

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-002354-MR

EULALA DAY

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE FRANK ALLEN FLETCHER, JUDGE  
ACTION NO. 01-CI-00329

BOBBY SALLEE AND  
BETTY SALLEE

APPELLEES

OPINION AND ORDER  
DISMISSING

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BEFORE: CAPERTON, KELLER, AND VANMETER, JUDGES.

KELLER, JUDGE: Eulala Day (Day) appeals from the trial court's summary judgment. On appeal, Day argues that the trial court erred when it designated the judgment final because not all issues had been resolved, when it addressed and/or resolved issues through summary judgment that were not raised in the Sallee's motion, and when it failed to notify all record title holders of the judgment. The Sallees argue to the contrary. Having reviewed the record, and for the reasons set forth below, we must dismiss this appeal as premature.

## FACTS

The facts in this long-standing case are essentially not in dispute. On October 30, 2001, the Sallees filed a complaint alleging that Day had trespassed on their property and thereby placed a cloud on their title. In addition to compensatory and punitive damages, the Sallees asked the court to establish the boundary line between their property and the Day's; to declare them owners in fee simple of the property in dispute; and to order Day to remove a fence she erected on the disputed property. On November 14, 2001, Day filed an answer and counter-claim. For her counter-claim, Day alleged that she either owned the property by deed or adverse possession and that the Sallees had placed a cloud on her title. Day sought essentially the same relief as the Sallees.

On April 23, 2002, the court entered an agreed order indicating that the parties would submit the names of three surveyors to the judge and that they would equally split the cost of a survey. It appears that this agreement did not last because the Sallees filed a motion on January 6, 2003, indicating that Day was not willing to pay her share of the cost of a survey and asking the court to appoint a surveyor. On January 10, 2003, the court appointed a surveyor, Von Campbell (Campbell), and ordered the parties to equally share the cost of the survey.

Campbell completed his survey, prepared a plat of the property, and testified by way of deposition in August 2003 that he had established the property line dividing the Day and Sallee properties. However, he stated that he could not give any opinion regarding adverse possession.

Day testified by deposition that she and her late husband obtained the tract of land containing the disputed property in 1964. In 1981, Day and her late husband conveyed a life estate in that tract to their daughter Barbara Lovins (Lovins). Upon Lovins's death, the property will pass to her surviving natural children to hold in fee simple. Day and her late husband retained life estates in the property and the mineral rights to the property.

On October 29, 2004, the Sallees filed a motion for summary judgment. In their motion, the Sallees argued that Campbell's survey and testimony were undisputed and they asked the court to establish the boundary as set forth by Campbell in his plat. Day did not file a response to the Sallee's motion. On November 19, 2004, based on an assertion that the matter had settled, the court entered the following order on the docket sheet: "It is hereby ordered this case is be [sic] dismissed as settled. Counsel to tender an agreed order of settlement." On January 6, 2006, the court entered another handwritten order on the docket sheet stating that "It's hereby ordered Plaintiff's Motion for Summary Judgment is granted. Plaintiff's counsel shall tender a Judgment." We note that there is no record of any hearing regarding the Sallees' motion.

On November 9, 2007, the Sallees presented a typed order granting summary judgment to the trial court. Counsel for Day argued that the court could not enter summary judgment because Lovins, who had an interest in the property, was not named as a party. Counsel for the Sallees indicated that the court could grant judgment as against Day and that the Sallees would, if necessary, take action

against any other property owners. The court signed the proffered order and, when asked by counsel, stated that it deemed the order to be final and appealable. On November 16, 2007, the court entered that order, finding that there were no issues of fact as to the location of the boundary, which the court set according to the plat prepared by Campbell. We note that neither the handwritten 2006 order granting summary judgment nor the typed 2007 order contain the finality language required by Kentucky Rule of Civil Procedure (CR) 54.02(1).

#### STANDARD OF REVIEW

Whether the order granting summary judgment was final and appealable is an issue of law, which we review *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

#### ANALYSIS

Before we can address the issues raised by Day on appeal, we must deal with the trial court's 2004 order dismissing this action as settled. We believe that order can be interpreted in one of two ways: either the court dismissed the case that day and would later enter an agreed order reflecting that dismissal, or the court agreed to dismiss the case upon receipt of an agreed order. There is no record of what hearing may have taken place on the date the court entered that order. Furthermore, there are no documents in the record reflecting that a settlement had been reached. Therefore, we have little to guide us in interpreting the court's order. However, because this matter stayed on the court's docket and came up for review after the court's 2004 order, we believe that the court deemed the dismissal

contingent upon receipt of an agreed order. There is no such agreed order in the record, thus we hold that the 2004 order of dismissal is without effect. In doing so, we note that, if we were to hold that the 2004 order of dismissal dismissed this action, the parties, absent a settlement agreement, would be in the same position as they were in 2001. This result would not benefit either party.

We next address whether the trial court's summary judgment was final and appealable. Kentucky Rule of Civil Procedure (CR) 54.02 provides that,

[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Day argues that the summary judgment was not final and appealable because it did not address her adverse possession claim and because not all parties with an interest in the real estate were before the court. The Sallees argue that Day's adverse possession claim was not viable because she only held a life estate in the property. As to other parties who may have an interest in the property, the Sallees argue that they brought their action against Day because she is the only

person who had trespassed upon their property. According to the Sallees, Lovins did not trespass upon their property or make a claim to it and Lovins's surviving children could not be determined; therefore, no cause of action existed against anyone but Day.

We first address Day's adverse possession claim. Five elements are necessary to establish adverse possession: (1) possession must be hostile and under a claim of right, (2) it must be actual, (3) it must be exclusive, (4) it must be continuous, and (5) it must be open and notorious. *Appalachian Reg'l Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878, 880 (Ky. 1992). Furthermore, the adverse possession must take place over a period of fifteen years. *Id.*

As noted above, the Sallees argue that Day could not adversely possess the property because she had only a life estate. The life estate Day created by the deed arose in 1981. Day and her husband owned the property in fee simple from 1964 to 1981, more than the requisite fifteen years. The trial court addressed where the boundary between the Day and Sallee properties is, but it made no findings about whether Day and her husband adversely possessed any of the property outside of that boundary between 1964 and 1981. Furthermore, the court did not address the Sallees' request in their complaint for a finding that they are the owners in fee simple of the property. Thus, the trial court's summary judgment did not dispose of all of the issues and, pursuant to CR 54.02, the court was required to

recite in its judgment that it was final and that there was no just reason for delay.

The court's judgment does neither; therefore, it is not appealable.

Because the issue of what parties must be involved may arise, we will briefly address it. As noted by Day, Lovins and her children have an interest in the property. This Court held in *Baker v. Weinberg*, 266 S.W.3d 827, 831-32 (Ky. App. 2008), that all record title holders must be made parties to a quiet title action. Because Lovins and, in particular, her children are record title holders they are necessary parties to this action and the trial court must join them on remand or set forth "whether in equity and good conscience the action should proceed among the parties before it" in their absence. CR 19.02.

Finally, we note that, as pointed out by the Sallees and as reflected in the record, Day has conceded that the boundary line as determined by Campbell is correct. Therefore, the trial court need not re-address that issue.

#### CONCLUSION

Because the trial court's judgment did not dispose of all of the issues and did not contain the mandatory language in CR 54.02, we must dismiss this appeal as being from a non-final order.

ALL CONCUR.

ENTERED: APRIL 9, 2010

/s/ Michelle M. Keller  
JUDGE, COURT OF APPEALS

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