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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001153-MR

KATHLEEN HURD — APPELLANT

v. — APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 1994-CI-000590

GLORIA HURD MOORE AND
CURTIS MOORE, HER HUSBAND — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GARDNER, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Kathleen Hurd appeals from an April 22, 1998, judgment of Laurel Circuit Court establishing a boundary between her real property on the Parris Karr Road in Laurel County and that of her former sister-in-law, the appellee Gloria Hurd Moore. Hurd maintains that, relying on inadmissible parol evidence, the trial court misconstrued the deed description of the boundary line. We agree and accordingly reverse the circuit court's judgment and remand.

By survivorship deed executed in October 1974, Kathleen Hurd and her husband, Clayton Hurd, purchased approximately four (4) acres of unimproved Laurel County real estate from one Arthur

Causey. Almost immediately thereupon, Kathleen and Clayton sold approximately half of the four-acre tract (the southeastern half) to Clayton's brother, Robert Hurd, and his wife, Gloria Hurd. The deed of conveyance from Clayton and Kathleen to Robert and Gloria describes Robert and Gloria's lot as follows:

> BEGINNING at a steel stake, in the right-of-way of the County Road at a new corner common to Clayton Hurd; Thence with the right of way of the County Road, and continuing with the driveway of Arthur Causey, approximately 120 feet to a concrete post in the property line of Arthur Causey; Thence with the property line of Arthur Causey, Eastward to a concrete post in Ray's line; Thence about North with Ray's line 131.9 feet to a steel stake, a new corner; Thence a straight line, up the hill, a Western direction to the beginning corner, and containing 2 acres more or less. . . .

By the end of 1978, both couples had erected dwellings on their respective lots; Kathleen and Gloria have resided there since.

The present controversy began in 1993, when Kathleen's daughter and son-in-law began preparing to move a house trailer onto Clayton and Kathleen's lot. The Hurd's wished to extend their driveway to the trailer site, but Gloria, now Gloria Moore, and her new husband[1] objected. The proposed driveway, they insisted, would encroach upon their property. Kathleen commissioned a survey of the lots in April 1993. Because the steel stakes mentioned in the deed were no longer existing, the surveyor, Brock, followed the calls one-hundred twenty (120) feet backward from the concrete post on the Causey line to what he determined to be the southern end-point of the Hurd/Moore

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[1]Robert Hurd died in about 1985, and by 1993 Gloria Hurd had become Gloria Hurd Moore.

boundary line. He also followed the calls forward from the concrete post to the northern end-point of the boundary line, then established the line by connecting the two ends. If one assumes that the beginning point of the survey can not be located, there is no dispute that this is a standard and appropriate method of reconstructing the boundary. Indeed, the parties agree that Brock correctly determined the northern end of the boundary line in this fashion. Gloria insists, however, for reasons discussed below, that the southern end of that line was about thirty feet (30') farther to the northwest along the county road (closer to the Hurds' house) than Brock placed it. She commissioned a survey (the Cannon survey) that incorporated this more northwesterly point. The Brock survey locates the boundary line farther to the east than does the Cannon survey, such that the Hurds' driveway is entirely on their own property and such that both lots comprise approximately one and nine tenths acres (the Hurds' lot being about 1.92 acres and the Moores' lot about 1.91 acres). According to the Cannon survey, however, the boundary line passes within a few feet of Kathleen's house, and the extension of the driveway to her daughter's trailer lies almost entirely on the Moores' property. Also according to the Cannon survey, the Hurds' lot is about one and seven tenths (1.7) acres, and the Moores' lot is about two and one tenth (2.1) acres.

The dispute eventually gave rise to a bench trial, at which Moore explained why she disagreed with the Brock survey's placement of what the deed refers to as the beginning corner.

She did not dispute that the monument mentioned in the deed, the steel stake, had disappeared. She testified, however, that, immediately prior to the 1974 transaction between Clayton and Robert Hurd, the parties established the disputed end of the boundary line in the following manner. They measured a straight line from the southwest corner of the Hurd lot (in the deed, the concrete post in Ray's line) to the southeast corner of the Moore lot (the concrete post in Causey's line), a line which did not follow the county roadway or the Causey driveway, and agreed that the center of that line would be on the boundary line between their lots. The Cannon survey's boundary line was based upon Moore's recollection of the point so determined. It so happened that the center point of the straight line between the two (2) concrete posts was about one-hundred twenty (120) feet from the post at the southeast corner of the Moore lot. This was why, according to Moore, the deed referred to a distance of 120 feet from the boundary stake to the post on the Causey line. Moore also testified that the brothers marked the point with a stake or piece of pipe (the steel stake referred to in the deed), and that she could remember where the stake had been because sometime thereafter Robert had planted near it a tree, which was still living. Moore's brother corroborated Moore's testimony concerning the parties' manner of initially establishing the corner, and her son corroborated her testimony concerning the tree.

