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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000827-MR

MARLENE HUDSON MARTIN,
MAYRENE HUDSON WOOLDRIDGE,
AND SHEREE WILLIAMS MILLER — APPELLANTS

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 10-CI-00490

TIMMY AND ROSE MARIE ANTLE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND JONES, JUDGES.

CLAYTON, JUDGE: Marlene Hudson Martin, Mayrene Hudson Wooldridge, and Sheree Williams Miller (hereinafter the "Hudson family") appeal the judgment of the Russell Circuit Court granting Timmy and Rose Marie Antle's directed verdict in a case based upon the Hudson family's allegations of various wrongful acts by the Antles including trespass, waste, wrongful entry, and denial of access to real

property. The real property consisted of a reservation of one acre of land for a Hudson family cemetery in a conveyance of property made in 1910. After careful consideration, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Hudson family cemetery is located on a cattle farm in rural Russell County, Kentucky. Access to the cemetery is off a secondary county road, which is black-topped. The Hudson family's claim to the cemetery is based on a 1910 conveyance, which reserved one acre of land on a farm for use as a cemetery. In 1911, the family cemetery was cited in another deed wherein S.B. Hudson and his wife Maud conveyed the real property where the cemetery was located to Newby Hudson. The deed states in pertinent part:

> Excluding a strip 15-feet wide across the southeast end to be used as a passway, and also excluding one acre on the northeast end and marked by walnut tree in the center which is used for burial purposes . . .

More recently, on April 8, 1996, Timmy Antle and his wife, Rose Marie, purchased 114 acres, which included the cemetery. Their deed states:

> Beginning at a hickory . . . to a 114 acre survey . . . excluding a strip of 15-feet wide across the southeast and to be used as a passway, also excluding one acre on the northeast end marked by a walnut tree in the center, which is used for burial purposes.

The Hudson family alleges that the Antles built cattle feed lots, which trespass onto the cemetery land. They now seek to enforce the full one-acre cemetery as

centered by the walnut tree. Notwithstanding the language in the deed about the walnut tree, there is currently no walnut tree standing in the cemetery.

In their complaint, the Hudson family contends that the Antles committed the following wrongful acts: unlawful trespass on the cemetery by building cattle fences; committed waste upon the cemetery; wrongfully entered the cemetery property; and denied the plaintiffs (the Appellants) access to the cemetery. Additionally, the Hudson family seeks money damages.

The Antles denied the allegations in the complaint and argued that the Hudson family failed to state a claim upon which relief could be granted. Further, the Antles pled the affirmative defenses of estoppel, laches, statute of frauds, statute of limitations, waiver, adverse possession, and standing.

Several pretrial motions were filed. Both parties filed summary judgment motions, which were denied. In addition, the Antles filed a motion to dismiss based on standing, arguing that the reservation of the cemetery did not vest title in the Hudson family and, therefore, they, under the statute of frauds, did not have the authority to file the action. The trial court denied the motion.

Also, the Antles filed a motion to exclude the deposition testimony of Blanche Fortenberry, the 89-year-old granddaughter of S.B. Hudson, a party named in the 1911 deed. The Antles maintained that her testimony regarding the walnut tree is hearsay. Blanche testified that the walnut tree was pointed out to her by mother, father, grandmother and her aunts (S.B. Hudson's daughters) when she was ten years old.

Additionally, the Antles filed a motion in limine related to the testimony of Michael Syphax, the surveyor at trial. Even though Syphax did not testify in a pretrial deposition, he provided a copy of a proposed survey exhibit to be used at the trial. The Antles' motion in limine was based on his failure to use a reputable scientific methodology in conducting the survey.

Trial on the matter was held on March 8, 2012. After the trial court heard all of the evidence, both parties made motions for directed verdicts. The trial court denied the Hudson family's motion but granted the Antles' motion. On April 18, 2012, the trial court entered the written directed verdict, which among other things, included the following findings:

> The Antles are fee simple owners of the 50 acre farm where the cemetery is located.
>
> The Hudson family's proof concerning the following items was speculative, amounting to conjecture – the location of the cemetery; the 1910 deed's description of the cemetery's location was that it was in the southeast corner of the 50 acre tract whereas the 1911 deed's description of the cemetery's location was that it was in the northeast corner of the 50 acre tract; the walnut tree is gone.
>
> The location of the walnut tree, supposedly in the center of the 1 acre cemetery reserve, was based on hearsay.
>
> The survey submitted by Michael Syphax lacked scientifically reliable information and was based on speculation about the location and the shape of the one acre tract.
>
> The deeds do not indicate the cemetery boundaries.

