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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001699-MR

ROBERT FITZPATRICK AND
TAMMY MARIE FITZPATRICK — APPELLANTS

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 13-CI-00094

ROY A. HUDGINS — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND THOMPSON, JUDGES.

JONES, JUDGE: Appellants, Robert and Tammy Fitzpatrick, appeal from a judgment of the Green Circuit Court finding that Appellee, Roy Hudgins ("Roy"), was the proper owner of a disputed parcel of land. Following careful review, we reverse and remand.

I. BACKGROUND

In 1965, Roy's father, Chester, purchased what was represented to be a 32.5-acre tract of land in Green County, Kentucky (the "Parent Tract"). In 1973, Chester divided the Parent Tract into two tracts, selling what was represented to be a 30-acre tract to Alvie Swartz ("Tract 1"). The remaining 2.5-acre tract ("Tract 2") was retained by Chester until his death in 1997, at which time Roy acquired it by virtue of Chester's will and a deed from Roy's siblings. Tract 1 was conveyed multiple times over the passing years. Ultimately, in 2006, Tract 1 was purchased by the Fitzpatricks from Jerry Durrett, J.T. Stearman, and their wives. The legal description of Tract 1 in the deed to the Fitzpatricks states as follows:

> BEGINNING at a point in Charlie Martins line; thence westward with Martins line of N.E. Whitlows line; thence turning left and running and following a private roadway in a southern direction to the Greensburg and Munfordville Road; thence with said road S 45 E 6 poles; thence S 67 E 16 poles; thence E 14 poles; thence S 67 E 22 poles; thence S 40 thence starting a new line at a white oak tree on the bank of the Greensburg and Munfordville Road going north to a corner roack [sic]; thence with another new line east to a stone at a corner in the Claud McCubbin's lands containing 30 acres, more or less.

Following the legal description, the parties inserted a page into the deed, page 624. Page 624 bears the same date as the deed and was signed by all parties to the transaction. Excluding the signatures and the date, the entirety of Page 624 states

as follows: "It is agreed that the tract of acreage being sold for $36,000 contains 24 Acres."

In 2012, the Fitzpatricks hired a licensed surveyor, James Banks, to determine the boundaries of Tract 1 as called for in the deed.[1] Banks first surveyed the Parent Tract as called for in the source deed and discovered that it actually contained 36.5 acres. He then used the calls found in the Fitzpatricks' deed to determine the boundary lines of Tract 1, including the boundary line shared with Tract 2. Once the survey was complete, Robert, Banks, and Roy met to discuss the results. Banks explained to Roy that the Parent Tract actually contained 36.5 acres and that, after he surveyed off the 30 acres belonging to the Fitzpatricks, that left Roy with a 6.5-acre parcel rather than a 2.5-acre parcel. Banks then showed Roy the plat he had drafted and pointed to where he had determined the boundary line between Tract 1 and Tract 2 was located. Roy disputed that the boundary line identified by Banks was, in fact, the actual boundary line. Instead, Roy pointed to a different area on the plat, where an old fence line is located, as the true boundary line. The boundary line as claimed by Roy divided the Parent Tract so that Tract 1 contained approximately 24 acres, and Tract 2 contained approximately 13.5 acres.

In July of 2013, the Fitzpatricks filed the underlying suit against Roy in the Green Circuit Court, seeking to quiet title to the 6.915 acres that Roy

[1] The Fitzpatricks declined to have Tract 1 surveyed before purchasing it. Accordingly, this was the first survey done of Tract 1 since it was purchased by the Fitzpatricks.

claimed belonged to him (the "Disputed Property"), compensatory damages for Roy's trespass on the Disputed Property, and treble damages for any timber that Roy may have removed or sold from the Disputed Property. Roy filed an answer on July 18, 2013, generally denying all allegations contained in the complaint. On April 3, 2014, Roy was granted leave to file an amended answer and counterclaim, in which he asserted that he was the owner of the Disputed Property by virtue of adverse possession and sought judgment quieting title to the Disputed Property in his favor. In his amended answer and counterclaim, Roy additionally noted that, while the legal description in the Fitzpatricks' deed stated that Tract 1 contained "30 acres, more or less," Page 624 explicitly stated that, "It is agreed that the tract of acreage being sold for $36,000 contains 24 Acres."

