RENDERED: SEPTEMBER 9, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001339-MR

C.W. HOSKINS HEIRS — APPELLANTS

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 98-CI-00242

BEN BOGGS JR.; FRANCIS H. BOGGS; SUSAN TRUBEY; ROBERT L. CUNAGIN; BEVERLY NEUMEISTER; PATRICIA WESLEY; VIRGIE GABBARD; TWILA J. GRAY; ANTOINETTE REINKE; DANNY SCALF; ROGER CUNNAGIN; KEVIN CUNNAGIN; DARRREN CUNNAGIN; KRISTEN MICHAEL CUNNAGIN; GERALDINE MARCUM; HELEN FIELDS; CHARLES R. BOGGS; SHIRLEY A. BOWLING; MARGIE SHELLEY; LINDA NEAL; ANNETTE R. WYLER; CATHY MALONEY; MIKE WALTERS; ROBERT B. BOGGS; LOUISE C. LAYNE; MARY ROSE OHLER; TERRY LYNN WILSON; VIRGINIA MILLER; WARREN WILSON; EDNA WILSON; MATTHEW WILSON; LISA MESSER;

JAMES DINKINS; JANELLE BIELICKE; SHERRY SMITH; GENEVA WILSON; CHARLOTTE HUDSON; DOUGLAS HOWARD WILSON; FRED STANTON; CARLA JONES WEAVER; BOBBIE WILSON; MICHAEL WILSON; RUBY BETH WILSON; CHRISTINE POWELL CLICK; VESTER POWELL; GERALDINE CLEMMONS; BETTY ROSE BARR; RODNEY GARRISON; MICHAEL VICTOR; MARK KENNETH VICTOR; PAULINE VICTOR; LORI A. VICTOR; KELLY M. VICTOR; GARY T. KINSELLA; JOSEPH M. KINSELLA, II; ALAN L. KINSELLA; ARTHUR KINSELLA, II; LEON STEELY CHESNUT; HAROLD L. CHESNUT; MANUEL BOGGS; GREG BOGGS; LESA GILLESPIE; AND HAROLD LLOYD BOGGS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: C.W. Hoskins Heirs appeal from a Leslie Circuit Court judgment which construed an ambiguous deed to find that the appellees, the Boggs Heirs, have superior title to a disputed tract of real property located in Leslie County, Kentucky.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

This case was initiated by the Bledsoe Coal Leasing Company, which held mining leases with two different lessors, the Hoskins Heirs and the Boggs Heirs, for the same tract of property in Leslie County. Bledsoe filed an action in Leslie Circuit Court to ascertain to whom it should pay mining royalties derived from the tract. The determination as to who held superior title to the property hinged upon the interpretation of a deed dating from October 3, 1881. The trial court held that the deed was unambiguous, interpreted it in favor of the Boggs Heirs and entered summary judgment in their favor on June 5, 2002. While that judgment was on appeal to this Court, the Hoskins Heirs and Bledsoe reached a settlement with the result that Bledsoe is no longer a party in this action. The summary judgment was affirmed by the Court of Appeals, *see* 2002-CA-001466-MR (Ky.App. 2005), but then reversed by the Supreme Court. *See Hoskins Heirs v. Boggs*, 242 S.W.3d 320 (Ky. 2007). The Supreme Court ruled that the deed was ambiguous and remanded the case to the trial court with directions to consider extrinsic evidence in interpreting the deed. Following a bench trial, the trial court entered findings of fact, conclusions of law and judgment in favor of the Boggs Heirs. This second appeal by the Hoskins Heirs followed.

The factual and historic background of this case is set forth fully in the opinion of the Supreme Court. We set forth a brief summary only.

On March 18, 1845, Henry M. Lewis obtained Patent No. 8158 for approximately five hundred acres of property located on Lewis Creek and Rockhouse Creek of the Greasy Fork of the Kentucky River. Lewis Creek runs

across the northwest part of the patent; Rockhouse Creek runs across the southeast part. Upon Lewis's death, the property passed to his children Wilson, Felix, Hampton and Catherine. By deed dated October 3, 1881, Wilson, Felix and Hampton conveyed three tracts of property, including Patent No. 8158, to Silas Boggs. Catherine later acknowledged the deed before the Lincoln County Court Clerk and the deed was re-recorded on June 25, 1884.

