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(2007-SC-0307-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-001835-MR

PATRICK D. McCONNELL; MARY &ELIZABETH McCONNELL — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 00-CI-004598

MARTIN B. STIVERS; MARION PATRICIA DOLL STIVERS; WILLIAM G. NORRIS, JR.; ANGELA ROSEMARY NORRIS; DONNA ALLGEIER; RONALD ALLGEIER — APPELLEES

AND NO. 2004-CA-001894-MR
AND
NO. 2004-CA-002302-MR

MARTIN B. STIVERS; MARION PATRICIA DOLL STIVERS; WILLIAM G. NORRIS, JR; ANGELA ROSEMARY NORRIS — CROSS-APPELLANTS

CROSS-APPEALS FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 00-CI-004598

PATRICK D. McCONNELL;
MARY ELIZABETH McCONNELL CROSS-APPELLEES

AND NO. 2004-CA-002213-MR

PATRICK D. McCONNELL; MARY
&ELIZABETH McCONNELL APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 00-CI-004598

MARTIN B. STIVERS; MARION
PATRICIA DOLL STIVERS; WILLIAM G.
NORRIS, JR.; ANGELA ROSEMARY NORRIS APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

** ** ** ** ** ** ** **

BEFORE: JOHNSON[1] AND WINE, JUDGES; MILLER,[2] SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: Patrick D. McConnell and Mary Elizabeth McConnell appeal from a judgment of the Jefferson Circuit Court which, as relevant to their appeal, (1) required them to remove structures encroaching upon a tract of property owned by Martin B. Stivers, Marion Patricia Stivers, William G. Norris, Jr., and Angela Rosemary Norris (collectively Norris/Stivers) and a tract

[1] Judge Rick A. Johnson concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

of property owned by Ronald and Donna Allgeier, and (2) determined that they do not have an easement by implication to use a driveway running between the McConnell and Norris/Stivers properties. (Appeal No. 2004-CA-001835-MR). Norris/Stivers cross-appeal the trial court's reduction of a jury verdict awarding them $5,000.00 in punitive damages. (Appeal No. 2004-CA-001894-MR). The McConnells also appeal and Norris/Stivers cross-appeal the trial court's awarding of costs. (Appeal Nos. 2004-002213-MR and 2004-CA-002302-MR, respectively). For the reasons stated below, we affirm upon the issues raised by the McConnells in Appeal No. 2004-CA-001835-MR, and reverse upon the issue raised by Norris/Stivers in Cross-Appeal No. 2004-CA-001894-MR.

Because neither of the parties briefed the matter of costs, we deem any arguments related to same to be abandoned. Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iii).

FACTUCAL BACKGROUND

Bishop Lane in Louisville, Jefferson County, Kentucky, runs approximately east-west. The McConnells own 3900 Bishop Lane, upon which they operate a lawn care business known as Perf-A-Green. Norris and Stivers own the property to the east, 3902 Bishop Lane, upon which they operate a HVAC business known as Stivers Heating and Air Conditioning. Each of the properties fronts upon Bishop Lane.

The Allgeier property is to the east of the Norris/Stivers property at 3904 Bishop Lane. The McConnell property is L-shaped, and in addition to bordering the Norris/Stivers property to the west, it also L's behind the Norris/Stivers property to border with the Allgeier tract on the west.

The McConnells and Norris/Stivers each obtained their property from a common grantor in 1986. In the mid-1990s, the McConnells undertook to place a building, fencing, and drainage system along the north-south line between the two properties. In the course of this litigation, the building, fencing, and drainage system were determined to encroach upon both the Norris/Stivers property and the Allgeier property and was ordered removed. Herein, the McConnells contest the injunction mandating removal of the encroachments.

A driveway runs north-south between the McConnell and Norris/Stivers properties. A dispute arose between the McConnells and Norris/Stivers concerning the boundary between their properties along the driveway area. In connection with the dispute, Norris/Stivers erected a gate across the driveway. Subsequently the McConnells vandalized the gate. While the McConnells assert a right to use this driveway, it was determined by a jury in this litigation that the McConnells have no such right. Herein, the McConnells contest this finding.

In late 1999 Norris/Stivers hired Rudy Engineering to survey their property. The survey determined that the McConnells' building, fencing, and drainage system encroached upon the Norris/Stivers property. Norris/Stivers then requested that the McConnells remove the encroachments. When the McConnells refused, Norris/Stivers initiated this litigation seeking both equitable and legal relief. CR 18.01. The complaint alleged trespass and sought compensatory and punitive damages. As amended, the complaint requested that the encroachments be removed and that the McConnells be prohibited from using the Norris/Stivers' portion of the driveway. The Allgeiers later joined as plaintiffs in the action, also challenging the McConnells' encroachment of the building, fencing, and drainage system upon their property.

