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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002136-MR

EVERETT JOSEPH AND LOUISE JOSEPH APPELLANTS

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 02-CI-00322

MAGDALEAN JOSEPH APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON AND WINE,[1] JUDGES.

ACREE, JUDGE: Everett and Louise Joseph appeal a jury verdict and judgment in a boundary dispute with Everett's sister, Magdalean Joseph. The jury found and the judgment reflects a boundary consistent with that identified by Magdalean's surveyor; the judgment included damages against Everett and Louise in favor of

[1] Judge Thomas B. Wine concurred in this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

Magdalean in the amount of $28,333.53 to compensate her for timber they had harvested from her land.[2] Finding their argument on appeal unpersuasive, we affirm.

After entry of the judgment, Everett and Louise filed a timely motion for a new trial. One ground they raised was that Magdalean failed to prove title to the property on which the timber they harvested grew. The motion was denied on all grounds.

On appeal, Everett and Louise refer to documentation of the chain of title indicating that Magdalean did not own the property.[3] Their argument is essentially that the 1946 deed which conveyed the property at issue to Everett and Magdalean's parents, Levi Joseph and Viola Joseph, was recorded in the county clerk's office as actually transferring the property to "Larry Joseph, and his wife."[4] Everett and Louise argue that this means the property was never technically conveyed to Levi and Viola (despite the fact that upon recordation of this deed, the two began living on the property and did so until their deaths). Consequently they conclude that Magdalean could never have acquired the eleven-twelfths interest in

[2] Strictly speaking, both Magdalean and Everett are owners of the land at issue; Magdalean possesses an eleven-twelfths interest in the property, and Everett owns the remaining one-twelfth interest. Everett and Louise own a plot of land adjacent to another plot jointly owned by Magdalean and Everett. The award of damages reflects Magdalean's 11/12 share of the timber removed from the property at issue.

[3] We do not know if all this evidence, attached to the brief as an appendix, is a part of the record because Everett and Louise fail to cite to that record, ignoring the requirements of Kentucky Civil Procedure (CR) 76.12(4)(c)(iv) and (v). Its presence in the record is irrelevant, however, given Everett's and Louise's admission that Magdalean owned the property in question.

[4] It is not refuted that no one in the family is named Larry, nor is anyone who testified familiar with any Larry Joseph.

the subject property because all subsequent transfers of the property from Levi and Viola were invalid.[5]

The failure-of-title argument Everett and Louise bring for the first time before this Court, the basis of which was known to them while the case was before the circuit court, is contrary to the position they took in the pleadings and at trial, sullying the argument as disingenuous.

Still, they argue in effect that CR 61.02 permits this Court to reverse the judgment when a party shows a palpable error affecting the party's substantial rights by presenting an argument they could have made before the circuit court, but chose not to do so. Everett and Louise misread the rule.

In *Cobb v. Hoskins*, 554 S.W.2d 886 (Ky. App. 1977), this Court explained that "[i]n applying this rule, the palpable error must result from action taken by the court rather than an act or omission by the attorneys or the litigants." *Id.* at 888. We see no error on the part of the circuit court in this case that would justify applying the rule because Everett and Louise removed any issue of Magdalean's ownership throughout the case while it was before the circuit court.

Magdalean's complaint alleged that she "is the owner, with an 11/12th undivided interest, and Defendants Everett Joseph and Louise Joseph are owners, sharing a 1/12th interest in" the subject property. In their amended answer filed on September 6, 2002, Everett and Louise admitted this allegation. Everett repeated his belief that he shared ownership of the subject property with Magdalean in his

[5] Everett appears unconcerned that if this argument is correct, he does not possess any interest in the property at issue either.

deposition and presented further testimony to that effect at trial. He even explained to the jury that "[t]hey made a mistake putting the name on there, they didn't put Levi's name on there, they put Larry Joseph . . . ."

Everett and Louise were aware of the mistake on the deed all along. They chose not to base their defense at trial on an obvious clerical error. Nevertheless, that decision cannot be the basis of an argument for palpable error for it was not an error of the court.

In accordance with Appellants' request, we reviewed the record for palpable error and found none. For the reasons stated herein, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

Frank R. Riley, III
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