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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000053-MR

DONALD JOHNSON; CINDY JOHNSON;
WAYNE F. COLLIER; AND KINKEAD &
STILZ, PLLC — APPELLANTS

APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 99-CI-00103

JAMES M. MATTINGLY; TAMMY S. MATTINGLY;
WILLIAM J. NALLEY; MAXINE NALLEY; JOSEPH
D. MILES; VERONICA S. MILES; MARK A.
THOMPSON; AMY L. THOMPSON; WHEATLEY
LOGGING, A SOLE PROPRIETORSHIP CONSISTING
OF RICHARD WHEATLEY; RICHARD WHEATLEY,
INDIVIDUALLY; AND JASON WHEATLEY,
INDIVIDUALLY — APPELLEES

AND

NO. 2002-CA-000088-MR

WILLIAM J. NALLEY; MAXINE NALLEY, HIS WIFE;
JOSEPH D. MILES; VERONICA S. MILES, HIS WIFE;
JAMES M. MATTINGLEY, JR.; TAMMY S. MATTINGLEY,
HIS WIFE; MARK A. THOMPSON; AMY L. THOMPSON, HIS
WIFE; RICHARD WHEATLEY, INDIVIDUALLY; AND
RICHARD WHEATLEY, d/b/a WHEATLEY LOGGING — CROSS-APPELLANTS

CROSS-APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE DOUGHLAS M. GEORGE
ACTION NO. 99-CI-00103

DONALD JOHNSON AND
CINDY JOHNSON — CROSS-APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This appeal and cross-appeal arise from a boundary dispute before the Marion Circuit Court. After a jury trial, the court entered a judgment in favor of the appellants/cross-appellees, Donald and Cindy Johnson (the "Johnsons"). Both parties now enter an appeal, claiming that the trial court erred in denying several post-trial motions. We affirm.

This dispute arose from overlapping claims of title to approximately 50 acres located in Marion County. The Johnsons have owned and lived upon an adjacent parcel of real property since 1992. In 1998, the appellees/cross-appellants (the "Mattingly Group") purchased a 75-acre tract of land situated southwest of the Johnsons's property. Shortly thereafter, the Mattingly Group became interested in purchasing a 200-acre tract that adjoined their 75 acres. Marie Tuttle owned the 200-acre tract. The Mattingly Group examined the title of the 200-acre tract (the "Tuttle property"), and discovered that their 75-acre parcel was actually included in the title description of the

200-acre parcel. Further examination revealed a complicated title problem dating back to the 1930s.

At that time, Andrew and Nannie Wayman owned the entire Tuttle property. Andrew Wayman had acquired the Tuttle property upon the death of his father, P.J. Wayman, who died intestate. P.J. Wayman had inherited the property upon the death of his mother, Ann C. Wayman, who had been granted a life estate by her husband (P.J.'s father), Andrew Wayman (hereinafter referred to as "Andrew Wayman, I") pursuant to a Last Will and Testament recorded in 1896. In 1937, the younger Andrew Wayman, and his wife, Nannie, conveyed a 75-acre tract of the Tuttle property to Kelly Abell. Twenty-two years later, the Waymans then attempted to convey the entire 200-acre Tuttle property to Charles and Goldie Wooley. However, the Waymans failed to note that 75 acres of the Tuttle property had previously been transferred to Mr. Abell. The description used in the conveyance between the Waymans and the Wooleys has been used in every deed in the subsequent chain of title, including Ms. Tuttle's. In examining the title, it became apparent to the Mattingly Group that Ms. Tuttle's property actually included no more than 125 acres.

The Mattingly Group then retained the services of Sam Anzelmo, a local surveyor, to carve out the 75-acre tract and determine where the undisputed 125 acres of Tuttle lay.

Satisfied that they had identified that portion of the original 200-acre parcel that was not in dispute, the Mattingly Group then purchased the remaining 125 acres of the Tuttle property. Shortly thereafter, the Mattingly Group began to cut trees and build a roadway on what they believed was their property. The Johnsons became aware of this activity, but claimed that there was a boundary line overlap with the Johnsons, and the Johnsons disputed the ownership of approximately 50 acres between the Mattingly Group's and Johnsons's property line, claiming that the trees cut down by the Mattingly Group were located on property to which they hold title.

