' property.

The Coxes' surveyor, Edvard Grande, identified the location of the drain in such a way as to include the disputed land within the Coxes' property; Loving's surveyor testified that the drain was located in a more westerly location and that therefore the disputed property formed part of Loving's tract. The court thereafter instructed the jury to find the disputed fact issue as to the location of the boundary line between the Loving and Cox properties. In the event that the jury found in favor of Loving's survey, the jury was then instructed to determine damages including the value of the timber taken and

the damage to the property. The record indicates that no objection was made to the jury instructions by any party. The court directed a verdict in favor of James Jarboe.

The jury found unanimously in favor of Loving on the issue of the property line dispute and awarded her damages in the sum of $5,600 against Clyde Cox. A judgment was entered on October 22, 2002, consistent with the jury verdict. Loving thereafter moved for triple damages and for an award of surveyor's and attorney's fees pursuant to KRS 364.130.

The Coxes responded with a CR 52 motion to set aside the verdict of the jury on the grounds that the fundamental issue at trial was one of equity and that therefore the role of the jury was advisory unless the parties expressly agreed otherwise. The Coxes argued that the determination as to whether the drain described in the deed was the one identified by the Coxes' surveyor or by Loving's surveyor involved construing an ambiguous deed and that this was exclusively the role of the court, not the jury. The motion stated in relevant part as follows:

> Construing the language used in a deed so as to quiet title in a disputed area are [sic] issues arising out of equity for which the right to trial by jury does not attache [sic]. Tarter v. Medley, [Ky.,] 356 S.W.2d 255 (1962). A jury verdict rendered on an issue arising in equity is advisory only and the Court is not bound by it. Transylvania University v. McDonald's Ex'r, [Ky. App.,]

> 126 S.W.2d 1117 (1939). In the absence of expressed consent a jury sitting to hear an equitable issue is advisory regardless of how the court may characterize it. Emerson v. Emerson, [Ky. App.,] 709 S.W.2d 853 (1986). Thus, in the present case, the Court may either accept the jury's verdict or substitute its own.

The Coxes argued that the Court should make its own findings of fact and conclusions of law pursuant to CR 52. In the alternative, they argued for a reduction in the amount of damages to the sum of $2,700 plus $500.

On November 1, 2002, the Coxes filed a CR 59 motion to vacate the judgment for the reasons set out in their CR 52 motion. The Coxes argued that since Loving had not specifically pleaded a cause of action under KRS 354.130, she was not entitled to treble damages. In addition or alternatively, they argued that since they were innocent trespassers, her damages should be limited to $675, the royalty value of the timber. The motions were heard on November 4, 2002 and apparently were orally granted because Loving filed a motion to alter, amend or vacate the order of November 4. The record does not contain an account of the November 4 hearing.

On March 24, 2003, the court entered Findings of Fact, Conclusions of Law and Judgment. The judgment does not specify the grounds on which the initial judgment was being set aside but states in part as follows:

> This matter came on for trial before a jury on October 15, 2002 and **the issues were not fairly and adequately presented to the jury for decision** and, therefore, the Court having heard the testimony of the parties and their witnesses and having examined the record and being otherwise sufficiently advised, sets aside the previous Judgment entered herein and makes the following Findings of Fact, Conclusions of Law, and Judgment. (Emphasis added.)

The court found the testimony of the Coxes' surveyor as to the location of the drain to be more convincing and consistent with the other terms of the description in the deed, and therefore based its opinion primarily on his testimony. It explained as follows:

> The drain identified by Loving's surveyor as the correct drain appears to be a place where water comes down the hill and goes into a sinkhole and is not a drain into the river. The drain identified by the Cox's [sic] as the correct drain is large and empties directly into the river.
>
> The contour lines on the exhibits verify the bluff and drain. If you follow the drain as the deed states to the bluff, thence in a northern course to the sweet gum and fence, the survey provided by Cox would identify the correct boundary line. If you use what Loving describes as a drain and follow the lines described in the deed along the top of the bluff, the line would run in a southeasterly direction rather than a northern course described in the deed.

Loving raises four arguments on appeal.

