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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001950

DAYMON MORGAN and
wife BETTY MORGAN — APPELLANTS

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR GAYLE HOUSE, JUDGE
ACTION NO. 06-CI-00253

EFFIE MORGAN MUNCY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Daymon Morgan and Betty Morgan appeal from a judgment of the Leslie Circuit Court in favor of their neighbor, Effie Morgan Muncy, regarding a boundary and quiet title dispute involving a tract of land located in Leslie County, Kentucky. For the reasons stated hereafter, we affirm.

I. STATEMENT OF FACTS/PROCEDURAL HISTORY

Effie and the Morgans own adjoining tracts in Leslie County, Kentucky, which they agree trace back to a common source of title. The Morgans acquired their tract by deed dated September 23, 1946, from James Blaine Mosley and Susan Mosley, who acquired this tract, in turn, from Cultan Callahan on July 3, 1942. Significantly, the deed between Callahan and the Mosleys states:

> It is understood by both parties that this boundary is to contain 50 acres and if after survey there should be more or less either or both parties agree to make the adjustments necessary so that $5.00 per each acre will be the actual amount received for each acre in said boundary.

The subsequent deed of conveyance from the Mosleys to the Morgans omits the above-quoted language. But, the Mosley-Morgan deed describes the tract at issue in that conveyance as the same tract described in the Callahan-Mosley deed. Furthermore, the record does not demonstrate that a survey of the Morgans' tract was ever performed, or that the amount of acreage recited in the Callahan-Mosley deed was ever adjusted from fifty.

With regard to Effie's tract, she and her husband, Charles Muncy,[1] acquired this tract by deed dated September 23, 1960, from Joe Morgan and his wife, Sudie Morgan. The deed of conveyance from Joe and Sudie to Charles and Effie describes a boundary "containing 400 acres more or less" and also states:

[1] After Charles died, Effie inherited his interest.

> There is excepted from the foregoing boundary of land the following:
>
> 1. Fifty acres in the head of main creek and which is described in a deed of conveyance from Jim Mosley and wife to Daymon Morgan, in a deed dated September 23rd 1946, and recorded in deed book 48 page 211, records of the Leslie County Court Clerks Office to which reference is made for a description of said 50 acre exception.

In short, Effie's deed specifically excepts from the boundaries of Effie's larger tract the smaller tract that was conveyed to the Morgans as described in the Morgans' deed. Unfortunately, the boundaries stated in the Morgans' deed do not speak in terms of distances or angles, and its calls, along with its descriptions of monuments, are extremely general in nature:

> Being and lying on Napier Fork of Lower bad Creek of the Middle Fork of the Kentucky River; Beginning at the head of the said Napier Fork, at a marked Chestnut Oak on the line of Boggs Stave & Lumber Co., thence around the ridge an eastward course to a rock on the divide of the ridge; thence with the meanders of the ridge a northward course to a high knob; thence a westward course down the hill to a large water oak near the branch on the Right hand side as you go down said Napier Fork; thence a straight line a westward direction to the top of the ridge between Marion Fork and said Napier Fork; thence with the meanders of the ridge a southward direction to the beginning.

In early 2006, a dispute arose between Effie and the Morgans regarding the location of their common boundary lines. Effie had sold the rights to harvest timber and mine coal from acreage she believed was described in her deed, but the Morgans claimed that the calls of their own deed actually described a portion of that acreage. On June 26, 2006, Effie filed this action to quiet title to the

acreage in question and to define the boundaries of the Morgans' tract,[2] claiming ownership by virtue of her deed and adverse possession.[3] On August 24, 2006, the Morgans filed their answer denying Effie's claim of ownership and counterclaimed to quiet title to that acreage in their favor, asserting ownership based upon the calls of their deed.

Prior to the March 25, 2009 trial of this matter, Effie and the Morgans each commissioned surveys of the Morgans' excepted tract. However, while both of their surveys purport to follow the calls of the Morgans' deed and were based upon searches of the property for the physical monuments described by those calls, the parties disagreed as to the location of some of the monuments described in the Morgans' deed and, in fact, conceded that some of the monuments no longer existed.