On October 24, 2016, Roy moved for summary judgment. In his supporting memorandum, Roy informed the trial court that, on September 9, 2016, the Durretts and the Stearmans had conveyed the Disputed Property to him by way of a quitclaim deed. The consideration for the quitclaim deed was stated as follows:

> NOT A MONETARY TRANSACTION: The purpose of this quitclaim deed is to establish that: (a) the deed from Grantors herein to Robert Fitzpatrick and Tammy Fitzpatrick, dated March 3, 2005 [sic], and found in Deed Book 214, page 523, Office of the Green County Clerk, Kentucky, only conveyed approximately 24 acres with the balance of said property having been retained by the Grantors herein; (b) the boundary between the Fitzpatrick

> property referenced above and the adjacent Roy Anthony Hudgins property has always been understood to follow the old boundary fence mentioned in the legal description below; (c) at all times known to Grantors herein continually since 1973, Roy Anthony Hudgins or his predecessors in title (his father and mother) Chester Hodgins and Lois Hudgins, have exclusively claimed the land described herein to the old boundary fence; and (d) by virtue of Roy Anthony Hudgins and his predecessors having adversely possessed this subject property, Grantors maintain that Mr. Hudgins is the rightful owner of the balance of the property reserved by Grantors and therefore, Grantors hereby gift their interest to Grantee.

R. 34.

Roy additionally noted that by inserting Page 624 into the deed conveying Tract 1 to the Fitzpatricks, the Stearmans and Durretts had gone to great lengths to establish that the property being conveyed was only 24 acres. Based on the existence of the quitclaim deed and the limiting language in Page 624, Roy contended that the Fitzpatricks simply had no claim to the Disputed Property. Alternatively, Roy argued that he and his predecessors in title had continuously exerted total dominion and control over the Disputed Property, and had, therefore, met all requirements to claim the Disputed Property through adverse possession.

On January 23, 2017, the Fitzpatricks responded to Roy's motion for summary judgment and filed a competing motion for summary judgment. The Fitzpatricks contended that Page 624 had only been inserted into their deed because the Durretts and the Stearmans had never surveyed Tract 1, and did not

want to subject themselves to a lawsuit in the event that Tract 1 contained less acreage than stated in the legal description. However, the Fitzpatricks contended that the Stearmans and Durretts had intended to convey the entirety of Tract 1 to them, which, according to the legal description contained in the deed, included the Disputed Property. They argued that if the Stearmans and Durretts had intended to except the Disputed Property from the sale, that language should have been included in the legal description of Tract 1. The Fitzpatricks contended that Roy could not claim the Disputed Property under a theory of adverse possession, as they contended Roy's deposition testimony had established that his use of the Disputed Property had been neither continuous nor adverse. Additionally, they argued that the quitclaim deed was ineffective, as the Durretts and the Stearmans no longer had any interest in the Disputed Property to transfer. Both motions for summary judgment were denied by order dated February 7, 2017.

Both parties renewed their motions for summary judgment in July of 2017, and both motions were denied from the bench on August 2, 2017. A bench trial was held on August 7, 2017. Robert testified first for the Fitzpatricks. Robert testified that he had first inquired into purchasing Tract 1 in 1999, when it was owned by David Curry. At that time, Curry was asking $65,000 for Tract 1, and he informed Robert that it contained 35 acres. Robert pulled the deed for Tract 1, saw that the legal description stated that it only contained 30 acres, and declined to

purchase it. In 2006, Robert saw Durrett and Stearman on Tract 1 cutting timber and approached them about purchasing it. After some negotiation, Durrett and Stearman agreed to sell Tract 1 to Robert for $36,000. Robert testified that, during negotiations, there was some discussion about Tract 1 containing less acreage than stated in the legal description. Stearman and Durrett told Robert that they were unsure about the front boundary lines of Tract 1, but that it contained anywhere between 24 and 30 acres. However, Robert stated that he was confident that Tract 1 did contain 30 acres, based on the legal description contained in the deed.

