

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000531-MR
NO. 2006-CA-000574-MR
NO. 2006-CA-000807-MR

DOUGLAS R. LEWIS

APPELLANT/CROSS-APPELLEE

APPEALS AND CROSS-APPEAL FROM LYON CIRCUIT COURT
v. HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 05-CI-00029

HAROLD TRAVIS;
SUE TRAVIS; AND
JON W. TRAVIS

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** *

BEFORE: HOWARD AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

STUMBO, JUDGE: Douglas R. Lewis appeals from a partial summary judgment and order reflecting a jury verdict rendered in the Lyon Circuit Court. He argues that he is entitled to fee simple title to a parcel of disputed real property, and that the trial court incorrectly placed the burden on him to prove adverse possession. Harold D. Travis, Sue Travis, and Jon W. Travis cross-appeal, arguing that Lewis should not have been allowed

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.

to assert the theory of adverse possession at trial, and that they improperly failed to receive a jury instruction on punitive damages. For the reasons stated below, we affirm.

In May, 1984, Harold and Sue Travis (“the Travises”) purchased a parcel of real property situated in Lyon County, Kentucky. The parcel was bounded on its western border by Route 819, and on its northern border by an old public roadway referred to either as Old Macedonia Road or Varmit Trace Road. The old roadway is used by the Travises to reach a driveway providing ingress and egress to the parcel. The Travis parcel is composed of two tracts, the western-most being referred to as the Compton Tract, and the eastern-most as the Rice Tract.

In 1991, pursuant to statute, the Lyon County Fiscal Court voted to discontinue its maintenance of Old Macedonia Road. The roadway had been abandoned as a public thoroughfare, though it continued to be used by the Travises to access their driveway. The Travises unsuccessfully objected to the action.

In January, 2004, Lewis purchased a parcel of real property directly north of the Travis parcel. The Lewis parcel is also bounded on its western border by Route 819, and on its south by Old Macedonia Road. Like the Travises, Lewis accesses his driveway by traveling east on Old Macedonia Road from Route 819.

In October, 1994, the Travises conveyed a 2-acre tract of the Travis parcel to their son, Jon Travis.² The parcel is situated on the northern edge of the Travis parcel and was made up of portions of both the Compton Tract and the Rice Tract.

²The phrase “the Travises” will refer either to Harold and Sue Travis, or to Harold, Sue and Jon Travis as warranted.

Sometime thereafter, a dispute arose between Lewis, the Travises and Jon Travis as to the location of the boundaries of the respective parcels and the ownership of Old Macedonia Road. At the center of the dispute was a section of realty between the centerline of Old Macedonia Road and an adjacent fence row that ran along the southern edge of the road. When the dispute could not be resolved, in February, 2001, the three Travises filed the instant action against Lewis in Lyon Circuit Court. They alleged ownership of the strip of land between the centerline of Old Macedonia Road and the fence road, and maintained that Lewis had trespassed on same resulting in damages. They sought injunctive relief and a declaration of fee simple title to the disputed strip of land.

Lewis answered and counterclaimed. An extensive procedural history followed, which is sufficiently set forth in the record and need not be recited herein. On February 14, 2005, the circuit court rendered an order enjoining all parties from using the disputed parcel and requiring Lewis to remove certain personal property items from same. Thereafter, the Travises moved for summary judgment and Lewis moved for partial summary judgment.

On October 17, 2005, the circuit court rendered an order addressing the motions. For purposes of clarifying the dispute, the court described a western portion of the disputed strip as “Segment 1” and the eastern portion as “Segment 2”. Segment 1 consisted of the disputed roadway running between Route 819 and the parties’ driveways. Segment 2 consisted of the portion of the abandoned Old Macedonia Road which ran east

of the parties' driveways. Upon personally inspecting the roadway, Circuit Judge Bill Cunningham noted that the portion of Old Macedonia Road through and past Segment 2 had been abandoned for many years and that "there is barely any evidence that an old roadway ever existed." Judge Cunningham also found that two outbuildings or sheds had been constructed many years earlier on what was once the centerline of Old Macedonia Road, leading him to conclude that a prior owner or owners of the Lewis parcel must have believed that the boundary was the southern edge of Old Macedonia Road rather than its centerline.