No evidence was provided as to cattle waste affecting the cemetery gravesites.

The Antles enlarged the area of the cemetery by fence on two occasions.

No proof was provided that the Hudson family did not have access to the cemetery.

No evidence of damages was provided.

At the conclusion of its directed verdict, the trial court stated that the causes of action had not been proven and that it would have been an abuse of discretion to allow the case to go to the jury.

The Hudson family now appeals the directed verdict.

STANDARD OF REVIEW

Appellate review of the grant of a directed verdict is guided by the following provisions. A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ. *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998).

Further, a motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. *National Collegiate Athletic Association v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988), citing *Kentucky Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (Ky. 1944).

A motion for a directed verdict raises only questions of law regarding whether there is any evidence to support a verdict. *Harris v. Cozatt, Inc.*, 427

S.W.2d 574, 575 (Ky. 1968). Although it is the jury's province to weigh evidence, a court will direct a verdict where there is no evidence of probative value to support the opposite result. Further, a jury is not permitted to reach a verdict based on mere speculation or conjecture. *Wiser Oil Co. v. Conley*, 380 S.W.2d 217, 219 (Ky. 1964).

When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992). And with regard to the review of the sufficiency of evidence, this Court must respect the opinion of the trial court that heard the evidence since a reviewing court is rarely in as good a position as the trial court that presided over the initial trial to decide whether a jury can properly consider the evidence presented. Once the issue is squarely presented to the trial court, which heard and considered the evidence, a reviewing court cannot substitute its judgment unless the trial court is clearly erroneous. *Bierman*, 967 S.W.2d at 18. With this standard in mind, we turn to an analysis of this case.

ANALYSIS

On appeal, the Hudson family argues that the trial court erred in granting a directed verdict because sufficient evidence existed to show that the Antles' fence enclosed only one-third acre in violation of the deed and, therefore, the Antles' feed lots trespassed onto their cemetery. To support this proposition, they maintain that they provided credible evidence about the location of the walnut

tree, which was not hearsay; that the location of the acre of land for the cemetery is not speculative; and, that they provided a qualified surveyor to establish the size and dimensions of the cemetery. Further, not only did the trial court err in granting the directed verdict against them, the Hudson family maintains that the trial court should have granted their earlier motion for summary judgment.

In contrast, the Antles support the trial court's decision that it would have been an abuse of discretion to allow the case to go before a jury based on the speculative nature of the Hudson family's evidence. Additionally, the Antles contend that the Hudson family did not prove their causes of action or establish any damages.

All issues presented by the Hudson family involve matters concerning the location, the boundaries, and the shape of the one acre reserved for the cemetery. The proof provided to the trial court, however, was speculative, ambiguous, based on conjecture, and for some issues, non-existent.

First, the location of the acre is entirely speculative. For instance, the first deed admitted into evidence regarding the chain of title says that the cemetery is located in the southeast corner of the tract, but the second deed in the chain of title indicates that the land is located in the northeast corner of the tract. In addition, the "passway" discussed in the second deed, which was on the southeast portion, no longer exists.

Moreover, the walnut tree mentioned in the deeds as being in the center of the acre no longer exists. The only evidence concerning the location of

the walnut tree was based on hearsay. Blanche, the 89-year-old granddaughter of S.B. Hudson, clearly indicated both in her pretrial deposition and after clarification from the bench during the trial allowing her to testify what she had been told, that long-deceased relatives pointed out where the walnut tree was located. At the time, she was ten years old, so this incident occurred almost eighty years ago. Moreover, as a little girl, her older relatives pointed out the tree, so her knowledge is not based on independent information. Further, she said that the walnut tree blew down in 1951, over sixty years ago. Another Hudson family witness testified to some roots on the land, but was not able to definitely tie these roots to the walnut tree in question. The court determined that Blanche's testimony was hearsay. Kentucky Rules of Evidence (KRE) 803(20) allows for a hearsay exception which would allow proof of matters relating to boundaries. This is based upon "[r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community…." There is no proof in the record of any reputation regarding the boundary to the cemetery prior to this controversy. In cases arising out of other jurisdictions, this rule has been interpreted to mean that the matter must have been one of general interest so that there was an opportunity for scrutiny which formed the basis of the community reputation. *See Darlington County v. Perkins*, 269 S.C. 572, 239 S.E.2d 69, (S.C. 1977). There was no such proof presented in this case.