Robert testified that he did not prepare the deed to him from the Durretts and Stearmans and that he was not responsible for asking an attorney to prepare it. When questioned about why Page 624 had been incorporated into the deed, Robert first stated that it had been "sprung on him" at the closing without explanation. While Robert acknowledged that he and his wife had both signed Page 624, he testified that he at no point agreed to purchase anything less than what was included in the legal description of Tract 1. He stated that he had discussed the possibility that Tract 1 might not contain 30 acres with Stearman and Durrett; however, his understanding had been that if Tract 1 contained more than 24 acres, the entire parcel would be his. Robert stated that he believed that Page 624 had been included in the deed to protect the Stearmans and the Durretts from litigation in the event that Tract 1 did not contain 30 acres as stated in the

description. Robert testified that he had purchased Tract 1 "by the deed" and that the purchase price had not been calculated based on the acreage Tract 1 contained. He acknowledged that he had not walked Tract 1 or discussed property lines with Stearman, Durrett, or any of the neighboring land owners prior to the sale.

Robert testified that, prior to having the survey of Tract 1 done, he and Roy had never discussed their respective properties' boundary lines. Robert testified that he had fenced off a portion of Tract 1, but that he had done so in order to graze cattle, not to establish a boundary. Robert stated that a good portion of Tract 1—including the Disputed Property—was grown up, covered in brush, and had piles of "junk" on it, which would have required a bulldozer to clear. Accordingly, Robert had not made use of that portion of Tract 1; however, he testified that the Disputed Property did not appear to have been used recently by any person. Robert stated that he can see the Disputed Property from his residence and would be able to tell if someone was spending time on it. Robert acknowledged that he had seen Roy's vehicle on the Disputed Property during deer-hunting season, but that it had been close to the line between Tract 1 and Tract 2. Robert testified that he pays property taxes for 30 acres of land on Tract 1.

Banks testified next for the Fitzpatricks. Banks testified that, in preparing to survey Tract 1, he examined the deeds of all adjoining land owners. At this time, it was stipulated that all deeds in the Fitzpatricks' chain of title

contain the same legal description, going back to the source deed. Banks testified to the fact that, while the legal description for the Parent Tract states that it contains only 32.5 acres, when the Parent Tract was surveyed based on the calls contained in the legal description, it actually came out to 36.5 acres. Banks stated that it was fairly common for "bounded deeds" to contain more or less acreage than was stated in their legal descriptions. Banks testified that, in all the deeds going back to the deed for the Parent Tract, there is no mention of a boundary fence. He acknowledged that there was some fencing around the perimeter of the Disputed Tract, which coincided with an established corner. Banks testified that his sole purpose in surveying Tract 1 was to set out the 30 acres as called for in the legal description. He testified that he was reasonably certain that he had correctly determined the location of Tract 1 as called for in the deed. Banks stated that there were some ambiguous calls in legal description contained in the Fitzpatricks' deed. He testified that he interpreted the ambiguous calls using his common-sense judgment; however, he reiterated that his purpose in surveying Tract 1 was to come up with the 30 acres as called for in the Fitzpatricks' legal description.

On cross-examination of Banks, it was determined that the legal description in the quitclaim deed from the Stearmans and the Durretts to Roy did not actually describe the Disputed Property, but rather described a parcel of land across the road from it. Banks acknowledged that, based on the survey he had

conducted, Tract 2 appeared to be landlocked. Banks stated that he did not remember seeing a fence when he surveyed Tract 1. Banks testified that, after he became aware that there was a dispute between Roy and the Fitzpatricks concerning the true boundary, he surveyed the Disputed Property. Banks stated that he was able to determine the boundary lines for the Disputed Property, as Roy claimed them to be, because there was a clear distinction between Tract 1, which had been mowed, and the Disputed Property, which was "grown up."