TRIAL PROCEEDINGS

Trial was held in May 2003. At the close of the evidence the Court submitted the case to the jury in two phases. In the first phase the jury heard evidence concerning the location of the line between the properties and fixed the line pursuant to the Rudy (Norris/Stivers) survey. This resulted in encroachments by the McConnells on both the Norris/Stivers' and Allgeiers' properties.

The jury heard evidence and rejected the McConnells' claims to an implied easement and/or license.

Thereafter, for the second phase of deliberations, the jury was instructed to consider damages. The jury returned a verdict as follows: $3,000.00 to compensate Norris/Stivers for the value of the property upon which the encroachments occurred; $1,620.00 to compensate Allgeier for the value of the property upon which the encroachments occurred; and that the McConnells intentionally damaged, without justification, the Norris/Stivers gate and its related structures, for which it awarded $700.00 in compensatory damages and $5,000.00 in punitive damages.

On March 10, 2004, the trial court entered a judgment consistent with the jury verdicts. The trial court also directed that the McConnells remove those portions of the fencing and waterproofing system which encroached upon the Norris/Stivers and Allgeier properties – **but not the building**.

The parties subsequently filed post-trial motions. On August 5, 2004, the trial court entered an Amended Order and Opinion addressing the post-trial motions. The original judgment was upheld except as follows: (1) the trial court determined that the McConnells' encroachment was intentional and ordered that the McConnells be also required to remove the building to the extent that it encroached upon the Norris/Stivers property and Allgeier property. Because all encroachments were now ordered removed, the money damages awarded to Norris/Stivers and Allgeier for the encroachments

were also set aside; and (2) punitive damages for the McConnells' damage to the Norris/Stivers gate were reduced to $1,400.00. On September 23, 2004, the trial court entered an order assessing costs against the McConnells.

McCONNELL APPEAL – APPEAL NO. 2004-001835-MR

ELECTION OF REMEDIES

First, the McConnells contend that the trial court erred by permitting the plaintiffs to elect a remedy of equitable relief after first seeking money damages. According to the McConnells, once the issue of damages for the encroachment was presented to the jury and a verdict returned thereon, the plaintiffs were thereafter barred from seeking equitable relief pursuant to the election of remedies doctrine. We disagree.

Under Kentucky law, the doctrine of election of remedies "means that when a person has at his disposal two modes of redress, which are contradictory and inconsistent with each other, his deliberate and settled choice and pursuit of one will preclude his later choice and pursuit of the other." Collings v. Scheen, 415 S.W.2d 589, 591 (Ky. 1967); Brown v. Diversified Decorative Plastics, LLC, 103 S.W.3d 108, 113 (Ky.App. 2003).

For two reasons we conclude that the doctrine is not applicable here. First, when the jury determined that there was

an encroachment at the conclusion of phase one, the trial court explicitly indicated that it was not prepared to rule upon the equitable remedy of injunctive relief.[3] This created the following dilemma: if the plaintiffs at that time elected the equitable remedy of injunction requiring removal, and the trial court later determined that removal was unjustified, there would be no means to determine damages other than to convene a new jury for that purpose. In light of this, and with a jury already convened and sworn, the trial court explicitly reserved its ruling on the appropriateness of an order of removal and presented the issue of damages to the jury as a contingency.

The trial judge has broad discretion in the conduct of any trial. Bush v. Commonwealth, 839 S.W.2d 550, 559 (Ky. 1992). Under the circumstances, the approach used by the trial court to resolve the dilemma was sensible and not an abuse of discretion.

Further, the plaintiffs early on in this litigation sought removal of the encroachments from their properties. Post-verdict, notwithstanding that damages had been determined by the jury, the plaintiffs continued to seek removal of the

[3] The trial court and the parties herein refer to the injunctive relief of requiring removal as "ejectment." Technically this is a misnomer. An injunction requiring removal is an equitable remedy. Ejectment is a legal remedy, being one of the original actions at common law. See Dan B. Dobbs, 1 *Dobbs Law of Remedies* § 5.10(4), at 815-816 (2d ed. 1993); See also Haxton by Haxton v. Haxton, 299 Or. 616, 628, 705 P.2d 721, 728 (1985) (Discussing original actions at common law.)

encroachments. Thus, there was never a "deliberate and settled choice" by the plaintiffs to seek monetary damages alone. It follows that the doctrine of election of remedies is inapplicable.

REMOVAL OF ENCROACHMENTS

Next, the McConnells contend that the trial court misapplied the standards necessary to grant a mandatory injunction requiring removal of the encroachments and improperly found that they had intentionally encroached upon the Norris/Stivers and Allgeiers properties.

