

RENDERED: AUGUST 7, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001835-MR

CECIL GLENN SHUMATE AND
HIS WIFE, BETTY SHUMATE

APPELLANTS

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 15-CI-00159

JIMMY MILLS AND HIS WIFE,
BRENDA MILLS; AMANDA MILLS; AND
JASON MILLS AND HIS WIFE,
MICHELLE MILLS

APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Cecil Glenn Shumate and Betty Shumate appeal from a judgment of the Knox Circuit Court entered following a jury verdict and terminating the Shumates' right to use an easement (referred to as the "old

roadway” by the parties) contained in their deed over property owned by Jimmy Mills and his wife, Brenda Mills. They allege the trial court erred in instructing the jury panel that the panel had limited time to decide the case; the jury instruction regarding the existence of the easement did not conform to the law and was misleading; the trial court erred in awarding a portion of the property to Jimmy and Brenda by creating a new legal description in the judgment; and the trial court erred when it did not attach a survey to the judgment. We conclude the trial court’s failure to attach the survey to the judgment was a clerical error and vacate and remand for the sole purpose of correcting that error. Otherwise, we affirm.

On April 24, 2015, the Shumates filed this action against Jimmy Mills, Brenda Mills, Amanda Mills, Jason Mills, and Michelle Mills (collectively, “appellees”) alleging trespass upon their real property, a boundary line dispute, damages caused to their real and personal property, intentional infliction of emotional distress, and removal and conversion of timber. The Shumates sought compensatory damages, treble damages for the removal of timber, quiet title regarding the boundary line, as well as a declaratory judgment and injunction regarding any further trespass/encroachment upon their real property by appellees.

The appellees filed an answer and counterclaim denying the Shumates’ allegations. Additionally, appellees filed a counterclaim against the Shumates alleging abuse of process, interference with contractual relationships,

and trespass. The appellees sought compensatory damages, punitive damages, as well as injunctive relief for any further trespass by the Shumates upon the appellees' property.

A jury trial commenced on all claims. At the conclusion of the Shumates' proof, all parties moved for directed verdict. The trial court sustained the appellees' motion for directed verdict on the boundary line dispute between the Shumates and the appellees based on the testimony of the Shumates' surveyor, Bobby Anderson, who reviewed the survey of the appellees produced by Neil Grande and agreed that the legal boundary was accurately reflected in that survey. Anderson testified that the lines provided in his survey represented only those where the Shumates believed the proper boundary lines to be. The trial court further directed a verdict on the claims against Jason and Michelle as there was no proof presented regarding them as to any claims asserted by the Shumates. The Shumates' claim against Brenda for trespass was also dismissed due to lack of evidence to support that claim. The trial court denied a directed verdict on the Shumates' claim for quiet title of an easement over the property owned by Jimmy and Brenda, finding that there was an issue of fact as to whether the old roadway was abandoned, Jimmy filled the roadway, or whether natural causes affected the old roadway.

On appeal, the Shumates do not raise any issue regarding the trial court's directed verdicts. The issues concern the single issue decided by the jury regarding the old roadway.

Betty was conveyed property located in Knox County by her mother, sister, and sister-in-law. The deed included "the perpetual use of the old roadway for the purpose of egress, ingress and regress to the grantee herein, Betty Jane Shumate, her heirs and assigns." At trial, Betty, who lived on the property and/or owned the property her entire life, testified that the old roadway was the only access to the property and that in 2013, Jimmy began filling in the old roadway. She further testified that in 2015, Jimmy blocked her access to the old roadway by placing a gate across the old roadway and placing a cable across it with a no trespassing sign. Betty testified she needed to use the old roadway to complete a home she was constructing on the property. Jeremy Bargo, a contractor, testified that the old roadway had been filled in by someone.

Jimmy admitted that he placed a gate across the old roadway to keep animals in but testified that the old roadway was impassable by motor vehicles because of natural conditions and flooding. Jimmy testified that the old roadway had been impassable for more than ten years and was never maintained by the Shumates.

Anderson testified that he found evidence of the old roadway with dirt and gravel in existence since 1952 on a topographic map and in the Shumates' deed conveying a perpetual easement for ingress and egress to their property. However, he testified that the old roadway currently was extremely difficult to determine and was not crossable. Grande testified that the old roadway no longer existed and was not visible.

The jury was instructed as follows:

Regarding the easement claimed by the Plaintiffs described as the old roadway, there are three (3) possibilities that you are to consider from the evidence. Which of the following do you believe from the evidence had occurred to the old roadway. Place a check mark in the appropriate blank (Use only one.):

- (a) Defendant Jimmy Mills has altered the old roadway by filling it and raising it with dirt and rock:
- (b) Plaintiffs Cecil Glenn and Betty Shumate have abandoned the old roadway:
- (c) The old roadway is no longer useable for travel by motor vehicle because of natural conditions and changes that have occurred over time.

