

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000034-MR

DAVID HUDDLESTON; CHARLES R. HUDDLESTON,
AUDREY A. HUDDLESTON, HIS WIFE; LINDA
MAY DAVIDSON; AND PATTY ANN HUDDLESTON APPELLANTS

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE CARL HURST, SPECIAL JUDGE
ACTION NO. 01-CI-00056

JIMMY WOODARD AND DIANE WOODARD,
HIS WIFE APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM,¹ SENIOR
JUDGE.

COMBS, CHIEF JUDGE: David Huddleston, Charles R. Huddleston, Audrey A.
Huddleston, Linda May Davidson, and Patty Ann Huddleston (“Appellants”) appeal from
a judgment of the Cumberland Circuit Court that awarded Jimmy and Diane Woodard a

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

total of \$50,265.80 in damages and legal costs resulting from the Woodards' property dispute and claims for wrongful harvesting of timber. After our review, we affirm.

On July 16, 2001, the Woodards filed a petition for declaration of rights in the Cumberland Circuit Court against the Appellants. They alleged that the Appellants were attempting to establish an adverse and hostile claim to a portion of their property and that the Appellants had removed timber from that property without the Woodards' consent. The Woodards sought a judgment declaring that they owned the property in question; they also asked for damages to compensate them for the timber removed from the property. Appellants filed an answer on August 11, 2001, denying all of the Woodards' claims.

The case proceeded to trial on August 29 and 30, 2005. After hearing the evidence, the jury returned a verdict finding that the Woodards were the rightful owners of the property in controversy and that Appellants had wrongfully removed timber from that property after it had been purchased by the Woodards. The jury awarded \$12,500.00 in damages for loss of timber, which was trebled pursuant to Kentucky Revised Statutes (KRS) 384.130 for a total of \$37,500.00 in damages. The Woodards were also awarded \$12,765.80 in legal fees and costs. The trial court entered a trial order and judgment consistent with the jury's verdict on September 27, 2005. Appellants' motion for a new trial was denied. This appeal followed.

Appellants first argue that the trial court erred in denying their motion for a directed verdict since there was no proof that they cut timber on the property **after** the Woodards purchased it in October 1997. The Woodards contend that this issue is unpreserved for our review because Appellants failed to raise it again in their motion for

a new trial. However, Kentucky Rule of Civil Procedure (CR) 59.06 provides that “[a]llegations of error, otherwise properly preserved, in respect to rulings, orders or instructions of the court need not be presented in a motion for a new trial in order to be preserved for appellate review.” Thus, the issue is properly before us.

Our standard of review in cases in which a motion for directed verdict has been denied was set forth by the Supreme Court of Kentucky in *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459 (Ky. 1990):

Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is “ ‘palpably or flagrantly’ against the evidence so as ‘to indicate that it was reached as a result of passion or prejudice.’ ” If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.

Id. at 461-62 (Internal citations omitted); *see also Previs v. Dailey*, 180 S.W.3d 435, 437 (Ky. 2005).

After reviewing the record, we are persuaded that the Woodards presented sufficient evidence to survive a directed verdict. Jimmy Woodard testified that he was present on the property in question in 1998 and that no timber had been removed at that point; he also noted that the timber was there when he purchased the property in October of 1997. He testified that in November 2000, upon discovering that timber had been cut

on the property, he questioned Appellants about its removal. David Huddleston told him that “they” were the ones who had cut the timber. Surveyor Ralph Anderson testified that he surveyed the Woodards’ property in November and December 1999 and that timber had not been cut on the subject land at that time. He also noted that timber had been cut on Appellants’ side of the claimed property line. Duane Bristow, a timber and foresting expert who testified on behalf of the Woodards, indicated that he was on the property in October 2001 and estimated that timber had been cut before 2001 – but not much earlier than that time and certainly not as long ago as 1997. Consequently, the evidentiary record amply supports the trial court’s decision. We have discovered nothing in the record to suggest that the jury’s verdict was reached as a result of “passion or prejudice.” We conclude that the trial court did not err in denying Appellants’ motion for a directed verdict.