As a result, Effie's survey differed from the Morgans' survey. When Effie's surveyor, Terry Bowling, mapped the boundaries of the Morgans' tract, he determined that the calls of their deed described exactly fifty acres; as outlined in

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[2] Pursuant to KRS 411.120:

> Any person having both the legal title and possession of land may prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. If the plaintiff establishes his title to the land the court shall order the defendant to release his claim to it and to pay the plaintiff his costs, unless the defendant by his answer disclaims all title to the land and offers to give such release to the plaintiff, in which case the plaintiff shall pay the defendant's costs, unless for special reasons the court decrees otherwise respecting the costs.

[3] The trial court did not find that Effie owned the subject acreage by virtue of adverse possession, and adverse possession is not an issue addressed on appeal.

Bowling's map, the Morgans' tract resembled, somewhat, the shape of the State of South Carolina. On the other hand, when the Morgans' surveyor, Monty Turner, mapped the boundaries of the Morgans' tract, he determined that the calls of their deed described exactly 96.98 acres; as outlined in Turner's map, the base of the Morgans' tract incorporated the South Carolina shape described in Bowling's survey. Turner's survey added a triangular boundary extending northward, beyond the upper boundary delineated in Bowling's survey, consisting of approximately 47 more acres.

Both parties agreed upon the locations of the first and sixth calls of the Morgans' deed. The reasons for the differences between Bowling's survey and Turner's survey lay in a fundamental disagreement over the interpretation of the second, third, fourth, and fifth calls in the Morgans' deed. After the hearing in this matter, the trial court found Effie's evidence, including Bowling's survey, more persuasive. The trial court established the boundaries between Effie's tract and the Morgans' tract according to Bowling's measurements, and quieted title of the additional 47 acres, claimed by the Morgans per Turner's survey, in favor of Effie. On September 22, 2009, the trial court entered its findings of fact, conclusions of law, and judgment to this effect, which are the subject of the Morgans' appeal. The specifics of the trial court's decision, as well as the specifics of Bowling's survey, are discussed further in our analysis.

II. STANDARD OF REVIEW

When a trial court decides a matter without a jury, the findings of the trial judge shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial judge to consider the credibility of the witnesses. Kentucky Rule of Civil Procedure (CR) 52.01; *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995). In *Webb v. Compton*, 98 S.W.3d 513 (Ky. App. 2002), this rule was held to apply to boundary disputes. Findings of fact are not clearly erroneous if supported by substantial evidence. *Black Motor Company v. Greene*, 385 S.W.2d 954 (Ky. 1964). The test for substantiality of evidence is whether the evidence, when taken alone, or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999). Moreover, on an appeal from the decree in an action involving a boundary dispute, it is also the rule that where this Court cannot say that the trial court's adjudication is against the weight of the evidence, the trial court's decree will not be disturbed. *See Rowe v. Blackburn*, 253 S.W.2d 25, 27 (Ky. 1952).

III. ANALYSIS

The Morgans' contentions on appeal are two-fold. First, they argue that Bowling's survey was incompetent evidence and that the trial court thus erred in relying upon it to establish their boundary with Effie's tract. Second, they argue that the trial court erred because it did not require Effie to survey her own tract, as described in her own deed. We address each of these arguments below.