At dispute is whether the entirety of Patent No. 8158 was conveyed to Silas Boggs in the 1881 deed. The Hoskins Heirs claim that a portion of the patent, consisting of 155.58 acres lying on Rockhouse Creek (the "Rockhouse Creek Property") was not conveyed to Boggs, was retained by the Lewis heirs and ultimately passed to the Hoskins Heirs. The Boggs Heirs claim that the deed conveyed the entire five-hundred acre patent to Silas Boggs and that it ultimately passed to them as his lawful descendants. The disputed mining royalties were derived from the Rockhouse Creek Property.

The parties agree that the 1881 deed describes three tracts of property to be conveyed from the Lewises to Silas Boggs: (1) a seven-hundred acre survey also made in the name of Wilson Lewis; (2) the five-hundred acre Patent No. 8158; and (3) an interest in land surveyed in the name of Henry M. Lewis and Abner L. Pace. The issue is whether language in the deed limits the conveyance to property located on Lewis Creek, thus excluding property located on Rockhouse Creek. The deed provides as follows; we have highlighted the disputed passages and also the language indicating the beginning of each tract description:

> This Indenture made this 3 day of October 1881 between Wilson Lewis and Felix G. Lewis of Harlan County and Hampton Lewis of Bell County and Catherine Wells of Lincoln County all the parties in State of Kentucky and Heirs of Henry M. Lewis Deceased and Silas Boggs of the County of Leslie and State of Kentucky of the Second part Witnesseth that for and in consideration of the Sum of Three Hundred dollars to them in hand paid the receipt whereof is hereby acknowledged this day granted Bargained and **Sold the following boundary of land to wit lying and being in the County of Leslie on the right hand fork of Lewis Creek Waters** of the Greasy fork **Beginning** at two beeches about 200 yds below the mill seat, thence north 30 poles to a Stake Thence northeast to the hand of the Second Hollow to a beech by the Side of the Road a corner of a Seven Hundred acre Survey made in the name of Wilson Lewis Sr Thence to the Head of Branch Thence with Said line to the top of the mountain Thence to the rocky gap thence to the beginning **Second tract** Beginning in the Head of the Right Hand fork of Lewis Creek on Two Dogwoods Black oak and Hickory Thence with the call of the 500 Acre patent to the beginning **Third tract** also our interest in the Land Surveyed in the name of Henry M. Lewis and Abner L. Pace on the Right hand of Lewis Creek **this is to include all the Land we own on the right hand fork from the Mill Seat up** Also if said Survey holds any Land on the Jennas Fork of the Greasy fork Said Boggs is to have it this not to include any of the Polly Lewis land nor Land of one older date with the appurtenances to have and to hold unto Silas Boggs, his heirs and assigns forever, and we will warrant and defend the same with a general warrantee this day and date above witnesseth.

The Hoskins Heirs argue that the reference to land "on the right hand fork of Lewis Creek" and the language "this is to include all the Land we own on the right hand fork from the Mill Seat up" (the latter is referred to as the "Mill Seat Clause") served to exclude all property from the conveyance that is not located on

Lewis Creek. The Boggs Heirs argue that the clause applies only to limit the third tract, with the result that the second tract, Patent No. 8158, was conveyed in full.

As we have noted, the Supreme Court held that the deed was ambiguous and remanded the case to the trial court to consider extrinsic evidence. The trial court concluded that the deed did convey the entire five-hundred acre patent including the Rockhouse Creek Property to Silas Boggs. The trial court found that the Mill Seat Clause was intended to clarify overlapping patents on the western side of the tract around Lewis Creek; it was not intended to affect the eastern side of the tract bordering Rockhouse Creek. The trial court described the Mill Seat Clause as language of inclusion, which was intended to clarify any confusion which might have occurred as a result of the crisscrossing of several patents in the area of the right hand fork of Lewis Creek on the western boundary of the property. The trial court reasoned that if the parties had intended to exclude the Rockhouse Creek Property, they would have included express language to that effect, as they did later in the deed with the exclusions of the "Polly Lewis land" and "Land of one older date." The trial court observed that the Hoskins' own witness, Walter Hoskins, testified that the parties could easily have specifically excluded the Rockhouse Creek Property had that been their intention.

The Hoskins Heirs raise three broad arguments: (1) that the trial court's interpretation of the deed is erroneous; (2) that even if the 1881 deed did convey the Rockhouse Creek Property to Silas Boggs, the Boggs Heirs cannot trace their claimed ownership from Silas Boggs because he conveyed any

properties he owned to a third party before he died; (3) even if Silas Boggs owned the Rockhouse Creek Property at the time of his death, the Hoskins Heirs subsequently obtained title to it through adverse possession.

