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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2003-CA-000842-MR

KATHY CARUTHERS

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 98-CI-00272

EARL ROBINETTE; ELBERT SESCO;  
LOWELL T. SESCO; AMERICAN  
GENERAL HOME EQUITY, INC.;  
AND GATHEL WARREN

APPELLEES

AND: NO. 2003-CA-000860-MR

AMERICAN GENERAL HOME EQUITY, INC.

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 98-CI-00272

KATHY CARUTHERS; EARL ROBINETTE;  
ELBERT SESCO; LOWELL T. SESCO;  
AND GATHEL WARREN

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

KNOFF, JUDGE: Kathy Caruthers and American General Home Equity, Inc. each appeal from a declaratory judgment of the Pike Circuit Court finding that Earl Robinette, Lowell T. Sesco, and Elbert Sesco are the owners of a disputed tract of real property. Caruthers argues that the trial court abused its discretion by allowing an unlicensed surveyor to testify for the appellees, and that the trial court's conclusions regarding ownership of the disputed property were clearly erroneous. Under the circumstances of this case, we conclude that the trial court did not abuse its discretion by allowing the appellees' surveyor to testify. However, we also find that the 1935 source deeds were ambiguous concerning the scope of the property conveyed, and the trial court failed to adequately address the extrinsic evidence which would explain the ambiguity. Hence, we vacate the judgment and remand for further factual findings.

The property at issue in this case is located in Pike County, Kentucky, at the head of the Middle Fork of Rockhouse Creek of Big Creek. The parties to this action stipulated that their respective titles flow from a common source, which was a farm consisting of over one-hundred acres owned by John B. Smith. Smith died intestate in August, 1923, and his interest passed to his children, Myrtie Robinette, Wayne Smith, Jonah Smith, Ben Smith, Willie Smith, and Maudie Maynard. On March 23, 1932, Ben Smith and Sophie Smith, his wife, Jonah Smith and

Susan Smith, his wife, and Willie Smith conveyed their undivided interests in the property to Myrtie Robinette. However, this deed was not recorded until 1977.

Thereafter, on February 19, 1935, the children of John B. Smith, including Ben, Jonah, and Willie, executed two deeds dividing their undivided interest in the property. In their respective deeds, Myrtie and Wayne each received from their brothers and sisters a tract of described property. The deed to Myrtie conveyed approximately 30 acres, while the deed to Wayne conveyed approximately 45 acres. Both deeds mention a boundary along an agreed and marked line, but Myrtie's deed specifically mentions that the agreed line "runs to the center of the Big Sheep Rock." Both deeds state that the children of John B. Smith were conveying the entire interest which they received from their parents.

Shortly thereafter, Wayne Smith divided his tract and conveyed 25 acres to his former wife, Gertrude Bevins. Bevins's tract was eventually conveyed to Earl Robinette. The portion of the tract retained by Wayne was also eventually conveyed to Earl Robinette. However, Robinette sold this portion of the property in 1995 to Lowell Thomas Sesco and Elbert R. Sesco.

Myrtie Robinette Ward died testate on July 15, 1976, and she devised all her real property to her niece, Kathy Reece Caruthers. In 1987, Caruthers sold the 30 acre tract which she

inherited from Myrtie. However, based on the 1932 deed, Caruthers claims that Myrtie retained some 45 acres on the right side of the Middle Fork. Caruthers recorded the 1932 deed in 1977, and county tax records show that she has paid taxes on this property since 1978. In addition, Caruthers mortgaged the property several times, including a currently outstanding mortgage held by American General Home Equity, Inc.

After a dispute arose concerning ownership of the property, Caruthers brought this declaratory judgment action against Earl Robinette, Lowell T. SESCO, Elbert SESCO, and Gathel Warren, who may have inherited an interest from Wayne Smith. Caruthers also named American General, as a holder of the mortgage and issuer of the title insurance on the property, and Addington Enterprises, Inc., which claimed the mineral estate under the property based upon prior conveyances which are not at issue in this action. At a bench trial conducted from July 31 to August 1, 2002, Caruthers presented documentary evidence and testimony to support her claim to the property. Two registered surveyors, Ertel Whitt, Jr. and Luke Hatfield, testified for Caruthers. Whitt testified that he had conducted a survey and prepared a plat based upon the descriptions in the 1932 and 1935 deeds and the subsequent conveyances. Whitt testified that he had located the agreed line in the location claimed by Caruthers. Based upon his research and survey, Whitt

concluded that Myrtie Robinette had owned one-half of the property inherited from John B. Smith, including the lands not specifically described in the 1935 deed. Consequently, he was of the opinion that Caruthers still owned some 45 acres on the right side of the head of the Middle Fork of Rockhouse Creek. Hatfield, who also visited the property and prepared a map based on the deed descriptions, agreed with Whitt's conclusions.