A. Boundary dispute

It is undisputed that Bowling, Effie's surveyor, was qualified as an expert in his field; what is in dispute is whether Bowling properly followed the calls of the Morgans' deed in establishing the boundaries of his survey of the Morgans' tract. Thus, at the onset, it is necessary to discuss the applicable rules governing the establishment of boundary lines. The parties to this case acknowledge that surveying standards mandate applying rules of comparative dignity when evaluating conflicting calls in deeds and determining which will take precedence over others. Under those rules, the hierarchy of calls begins with natural and permanent monuments (such as roads or rivers) as the strongest calls, followed by artificial monuments (such as iron pins or fences), directions (in degrees and seconds), distances,[4] and area. *See Wagers v. Wagers*, 238 S.W.2d 125, 126 (Ky. 1951); 201 Kentucky Administrative Regulations (KAR) 18:150. Further, in the event of an ambiguity, credit may be given to circumstances which show the intent of the original parties to the transaction. *Williams v. Williams*, 259 S.W.2d 53, 54 (Ky. 1953); *Wilkerson v. Young*, 285 Ky. 94, 147 S.W.2d 53, 55 (1941).

Additionally,

> [a] boundary may be proved by every kind of evidence which is admissible for the establishment of any other fact—and when the boundary is ancient, even reputation is admissible for its establishment. From the nature of the thing, an old boundary can not, in general, be proved by direct and positive proof; and reputation is, therefore,

[4] As noted above, no distances or angles are specified in the Morgans' deed.

> from necessity, admissible. Reputation as to the location of the lines and corners is admissible as evidence, and is an exception to the rule against hearsay evidence.

Hail v. Haynes, 312 Ky. 357, 227 S.W.2d 918, 921 (1950) (internal citations and quotations omitted).

Finally, directional terms such as "northward" or "northward course," "eastward" or "eastward course," et cetera, as contained in the Morgans' deed, do not mean, literally and respectively, "north," "east," and so forth. Rather, the terms mean

> towards, or approaching towards the north [or that particular cardinal point], rather than towards any of the other cardinal points. It is an elementary rule that courses and distances give way to natural objects, and one must go from the last corner to the beginning corner regardless of courses and distances.

Martt v. McBrayer, 292 Ky. 479, 166 S.W.2d 823, 825 (1943). To this effect, so long as a call describes an object or landmark guiding and controlling the course of a boundary, an expression, such as "southwardly," being flexible, is satisfied by any course from south forty-five east, to south forty-five west. *Stewart v. Clark's Heirs*, 5 T.B. Mon. 366, 21 Ky. 366 (1827). With these rules in mind, we turn to the calls of the Morgans' deed at issue in this case.

Because the location of the first call is not in dispute, we begin with the second call: "thence around the ridge an eastward course to a rock on the divide of the ridge[.]" Bowling and Turner both located the ridge in question, and, according to Turner's map, Bowling marked the location of this call approximately

900 feet from the location of the first call in what both he and Turner described as a "low gap" in the divide of the ridge, near the location of a road. Turner testified that there were rocks throughout the divide, but that he did not find any marked rocks. Turner also conceded that this low gap, as well as several other places along the ridgeline, could have constituted a "divide." Bowling testified that he did not find a marked rock in this low gap, either. Nevertheless, according to Turner's own map and survey, the line between the first call and Bowling's location of the second call, tracing the ridge which the parties agree constitutes part of the Morgans' boundary, proceeds at an "eastward course," *i.e.*, it is not more north than east,[5] as described in the Morgans' deed.

We turn next to the third call in the Morgans' deed: "thence around the ridge with the meanders of the ridge a northward course to a high knob[.]" Following Bowling's location of the second call, the ridgeline gradually changes from an eastward course to a northward course and continues to what all parties concede is a "high knob," *i.e.*, the top of a hill.[6] Bowling testified that he stopped at this knob because it was the first high knob he encountered on his survey of the Morgans' boundary line.

[5] Turner's measurements tracing the Morgans' boundary line between the first call and Bowling's location of the second call vary, as the line curves around the ridge, from N 65º 53' 43" E, to N 48º 30' 14", and ending with Bowling's marker at N 52º 10' 33" E.

[6] Turner's own survey measures the Morgans' boundary line, as it traces the ridge following Bowling's location of the second call, as proceeding for 439.06 feet at an angle of N 47º 30' 13" E; then at an angle of N 42º 19' 11" E for a distance of 263.99 feet; then at an angle of N 27º 48' 43" E for 117.04 feet; and finally almost exactly north at N 03º 47' 06" E for 189.44 feet until reaching the point that Bowling designated in his survey as the "high knob" described in the third call of the Morgans' deed.

