RENDERED: JULY 17, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000415-MR

GEORGE MASON, LESLIE MASON,
AND DAVID MASON — APPELLANTS

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 05-CI-00007

MARVIN L. "SKIP" WHITAKER, JR.;
MARVIN L. WHITAKER, III; AND
AUSTIN R. WHITAKER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND TAYLOR, JUDGES.

DIXON, JUDGE: George Mason, Leslie Mason, and David Mason appeal several orders entered by the Henry Circuit Court determining that Marvin L. "Skip" Whitaker, Jr., Marvin L. Whitaker, III, and Austin R. Whitaker hold valid legal

title to certain property located in Henry County and granting them an easement over the Masons' land. Following review of the record, briefs, and law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

This quiet title action concerns ownership of a tract of land located in Henry County, Kentucky. The facts are somewhat unusual. The Masons (three brothers) own property consisting of 241 acres inherited from their parents, R.R. Mason and Martha Mason, who purchased the property in 1952. This property is known as the Gilkerson tract. None of the Masons have resided on any portion of the property and have primarily leased it for hunting.

George and Shirley Curtsinger purchased a tract of land in Henry County from Haline Rohleder and Marie Dant in 1992, through realtor Ashley Chilton, for $8,000. In an unusual closing, the sale occurred on a Louisville sidewalk. Chilton had shown George Curtsinger a plot of land understood to be the subject of the sale and had drafted the deed for the property; however, there was apparently no title search performed.

Thereafter, for the next eleven years, Curtsinger and his nephew, "Skip" Whitaker, occasionally used this property for hunting and camping but never placed any structures or fences upon it. However, in 2003, another person, Ms. Cook, claimed ownership of the property Curtsinger had been told he had purchased. A subsequent survey indicated Curtsinger's property was actually

located adjacent to the Masons' property. Curtsinger claimed Chilton had changed the names of adjacent property owners in his deed to fit the incorrect location of the property Curtsinger purchased. Nevertheless, the Curtsingers' deed identified the actual metes and bounds location of the property owned by Rohleder and Dant—and correctly described in a deed they possessed—as the tract adjacent to the Masons' property. As a result of Curtsinger's new survey, he began using the property at the correct location. And, as is too often the case, a dispute arose as to ownership of this tract.

All of the property concerned in the case herein derived from what was once a single piece of property owned by Charles Downey. In 1905, after Downey's death, his property was partitioned into eight tracts. According to the division prepared by the Commissioner, tract one was conveyed to Mary Bennett and tract six—the Curtsinger lot—was conveyed to John Downey. The Commissioner designated easements to certain tracts but none to tract six, as it appeared to have access at the time via Old Harpers Ferry Road. In 1911, Mary Bennett and husband Ed Bennett deeded tract six to Frank Bramblett.[1] The Curtsingers' land traces back to this 1911 deed. Unfortunately, no deed was discovered transferring lot six from John Downey to the Bennetts. The remaining tracts were consolidated and are now owned by the Masons. The Curtsingers, and

[1] This deed, although executed and delivered to the county clerk, was not recorded until 1952.

their predecessors in title, used a dirt—now gravel—driveway off Highway 389 over a portion of the property of the Masons, dating back as far as the 1950s, to access the land at issue.

In 2005, the Masons filed a quiet title action asserting they owned the Curtsingers'[2] land by virtue of inheritance and conveyance or by adverse possession. Subsequently, the Curtsingers counterclaimed to quiet title in their own names. The counterclaim was later amended to additionally assert an easement of necessity over the Masons' land to allow for ingress and egress to the subject property. The Masons eventually conceded they did not have paper title to the subject property but nevertheless maintained they had acquired it by adverse possession.

After a rather confusing procedural history, on August 5, 2011, the trial court entered an order finding the Masons had not acquired the subject property via adverse possession. The same order further found the defendants had no easement of necessity because alternate means were available to access the property. The trial court's decision was based on a depiction of the 1905 division

[2] The petition alleged the land at issue was owned by George Curtsinger and Shirley Curtsinger. During the pendency of this action, Shirley passed away. The disputed property was, thereafter, transferred by George to the Whitakers during the pendency of the action, and they were later substituted as defendants.

of property showing an old roadway running along the creek which formed the boundary of the property.

By permission of the trial court, additional discovery was conducted, including the deposition of licensed surveyors, Neal Roberts and Michael Roberts. Their combined testimony established that the creek had now washed out and no longer abutted nor crossed the road anywhere along the subject boundary line. Curtsinger then moved for summary judgment alleging ownership of the property, as well as the existence of an easement since the 1950s. In February,[3] the trial court entered orders finding the northern boundary line never touched, nor was it contiguous to, the old road mentioned in the 1905 Commissioner's report. These orders further found the existence of an easement over the Masons' land, where the driveway was demonstrated, allowing ingress and egress. The Masons moved to alter, amend, or vacate that order, asserting that ownership of tract six had not been established by record title. That motion was denied, and this appeal followed.