Junior Milby testified first for Roy. Milby testified that he was familiar with all of the property at issue because it used to be owned by his father, who had sold the Parent Tract to Chester. Milby stated that he was familiar with the boundaries as Roy claimed them to be. He testified that, as long as he can remember, there had been a hot-wire fence on the Disputed Property, which generally followed the boundary line as he believed it to be. Milby testified that Roy lived in a trailer on the Disputed Property back in the 1970s. He had also known Roy to raise calves and hogs, garden, and cut timber on the Disputed Property over the years.

Stearman was next to testify. He testified that he and Durrett had purchased Tract 1, along with an adjacent parcel located in Hart County, from Curry in 2005. At that time, Curry had represented Tract 1 as containing 30 acres, and had told them that the Hart County property contained 100 acres. Stearman

testified that Curry had told him and Durrett that he was unsure of all the boundary lines for the properties; however, he told them that Roy had taken care of Tract 1 for him and the previous owner and that he would know the boundary lines. When Curry showed them Tract 1, he stated that Tract 1 went up to the old fence that Roy claims is the boundary line. Stearman testified that the fence was woven-wire, and, based on the type of wire used, he estimated that it was approximately 50-60 years old. After Durrett and Stearman had made the purchase from Curry, they determined that both parcels purchased were short on acreage. Stearman testified that he and Durrett had gone to the Green County Farm Service Agency, where an aerial map was used to determine that Tract 1 contained only 24 acres. Stearman and Durrett did not have Tract 1 surveyed. As it was determined that Tract 1 contained only 24 acres, this amounted to Stearman and Durrett purchasing Tract 1 for $1,200 per acre. Stearman testified that, shortly after determining that Tract 1 contained 24 acres, Robert contacted Durrett to inquire about purchasing Tract 1. Stearman and Durrett decided that they would sell Tract 1 for $1,500 per acre, or a total purchase price of $36,000. Stearman testified that he told Robert that he and Durrett were unsure of the exact boundary lines for Tract 1, but that it only contained 24 acres.

Stearman testified that Robert brought a prepared deed to the closing. When Stearman examined the legal description for Tract 1 contained in that deed,

he noted that it stated that Tract 1 contained 30 acres and refused to sign it. An attorney who was present at the closing then prepared Page 624, and all parties to the transaction signed it. Stearman testified that he had not intended to reserve any portion of Tract 1 for himself—whether it was 30 acres or 24 acres, he intended to sell the entire Tract. However, because he believed that he and Durrett had only purchased 24 acres from Curry, Stearman stated that he would not have signed the deed to the Fitzpatricks if Page 624 had not been included.

Next, Ed Hudgins, Roy's older brother, testified. He testified that he was familiar with the boundary line, as he had helped Chester erect the fence dividing Tract 1 and Tract 2. Ed stated that Chester had told him the fence was meant as a boundary fence, and that Chester and Swartz had agreed on the boundary. Following Chester selling Tract 1 to Swartz, Chester raised a garden, grew tobacco, and grazed cattle on the Disputed Property. In 1974, Chester dug a pond on the Disputed Property for the cattle. Ed stated that Roy lived in a mobile home on the Disputed Property in the mid-1970s and again in the 1980s. He testified that no one other than Chester and Roy had claimed the Disputed Property as their own since 1973.

