RENDERED: SEPTEMBER 27, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001395-MR

MARK GRAY and
MARY GRAY APPELLANTS

v. APPEAL FROM MERCER CIRCUIT COURT,
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 18-CI-00182

DAVID BEST, MERCER COUNTY PROPERTY VALUATION ADMINISTRATOR; MERCER COUNTY BOARD OF ASSESSMENT APPEALS; KENTUCKY CLAIMS COMMISSION, TAX APPEALS; COMMONWEALTH OF KENTUCKY FINANCE AND ADMINISTRATION CABINET, DEPARTMENT OF REVENUE APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, MAZE, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: Mark and Mary Gray appeal an order from the Mercer Circuit Court affirming a final order of the Kentucky Claims Commission

assessing an undeveloped lot owned by the Grays at $14,200.00 for property tax purposes. Upon review, we affirm.

Factual and Procedural Background

The Grays are owners of Lot 12 in the subdivision known as Deer Run Estates in Mercer County, Kentucky. The lot is undeveloped and consists of 4.19 acres. Mark Gray is the developer of the subdivision which consists of thirty-nine lots. Approximately sixteen homes have been built on various lots that have been sold. Most of the development is rolling (*i.e.*, consists of hills and/or steep inclines), including Lot 12.

Lot 12 was assessed at $14,200.00 for property tax purposes for tax year 2016 by David Best, Mercer County Property Valuation Administrator. The Grays appealed the assessment to the Mercer County Board of Assessment Appeals. The Board assessed Lot 12 at $21,000.00. The Grays appealed the Board's decision to the Kentucky Claims Commission. A hearing was conducted by the Claims Commission on March 8, 2017. On May 26, 2017, the Claims Commission entered its final order determining the assessment value of Lot 12 to be $14,200.00 for tax year 2016.[1] The Grays appealed the final order of the Claims

[1] We note that the Kentucky Claims Commission did not go into effect until June 29, 2017. *See* Kentucky Revised Statute (KRS) 49.020 *et seq*. The predecessor entity to the Kentucky Claims Commission was referred to as the Kentucky Board of Tax Appeals. However, we refer to the present name only for the sake of clarity.

Commission to the Mercer Circuit Court per KRS 131.370 (now cited as KRS 49.250)[2] and KRS 13B.150. The circuit court affirmed the Claims Commission. This appeal followed. Further facts will be developed as necessary.

Standard of Review

Judicial review of the Claims Commission's decision is governed by KRS Chapter 13B. *Louisville Edible Oil Products, Inc. v. Revenue Cabinet Com. of Kentucky,* 957 S.W.2d 272, 273 (Ky. App. 1997). The standard of review is found in KRS 13B.150(2) and reads as follows:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
>
> > (a) In violation of constitutional or statutory provisions;
> > (b) In excess of the statutory authority of the agency;
> > (c) Without support of substantial evidence on the whole record;
> > (d) Arbitrary, capricious, or characterized by abuse of discretion;
> > (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
> > (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or

[2] Effective June 29, 2017, many of the statutes contained in KRS Chapter 131 were either repealed or renumbered under KRS Chapter 49.

(g) Deficient as otherwise provided by law.

The statute is clear that the reviewing court does not conduct a *de novo* review except as to legal issues. The reviewing court must uphold the agency's decision if there was substantial evidence upon which the agency could base its decision and the agency applied the correct rule of law to the facts before it. *Kentucky Unemployment Ins. Comm'n v. Murphy,* 539 S.W.2d 293, 294 (Ky. 1976). "'[S]ubstantial evidence' means 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).

Analysis

Before we turn to the merits of the Grays' arguments, we note that in contravention of CR[3] 76.12(4)(c)(v), they do not have a preservation statement at the beginning of each argument. And while they provide some citations to the record, these citations refer primarily to the Grays' petition for review of the final order of the Claims Commission filed in the circuit court. The Grays make no citations to the hearing before the Claims Commission nor to any pleadings or arguments made to the Claims Commission or the circuit court. This is in

[3] Kentucky Rule of Civil Procedure.

contravention of CR 76.12(4)(c)(iv) and (v), which require ample references to the record supporting each argument. The Court recently addressed these issues in *Curty v. Norton Healthcare, Inc*., 561 S.W.3d 374, 377-78 (Ky. App. 2018). Given the length at which the Court in *Curty* urged compliance with CR 76.12(4)(c), we quote the rationale for the rule and the Court's warnings that leniency should not be presumed.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

. . .