The Johnsons filed this action to quiet title in the disputed property as well as to recover compensatory and punitive damages for trespass, conversion, and violation of KRS 354.130. The case was submitted to a jury, which found that the disputed piece of property belonged to the Johnsons. The jury also awarded damages for the stumpage value of the trees that were cut and for other damage to the property. The court heard several post-trial motions entered by both parties, which are the subject of this appeal.

The Johnsons first assert that the court should have trebled the damages awarded by the jury as authorized by KRS 364.130. Damages were awarded to the Johnsons as compensation for the trees cut from their property. Subsection (1) of

364.130 requires a person unlawfully cutting trees on another's property to pay three times the stumpage value of the timber provided that the person is "without legal right or without color of title in himself or the timber or to the land upon which the timber was growing." Both parties agreed to have the issue of color of title decided by the court, rather than the jury, and in its order, the trial court concluded that the Mattingly Group did act under color of title in cutting down the trees. Thus, KRS 364.130 was not applicable and the Johnsons were not entitled to the trebling of damages under that statute.

The trial court determined that the Mattingly Group held color of title as a matter of law; thus, our review of the issue is de novo. A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky. App., 998 S.W.2d 505, 509 (1999). However, the factual findings made by the trial court, including those supporting the legal conclusion of color of title, are not subject to reversal unless clearly erroneous. Com., Dept. for Human Resources v. Kentucky Products, Inc., Ky., 616 S.W.2d 496, 501 (1981); CR 52.01.

The Kentucky Supreme Court, citing section 11, page 267, 27 Am. Jur., defined 'color of title' as:

> [t]hat which is the appearance of title, but which in reality is not title. Color of title may be said to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title

> in the person making it, or from the defective conveyance that is used – a title that is imperfect, but not so obviously imperfect that it would be apparent to one not skilled in the law.

Kelly v. Kelly, 293 Ky. 42, 168 S.W.2d 339, 342 (1943). The Johnsons contend that the deed acquired by the Mattingly Group contained a description of the property that was so erroneous as to essentially put the Mattingly Group on notice that the deed was defective. Both parties agreed that, on its face, the deed appears valid because all formalities are met; thus, the issue before the trial court was whether the description of the land was so suspect as to put a layperson on notice that the deed was imperfect.

In determining that the Mattingly Group acted under color of title, the lower court was persuaded by several factors. First, both parties conceded that the deed, though "convoluted," appeared regular on its face. Also, in cutting the timber, the Mattingly Group had acted under the advice of a surveyor, Sam Anzelmo, who believed that the Mattingly Group's deed covered the disputed property.

Based on these findings, the trial court concluded that the Mattingly Group's deed was not so "obviously imperfect" that it would be apparent to a layperson and, consequently, the Mattingly Group acted under color of title. There was sufficient evidence on the record to support the lower court's

findings of fact and this Court will not disturb those findings. CR 52.01. In reviewing these facts de novo, we agree that the Mattingly Group acted under color of title. The Mattingly Group hired a licensed surveyor to examine the land and began cutting timber only upon receiving the surveyor's approval. Furthermore, both parties concede that the deed itself was facially normal. While the legal description may have been "convoluted," as the trial court noted, it was not so patently unclear as to indicate to a layperson that the deed was defective. Therefore, we affirm.

The Johnsons next claim that they were entitled to an award of attorney fees and expert witness fees pursuant to KRS 364.130, a request that was denied by the trial court. It is well-settled law in Kentucky that attorney fees "are not allowable as costs in absence of statute or contract expressly providing therefore." Batson v. Clark, Ky. App., 980 S.W.2d 566, 577 (1998). Having concluded that the Mattingly Group acted under color of title, the provisions of KRS 364.130 are no longer applicable. The Johnsons do not point to alternate authority for the award of attorney fees. Thus, the Johnsons were properly denied reimbursement of their attorney fees. See Craig v. Keene, Ky. App., 32 S.W.3d 90 (2000).

The Johnsons also allege that the language of KRS 364.130 provides for reimbursement of the Johnsons's expert

witness fees. Like an award of attorney fees, the general rule concerning expert witness fees is that "fees paid by a party to expert witnesses are not recoverable as part of the cost of the action, unless specifically authorized by statute." 20 Am. Jur. 2d Costs § 51 (2003). Kentucky courts have applied this rule. See Shelter Mut. Ins. Co. v. McCarthy, Ky. App., 896 S.W.2d 17, 19 (1995) (holding that "case expenses should be treated like attorney fees; that is, statutory authority must be given in order to allocate such costs"). Again, because we hold that the Mattingly Group acted under color of title, KRS 364.130 is no longer applicable and any authority for the award of expert witness fees disappears. Therefore, the Johnsons were properly denied reimbursement for their expert witness fees.

