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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001688-MR

J. DAVID AND KAY COLE; MICHAEL JONES; STEVE WHEELER; K. REDMON; DAVID F. BRODERICK; CENTER MAIN PARTNERS, LLC; HOLLAN-HBD, LLC; LANDMARK BUILDINGS, LLC; AND LEGAL REALTY, LLC — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 12-CI-00231

NORMAN JOHNSON; SCHAMPMIRE PROPERTIES, LLC; KEITH VAUGHN, III, AND SAM VAUGHN; FIRST FREE METHODIST CHURCH; CITY OF BOWLING GREEN; DYER BROWN PROPERTIES, LLC; LEADER INVESTMENTS, LLC; KAZIMUDDIN PROPERTIES, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND J. LAMBERT, JUDGES.

ACREE, CHIEF JUDGE: Appellants J. David Cole, Kay Cole, David Broderick, Steve Wheeler, Kevin Redmond, Michael Jones, Landmark Buildings LLC, Center Main Partners LLC, Hollan HBD LLC, and Legal Realty LLC ("Appellants"), appeal the Warren Circuit Court's August 30, 2013 Order modifying findings of fact and conclusions of law set forth in its December 20, 2012 Judgment. That Judgment determined that Appellants did not obtain a prescriptive easement in the driveway which runs over Appellee Norman Johnson's real property. We affirm.

I. Background

In 2007, Johnson purchased a parcel of real property located at 903 College Street, Bowling Green, Kentucky ("Johnson Property") from BB&T Bank. The Johnson Property, which had been used as a series of banks for over thirty years, rests on the corner of College Street and Main Street. The Southeast boundary fronts along College Street, while the Northeast boundary fronts along Main Street. Appellants own several parcels of improved real property which front along College Street and are located to the Southwest of the Johnson Property.

The Johnson Property has a parking lot and driveway located in the rear of the building. This driveway provides access to the Johnson Property's parking lot,

as well as the banking drive-thru, and can be used to access a nearby alleyway. This driveway is the source of the current dispute.

For over 15 years, Appellants used this driveway as a throughway to the nearby alleyway, which they in turn used to access the rear side of their own properties. However, in the fall of 2011, Johnson erected a construction fence and gate behind the Johnson Property, which blocked the Main Street driveway entrance.[1] Shortly after Johnson erected the gate, Appellants contacted Johnson to have the gate removed.[2] Appellants claimed that the driveway located behind the building was a perpetual right of way and that they had obtained a prescriptive easement to its use. Johnson declined to remove the gate. Appellants sued, and the Warren Circuit Court scheduled a trial.

The night before trial, Appellee Johnson's counsel, Brian Lowder, contacted Appellants' expert witness, Harvey Johnston, and questioned him regarding the content of his testimony, as well as what materials he had reviewed. Upon learning of the conversation, Appellants filed a motion to disqualify Lowder. The trial court denied the motion, but instead limited the scope of Lowder's cross-examination of the expert witness, prohibiting cross-examination regarding any information discussed during Lowder's conversation with Johnston.

[1] In his deposition, Johnson testified that he erected the construction gate to discourage patrons of a nearby bar from wandering onto his property.

[2] While this gate prevented Appellants from accessing the alley by way of Johnson's property, there are several other routes of access which Johnson does not own and did not block. See R. at 47.

After declining to disqualify Lowder, the Warren Circuit Court held a bench trial with an advisory jury, and found that Appellants had failed to establish a prescriptive easement because their use of the driveway was permissive, and therefore not hostile. Because Appellants' use of the driveway was not hostile, Appellants failed to establish the requisite elements necessary to obtain a prescriptive easement.

Following the Judgment, Appellants filed both a CR[3] 59.03 motion to Amend, Alter or Vacate, and a CR 52.04 motion requesting additional findings of fact, arguing that the trial court should make specific findings of fact as to each individual plaintiff. Appellants also filed a CR 59.01 motion for a new trial on the grounds that Lowder's contact with Johnston was improper. The trial court granted the motion to Amend, Alter or Vacate, and modified its judgment to include a statement that *each* plaintiff failed to establish a prescriptive easement. That Order also denied the motion for a new trial. This appeal followed.

II. Standard of Review

On appellate review, the circuit court's findings of fact shall not be set aside unless they are clearly erroneous. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). Findings of fact are clearly erroneous when they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). "Substantial evidence is defined as evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable persons."

[3] Kentucky Rules of Civil Procedure.

Borkowski v. Commonwealth, 139 S.W. 3d 531, 533 (Ky. App. 2004) (internal quotation marks omitted). We review the trial court's conclusions of law *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

"Our discovery rules are designed to promote efficiency, order, and expediency within the judicial system, and the sanction for their violation is within the discretion of the trial court, subject to the restriction that CR 37.02 envisions willfulness or bad faith on behalf of the party to be sanctioned." *R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654, 661 (Ky. App. 2009). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

III. Discussion

On appeal, Appellants argue that the trial court erred by: (1) finding that Appellants' use of the Johnson Property was permissive and therefore they failed to establish a prescriptive easement; (2) failing to make findings of fact with respect to each individual plaintiff; (3) denying Appellants' motion to disqualify Johnson's counsel; and (4) denying Appellants' motion for a new trial. We address, and reject, each argument in turn.