> **Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance**. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Curty's brief or dismiss her appeal for her attorney's failure to comply. *Elwell*. While we have chosen not to impose such a harsh sanction, we strongly suggest counsel familiarize himself with the rules of appellate practice and caution counsel such latitude may not be extended in the future.

Curty, 561 S.W.3d at 377-78 (emphasis added).

As did the Court in *Curty*, we would be well within our discretion to strike the Grays' brief, but we have chosen not to do so ***at this time***. However, as addressed later in this opinion, at least one argument put forth by the Grays not only lacks a statement of preservation in compliance with CR 76.12, but careful review of the record shows that the issue was unpreserved. We now turn to the merits of the case.

The Grays make four arguments on appeal. The first two arguments relate to KRS 13B.150. The Grays claim that the circuit court erred in its affirmation of the Claims Commission's final order because the order was (1) without support of substantial evidence on the whole record;[4] and (2) arbitrary,

[4] KRS 13B.150(2)(c).

capricious, or characterized by an abuse of discretion.[5] For their third argument, the Grays contend that they were prejudiced in the proceedings below. Finally, the Grays assert that the final orders of the Claims Commission and the circuit court violate Section 172 of the Kentucky Constitution and KRS 132.191. We disagree.

Regarding the Grays' first argument, there was substantial evidence in the record to support the final order of the Claims Commission. At the hearing, witness testimony was offered by Mark Gray, the PVA, and Sean Cook, Chairman of the Board. Mr. Gray testified that he is currently a realtor and has been in real estate for thirty-six years. He is both the owner of Lot 12 and the developer of Deer Run Estates. He testified that he believes Lot 12 should be assessed at $3,350.00 based on "farm value." He stated that the undeveloped lot is steep and overgrown; it is not usable as a homesite nor for farming; and the Grays have not sold a lot in the development for approximately ten years.

The PVA testified that he used a sales comparison approach to assess the fair cash value of Lot 12.[6] Specifically, he stated that he looked at Lot 35, an undeveloped lot in Deer Run Estates which consists of 2.359 acres and sold in September 2014 for $16,000.00. He also looked at a professional appraisal for Lot 38. This undeveloped lot of between 1.1 to 1.2 acres was appraised at $18,500.00

[5] KRS 13B.150(2)(d).

[6] *See* KRS 132.191(2)(c).

in December 2013. The PVA stated that, upon consultation with the Grays, he believed the sales record for Lot 35 represented a more accurate value and used $16,000.00 as the basis, which worked out to be $6,728.00 per acre. The PVA arrived at an assessment amount of $28,400.00 for Lot 12 based on this "per acre" amount, but then applied a developer rate which reduced the assessment by fifty percent (50%). The PVA explained that this rate reduction takes into account expenses to develop a subdivision. He testified that he did not give "a lot of credence" to the slope of Lot 12 because the entire subdivision is rolling and other sloped lots have sold.

Sean Cook testified that he has been a state-certified appraiser for twenty years and works in seven counties in Kentucky, including Mercer County. His opinion was that the fair cash value of Lot 12 is $21,000.00. He did not take into account expenses and absorption associated with development of the property. He also testified that he believed the slope of Lot 12 would not prevent building.

The PVA offered substantial evidence upon which the Claims Commission based its findings. The Grays offered no evidence beyond Mr. Gray stating that he "believed" Lot 12 "should be considered farm property." He offered no independent appraisals or recent sales figures to support his assertion. Indeed, he offered no explanation as to how he arrived at a fair market value of $3,350.00. The Grays argue that the lot "should be assessed based on its suitability

as a home building site," but offer no explanation, legal or otherwise, in support of this argument.[7]

In order to overturn an agency's decision regarding a tax assessment, taxpayers need to present evidence that would be so strong that a trier of fact would be compelled to agree with them. *Evans Oil & Gas Co. v. Draughn,* 367 S.W.2d 453, 454 (Ky. 1963). Kentucky law also grants the estimated property tax assessment a presumption of validity and places the burden of establishing that the assessment is incorrect on the taxpayer. *Revenue Cabinet, Com. of Ky. v. Gillig,* 957 S.W.2d 206, 210 (Ky. 1997).[8] To prevail, the taxpayer must "establish that the assessment was wrong, and if there is testimony of competent valuation witness/es in support of the assessment, even though conflicting, a finding adverse to the taxpayer cannot be set aside as clearly erroneous." *Jefferson County Property*

[7] *See* page 5 of Appellants' brief.

