

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-002613-MR

JAMES V. GAY; EARL GAY;
AND ELIZABETH GAY

APPELLANTS

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 94-CI-90077

JOYCE DAVIS AND
DOROTHY SAUNDERS

APPELLEES

NO. 2005-CA-001312-MR

JAMES V. GAY; EARL GAY;
AND ELIZABETH GAY

APPELLANTS

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 94-CI-90077

TEDDY MARTIN AND
EMMA JEAN MARTIN

APPELLEES

JAMES V. GAY AND EARL GAY

APPELLANTS

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 94-CI-90077

GORDON LIDDLE AND
JUTTA K. LIDDLE

APPELLEES

CROSS-APPEAL NO. 2005-CA-002500-MR

GORDON LIDDLE AND
JUTTA LIDDLE

CROSS-APPELLANTS

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 94-CI-90077

JAMES V. GAY; ELLIS C. GAY;
EARL GAY; AND ELIZABETH GAY

CROSS-APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING IN PART
APPEAL NO. 2004-CA-002613-MR
AND
AFFIRMING APPEAL NOS.
2005-CA-001312-MR AND 2005-CA-002442-MR
AND
REVERSING AND REMANDING WITH DIRECTIONS
CROSS-APPEAL NO. 2005-CA-002500-MR

** ** * ** * **

BEFORE: CLAYTON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

TAYLOR, JUDGE: This case involves four separate appeals from three judgments entered by the Montgomery Circuit Court in 2004 and 2005. These judgments arise from the same action where multiple parties have asserted multiple claims pertaining to boundary disputes, trespass claims, and the unlawful removal of timber. For judicial economy and expediency these appeals have been considered together. For the reasons that follow, we affirm in part and reverse in part Appeal No. 2004-CA-002613-MR, and affirm Appeal Nos. 2005-CA-001312-MR and 2005-CA-002442-MR, and reverse and remand with directions Cross-Appeal No. 2005-CA-002500-MR.

BACKGROUND

This is one of the older cases in the Kentucky Court system. The case originated in 1994, and there have been at least two previous trips to the Court of Appeals.² The case has involved over sixty parties and numerous attorneys, one of whom retired and several who apparently grew tired during the protracted litigation. The case includes allegations of trespass, boundary encroachment, unlawful removal of timber, and one assault claim arising from a fist fight between two of the parties during the litigation. Ironically, one person who has survived the carnage of this litigation is Circuit Judge William Mains, who deserves a silver star for valor for enduring this case from its inception in 1994 to hopefully a peaceful conclusion in the near future.

The plaintiffs below are the heirs of James M. Gay, who died intestate on February 15, 1953. Gay's heirs inherited a 283-acre tract of land in Montgomery

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

² Appeal Nos. 1996-CA-001067-MR and 1999-CA-000274-MR.

County, Kentucky, which is the genesis of all litigation that has transpired since two of the Gay heirs initiated this action on October 18, 1994. In order to fully understand the various issues now on appeal, a brief historical review of the facts of this case is necessary.

In an Order entered by Judge Mains on April 30, 2004, he said it best – “[i]t is important to take pause and review the tortured history of this case.” An excerpt from Judge Mains’ order summarizing the facts is as follows:

A complaint was originally filed on October 18, 1994 by Ellis C. Gay, Jr. and James Gay against Jerry Miller. It was brought as a petition for declaration of rights, and requested that the Court determine the Plaintiffs were the true and lawful owners of a disputed tract of land. It also alleged that the Defendant Jerry Miller had constructed a passway over the Plaintiffs’ property and had removed timber from said property. The Complaint also sought damages against Miller.

This Court granted summary judgment to Miller on January 28, 1999. Said summary judgment was appealed to the Kentucky Court of Appeals and upheld. Miller is therefore no longer a defendant in this case.

However, prior to the summary judgment in favor of Miller, Plaintiffs, on January 29, 1996, filed an Amended Complaint. It does not appear in retrospect that any motion was ever filed to amend the complaint. Nevertheless, the time for objections has long since passed with regard to that technicality.

