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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000441-MR
AND
NO. 2008-CA-000811-MR

TOMMY S. MATTINGLY AND
MARGARET MARY MATTINGLY

APPELLANTS

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 05-CI-00384

WILLIAM DARRELL ESSEX AND
BECKY ESSEX

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Tommy S. Mattingly and Margaret Mary Mattingly

appeal from a judgment of the Marion Circuit Court that resolved a property

¹ Senior Judge William L. Knopf 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.

dispute in favor of the appellees, William Darrell Essex and Becky Essex. The dispute generally centered on the location of a boundary line between the parties' properties, as well as the right of the Essexes to access their property from what was formerly Kentucky Highway 527 in Marion County, Kentucky. Following a trial, the jury found in favor of the Essexes. On appeal, the Mattinglys contend that the trial court erred by: (1) allowing the Essexes to introduce a state road design plan into evidence without proper authentication; (2) allowing the Essexes to ask about other boundary-dispute lawsuits in which the Mattinglys were involved; and (3) denying their motion for directed verdict on the issue of adverse possession. Upon review, we affirm.

The parties are relatives who own adjoining tracts of land near Holy Cross in Marion County, Kentucky. Separating the two properties is an abandoned state and county road generally known today as Old Kentucky Highway 527. Prior to that highway's construction, the roadbed at that location was referred to by a variety of names, including, "the Holy Cross and St. Francis Pike," the St. Francis-Holy Cross Highway," and the "St. Francis-Holy Cross Road." The Essexes acquired their property by deed on February 24, 1990. The deed's boundary description identifies the property as follows:

A certain tract or boundary of land about one mile South of Holy Cross, Marion County, Kentucky on the West side of the Holy Cross and St. Francis Pike and bounded thus: BEGINNING in the center of Pottingers Creek at the bridge over said creek where the Holy Cross and St. Francis pike crosses said creek; thence West with the center of said Pottinger Creek to the lands of Eddie

Miles; thence East with the lands of Eddie Miles and Edgar Russell to said Holy Cross and St. Francis Pike, corner to this land and lands of Spencer Mattingly; thence with said pike to the bridge at the beginning, containing 40 acres, more or less, and is sold by the boundary and not by survey.

ALSO conveyed in this deed is a road or passway to the tract of land as follows: BEGINNING at the old road that runs up the hill to the dwellings of Charlie Lucas and R.A. Fogle and on the inside of the gate on the road that opens out onto the said Holy Cross and St. Francis Pike, thence South with the fence on the West side of said Holy Cross and St. Francis Pike and on the west side of said fence on the inside of said fence and over the lands of Pauline and Charlie Lucas to the beginning, the above boundary of land at or in the center of Pottinger Creek at the bridge, and it is agreed that said Pauline and Charlie Lucas are to have the right to use this passway to their bottoms lands, and said road or passway is to be 40 feet wide.

The Mattinglys acquired their property by deed on July 22, 1974. Their deed's boundary description identifies the property as follows:

A certain tract or parcel of land situated on the Southeast side of Pottinger's Creek and on the East side of the St. Francis-Holy Cross Highway in Marion County, Kentucky and bounded as follows:

BEGINNING at a stone corner to F.L. O'Bryan, thence with his line N. 29 E. 18 ½ poles to a stone, N. 8 ¾ West 84 poles to a buckeye on a hillside, S. 80 E. 9 poles to a stake in a drain, thence down the drain N. 20 ½ W. 23 poles, N. 1 W. 17 2/5 poles to Mill Creek, thence down same N. 44 ½ W. 21 poles, N. 88 W. 10 poles to a stake on South bank of Pottinger's Creek, thence down the creek with its meanders S. 81 ½ W. 11 2/5 poles, S. 50 W. 23 ½ poles, S. 70 W. 23 poles, S. 16 ½ poles, S. 46 W. 17 3/5 poles, S. 49 W. 20 poles, S. 35 W. 9 ½ poles to the mouth of Spring Branch, corner to James A. Alvey, thence up said branch S. 52 E. 44 poles, S. 83 E. 52

poles, S. 57 E. 18 poles, S. 63 ¼ E. 16 poles, S. 79 E. 32 poles to a walnut, corner to F.L. O'Bryan, thence N. 73 E. 36 poles to the beginning, containing 115 acres, more or less.