The testimony of Blanche does not meet the hearsay exception. Blanche's testimony was about the location of the walnut tree and not the

boundaries. She was unsure of the boundaries of the acre itself. The Kentucky case of *Wells v. Sanor*, 151 S.W.3d 819 (Ky. App. 2004), has a brief reference to KRE 803 (20) in footnote 3 at page 824 based upon the North Carolina case of *Broyhill v. Coppage*, 79 N.C.App. 221, 339 S.E.2d 32 (N.C. App. 1986). A footnote, especially one without any analysis, is not controlling in the case at bar.

The surveyor, Syphax, said at trial that he saw the stake placed by Blanche and used it as the center of the property, which he opined must have been a square lot. But the placement of the stake was not based on information from a deed, and the shape of the cemetery was based on conjecture. Syphax noted in his testimony that the deed does not specify the shape of the cemetery as square, or, for that matter, as any shape at all. Thus, the survey provided by the Hudson family is based on conjecture, or hearsay at the most, and as a consequence, lacked scientific reliability as to the location and the shape of the land.

Next, regarding the allegation that cattle waste affected the cemetery, no evidence was given. One member of the Hudson family explained during the trial that there had always been cattle around the cemetery and no problems had resulted from the cattle. Another family member, Mayrene Hudson Wooldridge, stated during her cross-examination that not only was there no water runoff from the Antles' feed lots into the cemetery, but also that no cattle waste impinged on the cemetery.

Moreover, while the Antles built a larger, stronger fence around the cemetery, the new fence was constructed outside the cemetery's barb-wire fence.

Indeed, the fence built by the Antles actually enlarged the area of the cemetery. Furthermore, with regard to the size of the cemetery, that is, an acre, Mayrene testified at trial that the Antles offered them an acre of land, around a grove of trees, to expand the cemetery, but the offer was not acceptable to the Hudson family.

Finally, the Hudson family provided no evidence demonstrating any damages to them. Mayrene and other family members said at trial that the family, as a group, was not seeking money. As far as the Hudson family assertion that they were denied access to the cemetery, this was never substantiated. The cemetery was located on a secondary, black-topped county road. In fact, Sheree Williams Miller and Marlene Hudson Martin, confessed at trial that they had never been denied access.

The Martins do not have a fee interest in the property. Their complaint alleges trespass by the erection of a fence, waste, and the Antles trespassing upon the land. In *Commonwealth of Kentucky Dept. Fish & Wildlife Resources v. Garner*, 896 S.W.2d 10, 14 (Ky. 1995), the court stated that "[t]he existing precedent in Kentucky indicates that the mere construction of gates by the servient estate does not violate the dominant estate owner's easement rights." (quoting *Herndon v. McKinley*, 586 S.W.2d 294 (Ky. App. 1979)). Further the court held that there must be a right of access for ingress or egress to a private cemetery. There was no factual dispute that the Martins had access to the cemetery and that no waste was committed upon the land. The Antles owned the land and

had a right to be on the land. "The servient landowner and its licensee have rights and the easement to visit the cemetery does not entitle the user thereof to exclusive control of the land, but only to the extent necessary to enable it exercise its rights." *Id.* "The servient owner has all the rights and benefits of ownership consistent with the easement, however. Thus, the right to use the land remains in the servient owner, without any express reservation to that effect, so far as such right does not conflict with the purpose and character of the easement. The servient owner may cultivate or make improvements on the land subject to an easement of way, or use the way for any purpose, provided that he or she does not interfere with the right of passage resting in the owner of the easement." 25 Am. Jur. 2d *Easements and Licenses* § 86 (2014). Absent an injury there were no resulting damages of any kind.

The Hudson family argues that it should have been allowed to present its jury instructions to establish its theory of the case. But if the trial court determines that there are no material facts to present to a jury, jury instructions are meaningless. Here, the trial court heard the testimony and decided that it was too speculative. Accordingly, there was no need for jury instructions.

Lastly, a summary judgment motion is properly granted when a trial court correctly decides "that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. In our review of the propriety of a summary judgment, we evaluate whether the trial court correctly found that there were no

genuine issues of material fact. Here, the trial court decided that material facts existed supporting both sides' arguments and allowed a jury trial. Given the evidence presented at the trial, we are unable to reconcile the Hudson family's argument that the trial court erred in denying their motion for summary judgment. At trial, they produced no evidence to support some claims and other evidence was contradictory and speculative. Certainly, there is nothing now that would allow us to reverse the trial court's decision regarding its denial of their original motion for summary judgment.