In deciding in favor of Moore and adopting the boundary line represented on the Cannon survey, the trial court ruled that

the deed's reference to a distance of 120 feet from the steel stake at the boundary line corner to the concrete post in the Causey line had been shown to be ambiguous and thus that parol evidence was admissible to prove what had been intended by that reference. It found Moore's account of that intent persuasive, particularly in light of the general rule of deed construction that monuments be favored over measurements. Hurd maintains that the trial court misapplied the parol evidence rule. We agree.

The trial court decided this case without a jury, so our review is governed by the standards enunciated in CR 52.01. The judgment of the trial court must be sustained unless the reviewing court finds that the judgment is (1) unsupported by substantial evidence, (2) is against the weight of the evidence, (3) is an erroneous declaration of the law, or (4) is an erroneous application of the law. Appellate courts are further warned that they should exercise the power to set aside a decree or judgment of the trial court on the ground that it is against the weight of the evidence with caution and with a firm belief that the decree or judgment is wrong. Owens-Corning Fiberglass Corporation v. Golightly, Ky., 976 S.W.2d 409 (1998); Morganfield National Bank v. Damien Elder & Sons, Ky., 836 S.W.2d 893 (1992); Croley v. Alsip, Ky., 602 S.W.2d 418 (1980).

With regard to this standard, it is well to note that contract construction tends to blur the distinction between matters of fact and matters of law inasmuch as what is plainly a factual question--the meaning the parties attach to the words of their agreement--has traditionally been regarded as a question of

law. The Restatement (Second) of Contracts (1981) remarks on this tradition as follows:

> Analytically, what meaning is attached to a word or other symbol by one or more people is a question of fact. But general usage as to the meaning of words in the English language is commonly a proper subject for judicial notice without the aid of evidence extrinsic to the writing. Historically, moreover, partly perhaps because of the fact that jurors were often illiterate, questions of interpretation of written documents have been treated as questions of law in the sense that they are decided by the trial judge rather than by the jury. Likewise, since an appellate court is commonly in as good a position to decide such questions as the trial judge, they have been treated as questions of law for appellate review. . . .

Id. § 212 comment (d). Kentucky courts have followed this tradition. Morganfield National Bank, *supra*.

We are concerned with the parol evidence rule, which the Restatement (Second) of Contracts § 213 (1981) formulates as follows:

> (1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
> (2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.
> (3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.
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> Comment b to this section notes that
>
> [w]hether a binding agreement is completely integrated or partially integrated, it supersedes inconsistent terms of prior agreements. To apply this rule, the court must make preliminary determinations that

> there is an integrated agreement and that it is inconsistent with the term in question. See § 209. Those determinations are made in accordance with all relevant evidence, and require interpretation both of the integrated agreement and of the prior agreement. The existence of the prior agreement may be a circumstance which sheds light on the meaning of the integrated agreement, but the integrated agreement must be given a meaning to which its language is reasonably susceptible when read in the light of all the circumstances.

Although the trial court did not expressly find that the deed here in question is an integrated agreement, it is well established that modern deeds transferring real property are particularly important instances of such agreements and are subject to the parole evidence rule. Phelps v. Sledd, Ky., 479 S.W.2d 894 (1972). By statute, in fact, deeds are now required to integrate real property transfer agreements at least to the extent of identifying the property, the interest therein to be transferred, and the consideration for the transfer. KRS 382.135. There is no dispute that the Clayton Hurd/Robert Hurd deed before us integrated those terms.

In interpreting such a deed, the fact finder may have recourse to evidence of prior agreements, negotiations, and other pertinent circumstances, and, if the interpretation "depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence," it is to be regarded as a matter of fact. Restatement (Second) of Contracts § 212(2). *See also* Croley v. Alsip, *supra*; Caudill v. Citizens Bank, Ky., 383 S.W.2d 350 (1964). On the other hand, "the asserted meaning must be one to which the language of the

writing, read in context, is reasonably susceptible. If no other meaning is reasonable, the court should rule as a matter of law that the meaning is established." Restatement (Second) of Contracts, § 215, comment b. This is the familiar corollary to the parol evidence rule that extrinsic evidence may not be employed to contradict the plain terms of an integrated agreement. Ball Creek Coal Company v. Napier, 305 Ky. 308, 202 S.W.2d 728 (1947).