We first address the issue of whether the encroachments were intentional. We may not set aside the trial court's finding that the encroachment was intentional unless it was clearly erroneous. CR 52.01.

There is an abundance of evidence supporting the trial court's finding. The court noted that at the time of the initial fence construction Norris/Stivers made an effort to determine what survey the McConnells were relying upon in placing the fence. The McConnells were clearly on notice that there was a boundary dispute. Norris/Stivers provided the McConnells with surveys which demonstrated that the placement of the fence and later the building and water drainage system would result in an encroachment. Though repeatedly asked, the McConnells failed to provide any survey upon which they relied

in placing the encroaching structures. Either they had no such survey, or, if they did, it was not to their advantage. The acts of the McConnells clearly demonstrate an intentional and willful intrusion upon the Norris/Stivers and Allgeier properties.

In a situation involving innocent or negligent trespass resulting in encroachment, "[t]he dominant approach . . . is to balance the relative hardships and equities and to grant or deny the injunction as the balance may seem to indicate. If the injunction is denied, the plaintiff is left with defendant's encroaching structure partly on his land and he will be entitled to damages in lieu of the injunction. If the hardship of removal is not too great, a mandatory injunction will issue to require removal, leaving the plaintiff in complete possession." Dan B. Dobbs, 1 *Dobbs Law of Remedies* § 5.10(4), at 816 (2d ed. 1993).

Innocent or negligent trespass, however, is not the issue in the case at hand. We are dealing with intentional trespass. In cases of intentional, willful, or reckless encroachment, we believe the rule to be that "no one should be permitted to take land of another merely because he is willing to pay a market price for it. This would amount to a private eminent domain; no one should be permitted to accomplish this indirectly by intentionally trespassing with the hope that he

would be permitted to remain on the land because of the hardship or cost of removing the structure." Id. "The defendant who intentionally or recklessly builds his structure partly on the plaintiff's land will be compelled to remove it, even at great cost, to avoid giving him a right of private eminent domain." Id. at 817. The fact is that "[w]here an encroachment by an adjoining landowner is intentional or willful, a mandatory injunction will ordinarily be granted to compel its removal, without regard for the relative conveniences or hardships which may result from ordering its removal." Kratze v. Independent Order of Oddfellows, Garden City Lodge No., 11 442 Mich. 136, 145, 500 N.W.2d 115, 121 (Mich. 1993) (quoting Sokel v. Nickoli, 347 Mich. 146, 151, 79 N.W.2d 485 (Mich. 1956). See also Mandatory Injunction to Compel Removal of Encroachments by Adjoining Landowner, 28 A.L.R.2d 679, 705 and Calhoon v. Communications Systems Constr. Inc., 489 N.E.2d 23 (Ill.App. 1986) (holding abuse of discretion to deny mandatory injunction to remove structure when encroachment was intentional).

From the foregoing, we gather that it may generally be said that, in absence of extraordinary circumstances, an encroachment placed upon a neighbor's land as a result of willful, intentional, or reckless trespass is subject to an order of removal without a balancing of the equities. Any other

rule would permit private condemnation, a result abhorrent to traditional principles of property law.

EASEMENT BY IMPLICATION

Finally, the McConnells claim that the trial court erred in several respects with regard to their claim that they have obtained an easement by implication to use the driveway between their property and the Norris/Stivers property.

The McConnells allege that they obtained a right to use the driveway as an easement by implication, a type of easement also referred to as a quasi-easement. A quasi-easement is based on the rule that "where the owner of an entire tract of land or of two or more adjoining parcels employs one part so that another derives from it a benefit of continuous, permanent and apparent nature, and reasonably necessary to the enjoyment of the quasi-dominant portion, then upon a severance of the ownership a grant or reservation of the right to continue such use arises by implication of law." Kreamer v. Harmon, 336 S.W.2d 561, 563 (Ky. 1960). See also Swinney v. Haynes, 314 Ky. 600, 236 S.W.2d 705 (Ky. 1951).

Generally, in order to prove an easement by implication of law, a party must show: (1) that there was a separation of title from common ownership; (2) that before the separation occurred the use which gave rise to the easement was

so long continued, obvious, and manifest that it must have been intended to be permanent; and, (3) that the use of the claimed easement was highly convenient and beneficial to the land conveyed. Evanik v. Janus, 120 Ill.App.3d 475, 485, 76 Ill.Dec. 308, 458 N.E.2d 962, 969 (1983); Bob's Ready to Wear, Inc. v. Weaver, 569 S.W.2d 715, 718 (Ky.App. 1978); Cole v. Gilvin, 59 S.W.3d 468 (Ky.App. 2001). Also, the use must be "reasonably necessary" meaning more than merely convenient to the dominant owner, but less than a total inability to enjoy the property absent the use. Sievers, 305 Ky. at 328, 204 S.W.2d at 366. This factor is different from and less stringent than the analysis applicable to creating an implied easement by necessity. While all of the factors are considered, the factor involving necessity is considered the most important. Knight, 233 S.W.2d at 975-76; Cole v. Gilvin, 59 S.W.3d 468 (Ky.App. 2001).

