

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000134-MR

WILLARD BARGO

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 90-CI-00347

LAURA CARNES

APPELLEE

OPINION
AFFIRMING IN PART
AND VACATING AND REMANDING IN PART

** ** * ** * ** *

BEFORE: ABRAMSON AND VANMETER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

VANMETER, JUDGE: The doctrine of res judicata bars subsequent litigation between parties when a final judgment has been issued on the merits and is conclusive as to causes of action or issues litigated. The issue we must resolve in this case is whether a 1996 judgment, settling a boundary issue involving Willard Bargo's property and two other tracts of property, operated to bar further litigation as to boundary issues

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

between Bargo's property and a third tract. As we hold that it does not, we therefore vacate the Knox Circuit Court's order dismissing the action and remand this matter to the circuit court for further proceedings.

In 1990, Ruby Carnes Williamson and Mattie Mills filed this action against Willard Bargo. Williamson and Mills alleged that they were "owners in fee simple of certain tracts of property in Knox County," and that Bargo was asserting a contrary claim of ownership, trespassing on their property, and cutting and removing timber. By answer and counterclaim, Bargo claimed ownership of the following property:

BEGINNING at a hickory at the edge of the creek; thence running with Mary Jane (Lester) line to the top of the hill, to an oak; thence leaving the oak and running with Green Carnes Heirs line to Robert Williamson's line; thence with Williamson's line to the creek; thence with the creek to the beginning.

In July 1992, Bargo filed a motion for summary judgment concerning the location of his boundary with Williamson. He stated that he had not yet obtained a survey of the line between his property and that of Mills. In their response to Bargo's motion, Williamson and Mills confirmed this latter statement and noted that the line also had not been determined by their surveyor, Andy Buell, "ostensibly because the deeds in the parties' chain of title did not afford either party any property on the opposite side of the ridge line, as marked by old fencing which was still attached to, and in-grown into tree trunks along the ridge." After Mills died in September 1992, Laura Carnes was substituted as a party. In October 1992, the circuit court transferred the matter for

decision to its master commissioner, who recommended overruling Bargo's motion for summary judgment.

In April 1994, Bargo moved for a hearing date on his dispute with "the Plaintiff, Ruby Carnes Williamson." Williamson and Carnes stated in response that Buell "has indicated that he will have completed additional survey work on the boundary line between Plaintiff Ruby Carnes Williamson and [Bargo] on or about September 5, 1994, and will complete new survey work to determine the boundary line between Plaintiff Laura Carnes and [Bargo] on or about September 20, 1994." Laura Carnes participated in the hearing conducted by the master commissioner on October 13, 1994, but the proof adduced was primarily directed to the location of the boundary line between Williamson and Bargo. The master commissioner then memorialized the hearing as having been "on the merits concerning the boundary line between Plaintiff Ruby Carnes Williamson and Defendant Willard Bargo." He directed the parties to file memoranda and proposed findings and conclusions supporting their respective positions.

Ultimately, the master commissioner ruled in favor of Williamson, describing the issues for resolution as including that

[t]he boundary line in dispute between Plaintiffs Williamson and Carnes and [Bargo] is also identified in the deed [in Bargo's chain of title]:

thence with the branch to a mulberry (which is now down) thence up the hill a straight line to Robert Williamson's line; thence with the same line to Walker's line; and thence with the same line to Green Carnes line[.]

In making his findings of fact, the master commissioner adopted the boundary line as surveyed and established by Williamson's and Carnes' second surveyor, David Crockett, as shown on their Exhibit 1. Significantly, the master commissioner stated that "[a]ll remaining issues in this matter are reserved pending further orders of the Court." The circuit judge entered a judgment in October 1996 approving the master commissioner's report and adopting the boundary line established by Crockett. The judge further held, in conformity with Crockett's survey and the master commissioner's report, that "[t]he boundary line between the Parties on top of the ridge shall be and is a line drawn from the 'chestnut oak on high point' to 'a walnut in fence,' and thence, to 'a white oak on a ridge.'"