In the Amended Complaint, Earl Gay is joined as a plaintiff since he has an interest in the outcome of the litigation and an ownership interest in the property. Sued were Joyce Davis, Arlie Birchfield, Tony Tipton, Gene Barnes, and Teddy Martin. Tipton was eventually granted summary judgment which was also upheld by the Court of Appeals. The Court additionally granted summary judgment to Joyce Davis and Teddy Martin, but the Court of Appeals reversed as to them. The Court stated,

“Our review of the record in this case establishes that Gay’s stated cause of action against Davis and Martin sounds in trespass. However, our review of the record also shows

that neither Davis nor Martin alleged in response to Gay's allegations that they were the owners of the land on which they allegedly trespassed. In the absence of such an allegation, Gay is not required to prove superiority of title, but need only show that Davis and Martin did, in fact, trespass on property owned by him in order to recover."

The Court went on to say it was improper to grant summary judgment in favor of Martin and Davis on the ground that Gay failed to show superiority of title.

In response to the Amended Complaint, Davis and Jerry Miller filed a Counterclaim against the Plaintiffs and numerous other individuals they claim had an interest in the property, as well as a Cross[-]Claim against any individuals subsequently named as defendants. They alleged ownership of property that is in question in the Counterclaim.

Defendant Teddy Martin filed an Answer but did not counterclaim.

The Court of Appeals decision in this case became final on December 13, 2000. Little or no action was taken on the case for some time by any of the parties. On January 7, 2003[,] however[,] Defendant Teddy Martin filed a Motion to File a Counterclaim and for a Restraining Order. In his counterclaim, Martin alleged the Plaintiff's had wrongfully claimed ownership of a portion of his property and they had trespassed on his land causing damage to it. He asked the Court to set the property line between the parties and for damages for the trespass.

Subsequently on May 16, 2003 Gordon Liddle moved to intervene and filed an Intervening Complaint against the Plaintiffs. Liddle claimed Plaintiffs had locked a gate across a passway leading to his property, that the Plaintiffs had trespassed on his property, and were making to claim property owned by him. Plaintiffs/Intervening Defendants counterclaimed against Liddle claiming ownership of the land in dispute.

On October 17, 2003 an Order was tendered to the Court adding Dorothy Saunders as a party. All parties in the case at the time agreed that she should be made a party and signed the agreed order. Saunders filed an Answer to the pleadings of the Plaintiffs/Intervening Defendants, and also filed a counterclaim joining in the counterclaim of Jerry Miller and Joyce Davis.

On October 24, 2003 an agreed order was entered adding Emma Jean Martin, the spouse of Teddy Martin as a Defendant, and Jutta K. Liddle, the spouse of Gordon Liddle, as an Intervening Plaintiff.

The Plaintiffs/Intervening Defendants are represented by Robert C. Fields and Willie E. Peale, Jr. Defendants Teddy Martin and Emma Jean Martin are represented by Leah Hawkins. Defendants Joyce Davis and Dorothy Saunders are represented by F.C. Bryan. Intervening Plaintiffs Gordon Liddle and Jutta Liddle are represented by Stephen Neal.

As of this time, the Plaintiffs have claims through either the Amended Complaint or a Counterclaim to the Intervening Complaint against each of the Defendants and Intervening Plaintiffs. Likewise, each of the Defendants and the Intervening Plaintiffs have claims against the Plaintiffs. Each of these claims alleges a dispute over ownership of some of the property in question in this case, and therefore it is necessary from the standpoint of all parties that all persons with an interest in any of the property in question be given notice of it and an opportunity to participate and/or plead.

Before reviewing each of the judgments and the respective appeals therefrom separately, we would note some additional facts that are borne out by the court record. Judge Mains ordered in April 2004, that all Gay heirs be made parties to this litigation either as involuntary plaintiffs or defendants. A warning order attorney was appointed who attempted to notify each of the heirs of this action. The warning order attorney notified approximately fifty-one other known heirs. James V. Gay, Ellis Gay, Jr., Earl Gay, and Elizabeth Gay are the principal Gay heirs who have pursued the litigation and appeals now before this Court (hereafter they will be referred to collectively as the "Gay heirs"). Most of the remaining heirs did not respond to the warning order attorney notice. Of those who responded, a few indicated their support of the action while a few disclaimed any interest in the outcome. We note these facts for

the sole purpose of acknowledging, as did the circuit court, that the Gay heirs were sufficiently before the court for the action and these appeals to proceed.

