RENDERED: APRIL 20, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002162-MR

ROBERT KNOX LEWIS — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 08-CI-00234

DEBORAH L. MANNING;
TERRY LITTLETON; AND
WILMA LITTLETON — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Robert Knox Lewis appeals from a judgment of the Magoffin Circuit Court entered following a bench trial finding in favor of the

[1] Senior Judge Joseph E. Lambert 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.

Appellees. Appellant had filed an action against Appellees Deborah L. Manning, Terry Littleton, and Wilma Littleton seeking to void or reform a deed of conveyance between the parties on the grounds that the subject property contained fewer acres than represented in the deed. After careful review, we reverse and remand for further proceedings consistent with this opinion.

Appellees jointly owned certain real estate on Road Branch of Rock House Fork in Magoffin County, Kentucky. The deed description for the property indicated that it was "supposed to be three hundred (300) acres, more or less[,]" in size. On May 24, 2007, Appellees entered into a purchase contract to sell the property to Appellant for $159,900.00.[2]

As part of that contract, Appellant signed two documents of note. The first was entitled "Listing Broker's Disclosure to Potential Buyers" and provided as follows:

> I, Deborah L. Manning, Broker/Owner, of Manning Realty, am disclosing to any potential buyer that I am the listing broker and also co-owner of the property located in Magoffin County and further described in Deed Book 172, page 266 in the Magoffin County clerk office.
>
> Furthermore, I am also disclosing that I am not warranting or do not in any way guarantee the total amount of acreage included in this tract of land. This property is being sold by the boundary description. The buyer is welcome to have the property surveyed at the buyer's expense.

[2] Appellee Manning was a co-owner of the property and also acted as the real estate broker for the conveyance.

The second document was entitled "Survey Waiver Form" and contained the following language:

> I/We the Seller(s) or Buyer(s), Bob Lewis, hereby acknowledge(s) that we/he/she has/have been advised by our/his/her real estate agent, Roger K. Mayse, of real estate company, Manning Realty [ ], to obtain a property survey of the property of which I/We are either selling or buying. The Seller(s)/Buyer(s) hereby waive(s) our/his/her right to a property survey against the advice of his/her real estate agent or broker and agree(s) to hold harmless the real estate agents or brokers involved in this transaction for amount of acreage, boundary lines, or anything that could have been uncovered or clarified by a survey of the property.

Appellant signed both documents and, thereby, acknowledged that the total amount of acreage in the property was not guaranteed or warranted and that the property was instead being sold by the boundary description. The closing of the property was scheduled for October 15, 2007, at the office of attorney Jeffrey Scott.[3]

On the morning of the scheduled closing, Appellant spent approximately two hours looking at the property with a surveyor. The surveyor told him that the front boundary of the property was approximately 1,000 feet shorter than expected and that this resulted in a significant discrepancy in the acreage. When Appellant arrived at the closing, he told Appellees that he was not going to close because he was concerned that the property did not contain 300 acres. Instead, he offered to pay for a survey and $300.00 an acre for the land that was actually there, but this offer was declined. Appellant was instead advised that the property was being sold by the boundary – not by the acreage – and was told

[3] Scott also performed a title examination on Appellant's behalf.

that he need not close on the purchase of the property that day. Nonetheless, Appellant called and consulted with his attorney and decided to close that day pursuant to the terms originally agreed to by the parties.

On September 16, 2008, Appellant filed an action against Appellees in which he sought to void or reform the deed of conveyance and to obtain at least a partial refund because the subject property did not contain 300 acres. Appellant alleged that prior to the sale he had asked Appellees about the actual size of the property and was told that "the tract of land consisted of 300 acres of land as stated in the description of the property." Appellant further alleged that after he took possession of the property he discovered that it consisted of fewer than 45 acres – a deficiency of approximately 85%.[4] Appellant attributed this discrepancy to fraud on the part of Appellees or mutual mistake by the parties and sought relief on those grounds.

Following discovery, a bench trial was held on October 4, 2010. Appellant testified that based on his dealings with Appellees prior to the closing, he believed that he was buying 300 acres. However, Appellant offered contradictory testimony as to the question of whether Appellees had actually represented to him that the property contained 300 acres, at first testifying that he was not sure if Appellee Manning had told him this but later testifying that she had. He subsequently acknowledged that on the day of the closing he did not

[4] Mitch Estes, a surveyor hired by Appellant after the closing, testified that the subject tract contained only 44.329 acres due to various sales or conveyances that had not been recorded in the chain of title.

know how many acres there were in light of his conversation with the surveyor that morning.