Bargo appealed the judgment to this court, naming only Williamson as an appellee. Williamson's counsel, who also represented Carnes, filed an appellee brief stating in part:

This lawsuit involved the location of boundary lines between . . . Bargo and two (2) adjoining tracts, one (1) of which is separately owned by . . . Williamson (Ruby Williamson Tract #1), the other tract being owned jointly by Ms. Williamson and Ms. Laura Carnes (Ruby Williamson Tract #3). **Defendant's boundary line dispute with Ms. Carnes' [sic] on a third tract and all claims for damages in trespass arising out of logging operations at the disputed locations are not before the Court in this appeal.**

(Emphasis added.) This court upheld the judgment on appeal.²

Next, in September 1999, Williamson and Carnes began taking steps to establish the boundary between the properties of Carnes and Bargo. The parties appear to

² *Bargo v. Williamson*, 96-CA-3070-MR (Ky.App. July 17, 1998).

have engaged in mutual discovery until approximately mid-2000, at which point Carnes apparently adopted the position that the 1996 judgment, as affirmed by this court, resolved the dispute. In connection with an attempt to obtain a protective order to prevent Bargo from deposing Williamson's and Carnes' original surveyor, Carnes entered into the record an affidavit in which Buell stated that he "did not survey any of the Mills, now Laura Carnes, property south of the ending point of the line established by this honorable Court and its judgment." The record also contains a copy of a March 1980 deed from Mills to Carnes and Carnes' husband. The property is described as:

Beginning at the county road [sic] at the fence and with Willie Carnes line north up the drea[n] [sic] to a water birch; thence with Willie Carnes line to a white oak; thence with the same line to the top of the mountain to a locust; thence with George Bargo line to the Robert Williamson corner; thence south down the mountain with said line to a beech at the county road; thence west down the county road to the beginning. . . .

The deed reference to the George Bargo line refers to Bargo's grandfather, whose line apparently is the same line of Bargo's property which is the subject of the present litigation.

Following the appointment of a new circuit judge and a change in the parties' counsel, the trial court conducted a pretrial conference in October 2005. The court granted Carnes' motion for a protective order preventing any further discovery in the case, finding that the prior hearing and judgment covered "all issues in this litigation relating to the boundary dispute and quiet title aspects of the case" and was "the law of the case relative to both the Plaintiffs and the Defendant." The trial court noted that the

only remaining issue concerned the value of the timber removed by Bargo from Williamson's property. Since Williamson had died in the interim, the trial court required plaintiffs to file a motion to revive the action or the case would be dismissed. No motion to revive was filed and, without specifically addressing Bargo's motion to alter, amend or vacate, the trial court dismissed the action with prejudice. This appeal follows.

The related but distinct doctrines of res judicata, collateral estoppel, and law of the case have evolved toward the end that litigation cannot be endlessly pursued. Res judicata precludes a party from relitigating "a fact or matter distinctly put in issue and directly determined by a court of competent jurisdiction[.]" *Barnett v. Commonwealth*, 348 S.W.2d 834, 835 (Ky. 1961). The doctrine of collateral estoppel, which is a "part of the concept of res judicata," prevents the relitigation of issues which necessarily were determined in a prior action. *Gregory v. Commonwealth*, 610 S.W.2d 598, 600 (Ky. 1980). The law of the case doctrine precludes a litigant from relitigating any issue raised and decided in a prior appeal. *Williamson v. Commonwealth*, 767 S.W.2d 323 (Ky. 1989).

In this case, the record seems clear that the previously-litigated issues involved the location of the boundary line between Williamson's Tract #1 and the northern portion of Bargo's property and the location of the boundary line between Williamson's Tract #3 (apparently jointly owned by Williamson and Carnes) and the northeastern portion of Bargo's property, at least to the extent that the boundary is "on top of the ridge [and] shall be and is a line drawn from the 'chestnut oak on high point' to

‘a walnut in fence,’ and thence, to ‘a white oak on a ridge.’” The record also clearly shows that the parties did not litigate the location of the boundary line between Bargo’s property and Carnes’ tract, which Mills conveyed to Carnes in 1980 and which has as its source the Green Carnes property, as mentioned in Bargo’s deed description. Although the location of this Carnes tract and where it adjoins Bargo’s land is not clear from the record, the tract does not appear to be located along the boundary line which was determined by the 1996 judgment.

We therefore affirm the order of the Knox Circuit Court to the extent that any portion of the boundary between Bargo’s property and Carnes’ property (conveyed from Mattie Mills in 1980) is comprised of the line, specifically adjudicated in the 1996 judgment, which ends at a point at “a white oak on a ridge.” However, the order is vacated to the extent that it purports to dismiss with prejudice any litigation seeking to determine the boundary line between Bargo’s property and Carnes’ property (conveyed from Mattie Mills in 1980) which is not comprised of the aforesaid line. This matter is remanded to the Knox Circuit Court for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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