The first appeal in this case was filed by the Gay heirs in 1996 after the circuit court dismissed the claims against Tony Tipton. That appeal (Appeal No. 1996-CA-001067-MR) was dismissed for lack of jurisdiction by Opinion and Order entered February 6, 1998. As noted in Judge Mains' summary, the dismissal of claims against Tipton was affirmed by this Court's opinion entered in the second appeal, Appeal No. 1999-CA-000274-MR, on June 30, 2000. We also note that Dorothy Saunders was added as a co-defendant with Joyce Davis in 2003, after the earlier opinion of this Court was rendered in 2000. In May 2003, Gordon Liddle was permitted to file an intervening complaint against the Gay heirs. Jutta Liddle was added as an intervening plaintiff in October 2003. The Liddles acquired a tract of land adjacent to the Gay heirs in August 2002 from the Rainbow heirs. Almost immediately, a dispute arose between the Liddles and the Gay heirs regarding the location of the boundary between their respective tracts and the alleged unlawful removal of timber from the disputed area along the boundary. The Gay heirs then asserted a counterclaim against the Liddles on the same grounds.

Any additional facts pertinent to these appeals will be addressed as needed as each appeal is separately reviewed in this opinion.

APPEAL NO. 2004-CA-002613-MR

This appeal involves claims asserted by the Gay heirs against Joyce K. Davis and her mother Dorothy Saunders.³ Davis and Saunders have asserted counterclaims against the Gay heirs. In February 1999, a partial summary judgment was entered by the circuit court in favor of Davis on the premise that the Gay heirs had

³ Judge Mains' April 30, 2004, Order reflects that an agreed order was tendered on October 17, 2003, adding Dorothy Saunders as a party to this litigation. Saunders is apparently the mother of Davis and has an ownership interest in the Davis property. Although we cannot locate the agreed order in the record, Sanders did file an answer and counterclaim against the Gay heirs, without objection. Thus, we note that Saunders is a proper party to this action and appeal.

not shown superiority of title to their property sufficient for a claim against Davis. On appeal to this Court in Appeal No. 1999-CA-000274-MR, we reversed and remanded with “instructions” to the circuit court to reinstate the Gay heirs’ claims against Davis for resolution on the merits. This Court made the following observation in that opinion:

Under Kentucky law, when a defendant to a trespass action counterclaims and alleges ownership of the land on which he is alleged to have trespassed, the plaintiff must prove his title to be superior to that of the defendant by showing either “title of record from the Commonwealth or from a source shown to be common with that claimed by the defendant.” Marino v. Deskins, Ky., 344 S.W.2d 817, 819 (1961). If the plaintiff is unable to show superior title, then the action must be dismissed. Rose v. Gatliff Coal Co., Ky., 99 S.W.2d 214, 215 (1936).

Our review of the record in this case establishes that Gay’s stated cause of action against Davis and Martin sounds in trespass. However, our review of the record also shows that neither Davis nor Martin alleged in response to Gay’s allegations that they were the owners of the land on which they allegedly trespassed. In the absence of such an allegation, Gay is not required to prove superiority of title, but need only show that Davis and Martin did, in fact, trespass on property owned by him in order to recover. Thus, it was improper for the trial court to grant summary judgment in favor of Martin and Davis on the ground that Gay failed to show superiority of title.

Upon remand, there was little activity in this case until 2003 when Saunders joined Davis as a defendant and asserted a counterclaim against the Gay heirs. After some discovery was taken, Davis and Saunders again moved for summary judgment to establish their boundary line with the Gay heirs. Establishment of the boundary was relevant to the ultimate resolution of the Gay heirs’ trespass claims and claims for unlawful removal of timber from their property. On November 19, 2004, the circuit court granted summary judgment for Davis and Saunders, establishing the common boundary line between their property and the property of the Gay heirs.⁴ The

⁴ In reality, the circuit court actually granted a partial summary judgment, reserving for future resolution the remaining trespass claims asserted by the Gay heirs in the original complaint, as amended.

circuit court's summary judgment in favor of Davis and Saunders made the following two paragraph adjudication:

