

RENDERED: JANUARY 17, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001289-MR

PATSY WAGNER AND
PHYLLIS SMITH

APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 09-CI-00699

FANNIE BELLE BEVINS

APPELLEE

OPINION AND ORDER
AFFIRMING IN PART AND DISMISSING IN PART

** ** * * * * *

BEFORE: LAMBERT, MAZE, AND MOORE, JUDGES.

LAMBERT, JUDGE: Patsy Wagner appeals from the Pike Circuit Court's order entered June 16, 2011, enforcing a settlement agreement between Fannie Belle Bevins, Phyllis Smith, and herself. For the reasons stated herein, we hereby realign Phyllis Smith as an Appellee, and subsequently dismiss a portion of this appeal as moot. Otherwise, we affirm the trial court's order enforcing the settlement agreement between Ms. Wagner and Ms. Smith.

Ms. Smith and Ms. Wagner are the daughters of the underlying plaintiff, Fannie Belle Bevins. At issue is a parcel of real estate on Joes Creek in Pike County, Kentucky, conveyed by Ms. Bevins to Ms. Smith and described as:

BEGINNING at the intersection of a drain on the line of Patsy Wagner and the county road; thence running with the county road to an intersection of the hollow just below part of first party's house; thence running with the meanders of the hollow to opposite a pear tree; thence to the Pear tree; thence a straight line to the timer line; thence running with the timer line back to the line of Patsy Wagner; thence with the line of Patsy Wagner and meeting a drain; thence on with the line of Patsy Wagner and the drain to the Beginning.

This being the same property conveyed to Patsy Wagner, by deed dated May 24, 2000, from Phyllis Smith and Jerry Smith, her husband, which is recorded in Deed Book 787, Page 654, in the Pike County Clerk's Office. Also see Deed Book 516, Page 215, in the Pike County Clerk's Office.

(Hereinafter Lot A). Ms. Smith's later conveyance of the land to Ms. Wagner resulted in this action, in which Ms. Bevins claims that the conveyance by Ms. Smith to Ms. Wagner is void, as being in violation of a restriction in the deed. That restriction provides, "The Grantees shall not mortgage, encumber, sell, pledge, or hypothecate the said property for and during their lives for a period of 21 years thereafter."

There is a companion case involving Ms. Wagner and Ms. Smith in Pike Circuit Court, which is styled Action No. 09-CI-00836, *Patsy Wagner v. Phyllis Smith*, in which Ms. Wagner filed the action to sell the property. In that

action, the circuit court granted Ms. Smith's motion for summary judgment and dismissed Ms. Wagner's complaint.

In addition to the instant action and the other action in Pike Circuit Court, there was an action filed in Pike District Court, styled Case No. 09-C-00836, *Phyllis Smith v. Patsy Wagner*. In that action, Ms. Smith, the owner of a life estate, filed a forcible detainer action against Ms. Wagner. The real estate in that action was described as:

A certain tract or parcel of land lying and being in Pike County, Kentucky on Joes Cree, and being more particularly described, as follows:

BEGINNING at a metal stake at the intersection of the county road right-of-way and the line of Charles Smith (formerly Mandy Ellis line); thence running 114 feet with the Smith line to a thence; thence with a fence a short distance and turning at an approximate right angle, but turning left and running back up the hill to the tree line. The point at which this property touches the tree line is 185 feet back across the bottom and up the hill from a utility pole near the road; thence with the tree line and around the hill to a point in line with a drain in the middle of the bottom; thence on a line which will intersect the center of that drain to the public road; thence up the public road to the BEGINNING.

And being the same property, conveyed to Patsy Wagner by Belle Bevins, as recorded in Deed Book 787, Page 71, and being the same property conveyed to Phyllis Smith by Belle Bevins, as recorded in Deed Book 938, Page 630, in the Pike County Clerk's Office.

(Hereinafter Lot B). This action was being held in abeyance pending the resolution of the action filed to sell the property for indivisibility in 09-CI-00836. As a result of the summary judgment entered in the companion circuit court case,

the forcible detainer action in district court became ripe, and Ms. Smith could have proceeded with the action.

In the meantime, Ms. Wagner's former counsel, Phil Stalnaker, contacted counsel about a settlement of the district court case, together with the instant action. Ms. Bevins and Ms. Smith agreed to the settlement. Ms. Wagner and attorney Stalnaker discussed the settlement, and she agreed to it. The terms of the agreement provided that Ms. Bevins would dismiss the instant action; Ms. Smith and her spouse would convey all of their right, title, and interest in and to Lot B to Ms. Wagner; Ms. Wagner would convey all of the rights, title, and interest in and to Lot A to Ms. Smith; and the actions involving case number 09-C-00836 and the Smith Life Estate Property, together with this action, would be dismissed.