The Johnsons next assert that they were entitled to pre-judgment interest in this case. Pre-judgment interest is properly awarded where there is statutory authority, a valid and applicable contractual provision, or liquidated damages. Nucor Corp. v. General Elec. Co., Ky., 812 S.W.2d 136 (1991). The trial court denied pre-judgment interest, finding no statutory or contractual authority and determining that the Johnsons's damages were not liquidated.

"Liquidated damages" was defined by the Kentucky Supreme Court in Nucor:

> When the damages are 'liquidated', pre-judgment interest follows as a matter of course. Precisely when the amount involved qualifies as 'liquidated' is not always clear, but in general 'liquidated claims' means 'made certain or fixed by agreement of parties or by operation of law'. Examples are a bill or note past due, an amount due on an open account, or an unpaid fixed contract price.

Id. at 141 (internal citation omitted).

The determination as to whether or not pre-judgment interest is warranted is a decision within the discretion of the trial court, and will only be overturned by this Court upon a showing of an abuse of discretion. Church and Mullins Corp. v. Bethlehem Minerals Co., Ky., 887 S.W.2d 321 (1992). In applying the Nucor definition of liquidated damages to the present case, the trial court determined that the amount of the Johnsons's damages was not sufficiently certain to warrant pre-judgment interest. As evidence of their uncertainty, the trial court pointed to the fact that the damages awarded by the jury were significantly less than the damages sought by the Johnsons. Given this legitimate basis for its determination, we cannot state that the trial court abused its discretion in denying pre-judgment interest.

The Johnsons's fourth claim is for punitive damages. The trial court found no basis for an award of punitive damages and refused to instruct the jury on punitive damages. A party

plaintiff is entitled to have his theory of the case submitted to the jury if there is any evidence to sustain it. Clark v. Hauck Mfg. Co., Ky., 910 S.W.2d 247, 250 (1995). The evidence required for punitive damages is provided by KRS 411.184(2), which allows an award of punitive damages only upon a showing of oppression or fraud. In the present case, the trial court concluded that the Mattingly Group acted under color of title in cutting the timber, and that there was nothing in the record to show the Mattingly Group's actions were "malicious, willful or wanton". Our review of the record reveals a mistake on the part of the Mattingly Group. They admit to cutting timber that they honestly, albeit incorrectly, believed was on their property based on the advice of a qualified surveyor. While the Johnsons are entitled to reimbursement for the value of the lost timber, the Mattingly Group's mistake cannot reasonably be elevated to the level of willful or wanton conduct that would warrant punitive damages. As there was no evidence presented demonstrating oppression or fraud on the part of the Mattingly Group, the trial court did not err in refusing to instruct the jury on punitive damages.

Finally, the Johnsons claim error where the trial court dismissed Jason Wheatley as a party to this action. Because no evidence was presented concerning Jason Wheatley or his involvement in any activity concerning this case, the trial

court dismissed the claims against Jason Wheatley at the close of the Johnsons's case. CR 50.01 allows for a motion for a directed verdict and it does not appear the trial court acted improperly in so granting.

In its cross-appeal, the Mattingly Group alleges that they are entitled to a new trial on three different grounds. The Mattingly Group first claims that the trial court erred in its instructions to the jury. The jury was not asked to make a determination as to whether the disputed land was included in Ms. Tuttle's deed. Nor was the jury asked to determine if the disputed property was included in a deed executed by Sara Abell (wife of Kelly Abell) in 1946. Rather, the jury was asked to determine whether the disputed land was included in the Last Will and Testament of Andrew Wayman, I. The Mattingly Group contends that if this issue had been submitted to the jury, and if the jury had determined that the disputed property *was* included in Ms. Tuttle's deed, then the case would have been bound by the laws governing claims of overlapping titles from common antecedents. In other words, the issue would have been whether the Mattingly Group or the Johnsons had prior recorded paper title to the disputed property.

