RENDERED: SEPTEMBER 9, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000934-MR

CLYDE WILLIAM COX AND HIS WIFE,
JOYCE COX — APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE SHEILA ISAAC, SPECIAL JUDGE
ACTION NO. 00-CI-00294

FREIDA JOAN LOVING AND
JAMES JARBOE[1] — APPELLEES

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: LAMBERT, NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Clyde William Cox, and his wife, Joyce Cox (Coxes), appeal from a judgment entered by the Whitley Circuit Court on February 18, 2010, in a boundary dispute coupled with a trespass action for the wrongful taking of timber.

[1] Although named as an appellee in the notice of appeal, no brief has been filed on Jarboe's behalf.

Having reviewed the record, the briefs and the law, we ORDER the appeal DISMISSED.

PROCEDURAL HISTORY and FACTS

This matter is before us for a second time, having previously been appealed to another panel of this Court by Freida Joan Loving when the trial court set aside the jury's verdict of $5,600.00 in her favor because "the issues were not fairly and adequately presented to the jury for decision[.]" We set forth the facts of the original appeal as stated in *Loving v. Cox,* No. 2003-CA-000658-MR, 2004 WL 1948407, (rendered September 3, 2004, unpublished; rehearing denied October 29, 2004; DR denied March 9, 2005).

> 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[2] 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.

[2] Kentucky Rules of Civil Procedure. (Footnote added).

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.[3] 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[4] 364.130.

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[3] The precise wording of Interrogatory No. 2 was,

> If you found for [Loving's] survey in answer to Interrogatory No. 1, what sum do you believe from the evidence will fairly and reasonably compensate [Loving] for her damages sustained as a direct and proximate result of the actions of the Defendant, Clyde Cox, including the value of the timer [sic] taken and the damage to the property?

The instruction did not exclude any items from consideration. Nor did it state a maximum amount that could be awarded. (Footnote added).

[4] Kentucky Revised Statutes. (Footnote added).

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.,] 277 Ky. 608, 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.

Upon review of the foregoing facts, the panel held: the trial court should not have set aside the jury's verdict[5] because it was supported by sufficient evidence; it was error to direct a verdict for Jarboe because he admitted cutting timber on the disputed land and "there was sufficient testimony at trial for the jury to assess damages against Jarboe for the stumpage value of the timber and cleaning up the disputed area[;]" and, the trial court never reviewed the jury's verdict for excessiveness "because he overturned the jury verdict entirely." As a result, the panel reversed the case and remanded it to the trial court with direction that it do three things: (1) reinstate the jury's verdict; (2) determine the amount of damages owed by Jarboe; and (3) review the jury verdict for excessiveness.

The case was returned to the Whitley Circuit Court, whereupon Loving filed, on May 12, 2005, separate motions for judgments against Jarboe in the amount of $4,597.64 and against the Coxes in the amount of $12,100.00. On May 19, 2005, the Coxes filed an objection to Loving's motion to confirm the judgment against them as being excessive. The same day, the Coxes filed a CR 60.02 motion alleging Loving's surveyor had committed perjury at trial.[6] When

[5] In its opinion on remand, the Court of Appeals stated, "there was sufficient evidence to support the jury's verdict." This statement is made in relation to the jury's determination that the disputed property belonged to Loving and should not be construed as a comment on the damages award.

[6] On February 3, 2005, the Coxes filed a complaint against professional engineer and land surveyor Harrison Smith with the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors. In January 2007, the inquiry was resolved by consent decree in which

the CR 60.02 motion was filed, no valid judgment had been entered. While the Court of Appeals had directed the trial court to reinstate the jury's verdict, no action had been taken.

On January 5, 2007, Loving filed a verified motion for the trial judge to recuse alleging: his rulings had been hostile towards her; he had favored the Coxes who were represented by his former law partner; and, his setting aside of the jury's verdict had been reversed on appeal. The Coxes and Jarboe opposed the motion to recuse and it was denied on May 10, 2005. While the Coxes remained focused on the alleged perjury and the pending CR 60.02 motion, on January 30, 2007, Loving asked the trial court "to enter the Judgment per the order of the Kentucky Court of Appeals." On February 15, 2007, the trial judge entered an order reinstating the October 22, 2002, judgment stating:

> IT IS ORDERED that pursuant to the Opinion of the Kentucky Court of Appeals entered on September 3, 2004, the Judgment signed on October 21, 2002[,] and entered on October 22, 2002[,] be and is hereby reinstated on the docket of this court and is in full force and effect and shall be given full faith and credit subject to further rulings of the Court.
>
> THIS IS A FINAL AND APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.

Despite distribution of the order to counsel for all parties, entry of the order appears to have gone unnoticed as no attempt was made to have it set aside or to appeal it.

Smith made no admission of wrongdoing.

The next document filed in the record is a second motion by Loving for the trial judge to recuse and Jarboe's objection to the motion. The motion to recuse is followed by interrogatories and a request for production of documents filed by Loving in preparation for a hearing on July 13, 2007, on the CR 60.02 motion alleging perjury.

