

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000043-MR

VERNON MILLS

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 05-CI-00494

WILLIAM SEXTON AND
WIFE, EULA SEXTON

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

ACREE, JUDGE: Vernon Mills appeals from a judgment of the Knox Circuit Court in favor of William and Eula Sexton in a dispute over the boundary between their adjacent properties. The issues on appeal are whether the trial court should

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

have recused due to rulings in another case involving Mills, whether a survey offered as evidence by the Sextons was improperly admitted, and whether the Sextons presented sufficient evidence to prove adverse possession of the property in question. Finding no error, we affirm.

Mills purchased a piece of property in Knox County from Marie Sowders and her husband, Beverly, in 1999. As part of the purchase of the Sowders' property, Mills requested that a survey be conducted since Marie seemed unsure of her precise boundary. The Sowders hired Edvard Grande, a surveyor licensed by the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors. After Grande completed his survey, Mills purchased the property from the Sowders, accepting a deed containing the calls found in Grande's survey.

Some time later, Mills obtained predecessor deeds from the clerk's office and decided to plot them for himself. Although he has only a sixth grade education, Mills served in an engineering division in the Army and obtained experience tracing titles and surveying property while assisting professional engineers and surveyors. After plotting the deeds, Mills decided that he disagreed with the results of Grande's survey and approached him about it. According to Mills, the boundary between his property and the adjacent property owned by the Sextons was actually further west than Grande had determined, thereby excluding from Mills' tract some thirty to forty acres. He contended that Grande had neglected to refer to calls in two of the predecessor deeds which would have established that he owned the property in question.

Mills claimed that Grande responded “arrogantly” when questioned about the possibility of a mistake in his survey. Consequently, he then went to talk to William Sexton about the perceived error. Mills has asserted that Sexton told him he paid Grande to plot the survey in a way that favored the Sextons. In fact, Mills filed a complaint against Grande with the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors, as well as a civil action in the Knox Circuit Court. Both Grande and Sexton have denied that any money changed hands between them. The licensure board dismissed the complaint before it and the Knox Circuit Court civil action has been dismissed twice. This Court has remanded each dismissal, and the action is currently being held in abeyance awaiting the outcome of the current controversy.

In July 2002, Mills obtained a quitclaim deed from the Sowders. Two years later, in an attempt to establish his ownership of the disputed property, he hired Robert Moses to survey his property. Moses began conducting the survey, but apparently quit after speaking to Grande about it. He then claimed he was only asked to retrace the Grande survey and set stakes. He was paid \$28,000.00 for this task and sued unsuccessfully to collect an additional \$12,000.00. Once the Sextons noticed that Mills and others were attempting to place survey flags where Mills thought the boundary existed, they filed this action against Mills.

Prior to an April 2006 pretrial conference, Mills had been attempting his own representation. However, he appeared at the pretrial conference accompanied by legal counsel. The case was set for a bench trial on August 2,

2006, with the expert witness list due no later than forty-five days prior to trial, that is, around mid-June.

Owing apparently to controversies with several surveyors, Mills had difficulty retaining another licensed professional to conduct a survey. He finally hired Fred Shannon of Laurel County who began his survey work on June 30, 2006. Mills claimed that the Sextons interfered with Shannon's work and prevented him from completing his survey before the expert witness list was due. This appeared not to be the trial court's view and, on July 21, 2006, the trial court sustained the Sextons' motion to strike Shannon as an expert witness.

Mills filed a motion for a continuance and a motion for the trial judge to recuse due to his prior decisions dismissing the case against Grande which were reversed by this Court. These motions were not set to be heard until after the actual trial date. However, due to a conflict with the trial court's own calendar, the trial was rescheduled by the parties' agreement for October 19, 2006.

Despite this additional time, Mills did not obtain a survey of the property in question to present as evidence. Nor did he ask for a continuance on the day of trial. The Sextons were permitted to introduce a survey performed by Bill Ed Cannon. William Sexton also testified in support of the alternative theory of adverse possession. The trial court found in favor of the Sextons, and this appeal followed.