Appellant also testified that he had talked to Merle Williams, a neighboring landowner, on the day of the closing and was informed that Williams owned 40 acres of the subject property and that a realty company owned an additional portion. Because of this, Appellant testified, the actual acreage of the property was "up in the air" and he did not want to close on the purchase. Despite this fact, Appellant ultimately decided to close because he wanted the land for hunting. Nonetheless, Appellant testified that had he known he was getting less than 45 acres he would not have done so.

Appellee Manning testified that on the day of the closing, Appellant told Appellees that he did not want to close because "he didn't believe the acreage was there." According to Manning, she told Appellant that the property was being sold by the boundary and that she had never guaranteed that it contained 300 acres because she had never had the property surveyed and had no way of knowing the actual acreage. She further indicated that when selling non-surveyed property, she never warranted acreage. Manning testified that when Appellant announced that he was not going to close, he was informed that he would not be compelled to buy the property if he did not want to.

However, Appellee Manning also acknowledged that Appellees had previously signed an oil and gas lease stating that the property contained 300 acres, but she noted that they did not prepare the lease and did not actually know how

many acres were contained in the tract. Appellees, the Littletons interacted with Appellant only on the day of the closing and testified that they had never told him that the property contained 300 acres. They also testified that they had never walked the boundary of the property and did not know the actual acreage.

Rhonda Damron, Jeffrey Scott's paralegal, testified that she was in a conference room with the parties during the closing and had witnessed all conversations between them. Damron handled much of the work for the closing, including the title work. According to Damron, when Appellant arrived for the closing he stated that he was not going to close because he was concerned that the property did not contain 300 acres. Damron testified that no one in the conference room told Appellant that the property was 300 acres in size. Instead, Appellant was plainly advised that the property was being sold by the boundary and not by the acreage. Damron also testified that Appellant had previously been given a PVA assessment showing that the property consisted of only 128 acres, a fact which Appellant acknowledged.[5] She also told Appellant that he need not close that day, but she noted that Appellant insisted on closing.

On November 1, 2010, the trial court entered judgment in favor of Appellees. Based on the evidence discussed above, the court found that Appellant "was aware at the time of the closing that the property did not contain 300 acres" and that "he purchased the land by the boundary as it was shown to him." Because of this, the court concluded that no fraud had occurred that would merit voiding the

[5] Appellant never discussed this assessment with Appellees.

deed. The court also found that a reformation of the deed was not merited under the so-called "ten-percent rule"[6] due to the deficiency in the actual acreage because Appellant "was well aware of the fact that the property did not contain 300 acres and chose to close the real estate transaction anyway." This appeal followed.

This case was tried by the trial court sitting without a jury and, therefore, our standard of review is governed by Kentucky Rules of Civil Procedure ("CR") 52.01, which provides that, "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]" *See also Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). On appellate review, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Gosney*, 163 S.W.3d at 898. "Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person." *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003). "If the findings are supported by substantial evidence, then appellate review is limited to whether the facts support the legal conclusions made by the finder of fact. The legal conclusions are reviewed *de novo*." *London v. Collins*, 242 S.W.3d 351, 354

[6] This term will be explained in further detail below.

(Ky. App. 2007). After reviewing the trial court's findings of fact, it is apparent that they are supported by substantial evidence. Thus, we are left only to consider the court's application of the law to those facts.

Appellant argues on appeal that the trial court's judgment was erroneous because the deed of conveyance between the parties was based on a mistake as to the acreage of the subject property. Appellant contends that he would not have agreed to buy the property had he known it consisted of fewer than 45 acres since the deed represented that it contained approximately 300 acres. Therefore, he argues, the deed must be voided or at the very least reformed to reflect the correct acreage.

Of particular note, Appellant invokes the "ten-percent rule" in support of his position. This equitable doctrine holds that where relief from a sale and deed of conveyance is sought because of a deficiency in acreage and the deficiency is greater than ten percent of the stated acreage, relief will be granted if at the time of the conveyance the parties are ignorant of the deficiency or the vendee is deceived by the misrepresentations of the vendor as to the quantity of land. *Wallace v. Cummins*, 334 S.W.2d 904, 907 (Ky. 1960); *see also Rust v. Carpenter*, 158 Ky. 672, 166 S.W. 180, 182 (1914). Fraud or mistake are generally presumed under the ten-percent rule, and application of the rule is "almost automatic" when the deficiency is ten percent or more. *See Maxwell v. Moorman*, 522 S.W.2d 441, 443 (Ky. 1975); *Wallace*, 334 S.W.2d at 907. "[T]he right of recovery for acreage

deficiency is based simply on broad principles of equity[.]" *Maxwell*, 522 S.W.2d at 444.