On July 11, 2007, Loving filed a third version of her motion to have the trial judge recuse. Thereafter, on October 12, 2007, the trial judge overruled the CR 60.02 motion the Coxes had filed pertaining to the alleged perjured testimony. The closing sentence of that order stated:

> IT IS ORDERED that the CR 60.02 motion be and is hereby overruled in its entirety, the Judgment entered on October 22, 2002[,] and affirmed by the Court of Appeals be and is hereby reinstated with full faith and credit.

No motion was filed to set aside this order or to appeal it. On December 3, 2007, Loving moved the trial court "to declare the jury award of [$5,600.00] plus judgment interest from October 21, 2002[,] as the proper verdict of the jury." In the same motion, Loving requested a survey fee of $5,000.00 and an attorneys' fee of $12,500.00 plus the $130.00 cost of filing the appeal to this Court which she had won.

THE CURRENT APPEAL

This brings us to the events leading to the current appeal. After protracted debate about who should hear the case on remand[7] following the

[7] *Cox v. Braden,* 266 S.W.3d 792 (Ky. 2008).

retirement of the original trial judge, Hon. Jerry Winchester, and his entry into the senior judge program, the Hon. Sheila Isaac was appointed as a special senior judge on April 13, 2009. Four days later, without mentioning entry of the two orders that had previously reinstated the jury verdict; Loving moved the court to set a hearing "on all remaining issues."

A hearing was convened on August 5, 2009, at which counsel for the Coxes, Loving and Jarboe discussed the meaning of the Court of Appeals opinion on remand. Again, no mention was made of the two orders entered in 2007 that reinstated the jury verdict. From the outset, the trial court stated the jury's verdict did not appear to be excessive. The Coxes disagreed, contending the jury's verdict was excessive on its face because it exceeded $1,100.00 (stumpage value of $697.64 plus clean-up costs of between $400.00 and $500.00). Loving maintained that while Jarboe may have been an innocent trespasser, the Coxes were not. The trial court pointed out that the Court of Appeals had not held that Jarboe was an innocent trespasser, but rather had merely stated, "it appears that Jarboe was an innocent trespasser acting under Cox's color of title." The Coxes argued that Loving had not offered authority for her contention that Jarboe could have been an innocent trespasser while the Coxes were not.

The trial court stated that the Coxes were asking it to apply a different standard than the one used in the jury instructions, to which no one had objected, and so long as the jury's verdict was consistent with those instructions, it was not excessive and could not be attacked on remand due to lack of preservation. The

trial court noted that had the Court of Appeals believed the jury instruction was flawed, it would have ordered a retrial with new instructions.

After reinstating the jury's verdict and determining it was not excessive, the trial court addressed the only unresolved issue—the portion of the $5,600.00 judgment against the Coxes owed by Jarboe. The Coxes stated this was a moot issue because the Coxes were going to pay the full amount of the judgment since they felt responsible for Jarboe's trespass. The Coxes argued that the jury probably included the cost of Loving's survey in the damages award which was error since the award should have been limited to stumpage value plus restoration costs. The trial court again noted it could not apply a new standard and since there had been no objection to the instructions at trial, they were "perfect." The Coxes stated they did not believe the trial court was following the Court of Appeals' mandate. The hearing concluded with the trial court setting a tentative date for a hearing to apportion Jarboe's amount of the judgment if Jarboe and Loving could not reach an agreement on the amount owed.

The trial court entered judgment on February 18, 2010, finding that: judgment, consistent with the jury's verdict, was originally entered on October 22, 2002, and should be reinstated; a Court of Appeals' panel had previously held the trial court had erred in directing a verdict as to Jarboe; Jarboe had since entered into an agreed judgment[8] with Loving, stating he owes damages to Loving in the

[8] The agreed judgment does not appear in the record on appeal and is therefore unavailable for our review, were we inclined to consider it. We know of its existence only because it is referenced in the judgment entered on February 18, 2010. As the appellants, the Coxes are responsible for presenting a complete record to this Court for review. *Chestnut v.*

amount of $7,500.00; and, the jury's $5,600.00 verdict against the Coxes was not excessive. The final judgment was entered *nunc pro tunc* giving Loving judgment against the Coxes in the amount of $5,600.00 plus interest at the judgment rate from October 22, 2002, until paid, plus costs. Loving was also awarded judgment against Jarboe in the amount of $7,500.00 plus interest at the judgment rate from October 22, 2002, until paid, plus costs.

The Coxes moved the trial court to alter, amend or vacate the new judgment seeking specific factual findings as to: (1) the stumpage value of the timber taken; (2) the cost to restore Loving's property to its pre-logging condition; and, (3) the sum proven for each element of damages allowed against an innocent trespasser. They also sought a reduction of the verdict to the damages proved at trial and asked that interest be awarded as of February 18, 2010, the date on which the judgment was reinstated, rather than October 22, 2002, the original entry date of the jury's verdict because the "sum certain" was unknown until 2010. Finally, the Coxes argued the trial court had exceeded its authority on remand by endorsing the agreed judgment reached between Jarboe and Loving because the Court of Appeals had only ordered the trial court on remand to determine that portion of the $5,600.00 jury verdict against the Coxes that was owed by Jarboe. On May 8,

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Commonwealth, 250 S.W.3d 288, 303 (Ky. 2008). When the record is incomplete, we assume the omitted record supports the trial court's decision. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985) (citing *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 604 (Ky. 1968)).