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The division line between the land of Defendants, Davis and Saunders, and the Gay land in which the Plaintiffs, James V. Gay, Ellis C. Gay, Earl Gay and Elizabeth Gay and any other Plaintiffs hereto own a fractional interest, is established as outlined in yellow on Tab E, Exhibit E, at yellow line filed with Plaintiffs' Response to Defendants' Motion for Summary Judgment and also filed as Exhibit 1 with the Answer of the Defendants, Davis and Saunders, to Plaintiffs' Response to Defendants' Motion for Summary Judgment along the calls S. 52 deg. 14 min. 40 sec. W. 451.42 ft., N 86 deg. 45 min. 20 sec. W. 495.00 ft., S. 04 deg. 44 min. 40 sec. W. 2,187.84 ft., S. 04 deg. 44 min. 40 sec. W. 696.36 ft., S. 30 deg. 14 min. 40 sec. W. 198 ft., S. 41 deg. 09 min. 49 sec. W. 180.55 ft., S. 54 deg. 00 min. 40 sec. W. 59.12 ft. and S. 61 deg. 31 min. 13 sec. W. 161.17 ft.

2. IT IS FURTHER ORDERED AND ADJUDGED by the Court that the Plaintiffs, James V. Gay, Ellis C. Gay, Earl Gay and Elizabeth Gay, and any other Plaintiffs to this action, have no interest in the Davis and Saunders tract of land located northwest of the call "S. 52 deg. 14 min. 40 sec. W. 451.42 ft.,["] north of the call "N. 86 deg. 45 min. 20 sec. W. 495.00 ft.,["] west of the calls "S. 04 deg. 44 min. 40 sec. W. 2,187.84 ft. and S. 04 deg. 44 min. 40 sec. W. 696.36 ft." and northwest of the calls "S. 30 deg. 14 min. 40 sec. W. 198 ft., S. 41 deg. 09 min. 49 sec. W. 180.55 ft., S. 54 deg. 00 min. 40 sec. W. 59.12 ft. and S. 61 deg. 31 min. 19 sec. W. 161.17 ft."

The Gay heirs subsequently filed this appeal from the November 19, 2004, judgment. What is perplexing about this appeal is that the circuit court in numerical paragraph one of the summary judgment cited above, established the boundary line between the parties' property explicitly as shown on a plat attached as an exhibit to the Gay heirs' response to the summary judgment motion. In fact, the Gay heirs made the following concession in paragraph four of their response brief to the motion for summary judgment:

4. That [Davis and Saunders] are entitled to a partial summary judgment concerning the property line between what is the Gay farm and the Hardwick-Davis-Kratzer tract. See Tab E, Exhibit E at yellow line.

The circuit court entered numerical paragraph one of its judgment based on the boundary submitted by and conceded to by the Gay heirs, as highlighted in yellow on the plat attached to their response. In light of this, we find the Gay heirs' arguments set out in their brief in Argument I-IV to be totally without merit, and thus we will not expend the court's time addressing these meritless contentions.

Summary judgment is proper where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). In this appeal, as concerns the boundary between the parties' property, there are no disputed facts and paragraph 1 of the circuit court's summary judgment which sets out this boundary is affirmed.

The final argument raised by the Gay heirs is set out as "Argument V" in their brief. The Gay heirs argued that "it was clearly erroneous for the trial court to divest the appellants of their property." This purported divestiture arises from the language in numerical paragraph two of the circuit court's summary judgment previously cited herein. Numerical paragraph two of the summary judgment was an obvious attempt by the circuit judge to restate the boundary between the parties' property set out in numerical paragraph one. This restatement of the boundary was made to emphasize that the Gay heirs had no ownership interest in the Davis/Saunders property located "northwest" of the established boundary line. Unfortunately, upon careful review of the plat tendered by the Gay heirs which the circuit court relied, the Davis/Saunders land is actually located to the northeast of the established boundary, not northwest. In other words, the circuit court appears to have made a clerical error or mistake in numerical paragraph two of the judgment which Davis and Saunders readily acknowledge in their

brief. Instead of appealing this judgment, the error could have easily been corrected upon a timely filing of a Kentucky Rules of Civil Procedure (CR) 60.01 motion in the circuit court by the Gay heirs. However, we acknowledge that numerical paragraph two, as written, is directly in conflict with numerical paragraph one, if the circuit court intended for the boundary between the parties to be reflected as stated in numerical paragraph one. Rather than run the risk of any possible confusion that the Gay heirs may have with the proper procedure for correcting errors in a judgment, we reverse numerical paragraph two of the judgment and remand to the circuit court with instructions to reconsider and amend this judgment to correct any clerical errors or mistakes therein. If the circuit court determines there are no errors in paragraph two, then it shall have no force or effect and the boundary between the parties' property shall be established as set forth in paragraph one.

