RENDERED: NOVEMBER 5, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000787-MR

DAVID WESLEY HAYES — APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 07-CI-00158

ERNIE CLEMONS AND
SHIRLEY CLEMONS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: David Wesley Hayes filed a complaint seeking to have the Knott Circuit Court determine the boundary line between his property and that owned by Ernie and Shirley Clemons. On appeal, he alleges that the trial court relied on deeds placed in the file but not entered as exhibits. We conclude that even if the trial court improperly considered the deeds as evidence, there was

substantial evidence properly submitted to support the trial court's findings and affirm.

Our standard of review is set forth in *Phillips v. Akers,* 103 S.W.3d 705, 709 (Ky.App. 2002), where the court recited:

> With respect to property title issues, the appropriate standard of review is whether or not the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for that of the trial court absent clear error. *Church and Mullins Corp. v. Bethlehem Minerals Co.,* Ky., 887 S.W.2d 321, 323 (1992), *cert. denied,* 514 U.S. 1110, 115 S.Ct. 1962, 131 L.Ed.2d 853 (1995). Furthermore, in an action tried without a jury, the factual findings of the trial court shall not be set aside unless they are clearly erroneous, that is not supported by substantial evidence. *Cole v. Gilvin,* Ky.App., 59 S.W.3d 468, 472 (2001); CR 52.01.

The trial court relied on the testimony of a qualified surveyor and other properly admitted evidence to support its findings. Thus, even if Hayes's assertion is correct, any error was harmless.

The Clemonses assert that although the trial court correctly established the boundary line, it erred when it found that Hayes was entitled to an easement to use the roadway in dispute. However, because the Clemonses did not file a cross-appeal, their assertion cannot be reviewed. *Fryar v. Stovall*, 504 S.W.2d 701 (Ky. 1973).

Based on the foregoing, the judgment of the Knott Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTING: I dissent from the majority because the trial court has interpreted the language of a deed not admitted to the record as an evidentiary exhibit. The majority opines that expert testimony concerning the language contained in a deed is sufficient for factual findings without entry of the deed itself as an evidentiary exhibit.

We must remember the role of experts is set forth in Kentucky Rules of Evidence (KRE) 702. Experts, duly qualified in their area of expertise, are relegated to giving testimony on scientific or technical evidence or in areas where they possess specialized knowledge. I disagree that an expert's testimony concerning the plain language in a deed, particularly "to the edge of [an] oil well road", provides a proper evidentiary basis for a trial court's finding when the legal interpretation of the language of the deed is at issue. Certainly an expert may be needed to conduct a survey and interpret the technical aspects of a deed, but I opine that the plain language of a deed does not require expert interpretation.

I direct attention to the portion of Appellee's brief which cites to *Hensley v. Lewis*, 278 Ky. 510, 128 S.W.2d 917 (1939), and *Delph v. Daly*, 444 S.W.2d 738 (Ky. 1969), for the proposition that if a boundary line runs with a roadway then the boundary line is located in the center of the roadway absent language to the contrary. It appears that this law was necessarily applied by the trial court in interpreting the language of the alleged deed at issue, and this

certainly is a legal interpretation applied by a court to the language in a deed which, in the case *sub judice*, was not an evidentiary exhibit.

While true that KRE 703(a) allows an expert to rely on facts or data not admitted into evidence in forming an expert opinion, the opinion of the expert must still be scientific or technical in nature, or the expert must have other specialized knowledge that assists the trier of fact to understand the evidence or determine a fact in issue. I doubt there is little need to have experts read the language of a deed to the court for the purpose of the court interpreting the language. I submit that our trial courts have the necessary education and legal background to read the deed themselves.

I would hold that the trial court's factual findings and conclusions based upon the testimony of experts as to the effect of the language of the deed was error because the interpretation of a deed is a matter of law for the court and where no deed is before the court then no interpretation can be made. *Melton v. Melton*, 221 S.W.3d 391, 392 (Ky.App. 2007). Therefore, I would reverse and remand for further proceedings.

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