[Cite as *Ealy v. Nixon*, 2010-Ohio-2120.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Lester & Betty Jean Ealy	Court of Appeals No. E-09-046
Appellees	Trial Court No. 2008-CV-0778
v.	
Robert & Bonnie Nixon	**DECISION AND JUDGMENT**
Appellants	Decided: May 14, 2010

* * * * *

Andrew A. Kabat and Laura L. Volpini, for appellees.

Ronald G. Kaufman, for appellants.

* * * * *

SINGER, J.

{¶ 1} Appellants appeal a summary judgment issued against them in a property border dispute in the Erie County Court of Common Pleas. For the reasons that follow, we affirm, in part, and reverse, in part.

{¶ 2} Appellants, Robert and Bonnie Nixon, and appellees, Lester and Betty Jean Ealy, own abutting parcels of land in Groton Township, Erie County, Ohio. On April 21, 2008, appellees initiated a suit to quiet title, establish a boundary line between the parties' parcels and declare ownership of a triangular section of land to the west of the Ealy-Nixon lots. Appellees also sought damages in trespass, alleging that appellants came onto their land "killing and removing vegetation and wildlife planted and maintained" by them. Appellees also asserted that a shed and a portion of appellants' house are situated on the triangular section they claimed.

{¶ 3} On September 10, 2008, appellants responded with an answer and counterclaim in which they rejected appellees' claims to the disputed property and asserted their own. Appellants also claimed intentional interference with the enjoyment of their property resulting in economic and emotional damages.

{¶ 4} The matter was eventually submitted to the trial court on cross-motions for summary judgment. On consideration, the court ruled in favor of appellees, reforming the deeds of both parties to show a one acre parcel for appellees and a .7333 acre parcel for appellants. The court also declared that the triangular parcel to the west of the Ealy-Nixon property belonged to appellees. From this judgment, appellants now bring this appeal. Appellants set forth the following ten assignments of error:

{¶ 5} "1. The trial court erred by finding the plaintiffs/appellees owned more land than was actually described in the metes and bounds description in plaintiffs/ appellees' deed.

{¶ 6} "2. The trial court erred by failing to apply the Marketable Title Act in determining the legal description of plaintiffs/appellees' property.

{¶ 7} "3. The trial court erred by considering any deed language in deeds prior to the deeds emanating from Francis and Russell Conrad.

{¶ 8} "4. The trial court erred by assuming there was a mutual mistake in the language of the deed from Russell and Francis [sic] Conrad to Mingus.

{¶ 9} "5. The trial court erred by relying upon area where there was a metes and bounds description that clearly defines the portion retained in the sale from Conrad to Mingus.

{¶ 10} "6. The trial court erred by finding that two parties cannot correct a legal description in a previously recorded deed by the issuance and recording of a corrected deed with reference in the corrected deed that it is issued to correct the legal description in the previously recorded deed.

{¶ 11} "7. The trial court erred by determining it was the intent for Quiren [sic] to transfer all of the land described in both the original deed and the corrected deed to Waddington.

{¶ 12} "8. The trial court erred by finding that the filing of the corrected deed was a unilateral act of Quiren [sic].

{¶ 13} "9. The trial court erred by failing to find the defendants/appellants have ownership of at least part of the triangle property by adverse possession.

{¶ 14} "10. The trial court erred by granting summary judgment to plaintiff/appellees with regard to the triangle parcel and the portion of the 'parent parcel' involved in the boundary dispute."

{¶ 15} Appellate review of a summary judgment is de novo, employing the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 16} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 17} In this matter, the documents of title are undisputed. It is the legal import of these documents that is at issue.

I. Property Line Dispute

{¶ 18} The land that would eventually become that of appellants and appellees was part of 50 acres owned by Thomas and Fannie Wood. In 1896, the Woods conveyed "two acres" described by metes and bounds to William Gildenmeister. In 1903, William Gildenmeister conveyed the northern "one acre" of this parcel to Louis Gildenmeister.

{¶ 19} This is the parcel that would become appellees' land.

{¶ 20} In 1905, William Gildenmeister conveyed the remainder of the "two acre" parcel to Alfred McGill. The description of the land conveyed to McGill was identical to that of the original "two acres," but "[e]xcepting therefrom 1 acre of land sold to Louis Gildenmeister." The McGill lot eventually became appellants'.

{¶ 21} Between 1903 and 1961, appellees' lot changed hands a number of times, each time using the property description from the original deed to Louis Gildenmeister. In a transfer in 1961, however, the description of the property was converted to metes and bounds. This description was carried forward when the land was subsequently sold in 1962 to the Conrads, and continued into appellees' deed.