Roy was the last to testify. He testified that Chester and Swartz had agreed on a boundary line when Chester sold Tract 1 to Swartz and that Chester had erected a fence on the line. Roy testified that, from 1973-1980, Chester had

grown tobacco on the Disputed Property and raised cattle on it. Roy had lived on the Disputed Property from 1976-1980, left, and then resumed living on the Disputed Property in mid-1981. Roy then continued to live on the Disputed Property with his wife and daughter for approximately 13 years, until 1994. During the time that he was not living on the Disputed Property, Roy continued to garden and hunt on it. Roy stated that, until the Fitzpatricks filed this suit against him, no one had contested his claim to the Disputed Property. Roy acknowledged that there was some "junk" on the Disputed Property—he had placed some old shingles on it and there were piles of refuse from where he had bulldozing done. Roy testified that he had been cited by the Environmental Protection Agency in 2013 concerning some of the "junk" piled onto the Disputed Property, but he conceded that there were items on the Disputed Property that did not belong to him, such as old tires and a cow carcass. Roy acknowledged that the legal description for Tract 2 states that it contains 2.5 acres and that he had never had Tract 2 surveyed to determine its boundaries. He testified that, as long as he can remember, everyone had acknowledged the boundary fence as the dividing line between Tract 1 and Tract 2.

Roy testified that he had some bulldozing done on the Disputed Property when Curry owned Tract 1, and that he and Curry had split that cost. He stated that when he was living in a trailer on the Disputed Property, Tract 1 was

owned by the Barnett family. Roy testified that the Barnetts had allowed him to make use of Tract 1 and he had raised tobacco and peppers and hunted on their property. While Roy had initially testified that the old fence had been erected by Chester to establish the boundary between Tract 1 and Tract 2, he was impeached on this point by his prior deposition testimony, in which he had testified that the fence had been on the Parent Tract when Chester purchased it. Roy confirmed that the old fence had been on the Parent Tract when Chester purchased the property, but contended that Chester had maintained the fence and that it served as the boundary between Tract 1 and Tract 2.

At the instruction of the trial court, Roy and the Fitzpatricks filed post-trial memoranda on August 28, 2017. In his memorandum, Roy contended that the testimony presented during the bench trial established that Chester and Swartz had agreed to a boundary line in 1973 and that the agreed-upon line had ripened into the actual boundary line in 1988. Additionally, Roy argued that the Hudginses had satisfied all elements to allow them to claim the Disputed Property by adverse possession. Finally, Roy argued that the Fitzpatricks could not have purchased the Disputed Property, as their grantors, Stearman and Durrett, had only intended to sell the Fitzpatricks 24 acres of land and had clearly advised the Fitzpatricks of that intent.

In their post-trial memoranda, the Fitzpatricks contended that Stearman and Durrett had intended to convey everything contained in the legal description of Tract 1 to them, regardless of how many acres Tract 1 was determined to contain. The Fitzpatricks additionally argued that Roy was unable to claim the Disputed Property by way of adverse possession. They contended that it was uncontroverted that the Hudginses had permission from the prior owners of Tract 1 to make use of the Disputed Property. Further, they argued that Roy had failed to demonstrate that he had had actual, continuous possession of the Disputed Property for the requisite period of time.

On September 19, 2017, the trial court entered its Findings of Fact, Conclusions of Law, and Order adjudging Roy to be the rightful owner of the Disputed Property. After summarizing the facts as presented during the bench trial, the trial court concluded that the Fitzpatricks had agreed to purchase only 24 acres of property, and not the 30 acres as called for in their deed's legal description. To support this conclusion, the trial court stated that it found the testimony given by Stearman to be the most credible, specifically noting the portion of Stearman's testimony where he stated that he had informed Robert that his and Durrett's intent was to sell Robert only 24 acres of property and his testimony that he refused to sign the deed of conveyance until Page 624 was inserted. The trial court additionally noted that multiple witnesses had testified to

the fact that the old fence had always been the agreed-upon dividing line between Tract 1 and Tract 2 and that the Fitzpatricks had offered no evidence to rebut that testimony.

The trial court noted that much of the testimony concerning Roy's theory that he was the true owner of the Disputed Property by virtue of adverse possession was "conflicting, tedious, contradictory and confusing." Because it found that Stearman and Durrett had only conveyed 24 acres of Tract 1 to the Fitzpatricks, however, the trial court determined that it was unnecessary to address Roy's adverse possession claim. Nonetheless, the trial court underwent additional analysis concluding that the parties' predecessors in interest had entered into an agreement regarding the boundary between Tract 1 and Tract 2 in 1973. Accordingly, the trial court concluded that Roy had established ownership of the Disputed Property by acquiescence. The trial court further concluded that Roy is now the record title holder of the Disputed Property by virtue of the quitclaim deed from Stearman and Durrett to Roy dated September 9, 2016.

