RENDERED: MARCH 18, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-000612-MR

KAREN SOUTHWOOD; DAVID SOUTHWOOD — APPELLANTS

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JUDGE
ACTION NO. 01-CI-00201

CHARLES DENNEY; PAULINE DENNEY — APPELLEES

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: VANMETER, JUDGE; HUDDLESTON AND MILLER, SENIOR JUDGES.[1]

MILLER, SENIOR JUDGE: Karen Southwood and David Southwood appeal from the Findings of Fact, Conclusions of Law, and Judgment of the Wayne Circuit Court in this boundary and quiet title dispute involving tracts of land located in the Eadsville

[1] Senior Judges Joseph R. Huddleston and John D. Miller sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

Community in Wayne County, Kentucky. For the reasons hereinafter stated, we affirm.

On July 6, 2001, Charles H. Denney and Pauline Denney filed a petition to quiet title to three tracts of land located in Wayne County, Kentucky, in the Eadsville Community in Wayne County near Highway 789. David Southwood and Karen Southwood were named as defendants in the action. The petition also sought damages for the Southwoods' trespass onto the real property and an injunction enjoining the Southwoods from further trespass.

On July 18, 2001, the Southwoods filed their answer denying the Dennys' claim of ownership to the property and a counterclaim asserting ownership to portions of the property claimed by the Denneys by deed and/or adverse possession and seeking to quite title therein in their favor. The Southwoods also sought damages for lost sales to a subdivision development they alleged were brought about by actions of the Denneys, the additional expense for running electric lines because of the Denneys' interference by the Denneys with work already begun upon the property.

Several tracts of property are involved in this action. The Denneys claim title to three tracts: a 20.31 acre

tract located on the north side[2] of Kentucky Highway 789; a 57 acre tract located on the south side of Kentucky Highway 789; and a 4 acre tract located on the south side of Kentucky Highway 789, which is contiguous with the aforementioned 57 acre tract.

The Southwoods claim ownership of a 110 acre tract located on the north side of Highway 789. This tract and the 20.31 acre tract claimed by the Denneys are adjacent to each other. The Southwoods claim that a portion of their 110 acre tract description covers approximately 12 acres south of Highway 789 which overlaps the 57 acre tract claimed by the Denneys. In addition, the Southwoods claim title to an approximately 9 1/2 acre tract (the Matthews tract) located on the North side of Highway 789, which lies between their 110 acre tract and a gravel road (Ridge Road) and which is a portion of the 20.31 acre tract claimed by the Denneys. The Southwoods also claim title to the entire 20.31 acre tract (which includes the Matthews tract) by adverse possession.

On October 1 and 2, 2003, the case was tried before Judge Donald H. Byrom. On November 24, 2003, Judge Byrom's Findings of Fact, Conclusions of Law, and Judgment was entered. Judge Byrom determined that the Denneys had failed to adduce sufficient evidence to establish their property lines and

[2] For consistency we have conformed with the direction descriptions as used by the parties and the circuit court; however, we note that these direction descriptions are notably imprecise.

dismissed their claims; that the Southwoods had established the property lines to their 110 acre tract and quieted title in them to that tract; and dismissed the various claims for trespass and damages.

Each side filed motions to alter, amend or vacate pursuant to Ky. R. Civ. P. (CR) 59.05. In the meantime, Judge Byrom was replaced by Judge Vernon Miniard. The Southwoods filed a motion requesting that Judge Miniard recuse himself from the case on the basis that Karen Southwood had filed a complaint with the Attorney General in connection with Judge Miniard's conduct in his previous capacity as County Attorney of Wayne County. Following referral of the issue to the Chief Justice, Judge Miniard denied the motion to recuse.

On February 27, 2004, Judge Miniard, in addressing the motions to alter, amend or vacate, rendered his own Findings of Fact, Conclusions of Law, and Judgment. The decision again quieted title to the 110 acre tract in favor of the Southwoods, but amended Judge Byrom's decision by quieting title to the three tracts claimed by the Denneys in their favor. The judgment also awarded $15,000.00 in punitive damages to the Denneys based upon the Southwoods' trespass to their property and the destruction of a barn thereon. This appeal followed.

First, the Southwoods contend that Judge Miniard erred by failing to recuse himself from the case. The Southwoods

allege that recusal was required on the basis that during Judge Miniard's tenure as County Attorney of Wayne County, Karen Southwood had filed a complaint against him with the Attorney General's office criticizing his decision not to pursue criminal complaints as a result of actions allegedly directed against her by three individuals. Judge Miniard recalled the incident and referred to the matter in the parties' initial appearance before him. The Southwoods contend that Judge Miniard's animosity toward them was demonstrated by his comment that when he received a copy of the complaint from the Attorney General's office, he "just threw it in the trash."