In 1940, Marion County – through its department of county roads – purchased a 60-foot right-of-way for the construction of Highway 527 from the Mattinglys' predecessors-in-title that encompassed “[a] strip of land along the survey line of St. Francis-Holy Cross Road[.]” A similar right of way was purchased from the Essexes' predecessors-in-title at a different point on the survey line. Prior to 1988, the Kentucky Department of Transportation re-routed Highway 527 and abandoned the section of road between the Mattingly and Essex properties. The road was subsequently adopted by the Marion County Fiscal Court on May 21, 1988, and is designated on the official county road map as “Old KY 527.” Marion County apparently ceased maintaining the road at some point; however, no evidence was introduced at trial indicating that it was formally abandoned as required by statute.

The controversy leading to the present lawsuit began in 2003 when the Mattinglys began blocking the Essexes access to Highway 527 by placing logs in the roadway. Although the Essexes had a deeded easement enabling them to get to their property through an adjoining landowner's property, that easement was unsafe to use during certain parts of the year. Consequently, they used Highway 527 as the primary means to access their property. The parties continued to quarrel over the matter until, on May 17, 2005, an attorney representing the Mattinglys

sent a letter to the Essexes formally notifying them that they were being denied the use of Highway 527 to access their property.

On October 31, 2005, the Essexes filed a complaint against the Mattinglys in Marion Circuit Court seeking a judgment that would allow them to use Highway 527 to access their property. The Essexes specifically alleged that they had “good and marketable record title to property which adjoins” Highway 527, thereby giving them the right to use that road for ingress and egress. In the alternative, the Essexes claimed that they and their predecessors in title had acquired the right to access the road through the doctrine of adverse possession. The Essexes consequently asked the trial court for a judgment declaring their right to use Highway 527 and for a permanent injunction preventing the Mattinglys from impeding such use. The Mattinglys responded with an answer denying the assertions made in the complaint along with a counterclaim accusing the Essexes of trespass and asking for damages.

The matter ultimately proceeded to trial on October 29 and 30, 2007. At trial, a key issue presented to the jury was whether the right of way sold to the state for the construction of Highway 527 extended east of an area known as Spring Branch and into the Essexes’ property, thereby establishing a boundary line that would allow them the right to use the road for ingress and egress. The parties each produced expert testimony through surveyors in an effort to establish the boundary line between their respective properties. Donald Dabney, Jr. testified on behalf of the Essexes and indicated that the right of way overlapped Spring Branch

into the Essexes' property for a distance of approximately 180 feet. The parties also presented evidence relating to the questions of whether the Essexes had established a right to use Highway 527 through the doctrine of adverse possession and whether use of that road was necessary to provide them access to their property.

Ultimately, the jury was instructed on three different grounds on which they could find in favor of the Essexes. In "Instruction No. 2," the jury was told:

You will find for [the Essexes] if you are satisfied from the evidence that the boundary line between the parties begins at a point which lies east of Spring Branch and west of Old Kentucky Highway 527 and extends in a northerly direction to a point at the old bridge over Pottinger's Creek, as established by Don Dabney, the surveyor for [the Essexes]; otherwise, you will find for [the Mattinglys].

In other words, the jury was asked to resolve the question of whether the old Highway 527 right of way extended into the Essexes' property, establishing a boundary line that would allow them unencumbered direct access to their property via that road. The jury unanimously answered this question in favor of the Essexes. As a result, the jury did not consider the questions of whether the Essexes had established a right to use Highway 527 by adverse possession or whether Highway 527 provided a necessary access to the Essexes' property.

Following the jury's verdict, the Essexes filed a motion on December 10, 2007, that asked the trial court for an order prohibiting the Mattinglys from

interfering with or obstructing their use of Highway 527 in light of said verdict.

On February 12, 2008, the court entered an order granting this motion. On April 9, 2008, the court entered a judgment consistent with the jury's verdict and its order of February 12th. This appeal followed.

