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NO. COA05-390

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STEVE FRANKLIN SMITH,  
Plaintiff,

v.

Macon County  
No. 02 CVS 173

MARTHA J. COON,  
AVERY D. ILES,  
BRIAN M. BOTHE and wife,  
BARBARA BOTHE,  
Defendants.

Appeal by plaintiff from judgment entered 31 March 2004 by Judge Zoro Guice, Jr., in Macon County Superior Court. Heard in the Court of Appeals 16 November 2005.

*Bradley S. Tisdale, for plaintiff appellant.*

*Law Office of Russell R. Bowling, by Russell R. Bowling; and Stack & Associates, P.C., by Robert B. Jackson, IV, and Lisa B. Perlstein, for defendant appellees.*

McCULLOUGH, Judge.

Plaintiff (Mr. Smith) appeals from a directed verdict finding insufficient evidence to support Mr. Smith's claims or to justify a verdict in Mr. Smith's favor and a directed verdict on Ms. Coon, Mr. Iles and Mr. and Mrs. Bothe (defendants), counterclaims finding good title in defendants and declaring Mr. Smith's title null and void. We affirm.

Mr. Smith filed a complaint in Macon County Superior Court on 8 April 2002 alleging that he was the owner in fee simple of a tract of land located in Macon County, that defendants held an adverse claim and further that the adverse claim be removed and Mr. Smith declared the owner in fee simple. Defendants filed an answer and counterclaim denying Mr. Smith's title claim to the property, claiming superior title in the property and asking the court to cancel Mr. Smith's deeds and declare his title null and void. Mr. Smith presented numerous deeds at trial in an attempt to establish chain of title to the disputed property. Mr. Smith also presented evidence of a purported boundary dispute regarding the property in question. At the close of Mr. Smith's evidence, defendants moved for a directed verdict contending that Mr. Smith failed to submit any "legally competent evidence as to title to the property in dispute regardless of where the boundary is." At this point, Mr. Smith attempted to assert that he was claiming title by adverse possession, which was not pled at trial. The court granted the motion for directed verdict as to Mr. Smith's claims concluding that Mr. Smith had not obtained title by express grant nor by adverse possession to the property in question.

Defendants then proceeded to prove superior title in the property in question by offering into evidence several deeds showing their chain of title to the property along with the affidavit of Walter Robillard. After offering these exhibits and affidavit, defendants rested. The trial court then entered an order granting a directed verdict in favor of defendants on their

counterclaims, concluding that the deeds offered by defendants clearly established, as a matter of law, good title in defendants, to the property described in defendants' deeds and declaring Mr. Smith's deeds null and void and cancelled as of record to the extent they described property in defendants' deeds.

Plaintiff now appeals.

#### ANALYSIS

##### I

Mr. Smith asserts three assignments of error on appeal. The first assignment of error is that the trial court erred in granting defendants' motion for directed verdict on Mr. Smith's claims where there was sufficient evidence to show that Mr. Smith had a direct and connected chain of title to the property in question. The second is that the trial court erred in granting defendants' motion for directed verdict on Mr. Smith's claims where there was sufficient evidence that Mr. Smith's title was superior to defendants'. However, none of these assignments of error are argued on appeal. Instead, Mr. Smith argues on appeal that the trial court should have submitted to the jury the question of where the boundary line on the property was located.

Rule 28(a) of the North Carolina Rules of Appellate Procedure requires assignments of error be presented **and argued** in the brief in order to obtain appellate review. *Love v. Pressley*, 34 N.C. App. 503, 514, 239 S.E.2d 574, 581 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843-44 (1978). Where the assignments of error were not

argued on appeal, pursuant to N.C.R. App. P. 28(b)(6) (2004), they are deemed abandoned.

## II

Mr. Smith further argues that the trial court erred in granting defendants' motion for directed verdict on defendants' counterclaims contending that there was "insufficient evidence to make such a finding." We disagree.

In Mr. Smith's brief on appeal, he argues the theory of adverse possession. However, at the trial level, Mr. Smith presented numerous deeds which he purported established a direct, connected, and documented chain of title in himself. Moreover, in response to this argument and in support of their motion for directed verdict, defendants presented numerous deeds showing that instead superior title rested with them. Adverse possession was not pled by Mr. Smith, no evidence was presented on the issue of adverse possession, and the theory was not argued at the trial level. Mr. Smith made a feckless attempt to state that he was proceeding under the theory of adverse possession when he realized during the motion for directed verdict that the judge believed that defendants had a superior chain of title. This Court has repeatedly stated that a party "cannot swap horses between courts in order to obtain a better mount on appeal." *King v. Owen*, 166 N.C. App. 246, 250, 601 S.E.2d 326, 328 (2004).

Moreover, there was an abundance of evidence represented by deeds showing that defendants had a direct and connected chain of title superior to any claim by Mr. Smith. Therefore, this assignment of error is overruled.

Accordingly, we find that no valid arguments have been presented on appeal which establish grounds to reverse the decision of the lower court, and therefore we affirm.

Affirmed.

Judge HUNTER concurs in result only.

Judge GEER concurs.

Report per Rule 30(e).