Appellants next argue that the jury’s award of damages was not supported by the evidence and that, therefore, a new trial should have been granted. The Woodards presented testimony indicating that Appellants had wrongfully harvested timber with a stump value of \$34,753.00. Appellants admit that they did not present evidence rebutting this figure – or any evidence, for that matter, as to the value of the timber. They base this omission on the fact that their defense was dual in nature: that they owned the disputed property and that the timber in question had been harvested **before** the Woodards purchased the property. Therefore, their theory of the case negated any need on their part to present evidence as to the amount of damages.

The jury awarded the Woodards only \$12,500.00 in damages for the cutting of the timber. Appellants argue that this award is unsupported by the record and that it

was granted under the influence of passion or prejudice, contending that the jury could have awarded either \$34,753.00 or \$0.00 to the Woodards – and that no other figure could properly be considered. Since the Appellants declined to present any rebuttal evidence as to amount, they believe that the Woodards’ award must be their own damages figure of \$34,753 or nothing.

Although Appellants do not specify which particular provision of CR 59 entitles them to relief, it appears that their claim tracks the language of CR 59.01(d), which provides that a party may be granted a new trial if the jury awards “[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.”

Determining whether a jury’s award of damages meets this standard is “a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial.” *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984)²; *see also Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001). Accordingly, in reviewing a trial court’s decision to grant or to deny a new trial on the basis of an excessive or inadequate jury verdict, our task is to determine whether that decision constituted an abuse of discretion and whether it was, therefore, clearly erroneous. *Prater v. Arnett*, 648 S.W.2d 82, 86 (Ky.App. 1983); *see also Bayless v. Boyer*, 180 S.W.3d 439, 444 (Ky. 2005); *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky.App. 2001); *Davis*, 672 S.W.2d at 932. In conducting our review, we must bear in mind that the decision of the trial court must be accorded a presumption of correctness. *Embry v. Turner*, 185 S.W.3d 209, 213 (Ky.App. 2006); *Prater*, 648 S.W.2d at 86.

² *Davis* was overruled on other grounds by *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002). *Sand Hill* was subsequently vacated by *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (2003).

Since the Appellants surely are not complaining that the jury's award of damages against them was inadequate, the question is whether it was excessive. We conclude that it was not. Appellants acknowledge that the evidence supported a maximum award of \$34,753.00 in damages. Consequently, logic dictates that a substantially lower award could not be considered excessive. Appellants did not request an instruction seeking to limit a damages award either to \$34,753.00 or to \$0.00. Instead, the jury was instructed that it "may award damages to Plaintiffs for timber loss in an amount **not to exceed** \$34,753.00." (Emphasis added.)

The fixing and assessment of damages is exclusively a matter for the jury. *De Buyser v. Walden*, 255 S.W.2d 616, 618 (Ky. 1953); *Tennessee Gas Transmission Co. v. Teater*, 252 S.W.2d 674, 676 (Ky. 1952). We will not interfere with the jury decision in that respect unless it is "obviously and definitely excessive." *Peel v. Bramblett*, 305 Ky. 577, 581, 204 S.W.2d 565, 567 (1947). Under the facts of this case, we cannot agree that the jury erred in its role. Therefore, we conclude that the trial court's denial of Appellants' motion for a new trial on this ground was not clearly erroneous.

Appellants next argue that the trial court erred in denying their request to admit into evidence a survey and court judgment from 1949. These documents purportedly pertained to a lawsuit concerning a boundary dispute that had taken place in 1949. Appellants' father, Porter Huddleston, had prevailed against a number of his neighbors in that litigation. Appellants argue that the documents should have been admitted into evidence to rebut the Woodards' attempt to portray them as continually being on the wrong side of boundary disputes.

