[Cite as *Thomas v. Harmon,* 2009-Ohio-3299.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

Christine Thomas,	:	Case No. 08CA17
Plaintiff-Appellee,	:	
v.	:	**DECISION AND JUDGMENT ENTRY**
Tony Harmon,	:	
and	:	
All Unknown Occupants,	:	
Defendants,	:	
and	:	
Leah Daniels,	:	File-stamped date: 6-30-09
Defendant-Appellant.	:	

APPEARANCES:

Craig A. Allen, Ironton, Ohio, for appellant.

Richard R. Bentley, WOLFE & BENTLEY, Ironton, Ohio, for appellee.

Kline, P.J.:

{¶1} Leah Daniels appeals the judgment of the Lawrence County Municipal Court. Christine Thomas filed an action for forcible entry and detainer. However, the trial court had to first resolve who owned the disputed parcel of land. The trial court relied on a new survey to find Thomas the owner. On appeal, Daniels contends that the trial court erred in relying on the new survey because the surveyor's report referenced an old survey, which was never included in a deed within the chain of title. We disagree

because, Daniels has failed to demonstrate prejudice by reference to the record. Specifically, Daniels did not include the old survey as part of the record before us, and Daniels has failed to show that the surveyor relied on the old survey to create the new survey.

{¶2} Daniels next contends that the trial court erred in receiving the new survey, which was part of the surveyor's report, into evidence. However, we do not address this issue because Daniels failed to object and preserve this issue for appeal. Accordingly, we affirm the judgment of the trial court.

I.

{¶3} Thomas filed an action for forcible entry and detainer against Tony Harmon in the trial court. Thomas also named, as unknown defendants, whoever sublet the property in question from Tony Harmon. Daniels then intervened in the action, claiming that she owned the property at issue.

{¶4} Daniels and Thomas agreed to have the property surveyed to determine the owner. They further agreed that whoever was determined the non-owner would pay for the costs of the survey. Two agreed entries in the record show this agreement. First, the trial court ordered Lawrence Murphey to "conduct a survey to determine the property line in dispute in [this case]." One week later, the trial court entered a second order that "Jeffery Stephens shall conduct the survey to determine the property line in dispute in [this case] as Lawrence Murphey is unable to do so." The actual survey was completed by C. Nathan Dickerson. The record does not reflect why Jeffery Stephens did not complete the survey, and Daniels raises no assignment or error related to the individual who completed the survey.

{¶5} Dickerson submitted a surveyor's report, which included, inter alia, the new survey. A paragraph in the surveyor's report referenced an old survey, which Daniels did not include in the record before this court.

{¶6} The trial court entered an order that accepted the new survey as determining that Thomas owned the land. This order also found Daniels liable for the costs of the new survey, as per the parties' agreement.

{¶7} Daniels appealed this decision; however, this Court found the order was not a final appealable order because it did not fix the amount of liability. *Thomas v. Harmon*, Lawrence App. No. 06CA10. A second appeal followed that this Court again dismissed because the trial court's amended order did not comply with Civ.R. 54(B). *Thomas v. Harmon*, Lawrence App. No. 07CA11, 2007-Ohio-5374, at ¶12. The trial court then entered an amended opinion and judgment entry that now complies with the requirements of Civ.R. 54(B).

{¶8} Daniels appeals this latest judgment and assigns the following three assignments of error: I. "APPELLANT CONTENDS THAT THE SURVEY IN THE WITHIN CAUSE IS DEFECTIVE AND SHOULD BE DECLARED NULL AND VOID. THE ERROR IS REFLECTED ON THE SECOND PAGE OF THE SUREYOR'S NARRATIVE AND IN THE ATTACHED PLAT TO THE SURVEY, BASED UPON THE UNRECORDED SURVEY." II. "SURVEY ALSO FAILS TO DISCLOSE DEVIATIONS FROM MAGNETIC NORTH AS REQUIRED BY STATUTE." And, III. "THE TRIAL COURT ERRED IN ADMITTING THE SURVEY INTO EVIDENCE."

II.

{¶9} Daniels contends in her first assignment of error that the trial court erred when it relied on the new survey, included in the surveyor's report, to establish ownership of the disputed land because the surveyor's report referenced an old survey that was never used in any of the recorded deeds. Daniels assumes that the surveyor used the old survey to create the new survey. As a result, Daniels claims that the new survey violates both the Public Records Act and the Marketable Title Act, and thus, the court should never have considered it.

{¶10} Normally, these issues would require us to interpret the Public Records Act and the Marketable Title Act as they relate to the construction of a deed. The construction of a deed is a question of law, which we review de novo. See, e.g., *Esteph v. Grumm*, 175 Ohio App.3d 516, 2008-Ohio-1121, at ¶8.