The fourth call of the Morgans' deed states: "Thence a westward course down the hill to a large Water Oak near the branch on the right hand side as you go down said Napier Fork[.]" Following his location of the third call, Bowling determined that the boundary of the Morgans' property angled in a westward direction for a length of 1460.31 feet,[7] down the hill where he had placed the third call and stopping where he had located what he testified was the old stump of an oak tree at a creek. Turner also testified that an old stump was there, but that he did not know if it was the stump of a "water oak." Bowling and Turner also testified that there was a marked beech tree in this vicinity. Turner testified that Daymon Morgan told him that "there had been a dispute over that line years ago and somebody had went up there and marked on the tree." Mike Pollard, Effie's son-in-law and former neighbor, testified that Charles Morgan, Effie's deceased husband, had told him that this was the location of the boundary between Effie's property and the Morgans' property. Effie also testified to this effect.

The fifth call of the Morgans' deed is "thence a straight line a westward direction to the top of the ridge between Marion Fork and said Napier Fork." Bowling and Turner agreed upon the location of "the top of the ridge" and labeled approximately the same place as the fifth call on their respective surveys. They disagreed only as to the "straight line [in] a westward direction" connecting it

[7] Bowling measured this portion of the boundary between what he believed were the third and fourth calls of the Morgans' deed as proceeding in an eastward course, rather than a westward course, because he began with the *fourth* call and traced its progression back to the *third* call. Consequently, he measured the angle of this boundary to be "S 61º 35" 56" E." Reversing this bearing provides a westward course.

to the fourth call. However, the straight line Bowling surveyed between where he located the fourth call of the Morgans' deed and where he and Turner both located the fifth call, travels almost exactly west.[8] In light of the above, and in light of the fact that the parties do not dispute the remainder of the Morgans' boundary, there is substantial evidence of record supporting the trial court's decision as to the boundaries of the Morgans' tract.

In its order, the trial court also cites to the language appearing earlier in the Morgans' chain of title relating to a boundary of 50 acres, more or less, and states that it was further persuaded by the fact that Bowling's survey had created a boundary of approximately 50 acres and that Turner's survey nearly doubled that amount. The Morgans contend that it was error for the trial court to rely in any way upon the language relating to their boundary consisting of "50 acres" because 1) it does not appear in their deed and because their deed is older than Effie's, their deed should have been given more deference; and 2) because the phrase "more or less" appears with that estimate, which, as they argue, "speaks to an estimated, not a precise, fifty acres as it considers a variance in acreage based on a future survey," and "is conceded by both current parties as the least accurate method of determining a described area." As such, the Morgans contend that their own survey was more accurate than Effie's, and that the trial court's judgment should be reversed in their favor. We disagree for several reasons.

[8] Bowling's line is 868.89 feet in length. Bowling measured the angle of this line beginning with the fifth call, and ending with the fourth call, at "S 85º 59' 43." As before, reversing this bearing, *i.e.*, going instead from call four to call five, provides a westward course.

First, as noted above, substantial evidence supports the trial court's decision, regardless of whether it is relevant that the language relating to "50 acres" appears in the Morgans' chain of title, but is absent from the Morgans' deed.

Second, the "50 acres" language is relevant, inasmuch as it is at least regarded as some evidence of the size of a tract described in a deed. *See Wagers*, 238 S.W.2d at 126.

Third, the "50 acres" and "more or less" language is also indicative of the intent of the original parties to the transaction. *Williams*, 259 S.W.2d at 54; *see also Wilkerson*, 147 S.W.2d at 54. And, "[t]he phrase 'more or less' in a deed relieves the quantity or line in connection with which it is used of exactness and indicates the parties risk a *slight* deviation." *Goodloe v. Wallace*, 269 S.W.2d 718, 720 (Ky. 1954) (emphasis added). Nearly doubling the size of the Morgans' tract, as Turner's survey proposed, is not a "slight deviation."