CONCLUSION

Accordingly, we affirm the decision of the Russell Circuit Court to grant a directed verdict to the Antles because there was no proof to support the claims of the Hudson family.

CAPERTON, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS BY SEPARATE OPINION.

JONES, JUDGE, DISSENTING: Respectfully, I dissent from the majority. It is my opinion that the trial court: (1) incorrectly determined that Blanche Fortenberry's testimony was inadmissible hearsay; (2) incorrectly determined that the survey offered by the Appellants "lacked a scientifically reliable basis and was entirely speculative as to the location of the cemetery as well as the shape of the cemetery"; (3) incorrectly concluded that Appellants had no right to insist on the location of the cemetery; and (4) incorrectly refused to make a

determination regarding the location of the cemetery. For these reasons, I would reverse the trial court's directed verdict.

Blanche Fortenberry's testimony

Blanche Fortenberry testified that her grandfather, S. B. Hudson, founded the cemetery many years ago. She testified that she knew of the cemetery's location and the location of the walnut tree referred to in the deeds. She testified that she recalled picking walnuts with her brother as a child from under a single tree. She further testified that the walnut tree had been pointed out to her as a child from many different members of her family including her mother, father, grandmother, and her aunts (H.B. Hudson's sisters).

Fortenberry's testimony regarding picking walnuts in that location as a child was not hearsay because it was based on her personal experience. While the event occurred many years ago, that fact goes to the credibility of the testimony and not its admissibility. Additionally, the trial court erred in refusing to admit Fortenberry's testimony regarding what her relatives had pointed out to her as a child with respect to the location of the walnut tree. Pursuant to KRE 803(20), testimony regarding "[r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located" is not excluded under the hearsay rules.

In *Wells v. Sanor*, 151 S.W.3d at 824, we considered a similar objection to testimony regarding the location of a boundary. We held that the

testimony of the sons of a prior dominant-estate owner as to the prior owner's statements concerning creation of new bridge on a roadway easement were admissible under the hearsay exception for reputation concerning boundaries or general history in the dominant-estate owners' action to quiet title regarding the roadway easement.

> Wells's complaint that the finding was based on inadmissible hearsay testimony from George Delong's sons about his statements concerning creation of the new bridge is without merit. This testimony was admissible as an exception to the hearsay rule under KRE 803(20) for reputation concerning boundaries or general history.

Id. at 824 n.3; *see also Howard v. Kingmont Oil Co.*, 729 W.W.2d 183,185 (Ky. App. 1987).

In sum, I believe that the trial court erroneously excluded Fortenberry's testimony in determining whether to grant a directed verdict. The testimony was admissible both as a result of Fortenberry's personal observations and experiences and based on the history as conveyed to her regarding the boundary marker, a recognized exception to the prohibition against admission of hearsay evidence.

The hearsay exception rule contains no requirement that the lands be public lands or lands that affect a general public interest. Nevertheless, the majority cites *Darlington County v. Perkins*, a 1977 South Carolina case, for the proposition that the rule has been interpreted to mean that the "matter must have been one of general interest so that there was an opportunity for scrutiny." While

the *Darlington* case involved public land, South Carolina does not limit its hearsay exception only to public lands. *See Pinckney v. City of Beaufort*, 296 S.C. 142, 146, 370 S.E.2d 909, 911 (S.C. App. 1988) ("[E]vidence of common repute is admissible as to the location of a private as well as a public boundary line.").

Surveyor Michael Syphax

I also do not agree that the trial court correctly excluded Syphax's survey. Syphax reviewed essentially all the evidence available, including the deeds and headstones. He based his survey, in part, on a stake that Blanche placed in the ground in conformance with her memory of where the walnut tree was previously located. And, based on his credentials and the available evidence, he determined that in his expert opinion the boundary lines for the cemetery would have been in the shape of a square.

Pursuant to KRS 322.010(10)(a)(1) land surveying includes:

> (1) Measuring and locating, establishing, or ***reestablishing lines***, angles, elevations, natural and man-made features in the air, on the surface and immediate subsurface of the earth, within underground workings, and on the beds or surfaces of bodies of water involving the:
>
> > a. Determination or establishment of the facts of size, shape, topography, and acreage[.] [Emphasis added].