This appeal followed.

II. STANDARD OF REVIEW

Our standard of review regarding the trial court's findings of fact is governed by CR[2] 52.01. *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980).

[2] Kentucky Rules of Civil Procedure.

Accordingly, the trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. "Clear error only occurs when there is not substantial evidence in the record to support the trial court's findings." *Elsea v. Day*, 448 S.W.3d 259, 263 (Ky. App. 2014) (citing *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 116 (Ky. App. 1998)). Evidence is deemed substantial if "when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (citing *Blankenship v. Lloyd Blankenship Coal Co.*, 463 S.W.2d 62 (Ky. 1970)). Legal conclusions are reviewed *de novo*, in that "we owe no deference to the trial court's application of the law to the established facts." *KL & JL Invs., Inc. v. Lynch*, 472 S.W.3d 540, 544 (Ky. App. 2015) (citing *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 111 (Ky. App. 2014); *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998)).

III. ANALYSIS

A. Effect of Conveyance from Stearman and Durrett to the Fitzpatricks

The Fitzpatricks first dispute the trial court's finding, and conclusions based thereon, that they agreed that Stearman and Durrett were only conveying 24 acres of property to them and, accordingly, only received 24 acres of property by

way of deed. The Fitzpatricks argue that Page 624 should be characterized as a deed exception, which is invalid because it does not describe the 24 acres with certainty. They additionally argue that Stearman's testimony indicated that he had no intention of reserving or excepting any portion of Tract 1 when he sold it to them. The Fitzpatricks contend that Stearman's testimony is indicative of the fact that he and Durrett intended to sell them the entirety of Tract 1, regardless of whether it contained 24 acres or 30 acres.

As a general rule, "in case of a conflict between the particular description and the general description in a deed, the particular and not the general description controls." *Bain v. Tye*, 160 Ky. 408, 169 S.W. 843, 844 (1914). In the instant case, the clause representing that Tract 1 contains 30 acres gives a particular, metes and bounds description. In contrast, Page 624 simply describes Tract 1 as containing 24 acres, with no indication of where that 24 acres is located. Neither the deed itself nor the testimony at trial indicate that either of these descriptions was based on a professional survey.

"It is an elementary rule in the interpretation of deeds that the intention of the parties should be effectuated, and in doing this a liberal construction is given to deeds inartificially and untechnically [sic] drawn." *Id.* "The entire description in a deed should be considered in determining the identity of the land conveyed." *Id.* at 845. "[W]here it is manifest from the entire

instrument that the general description, in view of the facts and circumstances surrounding the transaction, most clearly reflects the intention of the grantor, the construction will be adopted which gives it full effect." *Chrisman v. Dennis*, 308 Ky. 408, 410-11, 214 S.W.2d 598, 599 (1948). Further, "[c]lauses inserted in a deed should be regarded as inserted for a purpose, and should be given a meaning that will aid the description." *Bain*, 169 S.W. at 845.

In determining that Stearman and Durrett had only conveyed 24 acres to the Fitzpatricks, the trial court relied, in part, on Stearman's testimony that he would not have signed the deed to the Fitzpatricks if Page 624 had not been inserted. The trial court is correct that Stearman testified as such. However, Stearman also testified that he and Durrett had no intention of retaining any portion of Tract 1. He testified that he and Durrett intended to sell all the property that they had purchased, specifically testifying that "if [Tract 1] was 24 [acres] or 30 [acres] he was going to sell it all." Stearman clearly believed, based on Roy's assertion of the boundary line in conjunction with an aerial map, that he and Durrett had only acquired 24 acres of property when they purchased Tract 1. As acknowledged in Roy's brief to this Court, Page 624 was inserted to avoid litigation in the event that Tract 1 contained less acreage than what was described in the legal description. Appellee Br. 9.

