RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002551-MR

LARRY DEAN HOSKINS — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 02-CI-00668

DAVID DIETZ — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

ABRAMSON, JUDGE: Larry Hoskins appeals from a November 15, 2005, judgment of the Laurel Circuit Court establishing the boundary between a tract of land Hoskins owns in Laurel County near London and an adjoining tract owned by David Dietz, the Appellee. A portion of a garage Hoskins built in 2001 lies across the boundary line, and the court ordered Hoskins both to remove the encroachment and to pay Dietz damages for timber Hoskins removed from Dietz's land in the course of construction. Hoskins contends that Dietz should be estopped from complaining of the encroachment, or, if not, that the encroachment is not as

extensive as the trial court found. Convinced that Dietz in no way induced Hoskins's trespass and that the trial court's boundary determination was not clearly erroneous, we affirm.

This case concerns a scrivener's error in the parties' deeds. The parties concede the error, but dispute its consequences. In 1976, a Mr. and Mrs. Prewitt conveyed an approximately 2.9 acre tract at the northwest corner of Reed Road and Blackwood Lane in Laurel County, about one-half mile north of Ky. Highway 80, to a Mr. and Mrs. Tomlinson. This tract was a portion of a larger tract that had been conveyed to the Prewitts in 1974. With the calls numbered for the sake of reference, the deed from the Prewitts to the Tomlinsons described the 2.9 acre tract as follows:

> (1) Beginning at a stake at the RW line of County Road [Reed Road];
> (2) thence with RW of said road, S. 3.30 W. 90.69 feet to a stake;
> (3) thence with RW S. 61.22 W. 52 feet to a stake at RW;
> **(4) thence with RW S. 42.40 W. 73.8 feet to a stake [emphasis added]**;
> (5) thence with RW S. 32.46 W. 96 feet to a stake in RW;
> (6) thence with RW S. 23.08 W. 81 feet to a stake in RW;
> (7) thence with RW S. 17.03 W. 75 feet to a stake in RW;
> (8) thence leaving RW N. 85.27 W. 315 feet to a stake;
> (9) thence N 30.25 E. 465 feet to a stake;
> (10) thence S. 85.39 E. 300 feet to the beginning corner, containing 2.9 acres, more or less.

This description was based on a survey made by Larry Jervis in 1976 apparently for the sake of severing the 2.9 acre tract from the Prewitts' larger tract. It should be noted, however, that the calls along Reed Road, nos. 1 – 7 (with the exception of the length of 7), also appear in the 1974 deed to the Prewitts. In 1981 the Tomlinsons conveyed the 2.9 acre tract, as described by the Jervis survey, to the Mintons. And in 1983, the Mintons conveyed approximately 2 of the 2.9 acres to a Mr. and Mrs. Bunch. The deed to the Bunches was based on a 1983 survey by Ace Hensley and described the two-acre property as follows:

> (1) Beginning at a stake at the right of way of the county road; thence 5 lines with the west right of way of the road;
> (2) S. 3.30 W. 90.7 feet;
> (3) S. 61.22 W. 52.0 feet;
> **(4) S. 24.40 W. 73.8 feet [emphasis added]**;
> (5) S. 32.46 W. 96.0 feet;
> (6) S. 23.08 W. 20.0 feet to a stake;
> (7) thence leaving the road; N. 84.25 W. 315.0 feet to a stake;
> (8) thence N. 30.25 E. 305.0 feet to a stake;
> (9) thence S. 85.39 E. 300.0 feet, to the point of beginning, containing 2.0 acre[s] the same to be more or less by survey by Ace Hensley on July 12, 1983.

As we have emphasized, the fourth call of the Hensley description contains what is clearly a scrivener's error by reversing the digits of "42." Following a series of five intervening conveyances, all of which incorporate the erroneous

Hensley description, Hoskins acquired the two-acre tract in April 1997.

In the meantime, in September 1992, the Mintons conveyed the approximately 0.9 acre remainder of their original 2.9 acre tract to Appellee Dietz. The deed to Dietz describes his conveyance as the entire 2.9 acres less the 2.0 acre prior conveyance and incorporates both of the above descriptions, including the discrepant fourth calls. Hoskins resides in a trailer on his property. The Dietz property is unimproved, and apparently Dietz visited the land infrequently, primarily on holidays.