{¶ 22} Concerning appellants' chain of title, when McGill conveyed the lot in 1905, the property description was again the metes and bounds description of the original "two acre" parcel, with the notation, "The intention of this deed is to convey the south one-half of the above described premises, or one acre of land." Subsequent deeds utilized the original "two acre" description, excepting the land conveyed to Gildenmeister in 1903. This description continued until the land was sold to the Conrads in 1974. In 1976, when the Conrads sold the lot, the reference to the 1903 Gildenmeister conveyance is marked out of the description and substituted with; "[e]xcepting therefrom, that part thereof as conveyed to Russell L. Conrad and Frances J. Conrad by deed dated February 23, 1962 * * *." This is the language appearing in the deed by which appellants took the land.

{¶ 23} When this property line dispute began, appellees engaged the services of a surveyor. This surveyor reported, and it is undisputed, that the property described in the original metes and bounds description in the deed from Woods to William Gildenmeister describes not a two acre parcel, but property consisting of 1.7333 acres. Moreover, according to appellees' surveyor, the metes and bounds description inserted in the 1961 transfer, in lieu of the original language, had to be erroneous because the borders described exceeded the bounds of the land in the original Woods to Gildenmeister deed.

{¶ 24} In their motion for summary judgment, appellees argued that a property description that conveys land which never belonged to anyone in the chain of title is inherently ambiguous and must be reformed. To appellees it is clear that it was the intent of the parties all along to convey that which had originally been conveyed to Louis Gildenmeister, the north one acre of William Gildenmeister's "two acre" parcel. Since the parties agree that the eastern beginning point of the dividing line between the properties is midway along the "two acre" parcel's 250 foot eastern border, appellee's surveyor set a dividing line beginning at 125 feet from the southeast corner of the "two acre" parcel and going southwest for 275 feet. Such a line would result in a one acre lot for appellees and a 0.733 acre lot for appellants.

{¶ 25} According to appellants, appellees' deed is what it is. Even though appellees' metes and bounds description sets a western boundary outside the original 1896 conveyance, it is the description by which appellants' property has been defined for more than forty years. This being the case, appellants argued, a reformation of appellees'

deed which would affect appellants' property is foreclosed by R.C. 5301.47, et. seq., Ohio's Marketable Title Act. Moreover, appellants insisted, no recourse to ancient deeds should be permitted because, when the two parcels were under the common ownership of Russell and Frances Conrad, the parcels merged. As a result, any prior conveyances are irrelevant.

{¶ 26} The General Assembly enacted the Ohio Marketable Title act in 1961, "* * * to simplify and facilitate land title transactions by allowing persons to rely on a record chain of title * * *." The act is to be construed liberally to effect that purpose. *Semachko v. Hopko* (1973), 35 Ohio App.2d 205, 209.

{¶ 27} "Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest * * *." R.C. 5301.48. "[A]n unbroken chain of title [exists] when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest * * *," in a person claiming such interest or some other person vested with such interest and there is nothing of record purporting to divest such interest. Id.

{¶ 28} "'Marketable record title' means a title of record * * * which operates to extinguish such interests and claims, existing prior to the effective date of the root of title * * *." R.C. 5301.47(A). "'Root of title' means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person,

upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the 'root of title' is the date on which it is recorded." R.C. 5301.47(E). Subject to certain exceptions, a "* * * record marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims, or charges whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title." R.C. 5301.50.

{¶ 29} A deed certainly represents an interest in property. The challenge to appellants' interest was raised by way of this lawsuit in April 2008. The root of appellants' title, then, is the most recent transaction recorded before April 1968. Since appellants' property description is pendant to the interest described in appellees' deed, the most recent recorded deed prior to 1968 was the 1962 conveyance to the Conrads. This deed carried forward the description that appellees' surveyor characterizes as erroneous.

{¶ 30} While we concur with appellees that the erroneous property description constitutes an ambiguity making it subject to reformation, see *Oncu v. Bell* (1976), 49 Ohio App.2d 109, 111, such reformation should not affect appellants' rights. The "erroneous" description was in place for more than 40 years before it was challenged. Since that description is the basis for appellants' property, compare *Heifner v. Bradford* (1983), 4 Ohio St.3d 49, 52-53, the Marketable Title Act is applicable and forecloses the

analysis appellees advance. Accordingly, appellants' first two assignments of error are well-taken. Assignments of error three, four and five are moot.