As stated above, the jury was instructed to determine whether the disputed property was included in the last will and

testament of Andrew Wayman, I. Both parties agree that their titles can be traced to Andrew Wayman, I's will. The jury concluded that the disputed property was not included in the property conveyed by Andrew Wayman, I's will. Therefore, it is irrelevant that the jury was never asked to determine if the disputed property was included in either the Abell deed or the Tuttle deed. One cannot convey property that one does not own. If the Abell's title can be traced to Andrew Wayman, I, and Andrew Wayman, I never conveyed the disputed property, then it necessarily follows that neither the Abells nor Ms. Tuttle ever conveyed the property. Therefore, the jury instructions were proper.

The Mattingly Group's request for a new trial on the grounds of newly discovered evidence is without merit. The Mattingly Group claims that it is entitled to a new trial pursuant to CR 59.01 (accident or surprise) and/or CR 59.01(g) (newly discovered evidence). At trial, a central issue to this case was the identity of an "R.N. Wayman" and whether this person was one and the same as a "Richard N.M. Wayman", a "Nicholas M. Wayman", and a "N.M. Wayman". The importance of this distinction is laid out thoroughly in the parties' briefs; however, for purposes of this appeal, it is sufficient to state that the identity of R.N. Wayman was significant, though not vital, to the establishment of the Johnsons's chain of title.

The Mattingly Group asserts that they were surprised at trial when the Johnsons argued that R.N. Wayman, Richard N.M. Wayman, and N.M. Wayman were all, in fact, the same individual. After trial, the Mattingly Group was able to locate records from the Marion County Public Library that purport to conclusively establish N.M. Wayman and R.N. Wayman as two separate individuals.

While the Mattingly Group may be correct in stating that the information relied upon by the jury was inaccurate, they offer no sound reason why this evidence could not have been discovered prior to trial. CR 59.01(g) requires that new evidence "could not have reasonably been discovered and produced at trial" in order to warrant a new trial. The records obtained from the Marion County Public Library concerning R.N. Wayman's identity were certainly available long before this case ever went to trial. That the Mattingly Group failed to actually obtain the records does not form the basis for a new trial.

Nor can the Mattingly Group legitimately claim that they were unfairly surprised at trial by the Johnsons's assertion that the various Waymans were one and the same. At trial, both parties sought to establish a superior chain of title through an extremely complicated web of conflicting deeds, wills, and mortgages. The names of R.N. Wayman, Nicholas

Wayman, Richard N.M. Wayman, and N.M. Wayman appeared in several of these documents, all purporting to either transfer or describe the disputed property or surrounding properties. It apparently occurred to the Johnsons that these four variations of the Wayman name referred to the same person. In fact, the same thought must have entered the mind of the Mattingly Group's own expert surveyor, Sam Anzelmo. At trial, he was asked to identify N.M. Wayman's property and responded that N.M. Wayman was "also referred to as Richard N.M. Wayman". Even the Mattingly Group concedes that the identity of Richard N.M. Wayman was central to the determination of this matter. The Mattingly Group simply failed to research this man's identity thoroughly before trial, and may not now contend that they were unfairly surprised.

Finally, the Mattingly Group cites error where the Johnsons's claim for trespass damages was submitted to the jury. They argue that the Johnsons failed to sufficiently establish title to the disputed land to merit an award of trespass damages. The jury in this case specifically found that the property claimed by the Johnsons – that is, the disputed property - was included in the will of Andrew Wayman, I. In other words, the jury concluded that the Johnsons had established their title to the disputed property to a common source. Proving title back to a common source is a valid method

of quieting one's title. Daniel v. Powell, 304 Ky. 52, 199 S.W.2d 715 (1947).

At trial, both sides presented extensive evidence in an effort to either establish or disprove that the disputed property was contained in the will of Andrew Wayman, I. The jury entered a finding of fact that the will *did* include the disputed property. The finding of the jury will only be overturned by this Court where it is "palpably or flagrantly" against the evidence. National College Athletic Ass'n By and Through Bellamine College v. Hornung, Ky., 754 S.W.2d 855, 860 (1988). In the present case, there is nothing to suggest that the jury's determination was based on anything other than the evidence submitted. Thus, having quieted the Johnsons's title to the disputed property, it was not improper for the trial court to award trespass damages.

For the foregoing reasons, the decision of the Marion Circuit Court is affirmed.

ALL CONCUR.

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