The present controversy arose in the fall of 2001, when Hoskins constructed a three-bay garage near the southeastern corner of his tract, where it abuts Reed Road to the east and Dietz's tract to the south. As Hoskins's deposition testimony makes clear, he had no idea who owned the property to his south before he commenced building. He had never seen Dietz and made no attempt to apprise him of the building plan. Nor did he consult a surveyor to locate his southern boundary, or even his deed description, but instead relied solely on his four-year-old recollection of where his realtor had pointed out a wooden stake—long gone—ostensibly marking the southeastern corner of the property. In September 2001 Hoskins cleared trees from the construction site, and

construction began about October 11, 2001. The garage was complete by early November 2001.

Dietz testified that he heard that someone may have been cutting timber on his land, so in early October he investigated. He found Hoskins's garage well underway, the roof and walls already complete, and was concerned that a portion of it extended onto his tract. He also noted tree stumps on what he believed was his land, and piles of brush and construction debris. He knocked on Hoskins's door that day, but received no answer. Because he was unsure about the boundary between his land and Hoskins's, he promptly hired a surveyor to make that determination.

The surveyor, George Adams, testified that he visited the property soon thereafter in October 2001. The garage was still under construction, and he encountered Hoskins at the site. Although Hoskins later testified that Adams claimed to be surveying Hoskins's western boundary, Adams testified that, while he may not have identified Dietz as his client, he made it clear that he was trying to determine the line between Hoskins's land and Dietz's land to the south. Indeed, he testified that Hoskins pointed out what Hoskins believed were both of his southern corners. Adams eventually located the beginning point of the above deed descriptions and using the calls from the parent deed—the S. 42.40 W. call above—determined that Hoskins's

southeast corner lay under the front of the new garage and that about a third of the garage extended across the boundary line onto Dietz's property. When Adams had completed his survey, Dietz approached Hoskins, on Thanksgiving Day 2001, and told him that he believed Hoskins's garage was encroaching.

Hoskins thereupon hired his own surveyor, Ralph Peters, who, beginning from the same starting point but using the calls from the erroneous Hensley survey—the S. 24.40 W. call—fixed Hoskins's southeast corner several feet east and south of the corner Adams determined. Even using Peters's corner Hoskins's garage encroaches on Dietz's property, but the encroachment is less. According to Peters, the garage encroaches about eight-and-a-half square feet onto Dietz's property.

The conflicting surveys left the parties at an impasse, with the result that in July 2002 Dietz brought the present suit seeking injunctive and monetary relief. The matter was submitted to the trial court on the basis of depositions, and, as noted, the court, although it deemed Hoskins's trespass mistaken rather than willful, adopted the boundary line determined by Dietz's surveyor, Adams, ordered Hoskins to remove his encroachments from Dietz's property, and awarded Dietz damages for the misappropriated timber. Appealing from that judgment, Hoskins first contends that Dietz should be estopped

from complaining about the encroachment because by his own testimony he became aware of it in October 2001 before construction was complete, but did not object until November 22, 2001, by which time Hoskins had expended additional funds to complete the building. The trial court did not err by rejecting this contention.

It is true, as Hoskins notes, that a boundary line may "become fixed by the operation of an estoppel."

> A landowner who knows the true line and silently permits an adjoining owner to make substantial improvements unknowingly past the line is estopped to claim to the true boundary.

Faulkner v. Lloyd, 253 S.W.2d 972, 974 (Ky. 1952). *See also Martin v. Gayheart,* 264 S.W.2d 653 (Ky. 1954). It is no less true, on the other hand, that an estoppel affecting title to real property is an "extraordinary circumstance," requiring the one asserting it to show "an actual fraudulent representation, concealment or such negligence as will amount to a fraud in law, and that the party setting up such estoppel was actually misled thereby to his injury." *Jones v. Travis,* 302 Ky. 367, 370, 194 S.W.2d 841, 842 (1946). More particularly, as this Court has recently reiterated,

> [t]he essential elements of equitable estoppel are:
> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to

> convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
> (2) intention, or at least expectation, that such conduct shall be acted upon by the other party;
> (3) knowledge, actual or constructive, of the real facts.
> As related to the party claiming the estoppel, they are:
> (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question;
> (2) reliance upon the conduct of the party estopped; and
> (3) action based thereon of such a character as to change his position prejudicially.