II. Triangular Parcel

{¶ 31} The parties' second area of contention is over a triangular parcel, the east border of which is the west border of the property owned by appellants and appellees. This land was part of the original 50 acres owned by the Woods, 45.21 acres of which were conveyed to Louis Gildenmeister in 1901. Gildenmeister conveyed the whole parcel to Quirin in 1929. In 1947, Quirin conveyed one acre of the parcel to Charles Waddington. Included in this acre was the disputed triangle. On June 7, 1948, Quirin issued a second deed to Waddington, "* * * to correct the description in [the prior] deed * * *." The second deed moved the east border of the grant to Waddington 50 feet west of the present parties' property, thus creating the triangular lot at issue.

{¶ 32} Appellees' claim to the triangle comes from the first deed to Waddington. Appellees insist that the second deed is a legal nullity. Therefore, on his death, the triangle passed to Waddington's heir, Frances Conrad, and on her death to her heir, Tony Conrad. Appellees claim title by virtue of a quit claim deed to the triangle from Tony Conrad.

{¶ 33} Appellants maintain that Quirin's second corrective deed was effective, resulting in ownership of the triangle remaining with him. Appellants note that when Waddington sold the land he had acquired from Quirin, Waddington used the property description in the second Quirin deed.

{¶ 34} Quirin sold the remainder of the larger parcel to the Russells in 1954. The Russells sold to Lynn and Mary Harris in 1959, but without the inclusion of the triangle in the legal description. Appellants maintain that the 1959 conveyance left ownership of the triangle with the Russells. Appellants' claim is based on a quit claim deed obtained from the Russell heirs.

{¶ 35} Appellants also claim the triangle by virtue of adverse possession, averring that they have maintained the triangle since they purchased their property in 1986. Moreover, a cistern, a shed and part of the foundation to their home is on the triangle and has been since no later than 1987. In their response to appellants' motion, appellees concede that appellants have established a claim premised on adverse possession on that portion of the triangle upon which their home and cistern are situated. Inexplicably, the trial court made no provision for this land when it ruled that the triangle belonged to appellees.

{¶ 36} Both parties rely on *Meeks v. Stillwater* (1896), 54 Ohio St. 541, each claiming that the case is dispositive in their favor. Appellants direct our attention to paragraph two of the syllabus which states that "If after [a correction by a grantor to conform to his or her real intent,] there is a valid delivery, the grantee's title will be such as is given by the corrected instrument." Appellants maintain this rule authorized Quirin to correct his deed to Waddington, leaving ownership of the triangle in his hands through which it descended to them.

{¶ 37} Appellees concur that *Meeks* is dispositive, but not in the manner appellants suggest. The second *Meeks* syllabus paragraph must be viewed in light of paragraph one of the syllabus which, in material part, provides that where an instrument "* * * does not express the real intent of the grantor, and *has not been recorded nor actually delivered to the grantee*, the grantor may lawfully resume possession of the instrument and correct it so that it will conform to the real intent." (Emphasis added.)

{¶ 38} The first Quirin deed was both delivered and recorded, appellees argue, therefore, Waddington held the property described in fee and Quirin had nothing to correct. The only manner in which Quirin could have corrected the deed, according to appellees, would have been for Waddington to re-deed the property to him and for Quirin to deliver a corrected deed to Waddington.

{¶ 39} We question whether appellees' deed and re-deed scheme was the only manner in which Quirin could have corrected the original conveyance. Waddington could have expressly accepted the corrected instrument or there could have been an action for reformation. Nevertheless, none of these remedies was undertaken at any time. Consequently, title to the triangle remained with Waddington and passed through his successors in interest to appellees.

{¶ 40} Accordingly, appellants' sixth through eighth assignments of error are not well-taken. Considering that appellees conceded in their original motion for summary judgment that appellants had established a claim for at least part of the triangle by adverse possession, appellants' ninth assignment of error is well-taken and the matter

remanded to the trial court for a determination of the exact measure of the land so acquired. Appellants' tenth assignment of error is in essence a reiteration of other assignments of error and is found moot.

{¶ 41} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to said court for further consideration consistent with this decision. It is ordered that the parties share equally the court costs of this appeal pursuant to App.R. 24.

