

RENDERED: OCTOBER 15, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001942-MR

STELLA HIBBARD; RUBY TAYLOR;
AND DELLA BLEVINS

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 87-CI-00010

DOCK HODGE; AND
KYLA McCLAIN

APPELLEES

OPINION AFFIRMING

** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; AND EMBERTON, SENIOR JUDGE.¹

JOHNSON, JUDGE: Stella Hibbard, Ruby Taylor, and Della Blevins have appealed from an order entered by the Knox Circuit Court on July 3, 2003, which dismissed their fraud claim against the appellees, Dock Hodge² and Kyla McClain. Having concluded that the appellants waived any arguments concerning the trial court's

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Although Dock Hodge is named as a defendant in this case, he was not represented in any the proceedings pertinent to this appeal and he has not filed an appellate brief.

decision to dismiss their cause of action by failing to cite any authority in support of their position as required by CR³ 76.12(4)(c)(iii) and (v), we affirm.

Willie Hodge died on December 8, 1986. Shortly after Hodge died, McClain offered a document for probate which she claimed was the last will and testament of Willie Hodge. The document named McClain as the executrix of the estate, and, with the exception of \$2,000.00, it bequeathed all of the real and personal property to his nephew, Dock Hodge, McClain's former husband.⁴ On January 8, 1987, the Knox District Court adjudged the document offered by McClain to be the last will and testament of Willie Hodge and admitted it to probate. On January 13, 1987, the appellants filed a will contest action in the Knox Circuit Court. The appellants insisted that the document offered for probate in the Knox District Court was invalid. The appellants further claimed that they were the daughters of Sam Hodge, the niece's of Willie Hodge, and therefore entitled to share in Willie Hodge's intestate estate.⁵

On April 8, 1987, the appellants' mother, Corine Flannery, testified via deposition that Sam Hodge was not their

³ Kentucky Rules of Civil Procedure.

⁴ Dock's father, Sam, who is also deceased, was Willie's brother. At the time of his death, Willie Hodge was not married, survived by any children, grandchildren or siblings, and his parents were deceased.

⁵ See Kentucky Revised Statutes (KRS) 391.010, et seq.

father. Flannery explained that Fred Moore fathered Hibbard, Taylor, and Blevins. Flannery confirmed, however, that Sam was Dock's father. Shortly thereafter, the appellants entered into a written settlement agreement with Dock Hodge and McClain, whereby they agreed to release "all claims which they have or have reason to believe they have to share in the [e]state of Willie Hodge," in exchange for the sum of \$17,200.00.⁶ On April 22, 1987, the Knox Circuit Court entered an agreed order dismissing the appellants' will contest action, with prejudice.

On August 24, 1988, Dock Hodge transferred 25 acres of real estate that he had received from Willie Hodge's estate to McClain. On December 7, 1989, the appellants filed a motion pursuant to CR 60.02 requesting the circuit court to set aside the order dismissing their will contest action and to "reinstate the case."⁷ On February 13, 1990, the trial court entered an order denying the appellants' motion to reinstate the matter. The trial court concluded that the "[m]otion to [r]einstate violates the statute of frauds in that neither the agreement nor the [a]greed [o]rder of [d]ismissal recites any conditions

⁶ Hibbard, Taylor, and Blevins each received a check in the amount of \$5,733.34, minus attorney's fees. The record does not disclose the precise value or extent of Willie Hodge's estate at the time of his death.

⁷ In sum, the appellants claimed they "were lied to and misled by [] Dock Hodge in order to induce them to enter into the agreement leading to dismissal of the action[.]"

whatsoever with reference to the real estate which is the subject matter herein."

On April 22, 2002, Dock Hodge transferred approximately 14 acres of real estate that he had received from Willie Hodge's estate to McClain. On October 11, 2002, the appellants filed a motion to redocket the case. In sum, the appellants requested the circuit court to "permit[] them to re-open th[e] case to assert a claim for an additional tract of real estate which was not disposed of in the earlier [s]ettlement [a]greement entered herein." On October 21, 2002, the trial court entered an order reinstating the matter on its docket. On January 15, 2003, McClain filed a motion to dismiss, in which she alleged, inter alia, that the appellants' claim was frivolous. On February 14, 2003, the appellants filed a motion requesting the trial court to allow them to exhume Sam Hodge's remains for the purpose of determining paternity. In support of their motion, the appellants alleged that Flannery perjured herself in 1987 when she testified that Sam Hodge was not their father. The appellants claimed Dock Hodge promised to pay Flannery \$5,000.00 in exchange for her "false testimony." The appellants further insisted that Flannery had informed them of her arrangement with Dock Hodge on several occasions.

