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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002483-MR

DARLENE AND RONALD WILSON — APPELLANTS

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING JR., JUDGE
ACTION NO. 05-CI-00093

DOUGLAS AND MARIA DANIELS;
CARLA SUSAN WEBB; AND
CARL AND ELIZABETH VAUGHN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: This appeal involves a boundary dispute between adjoining landowners. Appellants, Darlene and Ronald Wilson, argue that the trial court erred by: (1) finding a mutual mistake that justified reformation of a deed; (2) dismissing

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

their claims for breach of general warranty and fraud; and (3) dismissing their claim for private nuisance. We affirm.

The Wilsons and appellee, Carla Susan Webb, are adjoining property owners in a subdivision in Bell County, Kentucky. Both the Wilsons and Webb were deeded their respective properties from appellees, Douglas and Maria Daniels. The Daniels acquired a tract of approximately seven acres from appellees, Carl and Elizabeth Vaughn. The Daniels divided the seven acres into lots and sold lots ten and eleven to Webb and sold lots eight and nine to the Wilsons. During the process of creating the subdivision, the Daniels sought and received approval from the Middlesboro Planning Commission of a plat depicting the configuration of the lots. This plat (plat A) was prepared by surveyor, Mark Comparoni. Comparoni had not field checked the plat at this point in time, but based his work on an earlier plat prepared by surveyor, Tony Crutchfield. Although recordation was not required at this point in the approval process, the Daniels recorded plat A in the county clerk's office on May 21, 1999.

In August 1999, Comparoni's field survey disclosed several errors in the plat originally prepared by Crutchfield. Comparoni then prepared a revised plat (plat B) that represented the true boundary of the property conveyed by the Vaughns to the Daniels. Plat B was not placed on record in the county clerk's office until 2002, after all of the lots in the subdivision had been sold. Therefore, each of the deeds in the subdivision contained a mistake and ambiguity because each deed referred to plat A,

although the acreage that is recited is not what is depicted on plat A, but rather is consistent with the acreage depicted on plat B.

In February 2005, Webb filed a quiet title action against the Wilsons alleging that they removed boundary markers, trespassed upon her property, obstructed access to her property, and had claimed a portion of her property. The Wilsons filed an answer, counterclaim, and third-party complaints. In their counterclaim, the Wilsons alleged that Webb trespassed upon their property and had claimed a portion of their property as her own. The Wilsons also alleged that Webb had abused the process of the courts and had filed malicious criminal charges against them. The Wilsons filed a third-party complaint against Douglas and Maria Daniels for breach of the covenant of general warranty and fraud. The Wilsons also brought a third-party complaint against Carl and Elizabeth Vaughn claiming that certain buildings upon their property constituted a public and private nuisance.

The Wilsons and Webb eventually settled their boundary dispute. A bench trial was conducted on the Wilsons' remaining claims against Webb, the Daniels, and the Vaughns. After making findings of fact, the trial court reformed the deed from the Daniels to the Wilsons. This appeal followed.

The Wilsons first argue that the trial court erred by finding a mutual mistake in their deed from the Daniels that would justify reformation. The Wilsons argue that the Daniels made a unilateral mistake of law in not recording plat B before the conveyance was made.

"[R]eformation of a deed may be granted only if the mistake is mutual . . . the evidence is clear, convincing and beyond reasonable controversy, and it is shown that the parties had actually agreed upon terms different from those appearing in the written instrument." *Pressley v. Morton*, 325 S.W.2d 81, 83 (Ky. 1959).

The issue is what the Daniels and Wilsons believed was being sold when the deed was conveyed. The Wilsons admitted that they did not rely on plat A as a representation of the boundaries of their lots. Boundary stakes consistent with plat B were in place at the time the Wilsons purchased the property. Physical landmarks in the form of a row of evergreen trees existed on the property and were consistent with plat B. Beyond the row of trees was a rental house owned by the Vaughns. There is clear and convincing evidence that the mistake was mutual in that both parties believed that the boundaries of the property being conveyed were consistent with plat B. The boundaries recited in the deed reflected the descriptions contained in plat B, although the deed referred to plat A. Further, the Wilsons' claim arose after plat B was officially recorded. The trial court did not err in reforming the deed. As reformation was proper, there was no breach of warranty because the Wilsons enjoyed the property they bargained for.

The Wilsons next argue that the trial court erred in dismissing their claims against the Vaughns for nuisance. In its judgment, the trial court stated "[w]ithout finding or concluding whether the Vaughn rental house and store building are a nuisance, the Court finds and concludes that Vaughn is entitled to a reasonable amount of time to

repair these structures in the absence of the threat of litigation." The trial court effectively found that the nuisance claim was premature.

Nuisances are defined as "that class of wrongs which arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property and produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage." *City of Somerset v. Sears,* 313 Ky. 784, 233 S.W.2d 530 (1950)(quoting 39 Am.Jur., Nuisances, Section 2).

In this case, Elizabeth Vaughn testified that she had made plans to repair the fire damage to certain buildings on her property. Before the work commenced, Vaughn was served with a copy of the third-party complaint. In the various complaints, the Wilsons simultaneously claimed titled to portions of the very property they alleged constituted a nuisance. The Vaughns elected to postpone the repair work until the issue of title was resolved. This was not unreasonable and the trial court did not err in finding that the Vaughns had a reasonable time to complete the intended repairs.

According, the judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS RONALD AND DARLENE WILSON:

David O. Smith
Marcia A. Smith
Corbin, Kentucky

BRIEF FOR APPELLEES DOUGLAS AND MARIA DANIELS:

Keith A. Nagle
Nagle Law Offices
Middlesboro, Kentucky

BRIEF FOR APPELLEES CARL AND ELIZABETH VAUGHN:

F. Allen Lewis
Greene & Lewis
Pineville, Kentucky