

RENDERED: OCTOBER 30, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001212-MR

KATHY CARUTHERS

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 98-CI-00272

EARL ROBINETTE; ELBERT
T. SESCO; ELBERT SESCO;
AND AMERICAN GENERAL
HOME EQUITY, INC.

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

VANMETER, JUDGE: Kathy Caruthers appeals from a May 28, 2008, judgment of the Pike Circuit Court holding that she has no interest in, or ownership rights to, certain real property in Pike County. We vacate the judgment and remand this case

for further proceedings in accord with the opinion and directions entered by this court in 2004 relating to this matter.¹

The present appeal is Caruther's second appeal to this court. The first appeal followed the trial court's March 2003 judgment holding that Caruthers had no interest in, or ownership rights to, certain real property in Pike County. In 2004, this court vacated the 2003 judgment and remanded the matter to the trial court for "additional findings of fact, conclusions of law and a judgment consistent with this opinion."

On remand, the trial court conducted a hearing at which the parties presented their respective arguments regarding the remanded issues. Caruthers indicated that she had no new evidence to present, while appellees moved to present evidence provided by a surveyor, John Justice, either at a trial or via memorandum. The parties and the trial court then debated whether this court's 2004 opinion required the trial court to take additional proof.

Ultimately, the trial court denied appellees' oral motion for the court to consider Justice's evidence on remand, and allowed appellees 30 days either to take Justice's deposition on avowal or to place his report and map into the record by avowal. The trial court further ordered that after submission of the Justice avowal, the parties had 30 days in which to submit proposed Findings of Fact, Conclusions of Law, and Judgment on the remanded issues. During the same hearing, the trial court read this court's 2004 opinion into the record and stated, in

¹ Appeal No. 2003-CA-000842 (April 23, 2004).

effect, that it found the opinion difficult to understand. On May 28, 2008, the trial court entered a judgment identical to its 2003 judgment.

While we recognize that on occasion the directions of this court may be less than clear, in this case no ambiguity exists as to the fact that our 2004 opinion remanded the matter to the trial court for additional findings of fact and conclusions of law. According to the law of the case doctrine, the 2004 final decision issued by this court “whether right or wrong, is the law of the case and is conclusive of the questions therein resolved and is binding upon the parties, the trial court, and the Court of Appeals.” *Hogan v. Long*, 922 S.W.2d 368, 370 (Ky. 1995); *see also Thomas v. Commonwealth*, 931 S.W.2d 446, 450 (Ky. 1996); *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky. 1989); *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982); *Pieck v. Carran*, 289 Ky. 110, 157 S.W.2d 744, 746 (1941). The trial court has neither the authority nor the discretion to say otherwise. Irrespective of whether the trial court conducted a new hearing or admitted additional evidence, the prior mandate of this court requires the trial court to make additional factual findings. The trial court’s verbatim re-entry of its prior Findings of Fact, Conclusions of Law, and Judgment is clearly insufficient.

With respect to the trial court’s failure to recuse, whether or not the issue was properly preserved, we note that recusal is waived if not asserted at the first instance a party learns of the grounds for recusal. *See Bussell v. Commonwealth*, 882 S.W.2d 111, 112 (Ky. 1994) (holding that the defendant waived any objection to the trial judge sitting on the case by failing to move for

recusal when the judge indicated a willingness to recuse himself some five months before trial; thus, the recusal motion made six days before trial was untimely).

In this instance, the trial judge informed the attorneys of his prior representation of Caruthers, at which time the attorneys indicated that the parties had no objection to the trial judge's presiding over this case. Over three years later, Caruthers moved for recusal. Clearly, this motion was untimely and any request for recusal was waived.

We vacate the 2008 judgment and remand this matter for further proceedings in accord with the opinion and directions entered by this court in 2004.²

ACREE, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN RESULT ONLY.

² We will note that we deem it unacceptable for the trial court to enter the same judgment a third time.

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