The court found that though Old Macedonia Road had been abandoned by Fiscal Court in 1991, the portion running through Segment 1 remained a public roadway that was open for the mutual use and enjoyment of all of the parties. As such, it granted Lewis's motion for partial summary judgment on this issue. The court went on to deny the Travises' motion to quiet title to Segment 2. It determined that title was not justiciable solely from the record and ordered that the the question of title as to Segment 2 move to a jury trial. In so doing, the court noted that "all current surveys of record place the legal description [of the boundary] in the middle of the roadway as to both segments of the disputed property." It found that Lewis could prevail, if at all, only by prosecuting a claim of adverse possession to the disputed Segment 2, and a jury trial was ordered on that issue.

Trial on the matter was conducted in Lyon Circuit Court on November 29 and 30, 2005. After proof was heard, the jury determined that Lewis failed to prove title

to Segment 2 by adverse possession, and it returned a verdict in favor of the Travises on this issue. The jury also determined that Lewis has trespassed on Segment 2, but awarded no nominal or compensatory damages arising therefrom.

Lewis then moved for a judgment notwithstanding the verdict. After the motion was denied, he unsuccessfully sought to alter, amend or vacate the judgment. Other matters not relevant to the matter before us were reserved for later adjudication, such as the care and maintenance of the road and the removal of survey pins. This appeal followed.

Lewis now argues that he was entitled to summary judgment on his claim of fee simple title to all of the disputed property (Segments 1 and 2), and that he should not have been made to prove title to Segment 2 by adverse possession. He maintains that the circuit court incorrectly found that the deeds established the boundary at the centerline of Old Macedonia Road rather than at its southern edge, and that the court should have required the Travises - rather than himself - to prove adverse possession as to Segment 2. Lewis directs our attention to a quitclaim deed from the Compton heirs on July 25, 2005, purporting to convey to Lewis the strip of land between the centerline of Old Macedonia Road and the fence row. Relying in part on this conveyance, Lewis seeks an order vacating the trial judgment and remanding the matter for retrial with the burden on the Travises to prove title by adverse possession. On cross-appeal, the Travises argue that Lewis should not have been allowed to assert a claim of adverse possession, and also that they were entitled to a jury instruction on punitive damages as to Segment 1.

Having closely examined the written arguments, the record and the law, we find no error in the circuit court's denial of Lewis's motion for summary judgment on his claim of fee simple title to the disputed realty. As noted above, the circuit court found that there was no material issue of fact that all current surveys of record place the legal description of the boundary in the middle of the roadway. Relying on this finding, the court concluded that Lewis could prosecute a claim asserting title to the disputed property - if at all - in the form of a claim of adverse possession. The finding that the boundary ran down the centerline of the roadway is supported by substantial evidence in the record. The court noted, and the parties appear to acknowledge, that there exists a "convoluted and complex maze of deeds, easements and surveys" relating to the resolution of the boundary issue. In examining this maze, the circuit court relied to great degree on the chain of title going back to the Compton's common ownership of what later became the Travis and Lewis parcels in determining that the boundary ran down the middle of what was once Old Macedonia Road. Though the parties can reasonably extract more than one conclusion from this maze of deeds, easements and surveys, the question is whether the circuit court's findings of fact and conclusions of law on this issue are supported by the record. We must answer that question in the affirmative, and accordingly find no error on this issue.

In their counterclaim, the Travises first argue that the circuit court erred in allowing Lewis to prosecute a claim of adverse possession in his effort to secure title to the disputed parcel. Relying on KRS 413.050, they maintain that a claim of adverse

possession cannot be made against public land without written notice to the county executive, and argue that even if such a claim could be made that Lewis has failed to possess the property in an open, notorious and exclusive manner for the statutory period.