In support of their claims, Robinette and the Sescos primarily presented lay testimony as to the reputation of the boundaries, ownership and possession of the property at issue. They also presented the testimony of Mike Davis, president of Elkhorn Engineering, Inc. Elkhorn Engineering prepared a mining map for Addington Enterprises. Davis testified that he is a mining engineer and holds a West Virginia license as a land surveyor, but he is not licensed or registered as a land surveyor in Kentucky. Over Caruthers's objection, Davis testified that his staff had conducted a field survey and that he had prepared a map of the property based on the descriptions in the 1935 deeds. He was of the opinion that Myrtie Robinette did not have an interest in any property other than the 30 acres conveyed to her in the 1935 deed.

On March 20, 2003, the trial court issued findings of fact, conclusions of law and a judgment in favor of Earl Robinette and the Sescos. The trial court found that the 1932

deed did not represent the intent of the parties, and was superseded by the 1935 deed. Instead, the trial court found that the parties to the 1935 deeds intended to convey all of the property inherited from John B. Smith, including the interests previously conveyed to Myrtie in the 1932 deed. Consequently, the trial court concluded Myrtie Robinette had received only the 30 acres described in her deed, and that all of the remaining property was conveyed to Wayne Smith. Based on this finding, the trial court also concluded that Myrtie Robinette and Caruthers, as her successor, were estopped to make a claim based on the 1932 deed. The trial court was also persuaded that the map prepared by Elkhorn Engineering most accurately depicted the 1935 division of the property among the children of John Smith. Accordingly, the trial court entered a judgment declaring that Caruthers had no interest in the disputed property, and that the property is owned by Earl Robinette and the Sescos. Caruthers and American General separately appealed from this judgment, and their appeals have been consolidated before this Court.

Caruthers and American General first argue that the trial court erred by allowing the appellees' surveyor, Mike Davis, to testify as an expert witness. They note that Davis is not licensed or registered as a land surveyor in Kentucky. Consequently, they assert that Davis's testimony was inadmissible because it violated the statutory prohibition of

the unauthorized practice of land surveying. Under the circumstances presented in this case, we disagree.

Although Kentucky courts have not ruled on this precise question, the case law from other jurisdictions indicates that a surveyor need not be licensed in that state to be qualified to testify as an expert witness. Rather, most states only require a showing that the witness possesses sufficient knowledge, training or experience in the field in order to qualify.<sup>1</sup> We find the reasoning in these cases to be persuasive.

The practice of professional engineers and land surveyors is regulated through the state's police powers as set

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<sup>1</sup> See Howard v. Wills, 77 Ohio App. 3d 133, 601 N.E.2d 515, 520 (1991) (Fact that surveyor was not licensed in Ohio went only to the weight to be given to his testimony and not to his qualification as an expert witness.); Thomas v. Olds, 150 Vt. 634, 556 A.2d 62, 64 (1989) (Statute requiring licensing of surveyors "is aimed at protecting the public from the unauthorized practice of engineering; it is not meant to be used to keep properly qualified experts from testifying."); Yoho v. Stack, 373 Pa. Super. 77, 540 A.2d 307, 310 (Pa. Super. 1988) ("A witness will be qualified as an expert if he or she has any reasonable pretension to specialized knowledge on the subject under investigation. The standard does not mandate, however, that the witness need possess all the knowledge in his or her special field of activity in order to qualify."); Cutro v. Duffy, 88 A.D.2d 1007, 451 N.Y.S.2d 937, 938 (N.Y. App. Div., 1982) ("[A] surveyor is not required to be licensed in order to qualify as an expert witness as long as he possesses the requisite education and experience and is supervised by a licensed surveyor . . . ."); and Koenig v. Skaggs, 400 S.W.2d 63, 67 (Mo., 1966). See also 12 Am. Jur. 2d Boundaries § 108, p. 504, n. 54.