The jury unanimously found that the old roadway was not useable for motor vehicle travel because of natural conditions and changes that occurred over time.

Following the jury's verdict, the trial court issued a final judgment. In addition to including its rulings on the motions for directed verdicts and the jury's

finding, the trial court specifically recited: “The parties stipulated to the jury instruction to be presented to the jury.” The trial court ordered that the Shumates’ right to use the old roadway as an easement was terminated and the Mills’s right to the property quieted against all claims, demands, and pretensions of the Shumates. Further, and as relevant to this appeal, the trial court’s judgment states:

IT IS FURTHER ORDERED that the Plaintiffs are perpetually restrained and enjoined in and enjoined from interfering in any manner with the [Mills’s] use and enjoyment of said real property situated in Knox County, the Commonwealth of Kentucky more particularly described as follows:

BEGINNING at the stakes and set stone at the corner of Jimmy Mills and Betty Jean Shumate at the creek; thence running with the creek and the line of Betty Jean Shumate to a set stone on the bank of the creek at James Mills’ corner; thence running with James Mills line in a westerly direction to a set stake on top of the ridge at James Guiles line; thence running with the ridge south with the Guiles line to a set stake at a sugar tree near a small drain; thence running back down the hill with the set stake near a large forked white oak at the county road; thence running with the county road back to the stake and stone at the corner of Mills and Shumate, the place of the Beginning.

Also included and conveyed in this deed is the roadway of the grantor.

IT IS FURTHER ORDERED that the boundary line claims of the [Shumates] are hereby denied as both surveyors for the parties agreed that Neil Grande’s

survey represented the correct legal boundary; a copy of Neil Grande's survey (Titan Engineering) is attached hereto. The survey plat produced by Neil Grande and Titan Engineering, which is attached hereto, shall be recorded by the Knox County Clerk along with a certified copy of this JUDGMENT.

Following entry of the trial court's judgment, the Shumates filed this appeal.

The Shumates argue that the trial court erred when it made statements to the jury panel that the case would be decided in a day because the trial court had other duties the following days. In the Shumates' view, the trial court prejudiced the jury by suggesting the case was unimportant. The exact statements by the trial court were as follows:

Ladies and gentlemen, this is a trial we will need to finish today out of necessity, because I have court in Laurel County tomorrow and criminal grand jury here Friday, so we'll need to finish today. I have spoken with the attorneys and they do not anticipate that will be a problem, finishing today. Once again, I can't guarantee what time we will finish, ya know, we could go into the evening. So, do any of you all have anything going on today or this evening that would make it impossible for you to serve as a juror in this case?

The initial problem with the Shumates' argument on appeal is that there was no objection to the trial court's statement. If there was error, the issue was not preserved. Furthermore, there was no error. The trial court did not suggest the case was unimportant. To the contrary, the trial court indicated the importance of resolving the matter could require that the jurors stay into the

evening. Acting within its discretion, the trial court merely asked whether any juror could not serve because of that possibility.

The Shumates' second argument pertains to the jury instructions. They argue the jury should not have been instructed it could find against the Shumates if the old roadway is no longer useable for travel by a motor vehicle because of natural conditions and changes that occurred over time because that was not an issue raised at trial "nor the state of the law."

The Shumates do not cite this Court to the record where this issue was preserved. Kentucky Rules of Civil Procedure (CR) 51(3) provides: "No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection."

Moreover, CR 76.12(4)(c)(v) requires that an appellant's brief contain:

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.)

The Shumates omit any citation to the record where they objected to the challenged instruction and do not dispute the trial court's finding in its judgment that the "parties stipulated to the instructions to be presented to the jury." That stipulation alone precludes the Shumates from challenging the instructions on appeal. Additionally, contrary to the Shumates' argument, the Mills's primary defense was that Jimmy did not intentionally modify or destroy the old roadway. Jimmy testified that the old roadway had been changed by natural conditions and flooding and it had been impassable for more than ten years. Further, the surveyors testified the old roadway could no longer be identified and was not crossable.

In its final judgment, the trial court recited the description of the property contained in the Mills's deed. There was not, as the Shumates argue, an award of "an entire piece of property," or a "new legal description." The trial court merely recited the same description contained in the Mills's deed.

The final issue raised by the Shumates is that the trial court did not attach a copy of Neil Grande's survey to its judgment. They do not dispute that the Grande survey represents the correct legal boundary. Jimmy and Brenda concede this was error but argue it was not reversible error.

The failure to attach the survey was obviously a clerical error correctable pursuant to CR 60.01. We vacate and remand for the limited purpose of correcting this clerical error.

For the reasons stated, the judgment of the Knox Circuit Court is affirmed in all respects except that we vacate and remand for the trial court to correct its clerical error regarding attachment of the Neil Grande (Titan Engineering) survey to the judgment.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Rhonda Duerr Girdner
Barbourville, Kentucky

BRIEF FOR APPELLEES:

Brandon West
Barbourville, Kentucky