APPEAL NO. 2005-CA-001312-MR

This appeal looks to claims asserted by the Gay heirs against Teddy and Emma Jean Martin.⁵ Like the Davis case, a partial summary judgment was entered in Teddy Martin's favor by the circuit court in February 1999. As noted, our Court, in Appeal No. 1999-CA-000274-MR, reversed and remanded for a trial on the merits.

The amended complaint filed against Teddy Martin alleged that he trespassed upon the Gay heirs' property and unlawfully removed timber therefrom. The amended complaint also alleged that Martin planted and harvested crops on land owned by the Gay heirs.⁶ On January 7, 2003, Martin filed a motion to file a counterclaim that was accompanied by the proposed counterclaim. Our review of the

⁵ Teddy Martin's wife, Emma Jean Martin, was added as a defendant by agreed order entered October 24, 2003. Emma Jean Martin filed an answer and counterclaim against the Gay heirs on December 1, 2003.

⁶ The complaint also alleged that Teddy Martin punched Earl Gay in the face when Gay confronted Martin over the disputed property.

record does not reflect that an order granting the motion was ever entered. Likewise, we do not find an answer having been filed to the counterclaim – although the Gay heirs did file an answer to Emma Jean Martin’s counterclaim that was filed December 1, 2003, after she became a party. Regardless, the circuit court conducted a bench trial on May 23, 2005, on the sole issue of determining the disputed boundary between the Gay heirs and Martin’s property – any procedural errors were thus waived. The circuit court subsequently entered a judgment in favor of the Martins on May 27, 2005, as pertains to the boundary dispute only, reserving for future adjudication any damage claims between the parties. This appeal follows.

At trial, the parties agreed that the disputed property boundary involved a triangular shaped area consisting of approximately eight acres. The Martins had used the disputed area as a pasture for their cattle and for growing crops. Both parties traced the chain of title of their respective tracts to a common source in the late 1800s. The Martin property was first deeded from the parent tract in 1876 and the Gay heirs’ property was deeded from the original tract in 1879. Both parties’ source deeds referenced that their respective tracts of land contained approximately 200 acres, “more or less.” At trial, the respective surveys entered into evidence established that the Gay heirs’ property had approximately 283 acres and the Martin’s property approximately 195 acres.

Earl Gay and James Gay testified at trial for the Gay heirs. Their surveyor, Jamie Payne, failed to appear at trial. Notwithstanding, the trial court permitted into evidence Mr. Payne’s survey over the objection of the Martins. The Martins, who testified on their behalf, called as witnesses at trial surveyor J.D. Williams, along with the county property valuation administrator, Linda Cockrell.

On appeal, we have gleaned from the Gay heirs' brief two alleged errors in the judgment entered by the circuit court. The first argument looks to the size of the Gay heirs' property in comparison to the Martin's property. The Gay heirs characterize their property as the "dominant tract" because it contains more acreage and presumably this looks to some type of superiority of title over the Martin's property. The Gay heirs cite no legal authority for this proposition, nor are we aware that any exist. The trial court addressed the superiority of title issue in the judgment, finding that the Martins had superiority of title over the Gay heirs by virtue of their source deed having been obtained three years earlier than that of the Gay heirs, citing *Staley v. Richmond*, 236 Ky. 11, 32 S.W.2d 546 (1930) as authority.

However, we do not believe that superiority of title is dispositive of or relevant to the ultimate issue on appeal, that being a determination of the actual boundary between the two tracts of land. Effectively, this issue boils down to the evidence presented through surveyors, testimony by the parties, and any other witnesses or physical evidence that substantiates or supports the location of the boundary. The trial court weighed the various evidence presented by the parties and concluded that the evidence presented by the Martin's surveyor and other witnesses was most credible and represented the strongest evidence of the boundary location.

We begin our analysis on this final issue by noting that the findings of fact made by the circuit court at a bench trial shall not be set aside unless clearly erroneous. CR 52.01. This Rule is applied in boundary disputes. *Croley v. Alsip*, 602 S.W.2d 418 (Ky. 1980).

The Gay heirs introduced into evidence a survey prepared by Jamie Payne. This was actually a re-survey of the property that had originally been prepared by Michael Oliver in 1990 for the Gay heirs. Oliver was a surveyor with Astec

Engineering of Richmond, Kentucky. Neither Payne nor Oliver testified at trial.

