

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000335-MR

DONALD OWENS, JR.; DONALD OWENS, SR.;  
AND JUDY OWENS

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE RODERICK MESSER, SENIOR JUDGE  
ACTION NO. 04-CI-00544

SAMUEL E. DAVIES; LINDA G. DAVIES;  
ANDREA COLLINS; ELLA COLLINS;  
ELEANOR GRACE; AND WILLIAM GRACE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: NICKELL AND WINE, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Donald Owens, Sr., Donald Owens, Jr., and Judy Owens

(Appellants) appeal from a judgment in favor of Samuel E. Davies, Linda G.

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<sup>1</sup> Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Davies, Andreae Collins, Ella Collins, Eleanor Grace, and William Grace (Appellees) quieting title to a disputed boundary line. Appellants argue the trial court erred by: (1) failing to set aside an agreed order; (2) admitting alleged hearsay evidence of a prior condemnation action involving the disputed property and admitting survey testimony without foundation; (3) concluding Appellees satisfied the requirements of adverse possession; and (4) dismissing the claim for breach of warranty. After reviewing the record and briefs, we affirm.

Appellants and Appellees are adjoining landowners in Knox County, Kentucky. The respective properties are also adjacent to the right of way of U.S. Highway 25E between the towns of Corbin and Barbourville. Samuel E. Davies and Linda G. Davies acquired a one-half undivided interest in their property by deed from Speed Campbell. Through mesne conveyances,<sup>2</sup> Andreae Collins and Ella Collins acquired the other one-half interest in the Speed Campbell property. Appellants have jointly owned their property since 1982 and the former owner, Speed Campbell, had owned the land since 1930.

Donald Owens, Jr. acquired his property from Eleanor Grace and William Grace by deed dated November 3, 2000. Eleanor Grace had acquired the property from her mother, Opsy B. Garland, widow of Ashley Garland, by deed dated January 15, 1998. Ashley Garland had acquired his land by deed from Speed Campbell. Donald Owens, Sr. and Judy Ann Owens acquired a tract of property

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<sup>2</sup> Black's Law Dictionary, Ninth Edition, page 383, defines a mesne conveyance as "[a]n intermediate conveyance; one occupying an intermediate position in the chain of title between the first grantee and the present holder."

from Albert E. Phipps and Louise Phipps, which adjoins both the Appellees' tract as well as Donald Owens, Jr.'s tract.

In 2003, Appellants placed flags and a no trespassing sign along the disputed boundary line. Appellees inspected the disputed area and found their barbed wire fence had been cut. Appellees requested Appellants remove the no trespassing signs. Appellees hired Richard Fredericks to survey their property and Fredericks concluded there was an overlap in the deeds.

In 2004, Appellees again inspected the disputed area and found that trees had been cut along with more of their fence. Appellees filed a complaint in Knox Circuit Court seeking to quiet title to the disputed property and damages for trespass. Appellants filed an answer and counterclaim seeking to quiet title, to enjoin Appellees from trespassing, and for attorney fees.

Appellees and Appellants, Donald Owens, Sr. and Judy Ann Owens, tendered an agreed order, which was entered by the court on September 21, 2005. The order's four items: 1) provided that the tree line, as described in Appellees' complaint, established the boundary line between their property and the adjoining property the Appellants, Donald Owens, Sr. and Judy Ann Owens, acquired from the Phipps; 2) found that Donald Owens, Sr., and Judy Ann Owens had not trespassed on the Appellees' property; 3) dismissed Donald Owens, Sr. and Judy Ann Owens from the case; and 4) provided that no findings and conclusions were made concerning the property Donald Owens, Jr. had acquired from Eleanor Grace and William Grace.

Donald Owens, Jr., filed a third-party complaint against Eleanor Grace, William Grace and National Bank, which held a mortgage on the property. The Appellants filed a motion to set aside the agreed order, which the trial court denied. Appellants attempted to appeal the order denying the motion to set aside the agreed order. This Court dismissed the appeal as premature. On remand, the trial court dismissed National Bank as a party; held a bench trial on the Appellees' claims against Donald Owens, Jr. and the claims of Donald Owens, Jr. against the Appellees; tried the claims of Donald Owens, Jr. against Eleanor and William Grace; quieted title in favor of the Appellees; and dismissed all the various claims for damages. This appeal followed.

As a preliminary procedural matter, we will first consider the issue of whether the trial court erred by denying the motion of Appellants, Donald Owens, Sr. and Judy Ann Owens, to set aside the agreed order entered on September 21, 2005. As noted above, prior to trial, Donald Sr. and Judy Ann Owens, entered into an agreed order with the Appellees, dismissing them from the case. Donald Sr. and Judy Ann Owens did not sign the agreed order, but it was signed by their first attorney, Glenn Greene, and was tendered to the court. Appellants argue the trial court should have set aside the agreed order because of mistake and Greene's lack of authority to bind them to the agreed order. We disagree.