Ms. Wagner's counsel advised Ms. Bevins's counsel to prepare the deed from Ms. Wagner to Ms. Smith conveying Lot A, and that he would prepare the deed from Ms. Smith and her husband to Ms. Wagner. However, in the deed prepared by Ms. Bevins's counsel, he referred to the dismissal of a pending "criminal" action in the Pike District Court. This was not part of the settlement agreement and was a mistake, and after consultation with Ms. Wagner's attorney, this provision was removed from the deed. The parties then agreed to close the transaction on or around the sixteenth of that month.

Prior to the day of closing, attorney Stalnaker filed a motion to withdraw as counsel. His motion stated:

In support of said Motion, the undersigned, as a result of much work in this case and in two other cases, on in [sic] Pike Circuit court, 09-CI-00699 and 09-C-00836, a settlement was negotiated, in the two Circuit Court Actions, which involved Phyllis Smith conveying the life estate she obtained from Belle Bevins to Pats [sic] Wagner. This would terminate the forcible detainer since Patsy Wagner would have owned both the life estate and the remainder interest. This would have also resolved both Circuit Court Actions. Ms. Wagner called today and indicated she was not going to enter into this settlement at this time.

The motion to withdraw as counsel was granted. After the parties agreed to settle this action, together with the forcible detainer action in the Pike District Court, no one took any steps to enforce the judgment entered in the action styled 09-CI-00836 or in the forcible detainer action, 09-C-00836.

In its order entered June 16, 2011, the trial court concluded that Ms. Bevins and Ms. Smith rightfully believed that attorney Stalnaker had the authority to settle the disputes among the parties. The trial court concluded that attorney Stalnaker did have the authority to settle the case. Relying on *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996), the court recognized that the ultimate decision to settle a case rests with the clients, not the attorneys. However, the trial court concluded that Ms. Wagner gave her attorney the authority to enter into a “global” settlement, which included matters in the instant action, and the accompanying actions, 09-CI-00836 and 09-C-00836. Because of this settlement, no action was taken in those other cases. Because no action was taken in the other cases, Ms. Bevins and Ms. Smith delayed the enforcement of other judgments entered on their behalf in the other

cases. Because the forcible detainer action was filed so that the life tenant could take possession of the property, their positions would be substantially and adversely affected because their tenancy is being shortened by the passage of time. Thus, the trial court's order enforced the settlement agreement.

Ms. Wagner then appealed the trial court's enforcement of the settlement agreement, arguing that the trial court erred in applying *Clark v. Burden* and in determining that Ms. Bevins and Ms. Smith's interests would be substantially and adversely affected because their tenancy is being shortened by the passage of time. Ms. Wagner named Ms. Smith and herself as appellants in the appeal.¹

Looking at the merits of Ms. Wagner's initial arguments on appeal, we look to *Clark v. Burden, supra*, where the Kentucky Supreme Court instructed that the first inquiry the trial court must make is to "determine whether appellant gave her attorney express or actual authority to settle the case If the court finds that such authority was given, the settlement should be enforced." *Id.* at 577. The Supreme Court went on to say that even if no such authority was in fact given, if the parties would be substantially and adversely affected by their reliance upon the purported settlement, enforcement would be appropriate. *Id.*

In the instant case, the trial court found that attorney Stalnaker had the authority to enter into the global settlement agreement. Furthermore, the court found that Ms. Bevins and Ms. Smith were being adversely affected by the delay in the actions. Thus, the trial court upheld the settlement agreement in both regards,

¹ Smith has not participated in the appeal, and it is unclear to this Court whether she has received any pleadings or not.

which *Clark* very clearly authorizes. The trial court is in the best position to judge the credibility of the witnesses and make a factual finding that may result in the court believing the facts presented by one party over the facts presented by the other. *Bissell v. Baumgardner*, 236 S.W.3d 24, 29-30 (Ky. App. 2007).

Ms. Wagner also argued for the first time on appeal that the trial court erred under Supreme Court Rule (SCR) 3.130(1.7)(b) when it made the finding that Ms. Bevins and Ms. Smith rightfully believed that attorney Stalnaker had the authority to settle the disputes among the parties. Ms. Wagner argues that Ms. Bevins could not enter into settlement negotiations on behalf of Ms. Smith because Ms. Smith was a defendant in the action. Because this argument was not presented to the trial court below, we will not address it now for the first time on appeal.