However, the circuit court permitted their survey plats to be introduced into evidence at trial.

Both of the surveys introduced by the Gay heirs utilize a fence as a boundary line between the Gay heirs and the Martin's properties. Apparently the fence was used as a boundary by the surveyors at the instruction of the Gay heirs and the Gay heirs now argue that the trial court erred by ignoring the fence line as the actual boundary between the parties' property.

However, Teddy Martin testified that the fence had been constructed by his father as a pasture for cattle that he raised. His father acquired the property in 1960 and Teddy Martin inherited the property from his father in 1975. The Martins also called as a witness J.D. Williams, who testified that he surveyed the area owned by the Martins that was in dispute with the Gay heirs. Williams' survey was also based on an earlier survey prepared by C.H. Evans for the Martin's property in 1959. Williams testified that a key landmark in the Evans' survey was Kentucky Highway 599, located adjacent to the Martin property. Williams, who has been a surveyor in Montgomery County since 1957, testified that he knew personally that the location of the highway had not changed over the years. The highway was important in establishing the corners of the Martin property in the Williams' survey, which he further testified was consistent with the Evans' survey. The circuit court put significant weight on Williams' testimony in rendering the judgment for the Martins.

The trial court, as a fact-finder, may choose between "conflicting opinions of surveyors as long as the opinion relied upon is not based upon erroneous assumptions" or the opinion does not ignore established factors. *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky.App. 2002)(quoting *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183-

84 (Ky.App. 1987)). Based upon our review of the record, we cannot conclude that the trial court made clearly erroneous findings or conclusions in relying upon the Williams' survey in rendering its judgment.

In determining boundaries, our Courts have followed the general rule that natural and permanent monuments are the most satisfactory evidence and control all other means of description. *Metropolitan Life Ins. Co. v. Hoskins*, 117 S.W.2d 180 (Ky. 1937). If permanent or natural monuments cannot be identified, artificial marks, courses, distances, and area follow in that order, with area being the weakest of all methods for description. *Id.* A significant permanent monument or landmark identified by Williams was Ky. Hwy. 599, which was in existence at the time that all of the surveys were conducted. We do not believe the fence line constituted a sufficient monument for purposes of identifying a boundary, since the testimony clearly reflects that it was constructed by Teddy Martin's father to contain his cattle. The Gay heirs' argument that the fence constitutes sufficient evidence of the boundary between the properties is misplaced and was properly rejected by the circuit court in considering the evidence as a whole. We also note that upon thorough review of the legal descriptions and the deeds introduced into evidence at trial, there is no reference to a fence line as a permanent boundary between the parties' respective tracts of land.

Additionally, the Martins testified at trial that the disputed area had always been used by the Martin family as part of their property dating back to 1960 when the property was acquired by Teddy Martin's father. The Martins testified that their family had always claimed ownership of the disputed area and that no dispute ever arose over the use of their property until 1994 when the Jerry Miller began using the passway across the Gay heirs' property which triggered the initial complaint in this action.

For the foregoing reasons, the judgment entered by the Montgomery Circuit Court in Appeal No. 2005-CA-001312-MR shall be affirmed.

APPEAL NO. 2005-CA-002442-MR

AND

CROSS-APPEAL NO. 2005-CA-002500-MR

This appeal and cross-appeal looks to the claims asserted by Gordon and Jutta Liddle against the Gay heirs. The Liddles did not join this case until 2003. As noted in our earlier factual discussion, the Liddles acquired a tract of land adjacent to the Gay heirs' property in August 2002. This tract of land was owned by the Rainbow heirs. The deed to the Liddles reflected the tract was about 100 acres in size based upon a 1978 survey by J.D. Williams. Williams is the same surveyor who testified in the Martin case. Other deeds in the chain of title to the Liddles described the tract as containing approximately eighty-four acres. Thus, the disputed area between the two properties was approximately twenty acres, which resulted in the Liddles filing an intervening complaint in May 2003 in this action. In addition to the disputed boundary, the Liddles claim that the Gay heirs had unlawfully removed timber from the disputed area and further had blocked a passway across the Gay heirs' property, which was the Liddles' only access to Ky. Hwy. 599. This is the same passway that was involved in the dispute with Jerry Miller, which was resolved by our Court in Appeal No. 1999-CA-000274-MR.