We also pause to note that the location of the "high knob," described in the third call of the Morgans' deed and discussed earlier, is the strongest source of disagreement between Effie and the Morgans. Turner classified Bowling's "high knob" as the "rock" described in call two, which led Turner to draw the Morgans' property line further north, and somewhat west, to another mountaintop, or knob. This, as a consequence, led to the allegedly higher, triangular northern boundary of the Morgan's tract, and led Turner to survey the Morgans' property to contain 47 acres in excess of Bowling's estimate.

However, Turner's placement of the "high knob" also created a new problem when he tried to locate the fourth and fifth calls from that point. The fourth and fifth calls of the Morgans' deed both call for a "westward course" or "westward direction." But, as the trial court noted in its order, Turner's line connecting where he located the third, fourth, and fifth calls is far more south than west.[9] Likewise, Turner testified that he felt "uncomfortable" with where he placed this boundary line and that he could not locate the "water oak" described in the fourth call of the Morgans' deed.

Additionally, the evidence conflicted as to whether the Morgans' tract could have extended as far as Turner measured. The maps of record demonstrate the presence of three knobs in or around the area in controversy. Daymon Morgan testified that he had never previously surveyed his property to see whether the boundaries of his tract extended as far as Turner had drawn them and also testified that Culton Callahan, one of the previous owners of his tract, had told him that, in Callahan's opinion, the boundaries of the Morgans' tract did not extend that far. The parties also acknowledged that the knob Bowling had selected as the third call of the Morgans' deed was actually 60 feet higher than the knob that Turner had selected.

In sum, while there is some conflict in the evidence, the trial court's judgment with respect to the boundary between Effie and the Morgans is not

[9] The angle of the straight line that Turner drew, which connects each of these calls, measures "S 22º 26' 58" W."

against the weight of the evidence. Consequently, we must affirm its decision in this respect. *See Rowe*, 253 S.W.2d at 27.

B. Quieting title of the disputed 47 acres in favor of Effie

Although Effie's deed describes a boundary of "400 acres more or less," there are exceptions to her tract described in the record: 1) The Morgans' tract of "50 acre more or less"; 2) an estimated 89 to 91 acres conveyed to a man named Felix Hoskins; 3) three or four acres around Cultan Callahan's house; and 4) approximately ten acres for "house seats that come off the 400 acre more or less boundary description."[10]

The Morgans assert that, as a prerequisite to quieting her own title to the disputed 47 acres in this matter, Effie was required to survey her entire tract as set forth in the calls of her own deed and then survey out these exceptions. The Morgans reason that because the trial court did not require Effie to perform such a survey, the trial court committed reversible error in quieting title in favor of Effie to the remaining 47 acres above where the trial court located the Morgans' property line, regardless of whether the Morgans' deed only describes fifty acres. The Morgans contend that the trial court's decision should be reversed in their favor on this basis.

From the face of their brief, it is unclear whether the Morgans are arguing that a portion of one of these other exceptions, referenced above, might have been implicated in the disputed 47 acres. Further, it appears that by making

[10] The term "house seats," as described by Effie, is not defined in the record.

this argument, the Morgans are ignoring the fact that their own tract was excepted from and constitutes part of the boundary of Effie's tract, as described in Effie's deed. Regardless, however, we disagree with the Morgan's argument for several reasons.

First, if the Morgans are asserting that a stranger to this case could have any title to part of the 47 acres in dispute between Effie and the Morgans, this assertion has no basis or support in the record. No one in this matter testified or presented any evidence that any person other than Effie or the Morgans might have held title to any part of those 47 acres.[11] The boundary located by the trial court ran only between Effie's and the Morgans' respective tracts, and the parties stipulated that their properties share a common boundary. And, although only Turner performed a survey of the disputed 47 acres, his own survey uncovered no interest in that acreage held by any third parties.

