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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000527-MR

WILLIE C. THOMPSON — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 16-CI-00070

GARY MCCOY; LAWRENCE HICKS;
EARL GRIFFITH; CHARLES GRIFFITH, JR.;
LISA GRIFFITH; AND MICHAEL GRIFFITH — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL, AND L. THOMPSON, JUDGES.

NICKELL, JUDGE: Willie C. Thompson[1] sued Gary McCoy for damages resulting from repairs McCoy made to Rockhouse Fork on Cherokee Creek and the

[1] This is not the first property dispute between Thompson and McCoy. They previously contested ownership of a twenty-five-acre parcel Thompson assumed was his but which had not been conveyed to anyone by its original owner. The trial court awarded summary judgment to Thompson, but a panel of this Court reversed and remanded for trial on the merits. *McCoy v.*

county road[2] running beside it. Thompson alleges the repairs caused his land to flood and erode. On realizing surrounding landowners may have assisted McCoy, Thompson sought and was granted leave to amend the complaint to add indispensable parties. The suit resolved Thompson's claim for damages from McCoy and decided the boundary between the Thompson and McCoy farms. In a bench trial, the Lawrence Circuit Court ruled in favor of all Appellees on causation and damages and set the boundary as reflected in a survey offered by McCoy. A counterclaim filed by McCoy for reimbursement of half the money expended to maintain the county road and to require Thompson to remove rocks he had placed in the creek was denied. Thompson appeals. After thorough review, we affirm.

FACTS

Thompson bought a 199-acre farm on Rockhouse Fork in 1979 where he camps, farms and gardens. McCoy bought an adjacent farm north and upstream of Thompson in 1999. A county road, the sole means of access to both farms, runs

Thompson, 2005-CA-000270-MR, 2006 WL 1451567 (Ky. App. May 26, 2006). After trial, the court awarded the acreage to Thompson by adverse possession. McCoy appealed and another panel of this Court affirmed. *McCoy v. Thompson*, Case No. 2009-CA-001585-MR (March 2011) (Discretionary Review denied November 16, 2011, Case No. 2011-SC-307-D (Ky. App. Opinion ordered unpublished).

[2] The Thompson, McCoy and Hicks/Griffith deeds all reference a "county road" but there is no proof the road was ever dedicated.

along Rockhouse Fork. Thompson claims McCoy has moved both the creek and the road.

McCoy testified when he bought his farm, the county road was impassable. A portion of the road was missing, forcing drivers to use the creek bed to reach his property. McCoy repaired the road by placing fill dirt atop the impassable area. He said he changed neither the road nor the creek's location.

In late 1999 or 2000, McCoy began constructing a concrete retaining wall at the creek's edge. On completion of two sections of wall, Thompson saw no impact on his land and said nothing. There was a slight amount of erosion, but it was tolerable. Thompson acknowledged McCoy had done much to improve his farm since buying it. Thompson admitted McCoy patched washed out areas. Thompson also agreed McCoy had a right to maintain and repair the road.

On April 3, 2015, 4.09 inches of rain fell in Lawrence County in a brief period. The defense termed this an "extraordinary flooding event" after which McCoy built a third section of wall to preserve the county road and access to his farm. According to Thompson, this third section of wall is causing his farm to flood and erode.

Thompson drove to his farm April 4, 2015, the day after the flood, to inspect his property. The water had receded and while he saw some debris, there was no property damage and he had no trouble crossing the creek in his truck. He

testified he did not believe the flood washed out the road. He said he has spent $0 to maintain the road and likes driving in the creek. He admitted the road benefits him when he needs it and he placed $3,200 worth of blocks in the creek to curb erosion.

In preparation for trial, the judge twice visited the subject property with counsel. The last visit occurred on a Friday before trial commenced on Wednesday.

At the one-day bench trial, Thompson testified first. He said it was not until McCoy had the third section of wall installed—after the April 3, 2015, flood—that he noticed a problem. Thompson claims before building the third section of concrete wall, McCoy dredged the creek, widened the road into the creek, and relocated the creek channel. Thompson did not believe the 2015 flood washed out the road and maintained there was nothing to repair but McCoy built the third section of concrete wall.