As a licensed surveyor, I believe Syphax was qualified to give an opinion on the shape of the cemetery easement at issue. Certainly, the Appellees were free to cross-examine him on his methodology and the basis for his conclusions, which they did during trial. However, where his opinions were based

on all the available evidence, including a review of the deeds and a site visit, I believe that he was qualified to give an opinion as to the shape of the acre easement.

Location of the Easement

Both the trial court and the majority rely, in part, on the fact that Appellees offered Appellants an acre of land to expand the headstone portion of the cemetery. Apparently, Appellants refused because they wanted the full easement located according to their interpretation of its original location as established by the deeds.

"It must be understood that an easement or any other right of access for ingress or egress to a private cemetery is still governed by the common law principles of easements." *Commonwealth Dept. of Fish & Wildlife Resources v. Garner*, 896 S.W.2d 10, 13 (Ky. 1995). "The traditional rule at common law is that an easement with a fixed location cannot be relocated without the express or implied consent of the owners of both the servient estate and dominant estate, except in cases of an estate by grant where the creating instrument provides otherwise." *Wells*, 151 S.W.3d at 823. Thus, I do not believe that the Appellees offer of a full acre easement somewhere other than the location established by deed was of any legal consequence.

It is undisputed that the original deeds called for an acre cemetery. Based on a review of the record, it appears that the portion where the existing headstones are located was fenced in by someone in Appellants' family and that

this area was located within the acre reserved for the entire cemetery plot. The Appellees then fenced in about one-third of an acre that included the headstone area, but was less than the total acre called for in the deeds. Appellees later offered a full acre, but this was not in the place that the Appellants believe it should have been per the deeds. Thus, while the family could visit the headstone portion of the cemetery, the fence erected by Appellees cut off their uninterrupted access to the *entire acre cemetery* as centered by the walnut tree. Furthermore, Appellants testified that the Appellees placed cattle feed lots on the acre cemetery plot. The evidence at trial indicated that Appellants intend to continue burying relatives in the cemetery such that the headstone portion of the cemetery will continue to expand beyond the smaller fenced-in section of the cemetery. The Appellants testified at trial that the presence of the feed lots on the acre plot interferes with their use and enjoyment of the entire cemetery plot because it is muddy and smells.

I believe that the majority's opinion is factually flawed because it considered the fenced-in headstone portion of the cemetery as the entire cemetery. Based on this factual error, the majority states that Appellants testified that no cattle or waste impinged on the "cemetery." This is not what the record established. The record established that while no feed lots sit inside the smaller fenced portion of the cemetery, the feed lots sit within the acre. This is a significant factual distinction.

Location of Cemetery Easement

Furthermore, I believe that the trial court had an obligation to make a threshold legal determination regarding the easement's boundaries. Even in cases where there is no mention of a cemetery easement in the deed, and therefore no boundaries of record, our courts have set boundaries relying on lay and expert witness testimony.

Indeed, case law in Kentucky allows for a cemetery easement, and the setting of boundaries based solely on a survey and deposition testimony as to the family's beliefs of where the boundaries lie, even where the deeds never mention a cemetery easement and convey the entire tract in fee simple. *See Salyer v. Tackett,* 2006 WL 659233(Ky. App. 2006) (2005-CA-001046-MR) , at *1 ("The trial court had a survey 'showing the rows of graves in the cemetery and the natural boundaries of the cemetery including the east boundary marked by defendant, Eric Salyer[.]' The trial court found an easement by prescription for the cemetery according to the boundaries set forth by Eric Salyer in his deposition, and granted the family members a permanent injunction allowing visitation and further burials within the cemetery boundaries as established.").

If a trial court can set boundaries without any mention of a cemetery easement in the deeds, then I believe that a trial court can set boundaries according to the deed which designated one acre as centered by the walnut tree, the location of headstones, the testimony of lay witnesses, and the expert opinion of a surveyor. I believe the trial court should have determined the boundaries as a threshold legal issue.

Nominal Damages

Finally, in an action such as the present, I do not believe that Appellants were required to prove actual damages. I believe Appellants were entitled to nominal damages to the extent that they were able to prove that Appellees obstructed their use of the full acre in the location set forth according to the deeds. *See Cox v. Blaydes*, 54 S.W.2d 622, 624 (Ky. 1932).

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