We review a trial court's evidentiary rulings under the standard of abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581; *see also Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The survey at issue was not provided to the Woodards in pre-trial discovery. Moreover, it had a number of deficiencies that called its authenticity into question. For example, it had not been signed; there was no indication on its face as to the identity of the surveyor who prepared the plat; there was no indication on its face as to when it had been completed or by whom it had been executed; it had been altered by pencil; and the property surveyed had not been clearly identified. No one was available to authenticate the survey or otherwise to testify in order to explain or allay these concerns. Therefore, we cannot say that the trial court erred in refusing to admit the survey into evidence.

As for the court judgment from 1949, a review of that judgment reveals that it was not final in nature. The face of the judgment is unclear as to what specific property was addressed, and again there was no one available who could provide further any clarification on this question. None of the parties in this case was involved in that previous litigation. As was the case with the survey, this old judgment was not provided to the Woodards prior to trial.

Even though the judgment was not admitted into evidence, the record reflects that Charles Huddleston testified as to the 1949 lawsuit, telling the jury that Porter Huddleston had won a judgment against his neighbors in a boundary dispute case

and was awarded damages for timber that had been improperly cut. Thus, the jury learned about the 1949 lawsuit and judgment regardless of the trial court's evidentiary ruling. We find no abuse of discretion in the court's refusal to admit the judgment into evidence.

Appellants last argue that the trial court should have granted their request for a mistrial because the trial judge made allegedly inappropriate comments from the bench within the hearing of the jury during cross-examination of a witness. While Surveyor Kevin Crowe was testifying on behalf of Appellants, it was discovered that a preliminary plat had been introduced into evidence instead of Crowe's final certified survey. Crowe had been relying on the preliminary plat in his testimony. Counsel for Appellants asked to introduce the final plat into evidence; counsel for the Woodards objected. The trial judge then asked Appellants' counsel: "Do you want to introduce two exhibits and figure out which one's right and which one's wrong?" Appellants' counsel immediately requested a mistrial, but this request was denied.

The decision as to whether or not to grant a mistrial rests within the discretion of the trial court and is reviewed under an abuse of discretion standard. *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004); *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002). "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a 'manifest necessity for such an action.'" *Woodard*, 147 S.W.3d at 68, quoting *Bray*, 68 S.W.3d at 383. The defect must be of such a character and magnitude that it will effectively deny a litigant of a fair and impartial trial, and its prejudicial effect cannot otherwise be cured. *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996). "It is axiomatic that the

judge should refrain from making comments that tend to create prejudice to the litigants, the witnesses or the subject matter of the litigation.” *Transit Authority of River City (TARC) v. Montgomery*, 836 S.W.2d 413, 415 (Ky. 1992). Accordingly, we must view “with considerable caution statements made by the trial judge because of the respect and esteem with which he is held by the jury and the substantial bearing his remarks have on the jury's opinion.” *Irwin v. Jenkins*, 427 S.W.2d 819, 820 (Ky. 1968).

Although we agree that the trial judge should have refrained from making the comment as it arguably brought Crowe’s testimony into question, we do not believe that he abused his discretion by denying Appellants’ motion for a mistrial. Cross-examination of Crowe revealed that he was testifying as to a preliminary survey and not a final plat. Further questioning on this point followed. The jury was well aware that a dispute existed as to the proper plat before the trial judge made his comment. We also note that on re-direct examination, Crowe was able to explain that both surveys supported his opinion as to the location of the boundary lines. Before reading the jury instructions, the trial judge gave the jury the following curative admonition:

At times during the trial, if the court has said anything or acted in such a manner to create the impression that the court favored one side or the other or favored testimony of one witness as opposed to another witness, disregard that because that is not the case. This court has absolutely no interest as to who prevails in this proceeding.”

Such an admonition enjoys a presumption of rectifying an arguably prejudicial comment. “It is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition.” *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky.App. 1993). It is also presumed that a jury follows and obeys such an admonition. *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 740 (Ky. 1996). It would have been

preferable for this admonition to have been given immediately following the trial judge's comment. However, Appellants' counsel did not request that such an admonition be given. Under these circumstances, we do not believe that the trial court abused its discretion in failing to grant Appellants a mistrial. We find no error on this point.

The judgment of the Cumberland Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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