STANDARD OF REVIEW

The standard of appellate review in land dispute actions is well-established:

> factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [trier of fact] to judge the credibility of

[3] By this time, the Whitakers were substituted in place of Curtsinger as the defendants in this action.

> the witnesses." A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." With respect to property title issues, the appropriate standard of review is whether the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for that of the trial court absent clear error.

Cole v. Gilvin, 59 S.W.3d 468, 472-73 (Ky. App. 2001) (footnotes omitted).

The Masons put forward three separate arguments on appeal. First, they argue the trial court "made a substantial error" in its determination that the Whitakers have a valid title of record. Next, they maintain the trial court erred by failing to order that every interested owner be made a party to the case. And finally, the Masons claim that the trial court erred by allowing the Whitakers access to the disputed property by crossing the Masons' property.

RECORD TITLE

Although neither party refers us to statutory authority, quiet title actions in Kentucky are based on KRS[4] 411.120. The statute states, in relevant part:

> Any person having both the legal title and possession of land may prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. If

[4] Kentucky Revised Statutes.

> the plaintiff establishes his title to the land the court shall order the defendant to release his claim to it and to pay the plaintiff his costs . . . .

Courts have historically required that parties seeking to quiet title allege actual possession of the property at the time suit is filed. *Davis v. Daniel*, 295 Ky. 717, 175 S.W.2d 501, 502 (1943). We note from the record that the Masons alleged in their complaint, however, that the Curtsingers were in possession of the disputed tract. Nevertheless, as is the case herein, where the defendant counterclaims to quiet title in his own name, courts have carved out an exception to this rule and have determined the case on its merits. *Id*.

The Masons contend the trial court erred by finding that the Whitakers hold valid record title traceable to the 1911 Bennett deed. They also argue the court erred by failing to order every interested owner be made a party to the suit. However, we may summarily dispose of both of these issues. While the Masons sought to quiet title in their complaint initially, they have not appealed the trial court's rulings determining they possessed no color of title to the property nor ownership by adverse possession. As a result, they have no standing to appeal the court's determination of the Whitakers' right to title. *See Stearns Coal & Lumber Co. v. Douglas*, 299 Ky. 314, 185 S.W.2d 385 (1944); *Hopkins v. Slusher*, 266 Ky. 300, 98 S.W.2d 932, 936 (1936).

CR[5] 17.01 sets forth the criteria as to who may properly institute litigation.

> Every action shall be prosecuted in the name of the real party in interest, but a personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a county, municipal corporation, public board or other such body, a receiver appointed by a court, the assignee or trustee of a bankrupt, an assignee for the benefit of creditors, or a person expressly authorized by statute to do so, may bring an action without joining the party or parties for whose benefit it is prosecuted. Nothing herein, however, shall abrogate or take away an individual's right to sue.

"The 'real party in interest' is one who has actual and substantial interest in the subject-matter as distinguished from one who has only nominal interest therein." *Gay v. Jackson County. Bd. of Educ.*, 205 Ky. 277, 265 S.W. 772, 773 (1924) (citing *Taylor v. Hurst*, 186 Ky. 71, 216 S.W. 95 (1919)). "It is fundamental that in order to have standing in a lawsuit a party must have a judicially recognizable interest in the subject matter of the suit." *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 947 (Ky. 1985) (citing *Lexington Retail Beverage Dealers Ass'n v. Dep't of Alcoholic Beverage Control*, 303 S.W.2d 268 (Ky. 1957)). As noted, the Masons initially asserted such an interest in the disputed tract in their complaint. Now, however, since they have not

[5] Kentucky Rules of Civil Procedure.

appealed the trial court's ruling that they possess no ownership interest, they have no present or substantial interest in tract six and, thus, no justiciable claim concerning ownership of the property. *Plaza B.V. v. Stephens*, 913 S.W.2d 319, 322 (Ky. 1996). Consequently, the Masons lack standing to attack the trial court's determination that valid title to tract six is vested in the Whitakers.

EASEMENT

Lastly, the Masons argue no evidence has been introduced that an easement for the subject land was ever granted to the Whitakers or their predecessors in title. The Masons assert the only possible way an easement could exist herein would be as an easement of necessity. The Masons cite *Carroll v. Meredith*, 59 S.W.3d 484 (Ky. App. 2001), and claim the Whitakers must show that no other access exists regardless of how onerous that access may be. However, "[s]trict necessity has generally been defined as absolute necessity such as where property is landlocked or otherwise inaccessible[,]" as is the case herein. *Id*. at 491 (footnote omitted). The Whitakers successfully demonstrated this through the testimony of the surveyors. Therefore, sufficient evidence supports the trial court's finding that an easement of necessity exists in the gravel driveway over the Masons' property.

CONCLUSION

Therefore, and for the foregoing reasons, the orders entered by the Henry Circuit Court are AFFIRMED.

GOODWINE, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANTS:

D. Berry Baxter
LaGrange, Kentucky

BRIEF FOR APPELLEES:

Bryan Gowin
Louisville, Kentucky