out in KRS Chapter 322. Although the statutory qualifications for these professions are clearly relevant to determine the qualification of a proposed expert witness, the General Assembly's regulation of these professions does not directly implicate the rules of evidence. Indeed, such an interpretation would transgress established procedure relating to the qualification and admission of expert testimony, and would usurp the power of the judiciary to establish rules of evidence.<sup>2</sup>

The qualifications of an expert witness are governed by KRE 702 and 703, which vest the trial court with broad discretion to determine whether a witness is qualified to express an opinion in a matter which requires expert knowledge, skill, experience, training, or education. These rules require the trial court to determine if such expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.<sup>3</sup> The fact that a surveyor is not licensed in this state may affect the weight to be given to the witness's testimony, but it does not necessarily render him unqualified to testify as an expert witness.

However, just as the judiciary has the exclusive right to formulate rules of evidence, the legislature has the

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<sup>2</sup> Drumm v. Commonwealth, Ky., 783 S.W.2d 380, 382 (1990).

<sup>3</sup> Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577-79 (2000).

exclusive right to regulate the practice of land surveying and to prescribe the qualifications of those who engage in its profession. KRS 322.020(2) prohibits any person from engaging in the practice of land surveying unless licensed as a professional land surveyor.<sup>4</sup> While an unlicensed individual may

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<sup>4</sup> Under KRS 322.010(10)(a), the term "Land surveying" includes, but is not limited to:

1. Measuring and locating, establishing, or reestablishing lines, angles, elevations, natural and man-made features in the air, on the surface and immediate subsurface of the earth, within underground workings, and on the beds or surfaces of bodies of water involving the:
  - a. Determination or establishment of the facts of size, shape, topography, and acreage;
  - b. Establishment of photogrammetric [sic] and geodetic control that is published and used for the determination, monumentation, or description of property boundaries;
  - c. Subdivision, division, and consolidation of lands;
  - d. Measurement of existing improvements, including condominiums, after construction and the preparation of plans depicting existing improvements, if the improvements are shown in relation to property boundaries;
  - e. Layout of proposed improvements, if those improvements are to be referenced to property boundaries;
  - f. Preparation of physical written descriptions for use in legal instruments of conveyance or real property and property rights;
  - g. Preparation of subdivision record plats;
  - h. Determination of existing grades and elevations of roads and land;
  - i. Creation and perpetuation of alignments related to maps, record plats, field note records, reports, property descriptions, and plans and drawings that represent them; and
  - j. Certification of documents; and

possess sufficient knowledge or experience to testify as an expert witness, that person is not authorized to engage in the practice of land surveying within Kentucky. The giving of expert opinions is distinct from the practice of a regulated profession.<sup>5</sup>

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2. The negotiation or soliciting of land surveying services on any project in this state, regardless of whether the persons engaged in the practice of land surveying:
    - a. Are residents of this state;
    - b. Have their principal office or place of business in this state; or
    - c. Are in responsible charge of the land surveying services or work performed.
- (b) "Land surveying" shall not include:
1. The measurement of crops or agricultural land area under any agricultural program sponsored by an agency of the federal government or state of Kentucky;
  2. The services of a professional engineer who engages in the practice of land surveying incident to the practice of engineering, if the land surveying work does not relate to the location or determination of land boundaries; or
  3. The design of grades and elevations of roads and land;

<sup>5</sup> In her reply brief, Caruthers suggests that allowing an unlicensed surveyor to give expert opinions "would be equal to allowing an experienced mother to testify of her home remedies and the results she would achieve as an unlicensed medical practitioner, as opposed to a licensed surgeon performing a very specialized practice of medicine, just because the mother is experienced and well qualified." A more apt analogy would be a physician who is not licensed in Kentucky. A physician licensed in another state may testify as an expert witness upon proper qualification. But that same physician would not be permitted to engage in the practice of medicine within Kentucky, even if it were incident to a legal action in which the physician was testifying as an expert witness.

The decision as to the qualifications of an expert is within the sound discretion of the trial judge and should not be disturbed in the absence of some abuse of discretion.<sup>6</sup> In this case, Davis testified that Elkhorn Engineering is permitted by the state of Kentucky to engage in land surveying and other engineering work, and that a Kentucky-licensed land surveyor is on the staff of Elkhorn Engineering. Davis also testified that he did not actually visit the site or conduct the survey. Rather, he relied on information gathered by subordinates under his control and direction to prepare the map.<sup>7</sup> Under the circumstances, we conclude that the trial court did not abuse its discretion by allowing Davis to testify. Davis established his qualifications to testify as an expert, and we are not convinced that his participation in this litigation amounted to the unauthorized practice of land surveying.

