

RENDERED: JULY 30, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001104-MR

FRANK DEWEESE and  
CAROLYN DEWEESE

APPELLANTS

v. APPEAL FROM BUTLER CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 01-CI-00183

JOHN D. ANNIS

APPELLEE

AND

NO. 2003-CA-001128-MR

FRANK DEWEESE and  
CAROLYN DEWEESE

APPELLANTS

v. APPEAL FROM BUTLER CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 01-CI-00182

JOHN D. ANNIS; CARRIE ANNIS;  
JOHN ANNIS, JR.; CHARLES  
CECIL MARTIN; JAMES P. ROGERS  
TRUST; and ALL UNKNOWN PERSONS  
WHO CLAIM ANY INTEREST IN THE  
SUBJECT MATTER OF THIS ACTION

APPELLEES

1. OPINION VACATING AND REMANDING

2. OPINION AFFIRMING IN PART  
AND  
VACATING IN PART AND REMANDING

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BEFORE: DYCHE, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: In 2003-CA-001104-MR, Frank and Carolyn Deweese (hereinafter referred to as the "Deweeses"), appeal from an order of the Butler Circuit Court entered on March 11, 2003, that dismissed the Deweeses' complaint. In their complaint, the Deweeses sought one-third of any rental income generated from 1991 to 1999, by four acres of land in which they owned an undivided one-third interest and sought triple the value of one-third of the proceeds from any timber sales.

In 2003-CA-001128-MR, the Deweeses, appeal from an order of the Butler Circuit Court entered on March 11, 2003, which dismissed the Deweeses' petition to quiet title.

In both appeals, the Deweeses argue that the Butler Circuit Court erred when it dismissed their various causes of action based on the doctrines of res judicata and collateral estoppel. The Deweeses further argue that the trial court erred when it failed to make findings of fact and conclusions of law. In 2003-CA-001104-MR, finding that neither res judicata nor collateral estoppel apply, this Court vacates the trial court's

dismissal and remands. In 2003-CA-001128-MR, regarding the Deweeses' claim to quiet title, this Court affirms the trial court's dismissal. Regarding the Deweeses' claim for the right to access, this Court vacates and remands for further findings of fact.

#### **FACTS**

In 1991, Garland S. Taylor, Jr. (hereinafter referred to as "Garland"), filed a forcible detainer action in Butler District Court to eject the Taylor's Lake Fish Club (hereinafter referred to as "Fish Club") from approximately four acres of land. The Fish Club had rented the land, which lay to the east of and adjacent to Taylor's Lake, from Garland for several years. In defense against the detainer action, the Fish Club claimed that it, not Garland, owned the property. The detainer action was transferred to the Butler Circuit Court to determine who rightfully owned the property. It was assigned the case number 91-CI-0078. George Ivan Dewese (hereinafter referred to as "George") intervened in the action; counterclaimed to quiet title to the four acres; and argued that he owned an undivided one-third interest in the property. After a bench trial, the trial court found in favor of Garland's estate. (Garland had previously passed away.) George appealed the trial court's decision to this Court. In 1993-CA-001524-MR, this Court remanded to the trial court for further findings of fact.

Upon remand, the trial court again found in favor of Garland's estate and George's estate appealed once more to this Court. (George had also passed away before the resolution of the case.) After this Court set forth, in detail, the chain of title to the four acres, this Court concluded that the trial court had erred when it determined that George did not own an undivided one-third interest in the subject property. This Court reversed the trial court's judgment and remanded with instructions for the trial court to enter judgment in favor of George's estate giving his heirs an undivided one-third interest in the four acres.

Upon remand for the second time, the trial court entered, on August 5, 1998, a judgment and order of sale in which the court ordered the master commissioner to sell the subject property and to divide the proceeds. According to the trial court's order, John Annis as the executor of Garland's estate would receive two-thirds of the proceeds while Frank Dewese as administrator of George's estate would receive one-third of the proceeds. At the master commissioner's sale, John Annis; his wife, Carrie; John Annis, Jr.; Charles Cecil Martin; and the James P. Rogers Trust purchased the four acres. Frank Dewese appealed the judgment entered in August of 1998, but this Court subsequently affirmed it.