The Southwoods moved for Judge Miniard to disqualify himself, which the Judge denied. The matter was referred to the Chief Justice pursuant to Kentucky Revised Statutes (KRS) 26A.020. On January 28, 2004, the Chief Justice rendered an order which stated, in relevant part, as follows:

> Upon due examination of the affidavit of defendants which seeks recusal of Honorable Vernon Miniard, Jr., and the response of plaintiffs,
>
> IT IS HEREBY ADJUDGED that the affidavit is insufficient to demonstrate any disqualifying circumstance which would require the appointment of a special judge pursuant to KRS 26A.020.
>
> The request for disqualification is denied without prejudice of any party to seek appellate review after entry of a final judgment.

Kentucky Revised Statutes (KRS) 26A.015(2) requires recusal when a judge has "personal bias or prejudice concerning a party ... [,]" or "has knowledge of any other circumstances in which his impartiality might reasonably be questioned." KRS 26A.015(2)(a) and (e); *see* Supreme Court Rule 4.300, Canon 3C(1). The burden of proof required for recusal of a trial judge is an onerous one. There must be a showing of facts "of a character calculated seriously to impair the judge's impartiality and sway his judgment." Foster v. Commonwealth, 348 S.W.2d 759, 760 (Ky. 1961), *cert. denied*, 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962); *see also* Johnson v. Ducobu, 258 S.W.2d 509 (Ky. 1953). The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal. Stopher v. Commonwealth, 57 S.W.3d 787, 794-795 (Ky. 2001), *cert. denied*, 122 S.Ct. 1921, 535 U.S. 1059, 152 L.Ed.2d 829; Webb v. Commonwealth, 904 S.W.2d 226 (Ky. 1995);

Judge Miniard's decision as County Attorney not to pursue criminal charges was within his discretion and does not, in and of itself, reflect bias against Karen Southwood. Once assuming the circuit court bench and upon the parties appearing in his court, Judge Miniard appropriately raised his prior connection with Mrs. Southwood. While Judge Miniard's comment regarding his having "thrown the complaint in the trash" may

have been inconsiderate, we are not persuaded that this comment reflects personal bias or prejudice against the Southwoods so as to have required his recusal. The Southwoods, in this matter, have failed to meet the requisite burden to demonstrate facts "of a character calculated seriously to impair the judge's impartiality and sway [Judge Miniard's] judgment."

Next, the Southwoods contend that "it was error for Judge Miniard to try the case de novo; ignore the findings of fact, conclusions of law, and judgment of Judge Byrom; and enter a completely new judgment."

Judge Byrom issued his decision only a few days prior to leaving office. Each side subsequently filed motions to alter, amend or vacate pursuant to CR 59.05. Thus, Judge Miniard had assumed the bench by the time the motions were heard.

A motion under CR 59.05 is the proper remedy where an earlier court judgment is believed to be incorrect. Security Federal Sav. & Loan Ass'n of Mayfield v. Nesler, 697 S.W.2d 136 (Ky. 1985). Moreover, a court has unlimited power to amend and alter its own judgments. Henry Clay Min. Co., Inc. v. V & V Min. Co., Inc., 742 S.W.2d 566, 567 (Ky. 1987); Pattie A. Clay Infirmary v. First Presbyterian Church, 605 S.W.2d 52, 54 (Ky.App. 1980).

Upon assuming the bench of Wayne Circuit Court, we discern no bar to Judge Miniard treating Judge Byrom's decision as though it were his own, and deciding the motions to alter, amend or vacate with the unrestricted powers vested in a circuit court judge when considering such a motion. Moreover, the modifications to Judge Byrom's decision were within the scope of the issues raised in the parties' motions to alter, amend or vacate. Judge Miniard's handling of the motions was not error.

Next, the Southwoods contend that the trial court erred by not quieting title in them to the 12 acres claimed by them on the south side of Highway 789 and the 20.31 acre tract on the north side of the Highway.

This is a case of the trial judge sitting without a jury. In such cases the findings of the trial judge may not be set aside unless clearly erroneous with due regard being given to the opportunity of the trial judge to consider the credibility of the witnesses. CR 52.01; Lawson v. Loid, 896 S.W.2d 1, 3 (Ky. 1995). Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954 (Ky. 1964). The test for substantiality of evidence is whether the evidence, when taken alone, or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons. Kentucky State Racing Commission v. Fuller, 481 S.W.2d

298, 308 (Ky. 1972); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 852 (Ky.App. 1999). This Court has applied this rule in boundary disputes. "It is the rule that, where this Court cannot say on an appeal from the decree in an action involving a boundary dispute that the Chancellor's adjudication is against the weight of the evidence, the decree will not be disturbed." Croley v. Alsip, 602 S.W.2d 418, 419 (Ky. 1980) (*quoting* Rowe v. Blackburn, Ky., 253 S.W.2d 25, 27 (Ky. 1952)).