[8] *See also* KRS 13B.090(7) which states:

> In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record, except when a higher standard of proof is required by law. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

Valuation Adm'r v. Ben Schore Co., 736 S.W.2d 29, 30 (Ky. App. 1987). Not only did the Grays fail to present an alternative method for assessing the property, they also failed to present convincing evidence that the PVA's assessment overvalued Lot 12. Thus, their first argument fails.

The Grays' second argument is that the final order of the Claims Commission is arbitrary, capricious, and characterized by an abuse of discretion because they were "denied by the Hearing Officer the opportunity to introduce evidence of assessments of adjacent lots in the same development, having the same characteristics of the subject lot. These assessments are the best evidence as to what the subject lot should be valued for tax purposes." We pause to reiterate that CR 76.12(4)(c)(v) states, in part, that an appellant's brief shall contain "[a]n 'ARGUMENT' conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law[.]" The Grays fail to make any argument in support of *why* the Claims Commission should have allowed testimony from the PVA regarding what lots in the development had a reduced assessment value for tax year 2016. The Grays' brief lacks any citations of authority on this issue. Although the Grays do cite to page 9 of the record, we again note that this is simply a reference to their petition for review of the final order of the Claims Commission filed in the circuit court. The Grays fail to cite to arguments made to the Claims Commission and the circuit

court. It is not our function as an appellate court to research and construct a party's legal arguments, and we decline to do so here. *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005). As a result, we hold that the Grays are not entitled to relief as to this issue.

Regarding the Grays' third argument, they first claim that they were prejudiced because the Claims Commission "denied the Appellants the use of the best evidence of value." This is simply a repackaging of their previous argument. The Grays also claim that they were prejudiced because "the Hearing Officer merely arbitrated among the three values and chose the value at the mid-point of the three amounts."[9] We disagree. We again note that the Grays fail to cite to the record other than to their petition for review filed in the circuit court. They also again fail to cite any legal authority. Nevertheless, the record before us shows that the Claims Commission conducted a *de novo* hearing pursuant to KRS 131.340 (now cited as KRS 49.220) and KRS 13B.090. Thus, the Grays are not entitled to relief as to this issue.

The Grays also assert they were prejudiced because the PVA "attempted to subvert the Open Records Act (KRS Chapter 61) in response to

[9] We note that the Grays also argue they were prejudiced due to what they allege was the contentious nature of the hearing before the Board. However, that hearing is not part of the record before us, and the Grays submitted no evidence from the hearing before the Board in support of their argument that they were prejudiced.

[their] Open Records Request." The Grays claim that they were unable to get the documents they needed from the PVA prior to the hearing. The Grays cite to no instances in the record demonstrating that they attempted to motion the Claims Commission about documentation from the PVA prior to or at the hearing. Careful review of the record shows that no such motions were made.[10, 11] The Grays announced ready at the hearing before the Claims Commission. Therefore, their argument is unpreserved for appeal, and we decline to consider it further. "It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986)) (internal citation omitted).

The Grays' last argument is that the final orders of the Claims Commission and the circuit court violate Section 172 of the Kentucky Constitution and KRS 132.191. We disagree.

Section 172 of the Kentucky Constitution provides:

[10] KRS 13B.080 allows the hearing officer to issue discovery orders and subpoenas. KRS 13B.090 allows for the inspection and copying of documentary evidence.

[11] The Grays do cite to a copy of an Open Records Decision from the Office of the Attorney General that was attached to the petition for review filed in the circuit court; however, this was not admitted into evidence at the hearing before the Claims Commission and the Grays fail to make an argument regarding why this Court should consider it now. It is unclear to this Court why the Grays *only* sought a decision from the Attorney General and did not seek a discovery order from the hearing officer prior to the hearing before the Claims Commission.

> All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law.

It is the tax assessor's duty to estimate what the market value logically should be, not to determine what the market value actually is for the property. *Fayette County Board of Sup'rs v. O'Rear,* 275 S.W.2d 577, 579 (Ky. 1954). KRS 132.191(2) provides "a variety of valuation methods" that the tax assessor may use to determine property valuation. As previously stated, the PVA testified that he used the sales comparison approach pursuant to KRS 132.191(2)(c) and explained his methodology in detail. This was substantial evidence to support the final order of the Claims Commission. The final orders of the Claims Commission and the circuit court do not violate Section 172 of the Kentucky Constitution nor KRS 132.191.

Conclusion

For the foregoing reasons, we affirm the Mercer Circuit Court.

ALL CONCUR.

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