**2003-CA-001128-MR**

On December 6, 2001, Frank Deweese and his wife, Carolyn, filed with the Butler Circuit Court a petition to quiet title against John Annis; Carrie Annis; John Annis, Jr.; Charles Cecil Martin; and the James P. Rogers Trust (hereinafter collectively referred to as "John and Carrie"), the owners of the four acres which were the subject matter in 91-CI-0078. In their petition, the Deweeses stated that they owned one hundred and ninety-three (193) acres of land which was situated to the southwest of both Taylor's Lake and the four acres. The Deweeses' 193 acres shared a common property line with the four acres along the shoreline of the lake. According to the petition, the four acres stretched underneath Taylor's Lake. The Deweeses claimed that the property line of their 193 acres where it touched the four acres stretched down the bank of the lake to its low water point. The Deweeses sought to quiet title to set the low water mark as their property line. The Deweeses subsequently amended their petition to also claim that they had a right to access and use the lake since it was a blue line stream.

John and Carrie answered and counterclaimed that the property line extended to the top of the bank. They also asserted the doctrines of res judicata and collateral estoppel

barred the Deweeses quiet title action since this issue had been previously litigated in 91-CI-0078.

John and Carrie filed a motion to dismiss and again argued res judicata and collateral estoppel barred the Deweeses' claims. Without making either findings of fact or conclusions of law, the trial court granted John's and Carrie's motion and dismissed the Deweeses' petition. The Deweeses' filed a motion to reconsider and for findings of fact, which the trial court summarily denied. The Deweeses then appealed to this Court.

On appeal, the Deweeses argue that the trial court erred when it dismissed their petition as barred by the doctrines of res judicata and collateral estoppel. The Deweeses insist that neither res judicata nor collateral estoppel apply since the issues and questions of law they present in the instant case are different from those presented in the prior action, 91-CI-0078. The prior action addressed who owned the four acres, while the instant case addresses where the Deweeses' property line in relation to the four acres and the right to access the lake.

Furthermore, the Deweeses insist that the trial court committed reversible error when it failed to make findings of fact.

This Court agrees with the Deweeses that whether treated as a motion to dismiss due to failure to state a claim

on which relief can be granted or whether treated as a motion for summary judgment, the standard of review on appeal is *de novo*. See James v. Wilson, Ky. App., 95 S.W.3d 875 (2003) and Blevins v. Moran, Ky. App., 12 S.W.3d 698 (2000). Thus, this Court need not defer to the trial court's decision. Blevins v. Moran, *supra* at 700.

Regarding *res judicata*, the former Kentucky Court of Appeals, now the Supreme Court, stated in Prewitt v. Wilborn, 184 Ky. 638, 212 S.W. 442, 449-450 (1919):

The doctrine of *res judicata* is that a final judgment rendered upon the merits of the case, by a court having jurisdiction of the subject-matter and the parties, is conclusive of the rights of the parties and their privies in another suit on the points and matters in issue in the first suit. A distinction must be drawn, however, between the effect of a judgment in a second suit between the same parties upon the same cause of action and a second suit between the same parties upon a different cause of action. **In the first instance, the judgment is a complete bar to the second action, not only as to everything which was used in the first action to sustain or defeat the demand, but everything which the parties could have used properly for that purpose;** but in the second instance, where the second suit is between the same parties upon a different cause of action from that involved in the first action, the judgment in the first action is an estoppel to a relitigation of questions which were actually litigated and determined in the first action, and of such questions as were necessarily determined by the judgment in the first action in arriving at the decision, and is not conclusive as to matters not decided, and the decision of

which were not essential to the decision in the first suit, although issues may have been made in reference to them.

. . . The accepted rule in determining whether two suits are upon the same cause of action is whether the **same evidence will sustain or defeat the action in both cases.**

(Emphasis supplied.) See also Gibson v. Crawford, 259 Ky. 708, 83 S.W.2d 1 (1935) and Hays v. Sturgill, Ky., 193 S.W.2d 648 (1946).

The prior litigation was an action to quiet title. To quiet title to the property, the parties had to show title back to the Commonwealth or show title back to a common grantor. Brown v. Martin, 239 Ky. 146, 39 S.W.2d 243, 245 (1931). According to this Court's opinion, Deweese v. Annis, 1996-CA-002295, George Deweese showed title for the four acres back to a common grantor, J.J. Borah.