The first, and primary argument, is that the circuit court erred in setting aside the earlier judgment based on the

jury verdict and making its own findings of fact and conclusions of law. Our review of this issue is hindered by the fact that the second judgment does not specify the grounds for setting aside the first judgment, apart from the comment that the issues were not "fairly or adequately presented to the jury" for decision. We assume, in light of the motions made by the Coxes that the court agreed with the Coxes that this was primarily an equitable action and that therefore the role of the jury was purely advisory.

CR 39.03 states as follows:

> In all actions not triable of right by a jury the court upon motion or of its own initiative may try an issue with an advisory jury; or the court, with the consent of all parties noted of record, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

In Emerson v. Emerson, Ky. App., 709 S.W.2d 835, 855 (1986), the Court held that when the issue to be tried is equitable, express consent must be obtained before the parties are bound by the jury verdict. No such consent was obtained in this case.

Loving argues that the circuit court erred if it based its decision to disregard the jury verdict on the characterization of this action as one to quiet title. Loving maintains that this was essentially a boundary line dispute;

there was no dispute in this case as to title, chain of title or any "legal" issue.

The Coxes have correctly pointed out that this was characterized as a quiet title action in the pleadings, even though most of the trial was devoted to a factual determination of where the drain described in the deed is located. They cite the rule that in order to determine whether an issue is one which was traditionally regarded as legal or equitable it is necessary to look at the pleadings and not the proof. Brandenburg v. Burns, Ky., 451 S.W.2d 413 (1969). The Coxes further argue that this action primarily involved quieting title to the disputed portion of land.

We note that in some jurisdictions, disagreements over boundary lines may not, strictly speaking, be determined in quiet title actions. See e.g. Rush Creek Land and Live Stock Co. v. Chain, 586 N.W.2d 284, 289 (1998) ("Boundary disputes cannot be determined in a quiet title action. . . . [although] when the parties pursue a boundary dispute as a quiet title action without objection, the mode of procedure is no longer in question.") "[A] dispute in which each owner admits the title of the other but disagrees as to the physical location of the boundary is a boundary dispute, not a title controversy, and it cannot be determined in a quiet title action." 74 C.J.S. *Quieting Title* § 3.

In this case, there was no dispute as to the language of the deed or the construction of the deed or to ownership of the two adjoining tracts by the Lovings and Coxes. The only issue, and it was a purely factual one, was the location of the drain. Furthermore, every other claim in Loving's complaint was clearly a legal claim to which a right to a jury trial attached. Although at one point the court did set the case for a bench trial, on the parties' motion he thereafter set it for a jury trial. We think it is incumbent in such a case, and not contrary to the reasoning in Emerson, (where it was noted that the issue was equitable by virtue of the court's order and judgment, see Emerson, 709 S.W.2d at 855) for the court to make it clear, preferably at the outset of the trial, whether it views an action as being purely equitable and whether the jury is thus to be accorded an advisory role.

Moreover, if we review the court's action under the standard for a judgment notwithstanding the verdict, we find that there was sufficient evidence to support the jury's verdict.

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the

> evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, Ky. App., 700 S.W.2d 415, 416 (1985).

We have reviewed the trial testimony of the surveyors and find that there was some evidence to support the verdict of the jury and that reasonable minds could differ as to the location of the drain hole described in the deed. The Coxes argue that there was insufficient evidence to support the jury verdict, stating that in placing the drain where he did the Loving's surveyor was usurping the role of the court in interpreting the deed. Under this reasoning, however, the Coxes' own surveyor committed the same error when he similarly "interpreted" the deed and identified the drain as being farther east along the river. Therefore, the circuit court erred if its action is reviewed under the standard for the grant of a judgment notwithstanding the verdict.

Loving's next argument is that the trial court erred in granting a directed verdict for the logger, James Jarboe. Jarboe testified that at the time he was hired by Clyde Cox to cut the timber he was advised that there was a property dispute with the Lovings. Jarboe thereafter consulted with Loving and she told him that he could cut timber on the other side of a

roadway in the disputed area. Jarboe testified that he had discussed with her a possible agreement to pay her a 25 percent royalty to cut timber on her property as well. He testified that three or four weeks later she asked him for more royalty money, so the deal fell through. He further testified that he stopped logging when Loving protested that he was trespassing on her land. He received $2,755.15 for the timber and had placed 25 percent ($697.64) of that amount in escrow when he learned of the litigation. He admitted that he had cut timber in the disputed area. He also testified that it would cost four or five hundred dollars to clean up the area where the logging had taken place.