{¶11} Here, however, the only information about the old survey included in the record before this court is in the surveyor's report, which references the old survey in the following paragraph: "On March 1, 1930, Virgil R. Jenkins, Deputy County Surveyor, surveyed the remnant of the White Farm. This survey is recorded in the Surveyor's Record 12, Page 85. Virgil wrote a description and drew a plat (a copy of which is attached and made a part of this record). Unfortunately, the survey was never used on the deeds." As we stated earlier, Daniels did not provide this court with the description and plat that Virgil apparently wrote and drew.

{¶12} Even if we accept Daniels's proposition of law that the surveyor's reliance on an old survey (never recorded in a deed) violates the Public Records Act and the Marketable Title Act, Daniels has still failed to demonstrate that we should reverse the judgment. The reason is an appellant in an appeal "bears the burden of showing error

by reference to matters in the record." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶13} Here, Daniels merely references the paragraph in the surveyor's report where the surveyor indicates that the old survey was included in the report. The problem, however, is that the record before us includes the surveyor's report without the old survey.

{¶14} Daniels apparently just assumes that the surveyor used the old survey as the basis for the final plat of the new survey. Daniels does not refer to any evidence or make any argument that tends to establish that the surveyor used the old survey as the basis for the final plat of the new survey. Even if the old survey were included in the record before us, we would not sua sponte analyze whether the old survey formed a portion of the final plat drawn by the surveyor. "If an argument exists that can support this assignment of error, it is not this court's duty to root it out." *State v. Carman*, Cuyahoga App. No. 90512, 2008-Ohio-4368, at ¶31, citing *Cardone v. Cardone* (May 6, 1998), Summit App. Nos. 18349, 18673, unreported. Therefore, we find that Daniels failed to carry her burden of showing error by reference to matters in the record before us.

{¶15} Accordingly, we overrule Daniels' first assignment of error.

III.

{¶16} Daniels contends in her second and third assignments of error that the trial court erred when it considered the new survey (i.e., admitted it into evidence) because the new survey failed to comply with R.C. 315.16. Specifically, Daniels asserts

that the new survey failed "to disclose deviations from magnetic north as required by [the] statute."

{¶17} The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, at ¶ 50; *State v. Robb* (2000), 88 Ohio St.3d 59, 68. Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence. *State v. Martin* (1985), 19 Ohio St.3d 122, 129. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68; *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶18} R.C. 315.16 provides that "[w]hen a survey or calculation is to be used as evidence, all calculations, by the county engineer or other person, to ascertain the contents of a tract of land shall be made by latitude and departure. On such plat, the person making such survey or calculation shall note the variation of the magnetic needle from the original course of such survey."

{¶19} Here, the new survey does not have a notation of the variation of the magnetic needle from the original course.

{¶20} However, Thomas argues that R.C. 315.16 is not relevant. Instead, Thomas claims that the new survey only had to comport with the relevant provisions in Ohio Adm.Code 4733-37-01 et seq., which establish standards for boundary surveys. Thomas also argues that Daniels failed to object to the admission of the new survey in the trial court and waives any objections to the new survey as evidence.

{¶21} We consider Thomas's waiver argument first because it is dispositive.

{¶22} Daniels strongly disagrees with Thomas and contends that she raised these issues at the hearing on her motion for a new trial. Specifically, Daniels states, "Appellant did raise objections to the survey report. The transcript of the hearing filed as a record in this Court has large portions marked as inaudible by the Court Reporter. Appellant is not responsible for the electronic recording devices of the Trial Court." Daniels Reply Brief at 1.

{¶23} While Daniels may not have caused the inaudible parts of the record, nevertheless, an appellant must bear the burden of pointing out error by reference to the record, and this burden includes the requirement that an appellant supplement an inadequate record through the use of App.R. 9. *State v. Brewer* (1989), 48 Ohio St.3d 50, 60-61. "In the absence of an attempt to reconstruct the substance of the remarks and demonstrate prejudice, the error may be considered waived." Id. at 61.

{¶24} Here, Daniels' statement in her brief that she properly raised the issue does not comply with the procedural requirements of App.R. 9(C) or App.R. 9(E). Daniels fails to demonstrate that the trial court erred by denying her objections on the record, and she must therefore attempt to show she merits relief under plain error. See *Brewer* at 61; *In re W.B. II*, Highland App. No. 08CA18, 2009-Ohio-1707, at ¶59 (failure to object waives all but plain error).

{¶25} "The plain error doctrine is applicable in civil cases only where the error 'seriously affects the basic fairness, integrity, or public reputation of the judicial process.'" *Rocky v. Rockey*, Highland App. No. 08CA4, 2008-Ohio-6525, at ¶10, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122-123, 1997-Ohio-401. Daniels provides no argument for why the holding of the trial court implicates the fairness, integrity, or

public reputation of the judicial process. Nor is such an argument apparent from the record. For this Court to permit Daniels to raise this issue now would be "to allow litigation of issues which could easily have been raised and determined in the initial trial." *Goldfuss* at 122.

{¶26} Accordingly, we overrule Daniels' second and third assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court

BY:_____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.