Second, the contention that a stranger to this case could have any title to part of the 47 acres in dispute between Effie and the Morgans has no support in the pleadings of this matter. No one other than the Morgans has ever challenged Effie's ownership of those 47 acres. No adjoining property owners ever moved to join the action below during the three years of its pendency.[12] No one, except for the Morgans, is complaining of the judgment vesting title to those 47 acres in

[11] Indeed, Effie testified that the largest of the exceptions to her tract, the Hoskins tract, is located at the other side of her property and away from both the Morgans' tract and the contested acreage. Her testimony was not disputed.

[12] *See* CR 20.01.

Effie. And, in any event, the Morgans themselves never sought to dismiss Effie's action for failure to join an indispensible party, or join anyone other than Effie as a party in their own counterclaim to quiet title to those 47 acres, either.[13, 14]

Third, the Morgans have failed to establish any claim to those 47 acres. In a quiet title action, defendants, such as the Morgans, are not entitled to affirmative relief under their counterclaim when they fail to show title in themselves. *Vogler v. Salem Primitive Baptist Church*, 415 S.W.2d 72, 74-75 (Ky. 1967); *see also* KRS 411.120. Moreover, it is essential to the right of appeal that the party seeking review must represent an interest which is direct, pecuniary, and substantial. *Cooper v. Kentuckian Citizen*, 258 S.W.2d 695, 696 (Ky. 1953). As the Morgans have failed to establish any claim to the acreage at issue, they are entitled to no affirmative relief in this action; and, moreover, they are in no way prejudiced by the trial court's quieting of title in that acreage in favor of Effie. Consequently, we discern no benefit to them in a reversal of the trial court's decision.

Finally, while this issue appears to be mooted by the Morgans' failure on their counterclaim, we note that substantial evidence supports the trial court's decision to quiet title of this disputed acreage in favor of Effie. Turner and

[13] *See* CR 19.01 and 19.02.

[14] That said, if a *stranger* to this case, *i.e.*, someone other than Effie and the Morgans, did hypothetically hold record title to any portion of the 47 acres in dispute between Effie and the Morgans, that person would not be bound by this judgment. *See Hopkins v. Slusher*, 266 Ky. 300, 98 S.W.2d 932, 936 (1932). This is because "it is a universal rule, without exception, that no one having any interest in the subject matter of the litigation is bound by a judgment wherein he was not before the court, and any judgment rendered against him in such circumstances is void." *Brewer v. Burch*, 306 Ky. 339, 207 S.W.2d 562, 565 (1947).

Bowling both testified that they relied upon Effie's and the Morgans' deeds, the deeds of adjoining property owners, and the same plat maps to define the boundaries of their respective surveys. The surveys of both of these experts demonstrated, consistent with the description contained in Effie's deed, that the Morgans' tract and the contested 47 acres were both contained within the outer boundaries of Effie's tract. The only disagreement between Bowling and Turner was whether the 47 acres were also embraced within the boundaries of the Morgans' excepted tract; Bowling testified that they were not, and the trial court found Bowling's testimony and survey more persuasive.

Furthermore, Effie testified as to her ownership of the contested 47 acres down to the line delineated by Bowling. Effie also presented some evidence of her boundaries with the Morgans by reputation. As reflected in the record and the trial court's order, "Witnesses for the plaintiff testified that the area involved in this dispute had been logged on more than one occasion and had been re-forested without complaints. Although the use of the disputed area by the plaintiff does not rise to adverse possession, it is indicative of the belief that the plaintiff was utilizing her land for such activities."

In short, while the evidence regarding Effie's ownership of this land conflicted, the resolution of whether Effie's tract encompassed this property was a question of fact for the trial court to decide. And, based upon the record, the trial court's findings on this issue were not against the weight of the evidence or clearly erroneous.

IV. CONCLUSION

For these reasons, the decision of the Leslie Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Clint J. Harris
Manchester, Kentucky

BRIEF FOR APPELLEE:

John T. Aubrey
Manchester, Kentucky