2010, the trial court entered an order denying the motion to alter, amend or vacate. This appeal followed.

LEGAL ANALYSIS

In an attempt to clarify the confusing and confounding posture of this case, we have set forth more than a decade of facts and procedural history. This detailed explanation seems profuse in light of our swift, but necessary, dismissal of the appeal, but it is our attempt at explaining how we have reached this juncture. The Coxes raise four points on appeal—that the trial court erred in entering judgment against Jarboe for more than a portion of the jury's verdict; that the trial court erred in entering the judgment *nunc pro tunc*; that the jury's verdict is excessive because it exceeds the damages proved at trial; and, that the jury's verdict was clearly erroneous because it was contrary to the evidence and was therefore excessive—none of which we will address because the trial court lacked jurisdiction to enter the judgment from which this appeal emanates.

A critical event in this case appears to have been overlooked by the litigants, perhaps because they were preoccupied with alleged perjury and a debate over who should preside over the case. On February 15, 2007, the original trial judge reinstated the jury's verdict in a "final and appealable order."[9] Importantly, no one moved to set this order aside or to appeal it. In fact, its entry appears to have gone unnoticed as it is not referenced elsewhere in the record and was not

[9] Loving argues for the first time in her brief to this Court that this order resolves the case. The Coxes did not comment in their reply brief upon the existence or effect of the order entered on February 15, 2007.

mentioned at the hearing convened in August 2009. While this order did not do all three acts directed by the Court of Appeals panel on remand, it became final after the passage of ten days when no one took action, because "a court only 'has control over its judgment with a right to order a new trial, or alter, amend or vacate the judgment, either on motion or *sua sponte*, for ten days after entry of judgment . . . .' " *James v. James,* 313 S.W.3d 17, 21 (Ky. 2010) (quoting *Johnson v. Smith*, 885 S.W.2d 944, 947 (Ky. 1994)). Furthermore, while this order did not complete all three actions mandated by the Court of Appeals, it did not reserve "further questions or directions for future determination" and therefore, was not interlocutory in nature. *Hubbard v. Hubbard,* 303 Ky. 411, 197 S.W.2d 923, 924 (1946) (quoting 2 Am.Jur., Appeal and Error, § 23). Having failed to timely move the trial court to fully complete its task on remand, or to file a timely notice of appeal[10] of the 2007 order to this Court, the Coxes can no longer complain about the jury's verdict being excessive or the portion[11] of the $5,600.00 verdict owed by Jarboe. For that reason dismissal is the only avenue available to us.

In addition to not challenging the order entered on February 15, 2007, the parties took no action to challenge the order denying the CR 60.02 motion which again reinstated the original jury verdict. Whether the case became final in

[10] CR 73.02(1)(a) requires the filing of a notice of appeal "within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2)." CR 73.02(1)(d) authorizes a trial court to extend the time for filing an appeal by a maximum of ten days upon a showing of excusable neglect. No notice of appeal of this order has ever been filed.

[11] According to counsel for the Coxes at the hearing held on August 5, 2009, this is a moot point since his client will pay Jarboe's portion of the $5,600.00 verdict.

February 2007 or October 2007 is a distinction without a difference and an answer we need not reach today. Regardless of the answer, the time for filing an appeal expired years ago.

We comment briefly upon the judgment entered on February 18, 2010. That judgment has no effect because the court lost jurisdiction over the case in 2007. The notice of appeal from which this case emanates was not filed until May 18, 2010.

Finally, we realize neither of the orders entered by the circuit court in 2007 apportioned to Jarboe an amount of the jury's verdict against the Coxes as it was directed to do on remand. We further recognize a court speaks only through its written orders entered in the official record. *Kindred Nursing Centers Ltd. Partnership v. Sloan, 3*29 S.W.3d 347, 348 (Ky. App. 2010), citing *Midland Guardian Acceptance Corp. of Cincinnati, Ohio v. Britt*, 439 S.W.2d 313 (Ky. 1968); *Commonwealth v. Wilson*, 280 Ky. 61, 132 S.W.2d 522 (1939). Thus, we cannot read into the order words that do not appear. However, it is entirely possible that the circuit court believed Jarboe was not responsible for any portion of the jury's verdict and for that reason chose not to assign a dollar amount to him or to comment upon it. Thus, we conclude the Coxes are responsible for paying the entire $5,600.00 judgment to Loving.

For the foregoing reasons, be it ORDERED, that Appeal No. 2010-CA-000934-MR is DISMISSED for failure to appeal from the appropriate order in a timely fashion.

ALL CONCUR.

ENTERED: September 9, 2011

/s/ C. Shea Nickell
JUDGE, COURT OF APPEALS

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