On cross-examination, Thompson acknowledged when he drove past the Hicks' place in 1999 he had to drive in the creek bed and the creek did not flow in its channel. Thompson agreed McCoy had returned the creek to its original channel.

William Barrows, a mining engineer and land surveyor, testified next. He conducted a drainage study of the creek. He said erosion was visible on

Thompson's property and concrete appeared to have been added to the creek to control erosion. He agreed the water appeared to flow against the concrete and away from Thompson's creekbank.

Barrows said the stream had been dredged and was now a trapezoidal shape with increased water flow. While the channel was not necessarily deeper, the detention time had been minimized by removal of any obstacle hindering water flow.

On cross-examination, Barrows testified preventing roadway erosion is reasonable. Additionally, if he owned McCoy's property he would have done the same thing—he would have built a concrete retaining wall.

While unfamiliar with the area, Barrows prepared a boundary survey at Thompson's request. Thompson's 1999 deed was incomplete due to missing distances and bearings causing closure issues. Barrows indicated there was a 600 to 700-foot error in a 150-acre tract which was not good enough to determine the creek's original location. Barrows relied on Thompson's recollection of the creek in relation to the concrete barrier. Thompson told Barrows the road used to be in the creek.

Barrows testified he stumbled upon a ten to fifteen-foot length of rusted fence buried in the ground as he came down a hill toward Rockhouse Fork. The fence segment did not reach the creek although the deed called for the line to

reach the middle of the creek. Barrows projected the fence line to the creek, adding a call based on Thompson telling him where the line should be.

Doug Hall, a contractor, testified next. He said he would repair Thompson's creekbank at a cost of $21,900. On cross-examination he revealed the quoted price included $2,700 for concrete to create a new crossing for Thompson. Because the crossing was unrelated to the claimed damages from erosion, the cost of repairs was reduced by $2,700.

Realtor and insurance broker Debra Cordle was the last witness Thompson called. She reviewed comparable sales and the work of an appraiser who had fallen ill and did not appear at trial. Cordle testified Thompson's property had a fair market value of $182,000 before the erosion and $160,000 after but was never asked to define fair market value. She stated the decrease in value was the cost of returning the property to its undamaged condition. On learning $2,700 of the repair estimate was unrelated to erosion, Cordle agreed it might be necessary to adjust her testimony.

When Thompson's proof concluded, all defendants moved separately for a directed verdict which was granted as to causation and damages. Proof then focused on the boundary dispute.

McCoy testified the county road was impassable when he purchased his farm in 1999. Remnants of the road were visible, but a missing portion forced

visitors to drive up the creek bed to reach McCoy's farm. McCoy testified he had the road repaired but did not change the location of the road or the creek. He stated fill dirt was added to the impassable portion of the road and in late 1999 he began constructing a concrete retaining wall to preserve the creek bank. McCoy said he did not try to straighten the creek, he tried only to maintain and repair it.

Neighboring landowner Lawrence Hicks has lived on his property since 1984. He confirmed the road has not moved. Even after McCoy built the concrete wall, the creek and road were still in the same location. Charles E. Griffith, Jr. testified he does not live in the area, but his land has been in his family more than a century and the road has always been on the right side of the creek as one drives up the hollow. Earl W. Griffith does not live on the land either, but he recalls the road always being to the right of the creek.

Gary Ousley is an engineer and land surveyor. He surveyed the area at McCoy's request. Ousley's line and Barrows' line were consistent with one another showing several overlapping points. The surveys diverged coming down a hill. Ousley's field crew did not find the segment of fencing Barrows found. Ousley was not deliberately following a fence as the boundary; the two just happened to coincide. Following the deeds, Ousley's line was about fifty feet shy of the center of the creek called for in the deeds of both McCoy and Thompson.

When all proof concluded, the trial court found Ousley's line was more accurate because he followed the deed calls whereas Barrows relied on information provided by Thompson and added a call which was unsupported by the deeds. On appeal, Thompson claims the trial court ignored the proof and relied instead on its own perceptions of the land from two site visits. Against this backdrop we review four claims raised by Thompson.