We found no error with the trial court's conclusion that Ms. Wagner authorized the settlement at issue in this case and then later determined that it was not in her best interest and tried to revoke that authority. In the alternative, Ms. Bevins and Ms. Smith were negatively affected by the delay in the proceedings, and thus the trial court's determination to uphold the settlement was not in error.

Just prior to this Court's rendition of an opinion affirming the trial court's order in this case, Ms. Bevins passed away, and this Court's original opinion affirming was pulled and not rendered. Subsequently, Ms. Wagner tendered a "Motion to Extinguish Claim" due to the death of Ms. Bevins. In that motion, Ms. Wagner contends that as a result of Ms. Bevins's death, any claims Ms. Bevins might have had have been extinguished, rendering the action effectively moot. In

response, counsel for Ms. Bevins filed a motion for substitution of party and has tendered a response opposing the motion to extinguish the claim.

In Ms. Bevins's motion for substitution of party, she asks that Wilma Comer and Phyllis Smith—the co-executrices of Ms. Bevins's estate—be substituted in that capacity as party-appellees. However, in the notice of appeal, Ms. Wagner named both herself and Ms. Smith as appellants. Thus, if this Court were to grant the motion to substitute the estate—and the co-executrices—for Ms. Bevins, Ms. Smith would be both an appellant and an appellee. Such an outcome created an obvious concern to this Court.

To further complicate matters, while those motions were pending before this Court, a motion was filed in the Pike Circuit Court asking that court to revive the action, to substitute the estate and co-executrices for Ms. Bevins, and to enforce the settlement agreement. The circuit court scheduled a hearing on that motion for February 15, 2013. While we were skeptical that the circuit court had jurisdiction to revive the action or enforce a settlement agreement without leave of this Court, in light of the issues that had arisen after the death of Ms. Bevins, the Court believed that the circuit court was in the best position to attempt to consider those issues and any new facts they presented. Therefore, this Court entered an order on February 12, 2013, holding the appeal in abeyance for 45 days and allowing the circuit court to address the motion scheduled on February 15, 2013. We further ordered that Ms. Wagner's counsel file a certified copy of the circuit court's order ruling on the pending motion on or before ten days of its entry. In addition, we

ordered Ms. Wagner and Ms. Smith to file a status report on or before ten days of the circuit court's entry of any order setting forth their respective positions on 1) Phyllis Smith's current status as an appellant in light of the pending motion to substitute her as a party-appellee; and 2) whether this appeal, or any portions of this appeal, should be dismissed as moot.

Subsequently, Ms. Comer and Ms. Smith were named as co-executrices of the estate of Fannie Belle Bevins, and filed a motion before the circuit court for enforcement of the original judgment in this case. In an order entered July 3, 2013, the Pike Circuit Court found that because Ms. Wagner had not filed a supersedeas bond, in accordance with CR 73.04, enforcement of the judgment was not stayed. Thus, the court found that it retained jurisdiction for purposes of enforcement of the judgment. The court noted that Ms. Wagner, just as she had done on appeal to this Court, had raised the issue that a portion of the judgment had been extinguished by the death of Ms. Bevins, because the judgment had directed Ms. Bevins to convey Ms. Wagner her life estate in Lot B. The circuit court noted that the issue was moot. However, the circuit court noted, and this Court agrees, that that does not have any impact on the judgment directing Ms. Wagner to convey certain property to Ms. Smith. Thus, this Court issued an order on July 31, 2013, directing the parties to explain the status of the case and the parties' positions to the Court. In response, Ms. Wagner tendered the trial court's order entered on July 3, 2013, and a brief response, which this Court did not find helpful, as it did not

explain or address what to do with the issue of Ms. Smith being named as an appellant and as a co-administrator of the appellee, Ms. Bevins's estate.

Accordingly, we hereby issue this opinion and order dismissing as moot the requirement of the Pike Circuit Court's order that Ms. Smith be required to convey the life estate *pur autre vie* to Ms. Wagner. We further hereby realign Ms. Smith as an appellee for purposes of this opinion. It is of concern to this Court that Ms. Smith and Ms. Wagner have competing interests, and as such, both cannot be named appellants and Ms. Smith cannot be a named appellant and a co-executrix of her mother's, Ms. Bevins, estate. Finally, in all other aspects, we affirm the Pike Circuit Court's enforcement of the original judgment requiring Ms. Wagner to convey her interest in Lot A to Ms. Smith.

ALL CONCUR.

ENTERED: January 17, 2014

/s/ James H. Lambert
JUDGE, COURT OF APPEALS

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