

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002599-MR

DAVID J. CHANEY AND
ELAINE K. CHANEY

APPELLANTS

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, SPECIAL JUDGE
ACTION NO. 02-CI-00357

PHILIP D. WILSON; MICHAEL YNN
A. WILSON; RICHARD HARTMAN;
AND DONNA HARTMAN

APPELLEES

OPINION AFFIRMING

** ** * ** ** *

BEFORE: ACREE AND HOWARD, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

HOWARD, JUDGE: This appeal is from a summary judgment dismissing the complaint of David J. Chaney and Elaine K. Chaney which sought the establishment of the boundary line of their property and damages for alleged trespass, wrongful cutting of timber and the removal of lateral and subjacent support. We affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Philip D. Wilson and Michaelynn A. Wilson are the former owners of property adjacent to the Chaney's property in Maysville, Kentucky. The Chaney's live at the bottom of a steep hill, near the banks of the Ohio River. The Wilsons lived at the top of the hill, overlooking the river. Subsequent to the alleged actions that form the basis of this litigation, the Wilsons conveyed their property to Richard Hartman and Donna Hartman.

The Chaney's alleged in their complaint, as amended, that in December of 1997 the Wilsons caused timber to be cut and removed from the Chaney's property and that such actions caused the removal of lateral and subjacent support, either causing or aggravating a landslide that damaged their property.

On April 14, 2005, the trial judge, the Honorable William J. Wehr, Special Judge, met with the parties' attorneys and surveyors at the site of property in dispute. He viewed the property in question and discussed with counsel for both parties an appropriate procedure to resolve the case. The two surveyors agreed that they could work together and jointly provide the court with an agreed legal description resolving the boundary line dispute. The parties, through their attorneys, agreed to this procedure. The surveyors' joint report was filed on August 1, 2005. The boundary line determined by the two surveyors was consistent with the Wilsons' claimed boundary line, and resulted in the conclusion that any trees that had been cut were in fact on the Wilsons' property.

By order entered on August 31, 2005, at a scheduled hearing at which the Chaney's were present, the trial court accepted the surveyors' joint report and directed that

the Wilsons' previously filed motion to dismiss be treated as a motion for summary judgment because matters outside the pleadings were to be considered. *See Commonwealth, Fayette County ex rel. Geary v. Kentucky Cent. Life Ins. Co.*, 746 S.W.2d 565, 566 (Ky.App. 1987). At that hearing the trial court also granted a motion to withdraw by the Chaney's attorney, to which the Chaney's agreed. The trial court established a briefing schedule on the motion for summary judgment. Although the Chaney's were provided extensions of time in which to obtain substitute counsel, they did not do so and have proceeded *pro se* for the balance of the trial court proceedings and on this appeal. The trial court also granted the Chaney's additional time, through November 5, 2005, to file evidence supporting their contentions.

On November 14, 2005, the trial court entered its final order, incorporating by reference the surveyors' agreed description as the disputed boundary line and granting the Wilsons' motion for summary judgment. Regarding the Chaney's claim that some 400 trees had been cut, the trial court found,

That the physical evidence on the site did not equate with the claims of the Plaintiffs, and, based upon the boundary line as agreed and established by the parties two independent surveyors, any minimal cutting of trees occurred on the defendant's side of the established boundary line, effectively negating any claims of improper 'cutting of timber' as alleged in the Complaint.

The trial court also took judicial notice of a separate legal proceeding filed by the Chaney's against their insurance company in which they also alleged that their home was damaged by a landslide, but claimed that it was caused by heavy rains and

occurred in March of 1997, some nine months before the alleged actions of the Wilsons. The court noted that the Chaney's had received a settlement of \$200,000 from their insurer for damages to their property from this landslide. The trial court dismissed the Chaney's complaint, and this appeal followed.

On appeal, the Chaney's raise only one argument, that they did not authorize their attorney to agree to the surveyors' collaborating on the legal description of the disputed boundary line. There are two reasons why this argument cannot prevail. First of all, while an attorney cannot substantively settle a case without his client's express authority, a party is bound by the procedural agreements and stipulations of his or her attorney, in the conduct of the litigation for which that attorney was hired. *DeLong v. Owsley's Ex'x*, 308 Ky. 128, 213 S.W.2d 806 (1948). We believe the agreement entered into by the court and counsel in this case, to have the surveyors conduct a joint survey, was such a procedural agreement, within the attorney's authority.

More important, this issue was not preserved for appellate review. The Chaney's never asserted in the trial court that their attorney lacked the authority to make such an agreement.² This claim is raised for the first time in this Court. An issue not timely presented to the trial court may not be considered for the first time on appeal. *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky.App. 1980).

² We note that the Chaney's filed in the record a letter to their former surveyor in which Mrs. Chaney wrote that the surveyor agreed with the appellee's surveyor without consulting them. However, the trial court record contains no allegation that the Chaney's attorney entered into any agreement without his clients' authority.

We also note that the Chaney's did not include this issue in their prehearing statement as one proposed to be raised on this appeal. Civil Rule 76.03(8) states that "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." *See Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000). As the Chaney's failed to preserve this issue for appeal, we cannot here consider the merits of the issue.

The circuit court judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David J. Chaney, *pro se*
Elaine K. Chaney, *pro se*
Maysville, Kentucky

BRIEF FOR APPELLEE:

Jeffrey L. Schumacher
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