The first of Mills' three arguments on appeal is that the trial court was required to recuse because of its prior two dismissals of an action he filed against

Grande. The second dismissal was based on Mills' failure to prosecute that case. This Court vacated the trial court's decision in an unpublished opinion, *Mills v. Grande*, 2005-CA-002013, because the trial court's decision was based solely on the length of time since the action was commenced, contrary to our decision in *Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky.App. 2006). The trial court has held the matter in abeyance pending the outcome of the case *sub judice*. Mills argues that the trial court incorrectly believes the issues of *Mills v. Grande* will be resolved by the decision in this case. While we do not necessarily agree that the success of Mills complaint against Grande is dependant upon the outcome of this litigation, neither do we perceive any reason for the trial court to recuse based on its dismissals of the earlier matter.

“Every litigant, . . . is entitled to nothing less than the cold neutrality of an impartial judge, and the law maintains that no judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent.”
Commonwealth v. Murphy, 174 S.W.2d 681, 685 (Ky. 1943), *quoting* 30 *Am.Jur.*, Judges, Sec. 53. Consequently, KRS 26A.015(2)(a) requires a trial judge to recuse from any proceeding “[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding[.]” Nevertheless, recusal is not required merely because a trial court presides over other litigation involving one of the parties, even when the outcome of that litigation is not favorable to the party seeking recusal.

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, Ky.*, 348 S.W.2d 759, 760 (1961), *cert. denied*, 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962); *see also Johnson v. Ducobu, Ky.*, 258 S.W.2d 509 (1953). The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal. *Webb v. Commonwealth, Ky.*, 904 S.W.2d 226 (1995).

Stopher v. Commonwealth, 57 S.W.3d 787, 794-95 (Ky. 2001).

The fact that the trial court may have reached a legally incorrect conclusion in dismissing Mills’ suit against Grande without articulating its consideration of all of the factors governing dismissal for failure to prosecute does not meet the heavy burden imposed on Mills to show a lack of impartiality towards his defense in the present matter.

The second grouping of Mills’ complaints begins with the trial court’s failure to grant a continuance of the August 2006 trial date because of the difficulty which his surveyor, Shannon, had in attempting to complete a survey. He claims he requested help from the trial court to stop the Sextons from interfering with Shannon’s survey and was told to file a motion. At that time, the next motion date was after the scheduled trial date. Mills notes that even the trial court characterized its decision to strike Shannon as an expert witness as “harsh.” However, Mills argues that this decision was more than harsh because it assured that he would lose the case.

This argument does not support Mills' contention that the trial court showed bias against him. The trial was ultimately postponed a further two months due a conflict with the trial court's own calendar. Mills does not point to any efforts he made in the interim to secure an order from the trial court allowing Shannon to complete his survey. Nor is there any indication in the record that Mills asked for reconsideration of the decision to strike Shannon as an expert witness. Rather, on the day of trial, Mills went forward with no survey and no expert and failed to request more time to secure either.

Mills also contends that the Cannon survey, introduced by the Sextons, was inadmissible. Mills, who at the time was proceeding *pro se*, drafted requests for pretrial discovery. In response, the Sextons submitted an unsigned, undated, and uncertified survey plat prepared by their expert, Cannon. Mills then filed a motion to compel the Sextons to produce a signed, dated, and certified plat. At a hearing on the motion, the Sextons informed the trial court that they had given Mills a copy of the only survey plat in their possession. The trial court consequently denied Mills motion. A copy of the same unsigned, undated, and uncertified survey plat was entered as an exhibit during William Sexton's deposition. Mills did not object to the exhibit, but merely noted that the plat was not signed or certified.

At trial, the Sextons introduced the same plat with the addition only of Cannon's signature and the handwritten date of August 17, 2005. Mills' objection to its admission as an exhibit was overruled. Cannon also testified as an expert

witness, describing the methods he used to complete his survey and the documents in the chain of title to which he referred. The trial court found that the survey plat accurately depicted his work and, further, concluded that the Sextons had introduced sufficient evidence to establish the location of the boundary between their property and the property owned by Mills.

Mills' argument that Cannon's survey plat was inadmissible is difficult to decipher. However, it appears to rest primarily on three contentions. The first is that, at various times during the period from June 2005 to June 2007, Cannon was under suspension by the licensure board. Thus, Mills contends that any surveying work performed during that time could not be admissible. He finds it too convenient that the plat, as eventually produced at trial, was signed while Cannon was licensed, but between two periods during which that license was suspended. The second issue raised by Mills is the trial testimony of Robert Fentress, the Assistant Director of the licensure board, to the effect that an unsigned, undated, and uncertified plat map is not recordable. Thus, the survey plat Mills received in discovery was not a recordable instrument. Finally, he argues he suffered prejudice and unfair surprise because he never saw the signed and dated plat until it was introduced at trial. While we find the issue of Cannon's suspensions unpersuasive, we will address Mills' other complaints about the admission of the Cannon survey plat.

