

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000725-MR

JOHN G. SMITH

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
CIVIL ACTION NO. 90-CI-00588

THE ESTATE OF MILBURN WALKER;
BILLY KNIGHT; JIMMY KNIGHT, JR.

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: John G. Smith appeals a judgment of the Oldham Circuit Court in favor of the Estate of Milburn Walker, Billy Knight, and Jimmy Knight, Jr.

Finding no error, we affirm.

Smith appeals from a jury verdict awarding him damages in a wrongful timber harvesting case. Smith alleges that various improper rulings by the trial court

¹ Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

influenced the jury's award for the illegally harvested timber. This is the third appeal.² Liability has been determined in prior proceedings and the only issue remaining is damages.

There have been two prior trials with two different trial judges and two very different sets of instructions. In the first and second trials, the elements of damages are quite different. However, the difference in the two verdicts is only \$217.00, an award of \$6,157.00 in the verdict in the first trial and an award of \$5,940.00 in the second trial.

Smith filed a complaint in December 1990 against Milburn Walker, Milburn Walker d/b/a Walker Real Estate, Milburn Walker d/b/a Oldham Woods Sanitation, Billy Knight and Jimmy Knight, Jr. The complaint alleged that the Knights, acting on the instructions of Walker, entered onto Smith's property and cut timber without Smith's permission. Prior to trial, Milburn Walker died in 1995 and his estate was substituted as a party in this action.

Smith is the land owner and argues the trial court erred in: (1) allowing evidence of a 1995 contract indicating an offer and acceptance for the sale of the subject property; (2) excluding testimony concerning sale of land adjacent to Smith's property; and, (3) the trial judge asking questions to clarify the testimony of an expert witness.

Walker is the timber harvester and contends that Smith's arguments are without merit in that: (1) the sales contract issue was waived by failing to raise this issue on the first appeal; (2) the issue of the land sale of adjacent property was not preserved by offering an avowal; and, (3) a trial judge may legitimately ask questions of a witness.

² See *Smith v. Milburn Walker Estate*, 2002-CA-000616-MR and 2002-CA-000693-MR.

The real estate contract in question was admitted during the first trial and its admission was not raised as error in either prior appeal to this court. Under the law of the case rule, Smith cannot raise this issue at this time. *See Aetna Oil Co. v. Metcalf*, 190 S.W.2d 562 (Ky. 1945). This issue should have been raised in the first appeal and it cannot be raised on a subsequent appeal because the legal issues are limited to questions raised in the initial appeal. *See Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982). Further, in ruling on an earlier appeal in this matter, our Court in *Smith v. Milburn Walker Estate*, 2004 WL 221175, at *3 (Ky.App. Feb. 6, 2004)(quoting *Inman*, 648 S.W.3d at 849), stated:

The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions of law and not questions of fact. “As the term ‘law of the case’ is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate.

The trial court excluded testimony concerning the sale of land adjacent to Smith's property. Smith has failed to preserve this issue by requesting the testimony be preserved for review by an avowal outside the hearing of the jury. Absent an avowal, this issue cannot be reviewed on appeal. In *Commonwealth of Kentucky v. Ferrell*, 17 S.W.

3d 520 (Ky. 2000), the Kentucky Supreme Court opined that KRE 103³ requires an offer of proof into the record sufficient for an appellate court to review decisions concerning the admissibility of evidence. Smith's failure to preserve this testimony in accordance with KRE 103 forecloses our ability to review the trial court's decision to exclude the testimony concerning the land sale.

Finally, the trial court's questioning of the expert witness merely clarified the issues for the fact finder. It is well-settled that a trial judge may ask questions in order to expedite the production of evidence so long as he or she does not unduly influence the triers of fact. *See Terry v. Commonwealth*, 153 S.W.3d 794 (Ky. 2005). *See also* KRE 614. Based on our review of the record, the trial court did not abuse its discretion by asking questions of the expert witness.

Accordingly, the judgment of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald H. Smith
Louisville, Kentucky

BRIEF FOR APPELLEE:

Billy Knight
Louisville, Kentucky

³ KRE 103, in pertinent part, states “(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and . . . (2) Offer of proof. In case the ruling is one excluding evidence, upon request of the examining attorney, the witness may make a specific offer of his answer to the question.