The trial court's determination that these tracts are not encompassed within the Southwoods' deed descriptions is supported by substantial evidence. The Denneys do not dispute that the Southwoods own a 110 acre tract. The Southwoods' deed to this tract, however, has calls establishing the "western" boundary of their 110 acre tract as the Matthews line. The trial court reasonably concluded from this that their deed does not encompass the Matthews tract. Moreover, the deed establishes the "southern" boundary as Highway 789. The trial court reasonably concluded from that that their 110 acre tract does not include property on the other side of 789. Hence the trial court's determination that the Southwoods do not have title by deed to either the Matthews tract or any property on the opposite side of Highway 789 is supported by substantial evidence.

The Southwoods also claim the Matthews tract, the remaining acreage of the 20.31 acre tract on the opposite side of Ridge Road, and the twelve acres on the opposite side of Highway 789 by adverse possession.

One may obtain title to real property by adverse possession for the statutory period of time of fifteen years even when there is no intention by the adverse possessor to claim land not belonging to him. KRS 413.010; Tartar v. Tucker, 280 S.W.2d 150, 152 (Ky. 1955). There are, however, five elements, all of which must be satisfied, before adverse possession will bar record title: 1) possession must be hostile and under a claim of right, 2) it must be actual, 3) it must be exclusive, 4) it must be continuous, and 5) it must be open and notorious. Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878, 879-880 (Ky. 1992). The party claiming title through adverse possession bears the burden of proving each element by clear and convincing evidence. Phillips v. Akers, 103 S.W.3d 705, 709 (Ky.App. 2002).

Suffice to say that there was conflicting evidence on the Southwoods' claim of adverse possession. Charles Denney and many local residents testified that the Southwoods had not exclusively occupied these properties for the required statutory period. It was the trial court's prerogative to believe Charles Denny and his witnesses and to disbelieve the evidence presented

on the issue by the Southwoods. The trial court's finding that the Southwoods did not meet the requisites to establish title to the property at issue by adverse possession was not clearly erroneous.

Next, the Southwoods contend that Judge Miniard erred in quieting title in the Denneys to the 57 acre tract, the 20.31 acre tract, and the 4 acre tract. In association with this argument the Southwoods allege that Judge Miniard erroneously applied the exception to proving title contained in Jones v. Wheeldon, 309 Ky. 184, 217 S.W.2d 221 (1949); and that that the trial court erred because it did not locate upon the ground the various tracts quieted in favor of the Denneys.

As previously noted, the Southwoods have failed to establish claim to either the 57 acre tract, the 20.31 acre tract, or the 4 acre tract by either deed or adverse possession.

In a quiet title action, defendants, such as the Southwoods, are not entitled to affirmative relief under their counterclaim when they fail to show title in themselves. Vogler v. Salem Primitive Baptist Church, 415 S.W.2d 72, 74-75 (Ky. 1967). Moreover, it is essential to the right of appeal that the party seeking review must represent an interest which is direct, pecuniary, and substantial. Cooper v. Kentuckian Citizen, 258 S.W.2d 695, 696 (Ky. 1953).

As the Southwoods have failed to establish any claim to the tracts at issue, they are entitled to no affirmative relief in this action; and, moreover, they are in no way prejudiced by the trial court's quieting of title in the three tracts in favor of the Denneys. Consequently, we discern no benefit to them in a reversal of the trial court's decision. Neither does it appear that anyone else challenges the Denneys' claim to these tracts.

While this issue appears to be mooted by the Southwoods' failure on their claims, we nevertheless note that substantial evidence supports the trial court's decision. The Denneys presented the testimony of a licensed surveyor who expressed his opinion that the three tracts claimed by the Denneys were encompassed within their deeds. Moreover, the testimony of Charles Denney and various members of the community established the boundaries by reputation. For these reasons we reject the Southwoods' argument on this issue and find no error in the trial court's decision.[3]

Next, the Southwoods contend that the trial court erred by disallowing certain testimony of John D. Lyons and by failing to award damages.

[3] The Denneys did not attempt in this action to quiet title to the three tracts by adverse possession. Based upon the trial court's findings of fact, however, we note that the evidence strongly suggests that a claim under this theory would have been successful.

Contemporaneous with the eruption of this property dispute the Southwoods were developing Blue Water Heights Subdivision on the northern portion of their 110 acre tract. In conjunction with the development the Southwoods sought to widen Ridge Road, and hired a bulldozer operator to that end. At trial, Charles Denney testified that he approached the dozer operator and said to him that the "road and land was in dispute." According to the Southwoods, this statement started a "wildfire of rumors that the access road to Blue Water Heights Subdivision was in question." The Southwoods maintain that Charles Denney "attached a stigma to the Subdivision that killed the sale of lots." In their counterclaim, the Southwoods sought damages for lost lot sales allegedly associated with Charles Denney's casting of a cloud over access to the subdivision.