Embry v. Turner, 185 S.W.3d 209, 215 (Ky. App. 2006) (citation and internal quotation marks omitted).

Here, Hoskins's evidence fails to establish several of these elements. Even assuming that Dietz was somewhat negligent in not immediately apprising Hoskins of his concerns, Dietz did not know where the boundary was until Adams had completed his survey, which he did with more than reasonable promptness. Moreover, Hoskins was as privy to information about the boundary as was Dietz, so any reliance on Dietz's mere silence could not be deemed reasonable. In fact, Hoskins did not rely on Dietz's silence, of which he was not even aware, but relied instead on his own mere recollection of a questionable corner marker long since removed. Put simply, Dietz did not induce, negligently or otherwise, Hoskins's rash decision regarding the location of the

garage. If anyone was culpably negligent in this case it was Hoskins, whose cavalier assumption that he knew the boundary, even after Adams told him that the boundary was in question, resulted in his costly trespass. The trial court did not err, therefore, by ruling that Dietz's complaint was not equitably estopped.

Hoskins next contends that the trial court erred by adopting Adams's survey, although based on the correct call number 4 (S. 42.40 W. 73.8 feet), instead of Peters's survey, which perpetuated the Hensley survey error (S. 24.40 W. 73.8 feet). He bases his contention on the fact that Peters claimed to have discovered two steel surveying pins within a couple of feet of his southeastern corner, but only within about three and one-half feet of each other and both within an inch or two of the asphalt edge of the roadway. The pins did not have caps or other surveyor's marks. Nevertheless, Peters believed that they were prior monuments marking that corner. Relying on the general rule that "monuments ordinarily are controlling over courses and distances," *Powell v. Reid,* 519 S.W.2d 388, 389 (Ky. 1975), Hoskins maintains that the corner allegedly marked by these pins should control over the corner Adams arrived at by courses and distances. As the parties note, the fact finder's choice between conflicting surveys will be upheld on appeal

unless clearly erroneous. *Gatliff v. White,* 424 S.W.2d 843 (Ky. 1968).

In discussing the general rule just stated, the former Court of Appeals explained "that a mark or boundary that was visible and recognized when first mentioned in a document does not lose its legal force merely by physical disappearance, so long as its original site can be definitely established." *Powell v. Reid,* 519 S.W.2d at 389. Artificial markers are not talismans, of course, and here, as the trial court noted, even if the pins Peters allegedly found were meant to mark Hoskins's property and not, say, the edge of the road, they were not originally visible markers referred to in Hoskins's parent deed, but were merely artificial marks placed according to the erroneous course-and-distance description of Hensley's survey. As such, Peters's corner is really no less a course-and-distance determination than Adams's corner, and the pins are not entitled to the controlling force Hoskins claims. Another general rule is that deeds are to be construed so as to give effect to the intention of the parties, and obvious errors are to be disregarded in favor of that intention. *Chrisman v. Dennis,* 308 Ky. 408, 214 S.W.2d 598 (1948). Here, the trial court correctly determined that Hensley's obviously erroneous call should be disregarded in favor of the correct call from the parent deed, and that Adams's survey, based on the correct call, better

reflected the parties' intentions than Peters's survey, which did not incorporate that correction.

In sum, the trial court correctly held that Dietz did not induce or unduly permit the encroachment on his property and thus his claim is not estopped. Furthermore, the court's reliance on the Adams survey was not clearly erroneous. Accordingly, we affirm the November 15, 2005, judgment of the Laurel Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John T. Aubrey
Manchester, Kentucky

BRIEF FOR APPELLEE:

Mary-Ann Smyth Rush
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