

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000732-MR

TIMMY ANTLE AND
ROSE MARIE ANTLE

APPELLANTS

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 15-CI-00254

MARLENE HUDSON MARTIN;
MAYRENE HUDSON WOOLDRIDGE;
AND SHEREE WILLIAMS MILLER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JOHNSON,¹ AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Timmy and Rose Antle appeal from the Russell Circuit Court order dismissing their complaint against Marlene Hudson Martin, Mayrene

¹ Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office on November 20, 2018. Release of the opinion was delayed by administrative handling.

Hudson Wooldridge, and Sheree Williams Miller (the Hudson Family). We affirm.

In 2010, the Hudson Family had initiated a claim (Russell Circuit Court Action No. 10-CI-00490) against the Antles for allegations of various wrongful acts by the Antles including trespass, waste, wrongful entry, and denial of access to real property, namely, the reservation of one acre of land for a Hudson family cemetery in a conveyance of property made in 1910. After a two-day trial in 2012, the circuit court directed a verdict in the Antles' favor. That matter was affirmed on direct appeal (No. 2012-CA-000827-MR), and discretionary review was denied by the Kentucky Supreme Court (No. 2014-SC-000479-D). We rely on the facts and procedural history as stated in the previous appeal:

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-foot 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.

Martin v. Antle, No. 2012-CA-000827-MR, 2014 WL 3547778, at *1-2 (Ky. App. July 18, 2014).

After the Court of Appeals affirmed the Hudson Family's appeal², and the Supreme Court denied discretionary review, the Antles brought the within

² This Court held that "[t]he proof provided to the trial court, however, was speculative, ambiguous, based on conjecture, and for some issues, non-existent." *Id.* at *3.

complaint, seeking attorney fees and costs from the Hudson Family for expenses incurred in the Hudson Family's action against them. The Antles based their claim upon the Russell County Ordinance No. 09-07, which is a local version of the Kentucky Right to Farm Act, Kentucky Revised Statute (KRS) 413.072.³ Shortly after the Hudson Family filed its answer, the Antles filed a motion for summary judgment, followed by a motion to dismiss from the Hudson Family. A hearing was held on March 22, 2016, after which the circuit court took the matter under advisement. The circuit court issued its order dismissing the Antles' action on May 4, 2016. The entirety of that order states: "Upon Motion of the Defendants [Hudson Family] and the Court having considered same, heard arguments and received Memorand[a] from both sides, and being otherwise sufficiently advised, it is hereby ORDERED that the above styled action is hereby DISMISSED. This is a final and appealable order." The Antles filed a timely notice of appeal.

The Antles first argue that documentation in the record supports a summary judgment in their favor because all requirements were met regarding the ordinance upon which their action was based. We disagree. The ordinance's stated purpose is "to protect those engaged in normal agricultural operations from

³ "KRS 413.072 (commonly known as the Right to Farm Act) also reflects the agricultural supremacy doctrine by specifically prohibiting any city or county from adopting, and even voids, ordinances which would regulate farming through zoning or other regulations." *Nash v. Campbell Cty. Fiscal Court*, 345 S.W.3d 811, 817 (Ky. 2011).

lawsuits filed by adjoining non-agricultural land users for nuisance purposes.” The situation here is not encompassed by that language. Although the Hudson Family’s original complaint included a nuisance claim, it was grounded in their belief that they were prevented access and were kept from using their family’s cemetery which had been established nearly one hundred years before the Antles purchased their property. The Hudson Family’s lawsuit against the Antles was not because of “misperceptions of country living” as the ordinance states but rather of being cut off from a right they previously enjoyed.

The Antles’ second argument is in response to the Hudson Family’s assertion that the ordinance and statute are unconstitutional for denying them their right to a trial by jury. The Hudsons were afforded a two-day trial. The Antles’ motion for directed verdict was granted because of a lack of evidence to substantiate the claims, not because the lawsuit lacked merit. The issue of constitutionality of the ordinance need not be addressed.

The Antles next assert that the Hudson Family’s failure to prove their claim against the Antles “triggered” a violation of the ordinance; thus, the circuit court erred in dismissing the Antles’ claim. We have already ruled that the ordinance is inapplicable here. Thus, we need not discuss the ordinance’s applicable remedies.

The Antles lastly argue that the circuit court’s granting a directed verdict in their favor in the original action sufficed to meet the ordinance’s requirement of one that is “dismissed with prejudice or without merit.” Again, this argument is moot because of our decision that the ordinance does not apply. Furthermore, as we stated above, the directed verdict was granted because of the Hudson Family’s lack of proof, not lack of merit. *See, e.g., Collins v. Williams*, 10 S.W.3d 493, 496 (Ky. App. 1999).

The order of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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