It is a universal rule regulating the right of an appeal that it will not lie in favor of a party unless it was an involuntary adverse judgment. If the judgment appealed from was rendered at the instance of the complaining parties or by their consent, they will not be permitted to

complain upon an appeal. It is elementary that a judgment entered by consent and agreement is not the judgment of the court except in the sense that the court allowed it to be recorded as the judgment of the court. We are of the opinion that the judgment by consent or agreement as in the instant case is not appealable. It can only be set aside for fraud or want of consent by the court entering it. When obtained by fraud, it must be shown that there was a misrepresentation of a material fact by one of the adverse parties and that the party making it knew or could have known that it was untrue and made for the purpose of having the other party prejudiced to rely upon it, and further that he had the right to rely upon it in good faith and did rely upon it.

*Harrel v. Yonts*, 271 Ky. 783, 113 S.W.2d 426, 430 (1938).

An order made by consent can never be vacated without the consent of all the parties, unless it affirmatively appears that its rendition was procured by fraud or mutual mistake, the two essential prerequisites to the exercise of the power to annul or vacate such an order.

*Smith v. Smith*, 236 Ky. 693, 33 S.W.2d 651, 652 (1930) (quoting 29 Cyc. 1519;

*Deaver v. Jones*, 114 N.C. 649, 19 S.E. 637 (1894)). Additionally, admissions or

statements made by an attorney are binding on the client. *Bell County Bd. of*

*Education v. Howard*, 248 Ky. 766, 59 S.W.2d 982 (1933).

In the present case, there was no allegation of fraud and no demonstration of mutual mistake. The agreed order reflects the agreed upon boundary to be the boundary line described in the Appellees' complaint. At best, Appellants allege unilateral mistake and that is an insufficient reason to set aside an agreed order. The trial court did not err by denying the motion to set aside the

agreed order. Therefore, we affirm the dismissal of Appellants, Donald Sr. and Judy Ann Owens, from the case as a result of the agreed order and, as such, the remaining arguments relate solely to Appellant, Donald Owens, Jr.

Appellant argues the trial court erred by admitting the record of a prior condemnation proceeding involving the properties because the evidence constituted hearsay and was admitted without a proper foundation. Citing KRE<sup>3</sup> 902(4), the trial court admitted into evidence a certified copy of the record of a prior condemnation proceeding involving the properties at issue in this case on the grounds that the record was public. The Kentucky Transportation Cabinet had instituted condemnation proceedings against adjoining landowners Speed Campbell and Ashley Garland prior to the relocation of U.S. Highway 25E. Appellee, Samuel Davies, in his capacity as an attorney, represented both Campbell and Garland in the proceeding against the Commonwealth. The condemnation proceeding established a boundary point between the properties of Campbell and Garland where their properties adjoin U.S. Highway 25E.

KRE 803 states in relevant part:

The following are not excluded by the hearsay rules, even though the declarant is available as a witness:

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(8) Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or any other data compilations in any form of a public office or

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<sup>3</sup> Kentucky Rules of Evidence.

agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

- (A) Investigative reports by police and other law enforcement personnel;
- (B) Investigative reports prepared by or for a government, a public office, or an agency when offered by it in which it is a party; and
- (C) Factual findings offered by the government in criminal cases.

In *Prater v. Cabinet for Human Resources, Com. of Ky.*, 954 S.W.2d 954, 957 (Ky. 1997), the Supreme Court of Kentucky explained the common law rationale behind KRE 803(8):

Prior to the 1992 adoption of the Kentucky Rules of Evidence, there existed in the common law of Kentucky both a public records exception and a business records exception to the hearsay rule. In addition, there were statutory provisions providing for the admissibility of public records, KRS 422.020 and KRS 422.050, which were repealed concomitantly with the adoption of the new rules. 1990 Ky. Acts ch. 88, § 92; 1992 Ky. Acts ch. 324, § 33. The common law and statutory exceptions for public records were seldom used and only to justify the admissibility of such documents and records as city maps, *Hines v. May*, 191 Ky. 493, 230 S.W. 924 (1921), income tax returns, *Curd v. Commonwealth*, 312 Ky. 457, 227 S.W.2d 1003 (1950), deeds, *Culton v. Simpson*, 277 Ky. 808, 127 S.W.2d 826 (1939), and tax assessment records, *Voorhes v. City of Lexington, Ky.*, 377 S.W.2d 57 (1964). R. Lawson, *The Kentucky Evidence Law Handbook*, § 8.80, at 284 (2nd ed., Michie, 1984).