"The interpretation of a deed is a matter of law, and this court need not defer to the trial court's analysis." *Smith v. Vest*, 265 S.W.3d 246, 249 (Ky.App. 2007). Our standard of review changes, however, when, as in this case, the trial court considers extrinsic evidence. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01. As in the case of interpreting an ambiguous contract, "areas of dispute concerning the extrinsic evidence are factual issues and construction of the contract [or deed] become subject to resolution by the fact-finder." *Cantrell Supply, Inc. v. Liberty Mut. Ins Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002) (internal citations omitted).

The Hoskins Heirs argue that the trial court's interpretation of the deed is contrary to and inconsistent with the opinion of the Supreme Court. In explaining why the deed was ambiguous, the Supreme Court highlighted the contradictions that would result from the Boggs Heirs' argument that the Mill Seat Clause applied only to the third tract in the deed. For instance, the Court observed that this interpretation would limit the habendum clause in a way that was "inconsistent with all normal rules of construction and drafting[,]" *Hoskins*, 242 S.W.3d at 329, and further noted that the third tract did not even include land on

the right hand fork of Lewis Creek. On remand, however, the trial court did not find that the disputed clause applied exclusively to the third tract. As we have already described, the trial court found that the purpose of the clause was to clarify the overlapping patents on the western, Lewis Creek side of the entire conveyance. Thus, the trial court's findings are not inimical to the directives of the Supreme Court.

The Hoskins Heirs further contend that the trial court ignored the language at the beginning of the deed which appears to limit the entire conveyance to property "on the right hand fork of Lewis Creek Waters." The trial court did address this issue, however, by pointing out that Patent No. 8158 itself contains similar limiting language, "lying and being on the right hand fork of Lewis Branch." (This observation was also made by the Supreme Court, which noted that the Patent itself refers only to property on Lewis Creek, although "it is undisputed that it extended onto Rockhouse Creek." *Id*. at 322). The trial court concluded that if the Hoskins' Heirs interpretation of the language in the deed was applied consistently to the the language of the patent and the deed, neither the Boggs Heirs nor the Hoskins Heirs would own the Rockhouse Creek Property as it would never have formed part of the five-hundred acre tract. We can find no error in the trial court's decision to construe the patent and the deed to avoid such a contradiction.

The Hoskins Heirs also argue that subsequent conveyances made by Henry M. Lewis's heirs show that they did not believe that they had conveyed the entirety of Patent No. 8158 to Silas Boggs. The trial court reviewed the numerous

deeds in question and noted that each deed listing patents conveyed to the Hoskins Heirs' predecessors in title also list Patent No. 51933. This was the patent in the name of Henry Lewis and Abner Pace which appeared as the third tract in the 1881 deed. Yet, as the trial court noted, no one argued that this patent was not conveyed to Silas Boggs in the 1881 deed. We agree with the trial court that these deeds are of limited probative value.

The Hoskins Heirs also point to deposition testimony given by Silas Boggs in a lawsuit in 1901 which strongly suggests that he believed he had purchased only a part of Patent No. 8158 on the right fork of Lewis Creek. The trial court construed the testimony in the context of the lawsuit, which was concerned with property located on the forks of Lewis Creek. Boggs was testifying about the portion on which he had at one time resided. Although his testimony can certainly be interpreted to support the Hoskins Heirs' view, the trial court's decision to interpret the testimony in the context of the lawsuit is supported by substantial evidence and is not clearly erroneous.

The Hoskins Heirs also question the trial court's reliance on a copy of the 1881 deed with stamps on it that was an exhibit in the 1901 lawsuit. The deed contains punctuation and paragraph breaks which clearly indicate an intent to convey the entire 500 acre patent. The Hoskins Heirs argue that the trial court erroneously concluded that the stamps were revenue stamps when in fact they merely indicate payment for copies made in the 1901 litigation. Even if the stamps were not revenue stamps, however, we agree with the trial court that the deed has

some probative value if it was included as evidence in the 1901 litigation. The trial court acknowledged that the deed was a copy, and noted that the deed as copied evidenced an intention at that time to clear up the ambiguities caused by the absence of punctuation and paragraphs in the original deed. The trial court did not place undue reliance on the deed and any error relating to the significance of the stamps does not undermine the trial court's conclusions.