A. Substantial evidence was presented that use of the driveway was permissive.

A party asserting a claim that a prescriptive easement has been established must present evidence sufficient to support each of the following elements with regard to the subject property: (1) use of the property was actual; (2) use of the

property was hostile to the property owner, not permissive; (3) use of the property was open and notorious; (4) claimant's use of the property was exclusive; and (5) use of the property under the foregoing circumstances was continuous for the statutory period of fifteen years. *Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc.*, 15 S.W.3d 727, 730 (Ky. 2000). Failure to establish any one of these elements is fatal to a claim of a prescriptive easement. *Allen v. Thomas*, 209 S.W.3d 475, 478 (Ky. App. 2006) ("[A]s easements are not favored under [Kentucky] law, 'the right of one to acquire title to an easement . . . will be restricted unless it is clearly established by the facts that all the necessary requisites of adverse users have been fully satisfied.'"). The trial court focused on the second element – whether use of the property was hostile. So shall this Court.

This Court does not dispute that Appellants presented evidence that Johnson's use of the driveway was hostile. And we would reverse the trial court's ruling if the record demonstrated this was the only substantial evidence – but, it was not. There is evidence on both sides of this issue which the trial court, acting as fact-finder, considered and weighed, giving due regard to the credibility of the witnesses. We are prohibited from reweighing that evidence or reassessing the credibility of the witnesses. We must consider only whether the evidence that the driveway use was permissive is supported by substantial evidence. We conclude that it was.

While Johnson did not produce evidence that Appellants were expressly given permission to use the driveway, *express* permission is not required.

Rather, permission for the use of property may be express *or implied*. *McCoy v. Hoffman*, 295 S.W.2d 560, 561 (Ky. App. 1956) ("It is a well settled rule that use of property [may be based on] express or implied permission."). Evidence produced at trial showed that Appellants used the driveway in the same manner as bank customers, and that the bank took no action to prevent Appellants from using the driveway. One witness, Bill Borders, testified on cross-examination that he had been using the driveway since 1992. Borders confirmed that the building had been used as a bank during this period, and that bank customers, as well as others, used this driveway as an access point. Further, Borders admitted that he thought he had permission to use the driveway and that he would not have done so had bank employees told him not to. From this testimony, a reasonable fact-finder could infer that any use was permissive, and thus it was sufficient to rebut Appellants' presumption. It was not improper for the trial court to assign a greater weight to this evidence, and to conclude that Appellants' use was with the permission of the owners.

Because the trial court's finding of fact that Appellants' use of the driveway was with the permission of the owner is supported by substantial evidence, it cannot be set aside. *See Frances*, 266 S.W.3d at 756. We therefore hold that the trial court's finding that use of the driveway was not hostile was correct as a matter of law and that the Appellants' claim of a prescriptive easement was not, and could not be, established. We affirm the trial court on this issue.

B. The trial court's findings of fact and conclusions of law were sufficient.

The Appellant next argues that, even after amending its judgment in response to their motion, "the Court still failed to specifically state with respect to each Appellant individually how each Appellant refused to establish that the use of the property was hostile and how the proof indicated that the use of the property was in fact permissive." (Appellants' brief, p. 17). The essence of the argument is that the trial court failed to comply sufficiently with CR 52.01 even after Appellants' motion for additional findings. We disagree.

CR 52.01 provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the fact specifically and state separately its conclusion of law thereon and render an appropriate judgment." The purpose of the mandatory findings of fact in CR 52.01 is to provide a clear record of the basis of the trial court's decision, thereby allowing a reviewing court to easily understand the trial court's view of the controversy. *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986). Simply put, a trial "judge must make findings of fact and not address the matter in a perfunctory manner." *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011). The trial court's findings and conclusions in this case were sufficient to satisfy the requirements of CR 54.01.

Frankly, the Appellants demand more than that to which they are entitled under the rule, claiming the final judgment "still omitted any indication of the who, what, when, where or why as requested by Appellants." (Appellants' brief, p. 9). Certainly, the trial court could have provided even more detail than the rule called for, but more is not mandatory simply because a party sought more. "CR 52.02

does not require a trial court to make additional findings in response to a motion." *McKinney v. McKinney*, 257 S.W.3d 130, 134 (Ky. App. 2008). "The rule simply states that the court 'may amend its findings or make additional findings' in response to a motion." *Id*. The trial court concluded such specificity as requested by Appellants was beyond that necessary under the rule. We agree.

The trial court did not err in its ruling in response to Appellants' motion pursuant to CR 52.