The record indicates that the trial court granted a directed verdict for Jarboe on the grounds that the plaintiff had provided insufficient proof of damages. The judge stated as follows:

> He testified that he cut two truck loads of trees, that he took them and sold them, and then when he got back he found out that he didn't know which side of the line they were on. But he had the money, and he was agreeing to pay it into court to give it to whoever it belonged to, and that's it. And when somebody – The testimony I heard, when they said for him, don't be cutting over here, he didn't cut any more.
>
> [T]he case is for them to show what the value of the trees were that he cut[.]

Loving argues that the directed verdict was erroneous because Jarboe admitted that he cut timber in the disputed area and he was therefore liable for the stumpage value of the timber under either KRS 364.130 or the common law.

The common law differentiates between innocent and willful trespassers in setting the amount of damages for the removal of timber:

> The rule heretofore adopted by this court is that where timber is cut and removed by an innocent trespasser, the measure of damages is the reasonable market value of the timber on the stump. Allen v. Ferguson, Ky., 253 S.W.2d 8 [1952]. If the trespass is willful, a different measure is applied. In that event, the measure of damages is the gross sale price at the point of delivery. Morris v. Thomas Forman Co., 206 Ky. 191, 266 S.W. 873 [1824].

Gum v. Coyle, Ky. App., 665 S.W.2d 929, 931 (1984). In this case, it appears that Jarboe was an innocent trespasser acting under Cox's color of title.

In King v. Grecco, Ky. App., 111 S.W.3d 877, 885 (2002), the defendant King, like Jarboe, "did not deny that he trespassed on the Grecco's land and removed timber therefrom." This Court held that therefore "[n]ot only was he not entitled to a directed verdict, but the Greccos were properly so entitled as it related to King's liability. All that remained for the jury to find was the amount of damages resulting from King's wrongful action."

A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ. Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18 (1998). In this case, there was sufficient testimony at trial for the jury to assess damages against Jarboe for the stumpage value of the timber and for cleaning up the disputed area. The trial court thus erred in granting him a directed verdict.

Loving's final argument is that this case should be remanded for entry of a judgment consistent with the verdict of the jury and for consideration of triple damages and attorneys' fees pursuant to KRS 364.130 against Cox and Jarboe. KRS 364.130 provides for treble damages when a person is found liable for entering upon and cutting timber growing upon the land of another. It states in pertinent part:

> [A]ny person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon the land of another without legal right or without color of title in himself to the timber or to the land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the rightful owner of the property three (3) times the cost of any damages to the property as well as any legal costs incurred by the owner of the timber.

The provisions of KRS 364.130 were not invoked by Loving in any of her pre-trial pleadings or during the course of the trial.

The issue of statutory damages was first mentioned in a motion made after the first judgment was entered. The statutory claim was not raised in a timely fashion and may not therefore be considered on appeal.

We agree with Loving that this case should be remanded to the Whitley Circuit Court for entry of a judgment consistent with the verdict of the jury. The Coxes have argued that the award of $5,600 in damages by the jury in the original verdict was excessive and not consistent with any testimony given at trial. They contend that it must have been the product of passion or prejudice and cannot be sustained.

> W]hen confronted with the issue of reviewing an award of damages for excessiveness or inadequacy, the trial court and appellate court perform different functions. . . . [T]he trial court is charged with the responsibility of deciding whether the jury's award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). . . . Once the issue [excessive or inadequate damages] is squarely presented to the trial judge, who heard and considered the evidence, neither we, nor will the Court of Appeals, substitute our judgment on excessiveness [or inadequacy] for his unless clearly erroneous.

Burgess v. Taylor, Ky. App., 44 S.W.3d 806, 813 (2001)(citations omitted).

In this case, the trial judge never reviewed the award of the jury on these grounds because he overturned the jury

verdict entirely. We therefore remand the case for a reinstatement of the jury verdict and a review by the trial court of the damage award for excessiveness.

The March 24, 2003 judgment of the Whitley Circuit Court is hereby reversed and remanded for a reinstatement of the original judgment based on the verdict of the jury; a review of the amount of the award of damages for excessiveness; and a determination of the portion of damages owed by appellee Jarboe.

ALL CONCUR.

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