ANALYSIS

Thompson's first allegation is the trial court erroneously granted Appellees a directed verdict on causation and damages. Citing *National Collegiate Athletic Association v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988) and *Riley v. Flagstar Bank, F.S.B.*, 316 S.W.3d 884 (Ky. App. 2009), Thompson recounts the testimony elicited from his witnesses and posits he presented sufficient proof to defeat the three motions. In response, appellees emphasize the admissions made by Thompson's witnesses on cross-examination confirming repairs McCoy made to the sole road affording access to his property were neither unreasonable nor negligently made.

Thompson's position is technically correct but for a reason argued by no party. This was a bench trial. "[A] directed verdict is clearly improper in an action tried by the court without a jury." *Brown v. Shelton*, 156 S.W.3d 319, 320 (Ky. App. 2004) (citing *Morrison v. Trailmobile Trailers, Inc*., 526 S.W.2d 822

(Ky. 1975)). When the fact-finder is the court and not a jury, "the appropriate procedural mechanism for early dismissal is found in CR 41.02(2)." *Id*. That rule specifies,

> [i]n an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52.01.

At the end of Thompson's proof, McCoy moved for a "directed verdict" arguing three grounds. First, Thompson had admitted the rainfall of April 3, 2015, was an "extraordinary flooding event." Under *Russell Fork Coal Co. v. Hawkins*, 311 Ky. 449, 223 S.W.2d 887 (1949), damage caused by extraordinary flooding does not create liability for a neighboring landowner trying to preserve his land.

Second, Kentucky uses a "reasonable use" approach to water flow. *Klutey v. Commonwealth, Dept. of Highways*, 428 S.W.2d 766, 769 (Ky. 1967).

> Under the "reasonable use" approach, we view the diffused surface water as a nuisance problem and attempt to balance the "reasonableness of the use by the upper owner against the severity of damage to the lower owner." *Id*.

> The rule is that the dominant estate owner may divert water onto the servient estate without liability if the diversion is reasonable. *See Walker v. Duba*, 161 S.W.3d 348, 350 (Ky. App. 2004). Stated another way, "although a lower owner is bound to accept natural drainage from an upper owner, the rights of the upper owner are not unlimited and that the upper owner may not unreasonably change the natural flow of water or cause it to collect and be cast upon the lower estate at a point where it had not previously flowed or in an increased volume or accelerated rate of flow so as to [cause] substantial damage to the lower owner." *Taylor v. Carrico*, 528 S.W.2d 694, 696 (Ky. 1975).

Vescio v. Darnell, 2013-CA-000189-MR and 2013-CA-000247-MR, 2016 WL 354339, at *4 (Ky. App. Jan. 29, 2016) (unpublished).[3] Thompson himself testified it was reasonable for McCoy to maintain the road providing sole access to both the Thompson and McCoy farms. Barrows, testifying as Thompson's expert, confirmed it was reasonable to prevent roadway erosion and stated had he owned McCoy's farm he would have constructed a concrete retaining wall to stabilize and preserve the road just as McCoy had done.

Third, Thompson failed to prove all elements of his claim. The real estate appraiser called as a witness was neither asked to define, nor defined, fair market value. She stated only Thompson's property was worth $182,000 before the erosion and $160,000 after the erosion. She equated the decrease in value to

[3] This opinion is cited not as binding precedent but only for consideration on this precise point. *See* Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

the amount of money required to return Thompson's property to its undamaged condition. However, her testimony was based entirely on an estimate of repairs made by a contractor who included $2,700—the cost of installing a new crossing for Thompson wholly unrelated to the damage allegedly caused by McCoy.

In the wake of McCoy's motion, directed verdicts were also sought on behalf of Hicks and the Griffiths. After hearing argument on the motions, the trial court granted all defendants a directed verdict on causation and damages. Proof then shifted to the boundary dispute after which the matter stood submitted. The trial court ultimately entered a written judgment—supported by detailed findings of fact and conclusions of law—on February 28, 2018.