The circuit court conducted a bench trial on November 2, 2005, on all issues raised in the intervening complaint and the counterclaim. At trial, witnesses for the Liddles included Gordon Liddle, Teddy Martin, surveyor J.D. Williams, and Dick Branigan, a consultant forester. Witnesses for the Gay heirs included Earl Gay, James Gay, consulting forester John Clarity, and by deposition, surveyor Jamie Payne.

The circuit court entered a judgment on November 14, 2005, in favor of the Liddles as concerns the disputed boundary area and their right to use the passway across the Gay heirs and Martin properties to Ky. Hwy. 599.⁷ However, the circuit court ruled in favor of the Gay heirs on the Liddles' claim that the Gay heirs had wrongfully removed timber from the Liddles' property.

The Gay heirs raise two issues in their direct appeal. First, they argue that the circuit court erred in establishing the boundary between the Liddles and their property. Second, the Gay heirs argue that the court erred by granting the Liddles a prescriptive easement across their property to ultimately access Ky. Hwy. 599. The Liddles raise only one issue in their cross-appeal, that being that the circuit court erred by failing to award the Liddles treble damages against the Gay heirs for the unlawful removal of timber from their property in violation of Kentucky Revised Statutes (KRS) 364.130.

Like in the Martin case, we begin our analysis by noting that our standard of review of findings of fact made by the circuit court at a bench trial is whether they are clearly erroneous – if not, the findings shall not be set aside. CR 52.01. Additionally, any questions of law that are resolved at trial are reviewed *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894 (Ky.App. 2005).

At trial, the Liddles relied upon a survey prepared in 1978 by J.D. Williams for the Rainbow heirs. Williams testified that as part of his survey, he met with John Gay on the property. Gay pointed specifically to where he believed the boundary was located, which was subsequently set forth on Williams' 1978 survey. Williams testified that the boundary was consistent with his survey of the Rainbow property. John Gay was a Gay heir who apparently had some management responsibility for the Gay farm

⁷ Teddy Martin testified for the Liddles at trial and conceded that the Liddles, like Jerry Miller, had the right to use the passway across his property.

at the time that Williams conducted his survey.⁸ The Gay heirs relied on a survey conducted by Michael Oliver of Astec Engineering, which he prepared in 1990. The boundary line established by Oliver was substantially different from that of Williams' survey which placed some twenty acres of land between the adjoining properties in dispute. The circuit court concluded that J.D. Williams' testimony was much more credible regarding the establishment of the boundary line in this case. Williams testified at trial, Michael Oliver did not. Jamie Payne, who had prepared a re-survey of the Oliver survey, testified by deposition, but could not explain how Oliver determined the boundary line in his survey. The circuit court concluded that a dividing line acknowledged by owners of property was controlling, citing *Commonwealth v. Kinder*, 379 S.W.2d 732 (Ky. 1964). As we noted in the Martin case, the circuit court, as a fact-finder, may choose between conflicting opinions of surveyors as long as the opinion relied upon is not based upon erroneous assumptions or the opinion does not ignore established factors. *Webb*, 98 S.W.3d 513. In reviewing the testimony of J.D. Williams, we cannot find that his survey is based upon erroneous assumptions, and thus cannot conclude that the circuit court was clearly erroneous in finding that Williams' survey was more credible than the Oliver survey.

The Gay heirs' next argument in this appeal is that the circuit court erred in granting the Liddles a prescriptive easement across the Gay heirs' property, being the same passway for which a prescriptive easement had previously been upheld by this Court in Appeal No. 1999-CA-000274-MR in favor of Jerry Miller. Although not specifically detailed in this Court's earlier opinion, we believe it is important to identify, with particularity, the actual passway from the Miller property for which this Court has affirmed a prescriptive easement. From the Miller property, the passway actually

⁸ John Gay died in 1983, prior to this litigation.

passes through what at that time was known as the Buchanan property⁹ and then traveled along a portion of the Liddle property (formerly Rainbow heirs). From there the passway then proceeds through the disputed area in this case, which has been determined by the circuit court and affirmed in this appeal as property that is owned by the Liddles. From the Liddles' property the passway then proceeds across the Gay heirs' property to the property of Teddy Martin. The passway then crosses the Teddy Martin property to Ky. Hwy. 599.