The leading Kentucky case on the issue before us is *Wallace v. Cummins*, *supra*, in which the then-Court of Appeals discussed the ten-percent rule. Although the *Wallace* Court declined to grant relief even though the discrepancy in acreage was somewhat greater than ten percent, it notably embraced *Harrison v. Talbot*, 2 Dana 258, 32 Ky. 258 (1834). In *Harrison*, the Court identified four types of real estate transactions that generally arise:

> (1) "Sales strictly and essentially by the tract, without reference in the negotiation or in the consideration to any estimated or designated quantity of acres."
> (2) "Sales of the like kind, in which though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description and under such circumstances or in such manner as to show that the parties intended to risk the contingency of quantity, whatever it might be, or how-much-soever it might exceed or fall short of that which was mentioned in the contract."
> (3) "Sales in which it is evident from extraneous circumstances of locality, value, price, time and the conduct and conversations of the parties, that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might be reasonably calculated on as within the range of ordinary contingency."
> (4) "Sales which, though technically deemed and denominated sales in gross, are, in fact, sales by the acre, and so understood by the parties."

Id., 2 Dana 258, 32 Ky. at 266.

Per *Harrison*, the first two categories do not allow relief on grounds of mistake in the quantity in the absence of fraud, but the latter two allow for relief

if the complaining party has not somehow forfeited his equity. *Id.*, 2 Dana 258, 32 Ky. at 266-67. In our view, the instant case falls squarely under the third *Harrison* category, as a sale "in which it is evident from extraneous circumstances of locality, value, price, time and the conduct and conversations of the parties, that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might be reasonably calculated on as within the range of ordinary contingency."

The parties' contract was a deed of conveyance where the description said that the subject property was "supposed to be three hundred (300) acres, more or less." Appellees had previously signed an oil and gas lease on the same property for 300 acres. A deed of conveyance is the grantor's creation. Although deeds often use descriptions that are copied from preceding instruments, nothing prevents a grantor from disclaiming any representation as to acreage, and nothing prevents a grantor from correcting a description by noting off-conveyances from an original tract. A grantor should not be permitted to sell a deed description that states an acreage quantity and avoid liability for an overwhelming deficit by a modest disclaimer in a preliminary document. The deed at issue here contains no limitation or disclaimer of warranty of acreage.

Subsequent to the conveyance at issue, it was determined that the acreage contained in the boundary was 44.329 acres. As such, there is a deficit of approximately 85% – or nearly 256 acres. Although it is clear that Appellant knew or should have known that the real property to be conveyed was less than 300

acres, nothing in his conduct suggests that he should have known that only 15% of the acreage stated in the description actually existed. Indeed, it is apparent from the parties' interactions that none of them really knew how much land was actually being conveyed. Likewise, there is no proof that the parties contemplated more than an ordinary variation from the stated quantity and certainly no proof they contemplated an 85% deficiency.

We further note that the property conveyed was rough, mountainous land with ill-defined boundaries. Appellant intended to use it for hunting. The purchase price was $159,900.00. Based on 300 acres, the per-acre cost would have been $533.00. However, based on the actual acreage of 44.329 acres, the cost was $3,607.12 per acre. This is simply too great a discrepancy to ignore; therefore, equitable relief is warranted.

Appellant appears to have behaved unwisely and perhaps contributed to his own troubles. However, Appellees appear to have been equally ignorant or indifferent as to the facts. In a sense, both sides are responsible. While Appellant may appear to be largely to blame for what transpired, this case is not about blame but rather about equity. Not every person who behaves unwisely should be required to bear the full weight of his conduct. In light of the astounding discrepancy between the acreage set forth in the deed and the actual acreage, we believe it is appropriate to reverse and remand to the trial court with directions to formulate an equitable remedy in the nature of a price reduction or rescission of the subject transaction. Had the discrepancy in acreage been less severe, our opinion

likely would be different. A deficit of over 250 acres of a 300-acre tract, however, is simply too great to ignore.

For the foregoing reasons, the judgment of the Magoffin Circuit Court is reversed and remanded for further proceedings consistent with this opinion.

THOMPSON, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTING: The facts of this case are that neither party knew the acreage, the seller made no representation of acreage, the property was sold by the boundary and not by the acreage, the purchaser was accompanied by a surveyor and viewed the property and was told there was a substantial discrepancy in acreage, and the purchaser delayed the closing to speak with his attorney. Regardless, the purchaser decided to close on the sale of the property. The law only goes so far to protect a purchaser from unwise decisions.

BRIEF FOR APPELLANT:

Ira S. Kilburn
Salt Lick, Kentucky

BRIEF FOR APPELLEE:

Gordon B. Long
Salyersville, Kentucky