The mid-trial effect of a directed verdict and an early dismissal are nearly synonymous—even complementary—but the two devices are not the same. As noted by Thompson, when a defendant makes a directed verdict motion he "admits the truth of all evidence which is favorable to the party against whom the motion is made." *Hornung*, 754 S.W.2d at 860. In a bench trial, however, the court weighs and evaluates the evidence and makes findings as required by CR 52.01, but "does not, as in the case of a motion for a directed verdict, indulge every inference in the plaintiff's favor." *Morrison*, 526 S.W.2d at 824. Thus, the trial court was not bound to find Thompson's witnesses credible or persuasive.

While the trial court was technically wrong in entering a "directed verdict" on causation and damages, as an appellate court we "may affirm a lower court for any reason supported by the record." *Kentucky Spirit Health Plan, Inc. v. Commonwealth, Finance and Administration Cabinet*, 462 S.W.3d 723, 729 (Ky. App. 2015) (citations omitted). We choose to examine the trial court's decision under the proper rules, CR 41.02(2) and 52.01.

Under CR 52.01, we review the trial court's findings for clear error being mindful of the trial court's opportunity to judge witness credibility.

> When the trial court makes a finding of fact adverse to the party having the burden of proof and his is the only evidence presented, the test of whether its finding is clearly erroneous is not one of support by 'substantial evidence', but rather, one of whether the evidence adduced is so conclusive as to compel a finding in his favor as a matter of law. *Cf. Withers v. Berea College*, Ky., 349 S.W.2d 357 (1961); *Begley v. Wooton*, Ky., 350 S.W.2d 497 (1961).

Morrison, 526 S.W.2d at 824.

As the sole fact-finder, the trial court heard and considered the proof and ruled in favor of Appellees. Having reviewed the proof, we determine Thompson's evidence—occasionally contradictory—was not so overwhelming the court had to find it convincing. While the trial court erroneously used the term "directed verdict" during the bench trial, a mid-trial dismissal is permitted by the

rules. Under the circumstances of this case, the trial court's factual findings are not clearly erroneous. Therefore, reversal is not required.

Lack of fault being determinative of this appeal, we address the remaining claims only to present a complete review. Thompson's second and third arguments are the trial court—to the exclusion of the testimony—impermissibly relied on its own observations of the subject property made during two site visits with counsel. Thompson argues he did not oppose the court visiting the farms because he thought it was occurring "for the purpose stated in *Keeney v. Commonwealth, Dep't of Highways*, 345 S.W.2d 481, 48[3 (Ky. 1961)]: 'to acquaint the jury with the scene or object to enable them to comprehend and more intelligently understand the evidence introduced in the courtroom.'"

This is a curious argument to us. As noted previously, this was a bench trial. The record does not indicate a jury trial was ever contemplated. Neither the complaint, amended complaint nor any answer requested a jury trial. Based on the record, it appears a bench trial was contemplated from the start.

Thompson claims he preserved the claim

> by pleading damages above the jurisdictional limits of the court in his pleadings, by offering evidence at trial sufficient to establish a prima facie case on the issue of damages and causation, and by raising the issues of damages and causation in his prehearing statement as an issue to be raised on appeal. Further, appellant's attorney orally responded to the defendants' [sic] motion for

> directed verdict and pointed out to the Court the evidence sufficient to overrule that motion.

Wholly missing from the statement of preservation is any objection to the site visit or restriction on its use or purpose. Thus, Thompson's citation to *Fitzhugh v. Louisville & N.R. Co.*, 300 Ky. 509, 511, 189 S.W.2d 592, 593 (1945), does not support his argument. *Fitzhugh* directs:

> criticism of the judge viewing the premises comes too late, for the record shows the parties agreed that he should try the case without a jury and should personally view the situation, and that he was accompanied by the attorneys for both sides when he did so. Of course, it would not be proper without a definite agreement to that effect for a judge to base his finding alone upon what he saw and to ignore the testimony of the witnesses, but inspection of the premises by the court is permissible to enable him to understand and apply the evidence.