Essentially, the passway has provided access to Ky. Hwy. 599 for the Miller property, the Buchanan (now Gay) property, and the Rainbow heirs (now Liddle) property. But we acknowledge that neither the Buchanans nor the Rainbow heirs were parties in this case when this Court's earlier opinion was entered. Nonetheless, we are compelled to hold that the granting of a prescriptive easement for the passway across the Gay heirs' property for the benefit of the Miller property would also benefit the Buchanan and Rainbow heir property and hence constitutes the law of the case as concerns the establishment of the prescriptive easement.

The law of the case doctrine was explained in detail by the Kentucky Supreme Court in *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982) as follows:

The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions of law and not questions of fact. "As the term 'law of the case' is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and

⁹ The Buchanan property was acquired from the Buchanans by James Gay and his wife, Elizabeth, on February 9, 2004.

applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court."

Given that the Liddles intervened in this case and have established that the passway across the Gay heirs' property is necessary to access Ky. Hwy. 599 from the Liddles' property, the Gay heirs have failed to demonstrate why the Liddles should not also benefit from the prescriptive easement that has previously been upheld by this Court in an earlier appeal from this same case. The function of an easement should not be gleaned from the character of the traffic intended to travel on the passway, but rather the purpose which is to be served by the traffic thereon. See 28A C.J.S. *Easements* § 159 (1996). The purpose of use for all of the landowners who benefit from this passway is to access Ky. Hwy. 599. More importantly, in conjunction with our earlier opinion, the Miller's use of the passway would also encompass crossing the Buchanan property (now owned by James and Elizabeth Gay) and the Liddles' property. Similarly, both James and Elizabeth Gay and the Liddles have the benefit of the passway across the respective properties in which the passway lies, including the property of Teddy Martin. As a matter of law, we believe the circuit court correctly granted the Liddles a prescriptive easement across the Gay heirs' property on the passway that had previously been established by the earlier opinion of this Court.

Finally, in their cross-appeal of the circuit court's judgment, the Liddles argue that the circuit court erred by failing to grant a judgment in favor of the Liddles against the Gay heirs for the unlawful removal of timber from the Liddles' property. Upon establishing the boundary in accordance with J.D. Williams' 1978 survey, the Liddles argue that the Gay heirs have removed timber from the approximate twenty

acres of disputed property which they own and thus, they are entitled to treble damages in excess of \$41,000 pursuant to KRS 364.130.

The circuit court's finding on this issue was as follows:

Although there are many suspects and suspicions in this matter as to who has cut the trees, there is no direct evidence that the [Gay heirs] were in any way involved with this encroachment on the Liddles. The Court therefore determines the [Liddles] have failed to meet their burden of proof to show that the [Gay heirs] were involved in this improper activity, and therefore finds for the [Gay heirs] and does not award any damages to the [Liddles].

The Liddles argue that the circuit court's finding on this issue was contrary to the evidence presented at trial. We agree. At trial, Earl Gay admitted specifically to removing timber from the disputed property. Having determined that this property was owned by the Liddles at the time that the timber was removed, the court's finding on this issue is clearly erroneous and is reversed.

However, contrary to the argument of the Liddles, we do not believe that KRS 364.130 is applicable in this case. Specifically, KRS 364.130(1) states that a person is liable for treble damages for cutting "timber growing upon the land of another without legal right or without color of title in himself to the timber or to the land upon which the timber was growing." (Emphasis added.) In this instance, the testimony was clear at trial that the Gay heirs, based upon their interpretation of their deed and the 1990 survey conducted by Michael Oliver, believed in good faith that they owned the approximate twenty acres of property that was in dispute in this case. While the Gay heirs remain liable to the Liddles for the value of the timber removed they are not subject to the treble damage provisions of KRS 364.130, nor shall they be responsible for payment of attorney's fees and legal costs incurred by the Liddles in this litigation.

On remand, the circuit court is directed to determine the stumpage value of the timber that was removed by the Gay heirs from the disputed property only and

shall enter judgment thereon in favor of the Liddles, for which there shall be no treble damages or legal costs awarded thereon.

For the foregoing reasons, the judgment of the Montgomery Circuit Court in Appeal No. 2004-CA-002613-MR, is affirmed in part and reversed in part; Appeal Nos. 2005-CA-001312-MR and 2005-CA-002442-MR are affirmed; and Cross-Appeal No. 2005-CA-002500-MR is reversed and remanded with directions.

ALL CONCUR.

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