This argument is moot in light of the jury verdict - and our affirmation of the order and judgment reflecting the verdict - that Lewis did not prove adverse possession as to Segment 2. That is to say, even if we now determined that Lewis should not have been availed of the opportunity to prosecute a claim of adverse possession, it would not alter the status quo. *Arguendo*, even if this argument is not moot, the circuit court opined that a genuine issue of material fact existed as to whether Lewis adversely possessed Segment 2, and that the issue could not be summarily disposed of by judicial action. This finding is sustainable by the record, and as such we find no error on this issue.

Lastly, the Travises argue that they were entitled to a jury instruction on punitive damages arising from Lewis's trespass on the disputed parcel. They maintain that Lewis knew that the roadway was a public road, but nevertheless engaged in "intimidating behavior" as to its use on several occasions. The Travises note that they initiated the action as a claim for trespass and injunctive relief, and argue that punitive damages are the only means by which they can be made whole for the loss of thousands of dollars in attorney fees, surveys and court costs.

We find no error. We must first note that it cannot be determined from the record whether the Travises sought punitive damages as to Segment 1, or Segment 2, or

both. In fact, it cannot be determined from the record whether they sought punitive damages at all. Their citation to the record on this issue directs us to the trial order and judgment rendered on December 15, 2005. That ruling notes that instructions were tendered and objected to, but does not state that a punitive damages instruction was sought, nor if so, whether the proposed instruction addressed Segment 1, Segment 2, or both. If the tendered instructions are contained in the record, the Travises have not cited to them nor has our examination revealed their existence. Since the court's division of the parcel into Segment 1 and Segment 2 was an artificial distinction undertaken for the purpose of simplifying the adjudication of the claims - as opposed to a distinction made by Lewis or the Travises - we will assume that if the Travises sought punitive damages, it related to Lewis's use of the entire disputed parcel.

The primary consideration in determining whether punitive damages are applicable is whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm Mutual Auto Insurance Company v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). This rule, which regards the existence of harm as a prerequisite to an award of punitive damages, is applicable to boundary disputes. *McConnell v. Stivers*, ___ S.W.3d ___, 2007 WL 80897 (Ky. App. 2007) (ordered published). In *McConnell*, the tortfeasor repeatedly vandalized a gate to the disputed parcel by ramming it with his car and using a crowbar and bolt cutter to damage the lock. The behavior continued even after the trial court ordered the tortfeasor to refrain from damaging the gate during the pendency of the circuit court proceeding. Relying on

Campbell, the court went on to find that punitive damages were justified because of the serious and intentional nature of the harm.

In the matter at bar, the Travises cite to nothing in the record in support of their claim that Lewis engaged in the intimidating behavior they allege nor the other alleged resultant harm as arising from his trespass. In order to sustain a claim of entitlement to punitive damages, there must be an underlying finding that the actor engaged in wrongful conduct properly characterized as “harm”. *Campbell, supra*.

Lewis was not found to be a trespasser as to Segment 1. To the contrary, the circuit court found and so ordered that he was entitled to use Segment 1 to access his parcel. Since no harm was found resulting from Lewis’s use of Segment 1, there was no basis for instructing the jury to determine whether that non-existent harm merited an award of punitive damages.

As to Segment 2, the jury returned a verdict finding that Lewis had trespassed thereon, but it awarded no nominal damages or compensatory damages. While an award of compensatory damages is not a prerequisite to an award of punitive damages, *Commonwealth Dept. of Agriculture v. Vinson*, 30 S.W.3d 162 (Ky. 2000), the Travises cite to nothing in the trial transcript or the record evidencing the “intentional malice, trickery, or deceit” required by *Campbell* to sustain an award of punitive damages. While one may reasonably argue that the circuit court would have been justified in instructing on punitive damages, we cannot go so far as to conclude that it was error not to make such an instruction. This is especially true in light of the fact that the Travises

do not cite to even a scintilla of evidence in the record that a punitive damages instruction was tendered to the circuit court. Accordingly, we find no error.

For the foregoing reasons, we affirm the partial summary judgment and trial judgment of the Lyon Circuit Court.

ALL CONCUR.

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