

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002024-MR

JOSEPH L. DONAHUE;
DIANNE E. DONAHUE;
KENNETH SIMPSON;
BONNIE SIMPSON;
THOMAS WATHEN FENWICK;
WILLIAM MARKS, III;
ROBERT LEE SIMPSON;
CAROLE J. SIMPSON;

APPELLANTS

v.

APPEAL FROM LARUE CIRCUIT COURT
HONORABLE JOHN D. SEAY, JUDGE
ACTION NO. 09-CI-00076

KOETTER WOODWORKING, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: Koetter Woodworking owns two tracts of property in Larue County, Kentucky, consisting of approximately 1200 acres. The northern part of

Koetter Woodworking's property borders a tract that belongs to Joseph L. Donahue, Kenneth R. Simpson, William Marks, III, Thomas Wathen Fenwick, and Robert Lee Simpson; each of these men holds respective one-fifth undivided ownership interests in this abutting tract.

Koetter Woodworking filed a complaint to quiet its title against these abutting property owners, along with Donahue's wife, Dianne; Kenneth Simpson's wife, Bonnie; and Robert Simpson's wife, Carol. (Collectively, we will refer to these abutting property owners and their wives as the "Appellants.") In particular, Koetter Woodworking alleged that the Appellants were wrongfully claiming ownership of approximately 20 acres of the northern part of its property near their shared boundary. Koetter asserted that its ownership of this acreage was reflected in the descriptions contained in its deed and through a valid chain of title. Alternatively, Koetter Woodworking asserted that it owned the twenty acres in dispute by virtue of adverse possession, alleging that it and its predecessors in title "have notoriously, openly, continuously, and exclusively claimed ownership and possession of the property in dispute for more than 15 years."¹

Koetter Woodworking also alleged that it held an easement to access its property from a public highway, that a portion of this easement crossed the

¹ To establish adverse possession, the possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for a period of fifteen years. *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky. 1955); KRS 413.010.

Appellants' property, and that the Appellants "should honor this general easement of ingress and egress and be prevented from obstructing same."

The Appellants denied Koetter Woodworking's allegations in their respective answers, and also filed a counterclaim to establish themselves as the owners of the disputed twenty acres.

A trial was held in this matter. On the issue of the disputed 20 acres, the circuit court held in favor of Koetter Woodworking on two alternative theories. First, the circuit court found that Koetter Woodworking and its predecessors validly held the land at issue pursuant to a verifiable chain of title. Second, and alternatively, the circuit court held that Koetter Woodworking's possession of that land "has been open, hostile and notorious for the prescribed period and must now ripen into an ownership interest," or, stated differently, that Koetter Woodworking had adversely possessed the disputed 20 acres.

Additionally, the circuit court awarded Koetter Woodworking the easement over the Appellants' property Koetter prayed for in its complaint, and enjoined the Appellants from interfering with Koetter Woodworking's use and enjoyment of that easement, holding that "an award of easement is supported by the deeds and by the expert testimony."

On appeal, the prehearing statement submitted by the Appellants describes the issue as follows: "The issue on this appeal is whether the trial court judgment was supported by substantive evidence[.]"

As to the issue of the disputed 20 acres in this matter, the Appellants argue that Koetter Woodworking presented insufficient evidence supporting that its deed described and incorporated that acreage, and take issue with the circuit court's decision to rely upon a survey and the trial testimony of Koetter's expert witness, licensed surveyor David Ruckman. Furthermore, the Appellants urge that their own surveyor, Steven Hibbs, presented compelling evidence to the contrary.

However, the Appellants offer no argument addressing the circuit court's alternative basis for finding in favor of Koetter on this issue, *i.e.*, that Koetter had adversely possessed that disputed acreage. For this reason, we are precluded from reversing the circuit court's determination that Koetter was the rightful owner of the disputed acreage. As stated in *Milby v. Mears*, 580 S.W.2d 724, 729 (Ky. App. 1979), "When a judgment is based upon alternative grounds, the judgment must be affirmed on appeal unless both grounds are erroneous." And, "[a]n appellant's failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues. Consequently, the trial court's determination of those issues not briefed on appeal is ordinarily affirmed." *Id.* (internal citations omitted.)

Next, Appellants assert that the trial court erred in finding that Koetter held an easement over their property. The Appellants do not argue that the evidence of record fails to support the trial court's findings in this respect. Rather, as they describe it in their brief, the Appellants believe that two statements that Koetter's counsel made during trial "constituted a judicial admission that [Koetter]

was not claiming any easement rights over Appellants' property, and, perforce, removed easements from the field of disputed issues herein.”

By making this argument, the Appellants raise issues in their brief that were not identified in their prehearing statement, which contains nothing relating to the issue of any alleged judicial admissions, and, as noted, states only that “The issue on this appeal is whether the trial court judgment was supported by substantive evidence.” Civil Rule (CR) 76.03(8) states: “A party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.” Therefore, we will not consider this argument. As our Supreme Court has explained,

[T]he significance of this rule [CR 76.03(8)] is that the Court of Appeals will not consider arguments to reverse a judgment that have not been raised in the prehearing statement or on timely motion. After all, the issues on appeal are the issues used to challenge the trial court's judgment.

American General Home Equity, Inc. v. Kestel, 253 S.W.3d 543, 549 (Ky. 2008); *see also Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004) (refusing to reach appellant's argument to reverse trial court's judgment on ground not among issues raised in prehearing statement or by timely motion under CR 76.03(8)).

For these reasons, the judgment of the Larue Circuit Court is
AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry D. Raikes
Bardstown, Kentucky

BRIEF FOR APPELLEE:

James T. Kelley
Elizabethtown, Kentucky