The Court also stated the foundation requirements under KRE 803(8) are substantially more relaxed than the foundation requirement contained in the business records exception contained in KRE 803(6). *Id.* at 958. KRE 803(8) does not require the testimony of a live witness to satisfy the foundation requirement. *Id.*

We conclude the record of the prior condemnation proceeding involving the properties at issue was properly admitted as a public record. KRE 902(4) states in pertinent part: “An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by an official having the legal custody of the record.” The Knox County Circuit Clerk certified the record and attested the record was a “true and correct copy.” The trial court did not abuse its discretion by admitting the record of the prior condemnation proceeding.

Appellant next argues the trial court erred by admitting two surveys without proper foundation. The trial court entered into evidence the “Pritchard survey” and the “Dean survey.” Neither surveyor, John Pritchard nor Danny Dean, testified.

In *Bates v. Bates*, 399 S.W.2d 716, 718-719 (Ky. 1966), the former Court of Appeals held that a survey was admissible, even though it was not introduced by its maker, when a person familiar with the survey testified to his



familiarity with the map and his reliance upon it. Quoting 20 Am.Jur., Evidence, sec. 930, p. 783, the Court wrote:

The proof of authenticity required preliminary to the introduction of an instrument in evidence need not be by direct proof. Authenticity of documentary evidence may be shown, so as to render it admissible in evidence, by indirect or circumstantial evidence - that is, by facts and circumstances from which the jury may infer the execution of the document.

In the present case, Samuel Davies testified he hired Pritchard to survey his property in 1986 in preparation for possible development. He testified the survey introduced at trial was the work Pritchard provided to him. Davies also testified he hired Dean to survey his property in 1998 in preparation for possible development. He testified the survey introduced at trial was the work Dean provided to him. Under *Bates*, the trial court did not abuse its discretion by admitting into evidence the surveys prepared by Pritchard and Dean.

Appellant next argues the trial court erred by concluding Appellees satisfied the requirements of adverse possession. Although the trial court concluded Appellees had satisfied the requirements of adverse possession, it appears that mutual recognition and acquiescence of the boundary was the actual basis of the judgment as permitted by *Liberty Nat. Bank & Trust Co. v. Merchant's & Manufacturer's Paint Co.*, 307 Ky. 184, 209 S.W.2d 828, 832 (1948). In *Combs v. Combs*, 240 S.W.2d 558, 559 (Ky. 1951), the former Court of Appeals held that when paper titles are in conflict, “[i]t has, therefore, become well settled that where parties for fifteen years or more have recognized a certain line as the

true, common boundary of their property, the record line becomes unimportant, and the courts will recognize that as the true location.” Satisfaction of all the requirements of adverse possession is not required to establish a boundary line by mutual recognition and acquiescence. *Wallace v. Lackey*, 199 Ky. 190, 250 S.W. 843, 844 (1923).

In the present case, the evidence demonstrated there was no dispute over the boundary line from the time the property was divided in 1945 until the year 2000 when Appellants acquired the property. The evidence also showed Appellant’s predecessors-in-interest, Opsy Garland and Eleanor Grace, recognized the barbed wire fence and the tree line as the correct boundary. In the 1980s, Appellees cleared their property up to the fence and tree line with bulldozers without dispute. William Grace testified he offered to show Appellant, Donald Owens, Jr., the boundary line, but Owens, Jr. did not view the boundary line.

We conclude the evidence was sufficient to establish the boundary line by mutual recognition and acquiescence. The judgment is affirmed on this basis alone without the necessity of analyzing each element of adverse possession.<sup>4</sup>

Finally, Appellant argues the trial court erred by dismissing the claim for breach of warranty against the Graces for lack of evidence. CR<sup>5</sup> 52.04 states:

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<sup>4</sup> This Court is authorized to affirm the judgment on any basis supported by the record. *Com. Natural Resources and Environmental Protection Cabinet v. Neace*, 14 S.W.3d 15, 20 (Ky. 2000).

<sup>5</sup> Kentucky Rules of Civil Procedure.

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

The failure to request additional findings of fact on an essential issue constitutes a waiver and precludes appellate review. *Crain v. Dean*, 741 S.W.2d 655, 658 (Ky. 1987). Appellant failed to request additional findings as required by CR. 52.04.

Therefore, the issue is waived.

Accordingly, the judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

David Howard  
London, Kentucky

BRIEF FOR APPELLEES, SAMUEL  
E. DAVIES, LINDA G. DAVIES  
AND ANDREAE COLLINS:

Samuel G. Davies  
Dave R. Collins  
Barbourville, Kentucky

BRIEF FOR APPELLEES, ELLA  
COLLINS, ELEANOR GRACE AND  
WILLIAM GRACE:

No brief filed.