This matter was presented to the jury upon an instruction which was modeled upon the foregoing factors.[4] The jury determined that the factors required to establish an easement by implication were not met.

[4] In connection with this argument the McConnells argue that the "trial court . . . erred when it submitted this equitable claim brought by way of a declaratory judgment action to the jury over the McConnells' objections." Norris/Stivers state that the McConnells did not object to the issue being presented to the jury, and the McConnells do not cite us to where or how this issue was preserved in the record. We accordingly presume that the issue is not preserved and that the issue was properly submitted to the jury.

In Lewis v. Bledsoe Surface Min. Co., 798 S.W.2d 459, 461-62 (Ky. 1990) the rule was firmly established that a jury's verdict may not be impugned unless it is so "palpably or flagrantly" against the evidence as "to indicate it was reached as a result of passion or prejudice." We do not view the evidence in this case as requiring reversal of the jury's decision as to whether the McConnells had an easement. In particular we note that there is driveway space to the west of the McConnell building almost as wide as the disputed driveway to the east. As necessity is the most important element in finding an easement by implication, the access to the west forecloses us from disturbing the jury's determination.

NORRIS/STIVERS CROSS-APPEAL – APPEAL NO. 2004-CA-002213-MR

REDUCTION OF PUNITIVE DAMAGES

As the driveway dispute escalated, the Norris/Stivers installed a fence at the rear portion of their section of the driveway. The McConnells subsequently vandalized the fence and its supporting structures. As a part of this litigation, Norris/Stivers sued the McConnells for compensatory damages and punitive damages in connection with their vandalism of the gate. The jury awarded the McConnells $700.00 in compensatory damages and $5,000.00 in punitive damages. Post-verdict, the trial court reduced the punitive damage award to $1,400.00, or two

times the compensatory damages, upon its conclusion that a seven to one punitive to compensatory ration was a violation of due process under BMW of N. Amer., Inc. v. Gore, 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

As we are concerned with a punitive damage award which implicates due process, our review is de novo. Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483, 493 (Ky. 2002).

The conduct by the McConnells at issue in this case is as at least as flagrant as the conduct of Roberie. As was noted in Gore, the "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 517 U.S. at 575, 116 S.Ct. at 1599. One consideration in determining reprehensibility is "whether ··· the harm was the result of intentional malice, trickery, or deceit, or mere accident." State Farm Mutual Insurance Co. v. Campbell, 538 U.S. 408, 419, 123 S.Ct. 513, 1521, 1513, 155 L.Ed.2d 585 (2003). In this case, following the Norris/Stivers' installation of a fence at the rear of their portion of the driveway, the McConnells engaged in deliberate retaliatory conduct. The vandalism commenced immediately after the gate was installed. When Bill Norris asked Pat McConnell if he knew anything about the vandalism, Pat McConnell lied and blamed it upon disgruntled employees. Bill Norris then had surveillance cameras installed and found that Pat McConnell was the culprit

vandalizing the property. McConnell was seen on camera damaging the gate and fence; breaking the latch on the gate; using his own weight to bend a filler strip on the gate until it broke; using a crowbar to damage the filler strip; using his car to ram the gate; and using a bolt cutter to cut off the lock on the gate. Moreover, even after the litigation had begun and the trial court had ordered the McConnells to do no further damage to the Norris/Stivers property, the McConnells continued to vandalize the gate. Hence, the conduct at issue involved deliberate malice and deceit. These factors, then, would weigh toward the high-end of the permissible limits of due process. Gore, supra.

In the final analysis, the benchmark is whether the award was reasonable in light of and proportionate to the conduct of the defendants. We are persuaded that the punitive damage award made by the jury in this case did not violate due process. We accordingly reverse the trial court's reduction of the jury award and remand for reinstatement of the jury verdict.

APPEAL NOS. 2004-CA-002213-MR AND 2004-CA-002302-MR

The McConnells and Norris/Stivers each filed a Notice of Appeal reflecting that they intended to challenge the "Supplemental Judgment" entered by the trial court on September 23, 2004, which addressed the issue of costs. Because the parties failed to brief the issue of costs, we deem these issues

to be waived or abandoned. Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 815 (Ky. 2004).

For the foregoing reasons we affirm in Appeal Nos. 2004-CA-001835-MR, 2004-CA-002213-MR, and 2004-CA-002302-MR.

We reverse and remand in Appeal No. 2004-CA-002213-MR for further proceedings consistent with this opinion.

ALL CONCUR.

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