Because application of the parol evidence rule, which precludes recourse to extrinsic evidence to alter the meaning of an integrated agreement, requires that that meaning first be established by interpretation, and because interpretation necessitates the preliminary consideration of extrinsic evidence, it is sometimes wondered whether the parol evidence rule has any genuine effect. *See* Traudt v. Nebraska Public Power District, 251 N.W.2d 148 (Neb. 1977) (quoting at length from Wigmore's analysis of this seeming paradox). The need for an initial interpretation, however, does not render the parol evidence rule ineffective.

It often happens that the language of an agreement is susceptible to more than one reasonable interpretation. *See* Intretherm, Inc. v. Coronet Imperial Corporation, 558 S.W.2d 344 (Mo. 1977) (providing a good discussion of several different types of ambiguity). Indeed, as the Restatement notes, the meaning of a writing "can almost never be plain except in a context." § 212 comment b. The interpretation of that language, therefore, will require consideration of the agreement's context.

Under the parol evidence rule, however, the interpretation finally adopted must be reasonably consistent with the writing's actual terms. Even if the circumstances strongly suggest an intention at odds with the written terms, a court's reliance on those circumstances is precluded unless the writing, without alteration, can reasonably bear the alternative meaning those circumstances suggest. As the Restatement comment just quoted goes on to say, "after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention." *See also* Ball Creek Coal Company v. Napier, *supra*.

In the case before us, Brock, in making his survey, relied upon existing monuments and the standard meaning of the deed calls to reconstruct a boundary line that divides the property, consistently with the deed's stated purpose, into two (2) nearly equal sections. Nevertheless, the trial court ruled that the deed description could "conceivably" be read to mean that the 120 feet from the beginning stake to the concrete marker was to be measured not literally as the deed says, "with the right of way of the County Road, and continuing with the driveway of Arthur Causey," but rather along a straight line between the county right-of-way and the post, thus bypassing the angle formed by the county road and Causey's driveway. It then resolved this "conceivable" ambiguity by resorting to Moore's testimony concerning the purported method of first placing the steel corner stake and the purported substitution at some later time of the tree for the steel-stake monument. We believe that the trial

court applied the wrong standard in determining whether the deed was ambiguous--the ambiguity must be reasonably certain, not merely conceivable--and we further believe that its construction of the deed is not reasonably borne by the deed’s language, which plainly refers to ordinary metes and bounds measurements. We conclude, therefore, that the trial court violated the parol evidence rule by altering the deed on the basis of extrinsic evidence.

Moore contends, and the trial court apparently agreed, that application of the parol evidence rule is overborne in this case by the customary tenants of deed construction. It is well established, Moore points out, that where there is a conflict between a boundary line as determined by monuments and as determined by course and/or distance calls, the determination by monument will generally prevail. Marcum v. Cantrell, Ky., 409 S.W.2d 159 (1966). She also correctly notes that the intended location of monuments that have ceased to exist is subject to proof by competent extrinsic evidence. Powell v. Reid, Ky., 519 S.W.2d 388 (1975). Having proved to the trial court’s satisfaction the location of the disputed corner, Moore claims that the trial court correctly ordered the deed’s course and distance calls modified in conformity therewith. All of this would be correct if Moore’s evidence concerning the corner monument were competent. For the reason’s discussed above, however, we believe that that evidence is barred by the parol evidence rule. Without that evidence there is no inconsistency

in the deed description nor is there any other reason to reject the Brock survey.

In sum, the deed employs standard language tracing the boundary of Moore’s lot. If, as Moore asserts, a contrary meaning was intended, it was particularly important, given the deed’s potential role as a public record, that such meaning be more clearly expressed than it was. Such clarity, furthermore, could easily have been accomplished. That it was not may be unfortunate, but under the parol evidence rule, neither this Court nor the trial court is authorized to substitute a meaning contrary to that expressed in the deed as it was written.

For these reasons, we reverse the April 22, 1998, judgment of the Laurel Circuit Court, and remand the matter to that court for entry of a judgment in favor of appellant.

GARDNER, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS.

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