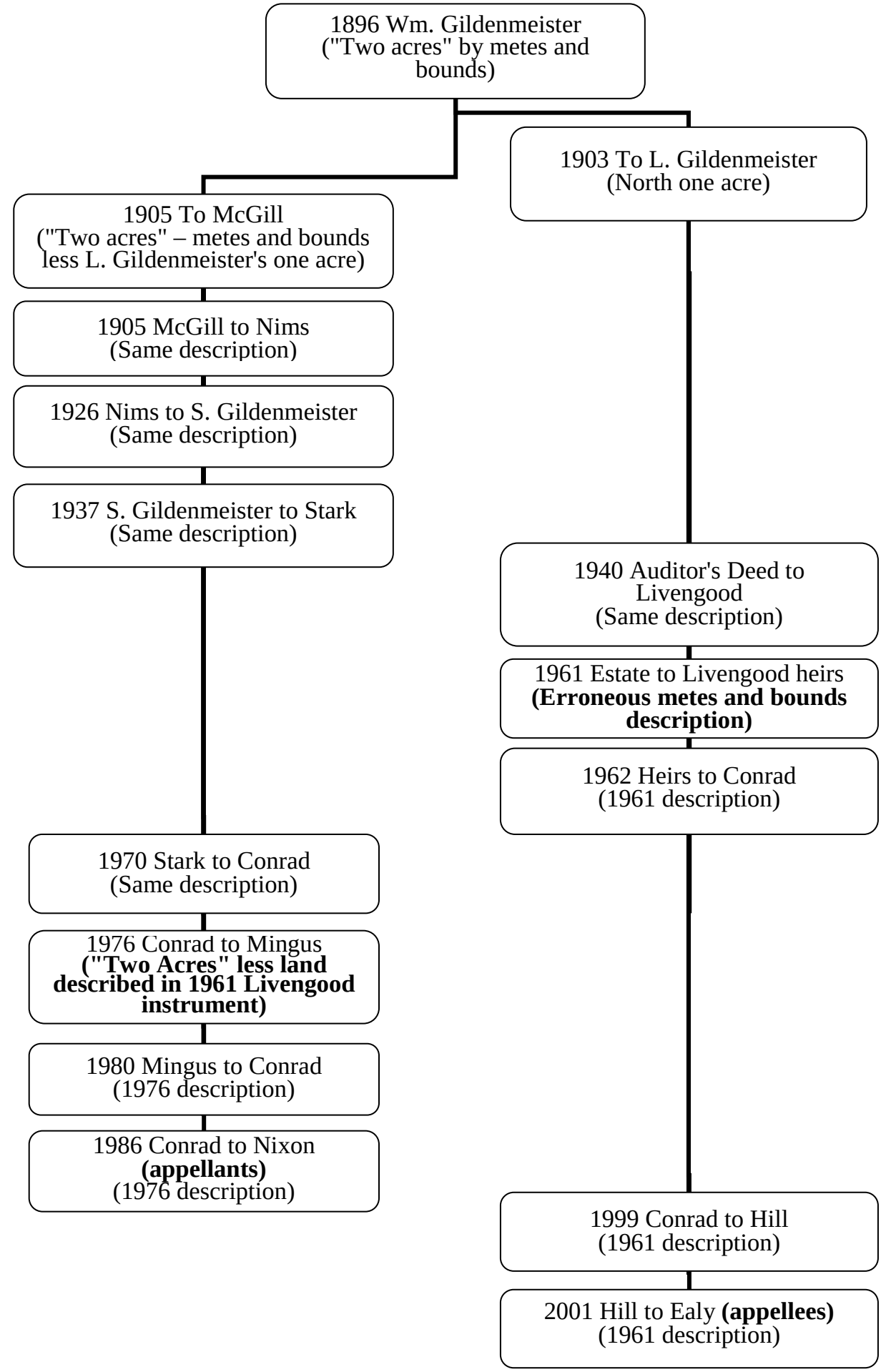
JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE


1896 Wm. Gildenmeister ("Two acres" by metes and bounds)
1903 To L. Gildenmeister (North one acre)
1905 To McGill ("Two acres" – metes and bounds less L. Gildenmeister's one acre)
1905 McGill to Nims (Same description)
1926 Nims to S. Gildenmeister (Same description)
1937 S. Gildenmeister to Stark (Same description)
1940 Auditor's Deed to Livengood (Same description)
1961 Estate to Livengood heirs **(Erroneous metes and bounds description)**
1962 Heirs to Conrad (1961 description)
1970 Stark to Conrad (Same description)
1976 Conrad to Mingus **("Two Acres" less land described in 1961 Livengood instrument)**
1980 Mingus to Conrad (1976 description)
1986 Conrad to Nixon **(appellants)** (1976 description)
1999 Conrad to Hill (1961 description)
2001 Hill to Ealy **(appellees)** (1961 description)