The Hoskins Heirs argue that the actions of the parties and their predecessors provide evidence that "everyone" understood and believed that the Rockhouse Creek Property was owned by the Hoskins Heirs. They contend that the trial court ignored numerous pieces of evidence of use of the disputed tract which would indicate their ownership. These include the following: 1) that as early as 1962, timber was harvested from the property under a contract with Lloyd Sluster; 2) long-time resident Frank Joseph testified that the Hoskins owned the property; 3) that in 1976 the Hoskins Heirs entered into a lease with a coal company, GRI, which cut roads on the property and mined the property beginning in the early 1980s; 4) that since 1983 the property has been the subject of various mine permit applications and amendments which would have put the Boggs Heirs on notice of the Hoskins Heirs' claim to the property; 5) tax records show that the Hoskins have always paid property taxes and unmined mineral taxes on the property; 6) the Boggs Heirs offered no evidence that they had paid taxes on the tract and the testimony of the Boggs' witness, Leslie County Property Valuation

Administrator James Wooton, was only that the property was not specifically mapped and that in 1983 the Boggs claimed ownership of only 30 acres.

In assessing this evidence relating to the subsequent actions of the parties, the trial court found much of it to be unreliable. For instance, although Frank Joseph, who lived on Rockhouse Creek from 1945 until 2000, testified as to the logging operations and other activities in the area, he also admitted that he did not know the location of the disputed property on Rockhouse Creek, and did not know if the claim covered the property adjoining where he grew up. Walter Hoskins conceded that Frank Joseph did not grow up beside the property in dispute, but instead grew up on property adjoining another parcel owned by the Hoskins Heirs further down Rockhouse Creek. Thus, the trial court's conclusion, that Joseph's testimony served only to confuse the ownership of numerous other tracts of land by the Hoskins Heirs in the same general area with the property that is the subject of this case, is not clearly erroneous.

The Hoskins heirs also dispute the circuit court's conclusion that there was no evidence of "mining or significant activity on the property other than the underground mining which is the subject of the case." They argue that this statement squarely ignores testimony from Greg Hoskins and Walter Hoskins, aerial photographs of the area, and the following observation by the Supreme Court:

> In addition, certain coal on the disputed tract was mined by Stansbury & Company, pursuant to a conveyance to them by the Hoskins Heirs at the request of Bledsoe.

> This was on February 4, 1983, when the number nine seam of coal on a part of the disputed tract was sold by the Hoskins Heirs, at the request of Bledsoe, to Stansbury & Company, Inc. This portion was originally prospected in 1976 and between 1983 and 1994, it was mined. The mining would have been obvious to anyone in the area who cared to look, as it was contour surface mining. Moreover, the mining permit was issued in accordance with law and only after public notice. No objection to the issuance of this permit, or this mining, was ever made by the Boggs Heirs from the record before us.

*Id.*at 327.

The trial court found that there were inconsistencies between the testimony of Walter Hoskins, Greg Hoskins and the aerial photos. For instance, the trial court observed that Walter Hoskins' testimony that a haul road went right through the middle of the property and still existed today was inconsistent with the testimony of Greg Hoskins and with the aerial photographs. The trial court also found that although Walter Hoskins testified regarding various mining permits, he could not tell which one of the permits would have affected the disputed property.

The trial court also found Walter Hoskins to be an unreliable witness, after discovering that he had concealed a map which provided the court with valuable guidance as to the location of the tracts conveyed in the 1881 deed. Although the evidence of mining activity on the tract could have supported a different conclusion on the part of the trial court, "judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, '[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal,' and appellate courts should not disturb trial court findings that are

supported by substantial evidence." *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004).

The Hoskins Heirs further argue that it was clearly erroneous of the trial court to state that the Boggs Heirs had historically been on the Leslie County tax rolls. But the evidence did show that the Boggs Heirs were on the tax rolls; the dispute concerned which property was involved. Although James Wooton testified that the Boggs Heirs were listed as owning only 30 acres as of 1983, far less than the more than 155 acres which comprise the Rockhouse Creek Property, the trial court also relied on his testimony that the amount of property listed was completely inaccurate and that new property was being added to the rolls as part of a mapping project. We have reviewed the evidence and cannot find clear error on the part of the trial court.

The Hoskins Heirs next argue that the trial court was confused and misled by two exhibits introduced by the Boggs Heirs: a 1979 lease exception and a 1985 title opinion by Stoll, Keenon and Park. They contend that these exhibits concern a different, eighty-five acre tract of property and are thus both irrelevant and inapplicable to the property at issue. The trial court discussed the 1979 lease exception largely in the context of the reliability of Walter Hoskins as a witness. The trial court did conclude that the Rockhouse Creek Property was an exception to the assignment, but we do not see how Gary Hale's testimony definitively refutes that conclusion. In any event, the 1979 lease exception was not a critical piece of evidence in the trial court's analysis.