We have some questions about the sufficiency of the map upon which the trial court relied. Davis testified that his staff had conducted only a field survey, not a full survey of the property. Davis also indicated that the maps offered were

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<sup>6</sup> See Wheeler v. Commonwealth, Ky., 121 S.W.3d 173, 183 (2003).

<sup>7</sup> Although the common use of the term suggests otherwise, the marks on the ground made by a professional land surveyor constitute the actual boundary survey. 201 KAR 18:150 § 4. The plat and the legal description are merely the record of the survey, and are not the survey itself.

not survey plats, that no coordinates or corners were set, and he did not provide a legal description. Furthermore, while the deed to Wayne Smith only called for 45 acres, the Elkhorn map adds an additional 30 acres to his tract. In addition, Caruthers's surveyor, Hatfield, testified that Elkhorn's map ignores changes in elevation and changes the direction and distance calls set out in the 1935 deeds.

Nevertheless, these issues ultimately go to the sufficiency of the evidence which supported the trial court's conclusion. As this matter was tried before the circuit court without a jury, our review of factual determinations is under the clearly erroneous rule.<sup>8</sup> This rule applies with equal force on an appeal from a judgment in an action involving a boundary dispute.<sup>9</sup> Furthermore, "[a] fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors."<sup>10</sup>

On the other hand, the construction of a deed is a matter of law, and the intention of the parties is to be

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<sup>8</sup> CR 52.01.

<sup>9</sup> Croley v. Alsip, Ky., 602 S.W.2d 418, 419 (1980).

<sup>10</sup> Webb v. Compton, Ky. App., 98 S.W.3d 513, 517 (2002) (*quoting* Howard v. Kingmont Oil Co., Ky. App., 729 S.W.2d 183, 184-85 (1987)).

gathered from the four corners of the instrument.<sup>11</sup> The entire instrument is to be considered in the light of attendant circumstances and it is to be presumed that no clause or word in a deed was used without meaning or intent.<sup>12</sup> A court may not substitute what the grantor may have intended to say for what was said. The rule is well settled that words in a deed that are not technical must be construed as having their ordinary connotation.<sup>13</sup>

In reaching its conclusion, the trial court noted that in the 1935 deed, Myrtie Robinette and her siblings conveyed the "whole and entire interest in their (Deceased) fathers [*sic*] and mothers [*sic*] Real Estate, so as to include all land in said boundary." Based upon this language, the court found that the children of John B. Smith intended to divide all of the property which they inherited from their parents. Therefore, the court disregarded any contrary language in the unrecorded 1932 deed.

In essence, the trial court found that the 1935 division deeds were not ambiguous, and limited its reading to the four corners of those deeds. We agree that extrinsic evidence cannot be admitted to vary the terms of a written

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<sup>11</sup> Phelps v. Sledd, Ky., 479 S.W.2d 894, 896 (1972).

<sup>12</sup> Dennis v. Bird, Ky. App., 941 S.W.2d 486, 488 (1997).

<sup>13</sup> Phelps v. Sledd, 479 S.W.2d at 896.

instrument in the absence of an ambiguous deed.<sup>14</sup> Moreover, parol evidence is admissible only to explain a latent ambiguity in a deed. A latent ambiguity is one which does not appear upon the face of the words used, and it is not known to exist until the words are considered in light of the collateral facts.<sup>15</sup> Caruthers contends that the 1935 division deeds contain such a latent ambiguity, and that the trial court should have looked to the 1932 deed and to other extrinsic evidence to explain the ambiguity. Had the trial court done so, Caruthers asserts that the trial court would have found that Myrtie Robinette retained the portion of the tract which was not specifically conveyed in the 1935 deeds.

We agree that the 1935 deeds contain a latent ambiguity. Although the 1935 deeds state that the children of John B. Smith are conveying all of the interest which they inherited from their parents, the deeds did not actually divide the entire tract. Rather, when the deed descriptions are read together, they exclude a portion of the original tract from the division. The specific descriptive terms of the property conveyed appear to contradict the more general statement that

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<sup>14</sup> Hoheimer v. Hoheimer, Ky., 30 S.W.3d 176, 178 (2000); Sword v. Sword, Ky., 252 S.W.2d 869 (1952).