The Mattinglys first argue that the trial court erred by admitting into evidence a Highway 527 road design plan that was allegedly produced by the Kentucky Department of Transportation in 1949. This plan was used by Donald Dabney, Jr. during his testimony to help establish a boundary line that favored the position taken by the Essexes. Of note, the design plan showed the Highway 527 right of way extending into Spring Branch – the Essexes' property – for approximately 100 feet. The Mattinglys contend that the plan was not properly authenticated and, therefore, should have been excluded as evidence.

“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Kentucky Rules of Evidence (KRE) 901(a). We review a trial court's finding of authentication under an “abuse of discretion” standard. *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Before allowing Dabney to testify about the design plan, he was asked about where the plan had been obtained. Dabney stated that he had originally

received a copy from the Essexes and their previous attorney. He also stated that his father – another surveyor who had originally been involved in the case – had obtained a copy of the same plan from the Department of Transportation office in Elizabethtown. Dabney further indicated that all of the copies of the plan in his possession were consistent with one another and that another copy of the plan could be obtained from the Department of Transportation office in Elizabethtown if necessary. Following this testimony, the trial court allowed the design plan to be introduced into evidence.

Although this evidence of authenticity was not overwhelming, it did not need to be for the design plan to be introduced into evidence. The burden of authentication for a party attempting to introduce an item into evidence is “slight” and “requires only a *prima facie* showing of authenticity to the trial court.” *Johnson*, 134 S.W.3d at 566. Accordingly, the obstacle of authentication is not a difficult one to surmount. Of particular note is Dabney’s testimony that a copy of the design plan was obtained from the Department of Transportation office in Elizabethtown. Given the “abuse of discretion” standard of review that this Court must employ, we believe that this testimony was “sufficient to support a finding that the matter in question is what its proponent claims.” KRE 901(a). We further note that the Mattinglys presented no evidence to the trial court that would support a contrary conclusion. Consequently, the Mattinglys claim of error in this respect must be rejected.

The Mattinglys next contend that the trial court erred by allowing into evidence testimony regarding other land disputes in which they had been involved. Prior to trial, the Mattinglys filed a motion *in limine* asking the trial court to prohibit the Essexes from presenting evidence relating to two other boundary dispute lawsuits the Mattinglys had filed in 2001 and 2002. The court reserved ruling on the issue until after the parties' opening statements. It then advised the parties that each side would be permitted to ask the other only if they had been involved in another land dispute. The parties were prohibited from delving into this issue in any further detail.

The Mattinglys specifically contend that the Essexes sought to introduce evidence of other lawsuits in order to portray them as having a litigious nature. They argue that such evidence was prohibited by KRE 401, 404, and 608(a) because it was irrelevant and because it constituted an inappropriate attack on their character. We review a trial court's evidentiary rulings under an "abuse of discretion" standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

We agree with the Mattinglys that the evidence at issue was of questionable relevance. However, even if allowing it to be presented to the jury was in error, it was error of a minor nature and we cannot say that it affected the Mattinglys' substantive rights so as to merit reversal. Kentucky Rules of Civil Procedure (CR) 61.01. As noted, the trial court severely restricted the extent to which the parties could put the issue of other lawsuits before the jury. Therefore,

the details of the Mattinglys' other boundary disputes were never put into evidence. This Court also notes that the trial court allowed *each* side to ask a question relating to this issue, and testimony was subsequently elicited concerning the Essexes' own involvement in a land dispute. Thus, we cannot say that the Mattinglys were unduly prejudiced by the admission of such testimony into evidence since both sides were adversely affected by the trial court's ruling. Accordingly, we hold that the trial court did not commit reversible error as to this evidentiary matter.

The Mattinglys finally argue that the trial court erred by failing to grant their motion for a directed verdict as to the issue of adverse possession. The record reflects, however, that the jury never reached the question of whether the Essexes had established the right to use the subject property by adverse possession because it resolved the boundary line question in their favor. Thus, the issue is moot and merits no further consideration.

The judgment of the Marion Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael E. Coen
Bardstown, Kentucky

BRIEF FOR APPELLEE:

James L. Avritt, Jr.
Lebanon, Kentucky