As to the 1985 title opinion from Stoll, Keenon and Park, the Supreme Court noted that there were two such opinions, one which found that the Hoskins Heirs had marketable title to the disputed tract (although the title opinion expressed some reservations about the legal sufficiency of language of the deed) and the other "which appeared to pertain to property of the Henry M. Lewis Patent No. 1858 on Lewis Creek and Lick Creek." *Hoskins*, 242 S.W.3d at 326, n. 7. The trial court also noted the existence of the two opinions and concluded that the apparent conflict between them may have arisen from the fact that Lick Branch did not appear on any of the modern maps and that Henry Lewis Patent "No. 1858" was simply a typographical error because none of the patent maps list a Patent No. 1858. Although the Hoskins Heirs now argue that the significance of Lick Creek was never raised by the parties and has no bearing on the question at hand, it does appear in maps filed into evidence by the Hoskins Heirs following the trial. The location of Lick Creek assisted the trial court in resolving the conflict between the title opinions and it did not therefore err in relying on it.

In the alternative, the Hoskins Heirs argue that even if the trial court correctly interpreted the deed to mean that Silas Boggs retained the Rockhouse Property, he later conveyed it to either John I. Shell or James Blevins. Consequently, it could not have passed to the Boggs Heirs.[2] The Hoskins Heirs contend that the circuit court completely failed to make any findings whatsoever

[2] On November 19, 2008, the trial court entered a summary judgment ruling that the parties listed in this case as the heirs of Silas Boggs are in fact the lawful descendants of Silas Boggs. This ruling was also reaffirmed during the trial.

regarding the significance of the two deeds to Shell and Blevins. Our review of the record shows that the Hoskins Heirs did not make a request for findings on this issue. Kentucky Rules of Civil Procedure (CR) 52.04 provides as follows:

> A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

"The thread which runs through CR 52 is that a trial court must render findings of fact based on the evidence, but no claim will be heard on appeal unless the trial court has made or been requested to make unambiguous findings on all essential issues." *Vinson*, 136 S.W.3d at 471.

Furthermore, there is substantial evidence in the record that the deeds to Shell and Blevins did not convey the Rockhouse property. The deed descriptions do not mention that area and are confined to the area around Lewis Creek. Furthermore, the trial court observed that the Hoskins Heirs' own witness, Walter Hoskins, testified that the deeds did not include the property on Rockhouse Creek.

Finally, the Hoskins Heirs argue that the trial court erred in finding that they had not acquired title to the Rockhouse property by adverse possession. Although the trial court addressed the issue fully in its opinion, it did so after noting that the Hoskins Heirs have never formally pled adverse possession. The Hoskins Heirs disagree, contending that adverse possession was expressly

identified as a "potential theory of ownership" very early in the case. Their only citation to the record consists of their response to an interrogatory dated August 16, 1999, in which they stated that they had record title to the property but would prove title by adverse possession if necessary. In its opinion, the Supreme Court stated that the issue of adverse possession was not raised by the parties in their cross-claims. Thus, the issue was not pled before the first appeal in this case and the appellants have not provided any citation to the record to indicate when it was properly pled thereafter. We agree with the trial court that the issue is not preserved.

The trial court nonetheless reviewed the Hoskins Heirs' adverse possession claim and concluded that they had failed to prove the necessary elements. In order to establish adverse possession the possession must be: (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for a period of fifteen years. *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky.1955); KRS 413.010. As evidence of continuity of possession, the Hoskins Heirs point to evidence that they entered into a succession of contracts and leases with third parties who "developed" the land; that Walter Hoskins operated a bulldozer on the property; and that a haul road was constructed through the property. "[I]t has long been held that "[t]he surveying and marking of a boundary, the payment of taxes, and occasional entries for the purpose of cutting timber are not sufficient to constitute adverse possession." *Moore v. Stills*, 307 S.W.3d 71, 78 (Ky. 2010). The most permanent evidence of possession was the

construction of a road by Nally and Hamilton Enterprises, but as the Boggs Heirs have argued, the exact location of the road was not identified to the trial court's satisfaction and the use of the road was not exclusive since anyone was permitted to use the road for any purpose. The party claiming title through adverse possession bears the burden of proving each element by clear and convincing evidence. *Phillips v. Akers,* 103 S.W.3d 705, 709 (Ky.App. 2002). We agree with the trial court that the Hoskins Heirs failed to meet this heightened burden.

The judgment of the Leslie Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

William A. Hoskins
Jay E. Ingle
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BRIEF FOR APPELLEE:

Phillip Lewis
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