C. The trial court did not abuse its discretion by denying more severe sanctions.

Appellants next argue that the trial court erred by declining to impose sanctions or grant a new trial on account of Appellees' attorney's pretrial communication with Appellants' expert witness. In support of their argument, Appellants allege this behavior violated both CR 26.02(4) and SCR[4] 3.130(3.5). While counsel's contact with the expert witness was outside the civil discovery rules, we cannot say that it was a violation of SCR 3.130(3.5).

SCR 3.130(3.5) provides that "a lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; [or] (b) communicate *ex parte* with such person as to the merits of the cause except as permitted by law or court order[.]" An expert witness is not a judge, juror, or prospective juror an d does not qualify as an "other official." Therefore,

[4] Kentucky Supreme Court Rules.

Lowder's communication with the expert witness does not appear to have violated SCR 1.130(3.5).

While not a violation of SCR 1.130(3.5), Lowder's communication constituted improper discovery in violation of CR 26.02(4). Other than an interrogatory, the sole method for discovery of an expert witness is an oral or written examination pursuant to Rules 30 and 31.[5] Lowder's phone call to Johnston was not in compliance with Rule 30 and was therefore improper discovery under the Civil Rules.[6]

However, we review a trial court's decision as to a motion to recuse or to disqualify an attorney for abuse of discretion. *See* 7 Am.Jur.2d *Attorneys at Law* §

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[5] CR. 26.02(4) provides:

> Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> > (a)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) After a party has identified an expert witness in accordance with paragraph (4)(a)(i) of this rule or otherwise, any other party may obtain further discovery of the expert witness by deposition upon oral examination or written questions pursuant to Rules 30 and 31. The court may order that the deposition be taken, subject to such restrictions as to scope and such provisions, pursuant to paragraph (4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

[6] CR 30.02(1) provides: "A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action." Lowder provided no notice to other parties to the action that he would examine Johnston regarding his testimony.

204 (1997). Typically, disqualification of counsel is not an appropriate remedy for a violation of the Civil Rules regarding discovery.[7] "[D]isqualification is a drastic measure which courts should be hesitant to impose except when absolutely necessary." *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555, 560 (Ky. 2001) (citing *University of Louisville v. Shake*, 5 S.W.3d 107 (Ky. 1999)). While he did so in contravention of the Civil Rules, Lowder's contact with an expert witness can hardly be said to mandate this "drastic measure." Therefore, we cannot say the trial court abused its discretion by declining to disqualify Lowder. The less drastic remedy this court elected in this case, limiting the scope of Lowder's cross-examination of Johnston, seems to this Court a measured exercise of judicial discretion.

That being said, we hold that the trial court's denial of Appellants' motion to disqualify was not error, and affirm the trial court on this issue.

D. The trial court did not err in denying Appellants' motion for a new trial.

Appellants further argue that the trial court erred in denying their motion for a new trial as a result of counsel's contact with Appellants' expert witness. This argument is not persuasive.

CR 59.01 allows the grant of a new trial for, *inter alia*, "misconduct of the jury, of the prevailing party, or of his attorney." CR 59.01(b). While Appellants' motion failed to identify the section of the Rule on which their motion was based,

[7] Technically, disqualification is not the correct remedy. Disqualification of counsel may be granted when a lawyer violates the Rules of Professional Conduct. The violation here was improper discovery of an expert witness's testimony. The appropriate action would have been for plaintiffs' counsel to file a motion for discovery sanctions rather than a motion to disqualify.

Appellants' argument in favor of the motion focused on Lowder's *ex parte* contact with Appellants' expert witness. As no other subsection of this rule relates to attorney misconduct, we assume that Appellants' motion was made on the grounds of subsection (b) and address the issue as though it does.

Even though the conduct of the prevailing party's attorney was not entirely proper, that conduct was not sufficient to require a new trial. "Even if the trial court finds that one of the grounds [under CR 59.01] exists, it is not bound in every case to grant a new trial." *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 72 (Ky. 2010). "[W]hether to grant the motion for a new trial is always within the trial court's sound discretion and is entitled to a great deal of deference by an appellate court." *Id*.

Counsel had minor *ex parte* contact with Appellants' expert witness during which counsel asked the witness about the content of his testimony. Counsel apologized to the trial court for this conduct and the trial court restricted the scope of counsel's cross-examination of the witness. The trial judge did not believe the conduct in question to be severe enough to require harsh sanctions, let alone a new trial. The decision was within the trial court's discretion, and we have not been given good reason to reject it as abusive of that discretion. We therefore affirm the trial court on this issue.

IV. Conclusion

For the foregoing reasons, the August 30, 2013 Order of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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Brandon T. Murley
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BRIEF FOR APPELLEE, NORMAN JOHNSON:

T. Brian Lowder
Bowling Green, Kentucky

NO BRIEFS FOR, SCHAMPMIRE PROPERTIES, LLC; KEITH VAUGHN, III, AND SAM VAUGHN; FIRST FREE METHODIST CHURCH; CITY OF BOWLING GREEN; DYER BROWN PROPERTIES, LLC; LEADER INVESTMENTS, LLC; KAZIMUDDIN PROPERTIES, LLC