Mills argues that because Cannon's survey plat was not recordable, it was inadmissible at trial. He offers no support for this argument. The Sextons, on

the other hand, point out that the Kentucky Administrative Regulations (KAR) governing professional engineers and land surveyors specifically allow the use of a working drawing or unfinished plat as an exhibit, although such a drawing may not be used to record a land transfer. 201 KAR 18:150 Section 10(1) and (2). At trial, the trial court stated that the lack of a signature and date on the plat did not affect the admissibility of the survey plat, but rather the weight which the fact finder would attach to the evidence. We are at a loss to discern the relevance of whether the unsigned plat, furnished during discovery, was recordable when the Kentucky Administrative Regulations provide for the use of an unfinished plat as an exhibit. Further, the actual plat introduced at trial, while otherwise identical to the plat furnished in discovery, was in fact signed and dated.

Mills' final complaint about the admission of the signed Cannon survey plat at trial is that he suffered unfair surprise and prejudice. He points to the requirement in Kentucky Civil Rule (CR) 26.05(b) outlining the duty to amend responses to interrogatories.

(b) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Mills then argues that the case of *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999), prohibited the Sextons from supplementing their discovery responses once the trial began. The reasoning underlying the decision in *Fratzke* is simply inapplicable

here. *Fratzke* involved a party's failure to specify the amount of unliquidated damages suffered as specifically mandated by CR 8.01(2). Thus, it was held that, since the specific language of the rule does not allow the damages to "exceed the last amount stated in answer to interrogatories" *Fratzke* could not recover for her unliquidated damages. Given that the only difference between the survey plat furnished in discovery and the one admitted at trial was the addition of Cannon's signature and handwritten date, we are not persuaded that the information furnished to Mills in discovery was incorrect. The signature and date merely affected the weight of the evidence, just as Cannon's testimony would have. Further, since the contents of the survey plat introduced at trial were identical in every respect to the information furnished during discovery, there was no unfair surprise and any error in admitting the signed and dated survey plat would be harmless.

Third and finally, Mills argues that the Sextons' alternate theory that they owned the disputed property by adverse possession was not supported by the evidence. CR 52.01 provides that the factual findings of a trial court are binding upon the appellate courts "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The trial court noted that Mills did not present a survey or any expert witness testimony of his own as to the location of the boundary between his property and the property owned by the Sextons. Mills' testimony was characterized as "vague" and the trial court further found that he

was not able to state with particularity the amount of property that he was claiming, nor did he offer any drawing, map, or plat to identify the specific area in which he claimed ownership.

William Sexton testified as to his ownership and use of the property for a period in time of excess of fifteen years. Sexton's testimony included the assertion that the disputed property had been in his family since before his birth in 1926. Sexton himself had never lived anywhere else, and he and his family members had raised cattle, kept gardens, and had previously cleared portions of the disputed property. The trial court found that Mills did not offer any testimony that disputed Sexton's claims of continuous use of the property. In fact, Mills himself admits that the Sextons' current house is, and has been for more than fifteen years, located on a portion of the disputed property. This Court has previously found CR 52.01 to be applicable to boundary disputes. *Webb v. Compton*, 98 S.W.2d 513, 517 (Ky.App. 2002). Thus, Mills' failure to show clear error in the trial court's factual findings compels us to uphold them.

The trial court concluded, as a matter of law, that the Sextons met the burden of proving ownership by adverse possession of the disputed property as an alternate theory of their case.

The basic elements of adverse possession are well-established. In order to establish title through adverse possession, a claimant must show possession of disputed property under a claim of right that is hostile to the title [owner's] interest. Further, the possession must be shown to be actual, open and notorious, exclusive, and continuous for a period of fifteen years.

Phillips v. Akers, 103 S.W.3d 705, 708 (Ky.App. 2002). The testimony which the trial court found to be persuasive, and accepted in its findings of fact, met all of the elements of the test for adverse possession. Thus, the trial court correctly decided the boundary dispute between Mills and the Sextons in favor of the Sextons.

For the foregoing reasons, the judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Linda J. West
Barbourville, Kentucky

BRIEF FOR APPELLEE:

Yancey L. White
Manchester, Kentucky