<sup>15</sup> Thornhill Baptist Church v. Smither, Ky., 273 S.W.2d 560, 562 (1954); citing Carroll v. Cave Hill Cemetery Co., 172 Ky. 204, 189 S.W. 186, 190 (1916).

the siblings had intended to divide the entire tract which they had inherited from the parents. Therefore, the trial court should have considered the parol evidence to explain the ambiguity.<sup>16</sup>

Nonetheless, Caruthers and American General are not entitled to a judgment as a matter of law at this point in time. Because the trial court relied only on the 1935 deed descriptions, it did not consider other evidence which might have explained the apparent ambiguity. We conclude that there are issues of fact which remain for the trial court to resolve.

Most notably, the sufficiency of the 1932 deed has also not yet been determined. The parties agree that an unrecorded deed is valid and effective between the parties to that deed, and against a subsequent grantee who knew or had notice of its existence prior to his purchase, or had information sufficient to put him on inquiry that would have led to its discovery upon a search; such information is deemed equivalent to notice.<sup>17</sup> However, an unrecorded deed is not valid

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<sup>16</sup> Thornhill Baptist Church v. Smither, 273 S.W.2d at 562-63; citing Tarr v. Tarr's Executor, 259 Ky. 638, 82 S.W.2d 810, 811(1935).

<sup>17</sup> Turner v. McIntosh, Ky., 379 S.W.2d 470, 472 (1964).

against a subsequent purchaser for value and without notice of the deed.<sup>18</sup>

Earl Robinette testified that he acquired his property in 1947 and in 1952 - long before the 1932 deed was recorded. But it is not clear from the record that the disputed area was within the property conveyed in his chain of title. If the property is not within his chain of title, then Caruthers would not be estopped from claiming the property under the unrecorded 1932 deed.

Likewise, it is not clear from the record before this Court whether this property was ever specifically conveyed to Myrtie Robinette or to Wayne Smith. Although the Elkhorn map assumes that the disputed area was included in the property conveyed to Wayne Smith, the 1935 deed descriptions do not fully support that assumption. But on the other hand, the 1932 deed appears to convey only an undivided interest in the John B. Smith farm to Myrtie Robinette, and not a specific portion of that tract. It is not clear from the record before this Court that the description in that deed would necessarily encompass the property now claimed by Caruthers.

To determine the intent and effect of the 1935 division deeds, the trial court must look to all of the facts

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<sup>18</sup> KRS 382.270.

and circumstances which existed at the time those deeds were executed. Where a deed contains both a particular and a general description of the property conveyed, the particular will prevail over the general.<sup>19</sup> The intention of the parties must be looked at to determine what interest was conveyed. In determining the intention of the parties, courts look at the whole deed, along with the circumstances surrounding its execution, and courts may also consider the acts of the parties following the conveyance.<sup>20</sup> To this end, the 1932 deed may be relevant to the question of whether the parties to the 1935 deeds intended to exclude a portion of the John B. Smith farm from the division. Similarly, the trial court should consider whether the parties understood that the disputed area had already been separately conveyed to Myrtie, as well as the conduct of the parties both before and after the transaction.

The testimony of Whitt and Hatfield, together with the other testimony offered by Caruthers, would support the conclusion that Wayne and Myrtie did not intend to divide the entire tract between them in 1935. But conversely, the testimony offered by Earl Robinette would indicate that the sheep rocks were the recognized boundary between Myrtie and

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<sup>19</sup> Handy v. Standard Oil Co., Ky., 468 S.W.2d 302, 303 (1971).

<sup>20</sup> Arthur v. Martin, Ky. App., 705 S.W.2d 940, 942 (1986).

Wayne's tracts. Although the Elkhorn map does not exactly follow the 1935 deed descriptions, it is accurate to the extent that it reflects those descriptions as supplemented by reputation evidence concerning the boundary. Furthermore, the trial court must determine whether the disputed property was ever included within Earl Robinette's chain of title, and whether he knew or had reason to know of a prior conveyance to Myrtie. These are all questions of fact, and are exclusively within the purview of the trial court to decide. Therefore, we conclude that this matter must be remanded for additional factual findings.

Accordingly, the judgment of the Pike Circuit Court is vacated, and this matter is remanded for additional findings of fact, conclusions of law and a judgment consistent with this opinion.

ALL CONCUR.

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