In an effort to prove damages resulting from the alleged lost sales, the Southwoods relied upon the testimony of licensed real estate broker John D. Lyons. Lyons calculated damages to the Southwoods by comparing sales at the Blue Water Heights Subdivision with sales at another subdivision, Sunset Point, over the same period of time. Lyons testified that whereas the developers of Sunset Heights had sold 76% of their lots during the period of time, the Southwoods had sold only 29% of Blue Water Heights lots. Lyons concluded that had Blue Water Heights lots sold at the same rate as Lots in Sunset Heights, an

additional 31 lots would have been sold. Lyons then applied the Southwoods' asking price of $14,000.00 per lot to the 31 lost sales and concluded that the Southwoods had suffered damages of $434,000.00.

The trial court rejected the Southwoods' theory that Charles Denney's isolated statement to the bulldozer operator caused any loss to the Southwoods regarding the sale of lots in Blue Water Heights Subdivision. We agree that the evidence does not establish causation between the alleged lost sales and Charles Denney's comment.[4] As noted by Lyons, there may be other reasons for the differential in sales rates between the two developments, including different marketing schemes; different property characteristics such as size of lots; and access and distance to Lake Cumberland and Beaver Creek Resort, a dock facility located on Lake Cumberland.

Given the multiplicity of relevant variables, any loss in lot sales associated with Charles Denney's comment – if any – is purely speculative. The trial court's finding that the Southwoods had failed to sustain their burden of proof with regard to this issue was not clearly erroneous. With regard to the allegedly excluded testimony of Lyons, the Southwoods do not

[4] We moreover note that the bulldozing project called for the widening of Ridge Road. As the Denneys own the land on both sides of the road on the Highway 789 end, it necessarily follows that any widening would encroach upon their land. In this respect, there was significant truth in the statement of Charles Denney that there was a dispute concerning the road.

cite us to his avowal testimony preserving this issue, and we will not further address the matter. Charash v. Johnson, 43 S.W.3d 274, 281 (Ky.App. 2000).

Next, the Southwoods contend that the trial court erroneously found that they recognized the Denneys' claim by putting the electric lines running to their subdivision development on their 110 acre tract instead of along the ridge road. Specifically, in its February 27, 2004, opinion the trial court stated as follows:

> The Plaintiff, Charles Denney, testified to having talked to the Defendant, David Southwood, concerning widening the Ridge Road and placing electric lines on the Plaintiff's property. The Court finds from this testimony that the Defendants recognized that the Plaintiffs were claiming an interest to the property in question. The Court finds of more compelling interest, the fact that the electric lines were ultimately not placed on the Ridge Road, but on the Defendants' 110 acre tract.

The Southwoods state that the locating of the lines on their 110 acre tract came about because the Denneys made the electric company aware of the existing property dispute, and that the electric company accordingly refused to run the lines along the Ridge Road due to the controversy. The Southwoods allege that they had no choice in the matter if they wanted the lines run, and that their decision regarding the lines certainly was not recognition of the Southwoods claim to the property.

The Southwoods seem to be missing the point of the finding. We construe this finding as relevant only insofar as the trial court determined that the Southwoods acted with malice in entering onto the Matthews tract and destroying the barn located thereon. We do not construe the finding as a finding that the Southwoods were *conceding* the superiority of the Denneys claim, but, rather, we construe the finding as evidence that the Southwoods were *aware* of the claim, and, despite this awareness of the Denneys' claim, nevertheless unilaterally entered upon the property and destroyed the barn. This is relevant evidence as to malice. As the trial court's conclusion regarding the discussions between Charles Denney and David Southwood, and the electric company's honoring of the Denneys' claim, was reasonable, we cannot agree that the finding was clearly erroneous.

Finally, the Southwoods contend that the trial court erroneously concluded that the appellants acted maliciously, and in awarding the Denneys punitive damages for said acts.

KRS 411.184(1)(c) defines malice as "either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a

subjective awareness that such conduct will result in human death or bodily harm."

A reasonable interpretation of the evidence is that despite their knowledge of the Denneys' claim to the Matthews tract, the Southwoods nevertheless unilaterally hired someone to enter onto the property and destroy the barn located thereon. This conduct could reasonably be construed as conduct specifically intended to cause tangible injury to the Denneys, and as being carried out with a flagrant indifference to their rights. As such, the trial court's finding that the Southwoods acted with malice was not clearly erroneous.

For the foregoing reasons the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John T. Mandt
Somerset, Kentucky

BRIEF FOR APPELLEE:

John Paul Jones II
Monticello, Kentucky