On July 3, 2003, the trial court entered an order granting McClain's motion to dismiss. The order provided, in relevant part, as follows:

Kyla Hodge McClain [] plead and relied upon the defenses of [s]tatute of [l]imitations, [l]aches, [s]ettlement, [a]ccord and [s]atisfaction, [e]stoppel, [f]ailure of [c]onsideration, [p]ayment, [r]elease, [r]e[s] [j]udicata, and [w]aiver, and the [c]ourt finds that these are all valid defenses to what the [p]laintiffs now claim, in that said [p]laintiffs settled the case on April 17, 1987, and the case was dismissed by [a]greed [o]rder, with prejudice and then, in January 1990, the [p]laintiffs filed a [m]otion to [r]einstate, which was objected to by the [d]efendant, and said [o]bjection was sustained by this [c]ourt on February 12, 1990, and filed in the record on February 13, 1990, which was a final and appealable order and no appeal was taken and therefore, there has been accord and satisfaction by payment and release and anything further was waived by the [p]laintiffs. It has been indicated by the [p]laintiffs as to fraud, and there is a five (5) year[] statute of limitations, which should be invoked by this [c]ourt, along with the other defenses stated above.

. . .

The defenses set forth by the [d]efendant, Kyla Hodge, are equitable and legal defenses and a bar to [p]laintiffs['] claim.

On July 14, 2003, the appellants filed a motion to alter, amend or vacate. In sum, the appellants alleged that they entered into a written agreement with Dock Hodge on April

11, 1987, whereby he agreed to offer each of them first refusal rights before transferring any of the property he received from Willie Hodge's estate.⁸ On August 15, 2003, the trial court entered an order denying the appellants' motion to alter, amend or vacate. This appeal followed.

The appellants argue on appeal that "the [trial] court erred in dismissing this action without giving [them] an opportunity to assert their claim to the additional tract of real estate and to present proof of the fraud which had been practiced on the court[.]" However, we must decline to address this issue as the appellants have failed to cite any authority whatsoever in support of their contention that the trial court erred by dismissing their claim.

CR 76.12(4)(c)(iii) provides that any brief filed with this Court on behalf of an appellant shall contain:

A "STATEMENT OF POINTS AND AUTHORITIES," which shall set forth, succinctly and in the order in which they are discussed in the body of the argument, the appellant's contentions with respect to each issue of law relied upon for reversal, listing under each the authorities cited on that point and the respective pages of the brief on which the argument appears and on which the authorities are cited [emphasis added].

CR 76.12(4)(c)(v) further provides that the appellant's brief shall contain:

⁸ The appellants attached a copy of the purported agreement to their motion.

An "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 and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner [emphasis added].

It is well-established that an alleged error may be deemed waived where the appellant fails to cite any authority in support of the issues and arguments advanced on appeal.⁹

"[W]ithout any argument or citation of authorities, [an appellate] [c]ourt has little or no indication of why the assignment represents an error."¹⁰ The importance of an appellate brief cannot be overstated as it is the principle means of presenting an argument to the appellate court. Given our adversarial system of litigation, it is simply not our function as an appellate court to research and construct legal arguments on behalf of a party.¹¹ Thus, the appellants waived any arguments concerning the trial court's decision to dismiss their cause of action by failing to cite any authority in

⁹ See Elwell v. Stone, Ky.App., 799 S.W.2d 46, 47-48 (1990); and Pierson v. Coffey, Ky.App., 706 S.W.2d 409, 413 (1986), discretionary review denied, 706 S.W.2d 408 (1986), cert. denied, 479 U.S. 825, 107 S.Ct. 100, 93 L.Ed.2d 51 (1986). See also 5 Am.Jur.2d, Appellate Review, § 616 (1995 & Supp. 2003).

¹⁰ State v. Bay, 529 So.2d 845, 851 (La. 1988).

¹¹ See, e.g., Doherty v. City of Chicago, 75 F.3d 318, 324 (7th Cir. 1996).

support of their position.¹² In any event, an ex gratia review of the sole issue raised by the appellants on appeal reveals no manifest injustice.¹³

Based on the foregoing reasons, the order entered by the Knox Circuit Court on July 3, 2003, is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Kenneth M. Boggs
Barbourville, Kentucky

BRIEF FOR APPELLEE, KYLA
McCLAIN:

Joe T. Roberts
London, Kentucky

¹² We are not unmindful of the policy of substantial compliance that applies to rules of procedure regarding appeals. See Ready v. Jamison, Ky., 705 S.W.2d 479, 481 (1986); and CR 73.02(2). We are simply unpersuaded that the appellants "substantially complied" with the procedural rules at issue. The appellants did not even attempt to correct the deficiencies in their brief by way of a reply brief, after the appellee argued these deficiencies as grounds for affirming in her brief.

¹³ Elwell, 799 S.W.2d at 48.