Despite the Deweeses' claims to the contrary, their current claim to quiet title does concern the same four acres that was the subject matter of the prior litigation. So, the parties to the instant case would have to once again trace the chain of title for the four acres back to a common grantor. The same evidence presented in the prior action would be presented again in the instant case. As a result, res judicata does bar the Deweeses' action to quiet title in the instant case. Given the fact that the same evidence sustains both actions to quiet

title, the Deweeses should have raised their current claim during the prior litigation. Therefore, this Court affirms the trial court's dismissal of the Deweeses' action to quiet title.

The Deweeses' also claim that Taylor's Lake is a blue line stream; thus, they have access to it. This Court finds this claim to be ambiguous. The Court cannot discern the nature of the evidence the Deweeses would have produced to support this claim. Therefore, this Court is unable to apply the same evidence test to determine whether res judicata would bar this cause of action. Therefore, this Court remands this claim to the trial court for further findings of fact to determine its exact nature and whether it is barred by res judicata.

The doctrine of collateral estoppel does not apply to either of the Deweeses' claims since collateral estoppel applies to questions of fact or law that have actually been litigated in prior suits. Revenue Cabinet, Commonwealth of Kentucky v. Samani, Ky. App., 757 S.W.2d 199, 2002 (1988). Neither of the Deweeses' claims was litigated in the previous case.

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On December 7, 2001, the Deweeses filed a complaint in which they alleged that from 1991 to 1999, John and Carrie received rent in the amount of \$2,100.00 per year, presumably from the Fish Club. Since the trial court eventually determined that the Deweeses, as heirs of George Deweese, owned an

undivided one-third interest in the four acres, the Deweeses argued that they were entitled to one-third of any rental income received by John and Carrie from 1991 to 1999. Moreover, the Deweeses alleged that John and Carrie, without the Deweeses' consent, entered the four acres, cut, and sold timber for an unknown price. The Deweeses argued that they were entitled to triple the value of one-third of proceeds from any timber sales.

On May 4, 2002, John and Carrie filed a motion to dismiss and argued that, in the prior litigation, 91-CI-0078, the Deweeses had filed a motion in which they sought the same relief. In support of their motion, John and Carrie attached a motion filed by the Deweeses in the prior litigation in which the Deweeses sought one-third of any rental income and one-third of the proceeds from any timber sales.

The trial court summarily granted John's and Carrie's motion and dismissed the Deweeses' complaint. As in the companion case, the Deweeses appealed to this Court.

On appeal, the Deweeses argue that the trial court erred since the instant case presented different issues than those adjudicated in the prior litigation, 91-CI-0078. In the prior litigation, George Dewese sought to quiet title in the four acres, while in the instant case, his heirs, the Deweeses, seek alleged rental income and alleged proceeds from timber sales. The Deweeses argue that neither *res judicata* nor

collateral estoppel applies since the trial court never determined these issues on their merits.

This Court agrees. In Newman v. Newman, Ky., 451 S.W.2d 417, 419 (1970) the high court held:

The general rule for determining the question of res adjudicata as between parties in actions embraces several conditions. First, there must be identity of parties. Second, there must be identity of the two causes of action. Third, the action must be decided on its merits. In short, the rule of res adjudicata does not act as a bar if there are different issues or the questions of law presented are different.

There can be no question that identity of parties exists since the same parties were involved in both 91-CI-0078 and the instant case. Likewise, there can be no question that identity of the causes of action exists. In 91-CI-0078, the prior litigation, the Deweeses filed with the Butler Circuit Court a motion in which they sought one-third of rental income generated by the four acres and one-third of the proceeds from any timber sales. The Deweeses seek the same relief in the instant case. However, the trial court never ruled upon the Deweeses' motion, therefore, never decided the Deweeses' claims on their merits. Thus, res judicata does not apply to the claims for rental income and for the proceeds from timber sales.

Furthermore, collateral estoppel does not apply, since collateral estoppel applies when an issue of fact or law has

been actually litigated and determined by a valid and final judgment. Revenues Cabinet, Commonwealth of Kentucky v. Samani, Ky. App., 757 S.W.2d 199, 202 (1988).

Thus, in 2003-CA-001104-MR, for the foregoing reasons, this Court vacates the Butler Circuit Court's dismissal and remands for further proceedings not inconsistent with this opinion. Further, in 2003-CA-001128-MR, the dismissal is vacated and remanded for further findings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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