Id. The only possible purpose for not one, but two site visits, was to acquaint all involved with the property and develop an understanding of the lay of the land which appears to be precisely what the trial judge did, and about which only now Thompson complains. We do not understand why Thompson would believe the judge would not—and indeed could not—rely on impressions formed during the site visits. To endorse that position would encourage a waste of time and judicial resources. Furthermore, close reading of the trial court's judgment shows his impressions were confirmed by the testimony he heard at trial.

Keeney was a state highway case tried by a jury. When *Keeney* was decided in 1961, KRS 177.087 (since repealed) allowed the trial court—on application of either party—to send the jury in the company of the sheriff to view the "land and material" in a condemnation proceeding seeking to take private property for a public highway. The purpose of the jury visiting the subject property was to gain a perspective of the land being condemned.

Outside influence on jurors is of paramount concern. Jurors are routinely admonished not to prejudge the case; not to discuss the case with friends, family or other jurors; not to do independent research; and, to avoid media accounts. The presiding trial judge is not under similar restrictions. It is believed a judge can distinguish what is properly before the court and what is not.

Thompson states at page 13 of his brief:

> Kentucky's appellate courts have considered cases involving viewing by juries and, in bench trials, by the court and in both situations have followed the same rule: observations made by a jury, or in the case of a bench trial, by the judge acting as trier of fact, cannot, standing alon[e], be considered as evidence but such observations may be used for the sole purpose of explaining or understanding evidence presented in the courtroom.

He cites no case in support of this position. Such a failure could qualify as a violation of CR 76.12(4)(c)(v) requiring "ample . . . citations of authority pertinent to each issue of law[.]"

Appellees have chosen not to directly address this claim. Instead they emphasize their belief any damages resulted from the extraordinary flood of April 2015 rather than anything McCoy did attempting to preserve the road to his farm.

We found one unpublished case involving a site visit and bench trial to resolve a boundary dispute. *Decota v. Penney*, No. 2012-CA-001706-MR, 2014 WL 2810326, (Ky. App. June 20, 2014) (unpublished).[4] About the site visit the opinion says only

> [t]he matter proceeded to a bench trial in September 2011. Prior to the beginning of the trial, the trial judge visited the site and personally viewed the property in question.

Id. at *2. Thereafter, the trial court made its initial findings of fact and conclusions and motion practice resumed with both parties moving the trial court to alter, amend or vacate its findings and conclusions. The opinion states:

> [a]s this matter was tried before the circuit court without a jury, our review of factual determinations is under the clearly erroneous rule. Kentucky Rules of Civil Procedure ("CR") 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence, which is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). It is within the province of the trial court as the

[4] This unpublished opinion is cited pursuant to CR 76.28(4)(c). It is not cited as binding precedent, but only for consideration as no published opinion appears to directly address this issue.

> fact-finder to determine the credibility of the witnesses and the weight given to the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). This rule applies with equal force on an appeal from a judgment in an action involving a boundary dispute. *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980).

Decota at *3. Unlike *Decota*, no post-judgment motions were filed in this case.

This trial was marked by conflicting proof. Clearly, Thompson and McCoy have different points of view and took the matter to the court for resolution. The trial court's findings and conclusions are supported by the proof. We discern no error.

Thompson's fourth and final argument is he adequately proved damages. Lack of proof of fair market value is not critical in this case because no defendant was shown to be at fault. Thus, there is no need to further detail the alleged damages. It is sufficient to say diminution in total value is the upper limit on recovery for property damage. *Ellison v. R & B Contracting, Inc*., 32 S.W.3d 66, 70 (Ky. 2000). Had causation been established, Thompson could have received the cost of restoration if shown to be the least expensive way to make him whole. Because Thompson testified he curbed the erosion by placing $3,200 worth of block in the creek, the contractor's estimated repair—already reduced by $2,700 for the unrelated crossing—is suspect.

For the reasons stated, we affirm the judgment of the Lawrence Circuit Court.

ALL CONCUR.

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