Considering the evidence in light of the above-cited legal principles, we cannot agree that the deed to the Fitzpatricks conveyed only 24 acres. Stearman testified that he and Durrett intended to sell all that they owned when they conveyed Tract 1 to the Fitzpatricks. The legal description of Tract 1 states that it contains 30 acres, and a survey of Tract 1 confirmed—with reasonable certainty—that it contained 30 acres. Because Stearman and Durrett were under the erroneous impression that they had only acquired 24 acres when they purchased Tract 1 from Curry, they inserted Page 624 into the Fitzpatricks' deed to avoid litigation. This understanding gives effect to the clause inserted on Page 624 while still adhering to the principle that particular descriptions, not general ones, are controlling.

B. Establishment of a Boundary by Acquiescence

Next, the Fitzpatricks argue that the trial court erred in finding that Roy was the rightful owner of the Disputed Property due to acquiescence of the parties' predecessors in title. The trial court found that the evidence presented had clearly demonstrated that Chester and Swartz had agreed to a boundary line at the time that Chester conveyed Tract 1 to Swartz and that their agreement had been continually recognized by all successors in title until the present action was filed. The Fitzpatricks acknowledge that Chester, and then Roy, have made use of the Disputed Property since Tract 1 was conveyed to Swartz in 1973. They argue,

however, that there was insufficient evidence presented to show that Chester and Swartz reached an agreement that the Disputed Property belonged to Roy as the result of an agreed-upon boundary. We agree.

In Kentucky, "[t]he 'agreed boundary' doctrine allows for parol agreements establishing boundary lines to be enforceable—despite the statute of frauds—'only in the event the true dividing line between two tracts is in doubt, and there is a dispute between the adjoining owners as to the exact location of the line, which depends on variable circumstances not susceptible of certain determination.'" *Embry v. Turner*, 185 S.W.3d 209, 214 (Ky. App. 2006) (quoting *Faulkner v. Lloyd*, 253 S.W.2d 972, 974 (Ky. 1952)). "[I]n order for the 'agreed boundary' doctrine to apply, there must be *clear proof* of a parol agreement between the applicable parties setting forth an agreed boundary." *Id.* (citing *Bringardner Lumber Co. v. Bingham*, 251 S.W.2d 273, 274 (Ky. 1952)) (emphasis added).

In the instant case, it cannot be said that there is clear proof that Chester and Swartz reached an actual agreement as to the boundary line. The trial court's findings state that Roy testified that he was present when Chester and Swartz agreed on the boundary; that finding is erroneous. While Roy testified that he believed that Chester and Swartz had agreed to a boundary line, when he was questioned as to whether he was present when this agreement was made, Roy

clearly said that he was not. VR 08/07/17, 5:14:40. The trial court's finding that Ed was present when Chester and Swartz agreed to a boundary line is likewise erroneous. Ed testified that Chester took him down to the purported boundary line and told him that was the dividing line between Tract 1 and Tract 2. He additionally testified that he believed that Chester and Swartz had agreed on this boundary line when Chester sold Swartz Tract 1. He never testified, however, that he was present when Chester and Swartz agreed on a boundary.[3]

Other witnesses testified that they believed that the boundary line was at the point that Roy claimed. But there were no witnesses available to testify that Chester and Swartz—or any of their successors in interest—ever discussed and came to an agreement about the property line, other than the "agreement" that is represented by the legal description contained in the deed from Chester to Swartz. There was some evidence offered at trial that the old fence had been constructed in order to demonstrate a boundary line and thus represented an agreement between Chester and Swartz. This testimony, however, was frequently contradicted. For example, Roy and Ed were initially adamant in their testimony that Chester had constructed the old fence in order to establish a boundary. When Roy testified to

[3] While not raised by the Fitzpatricks, we additionally note that all testimony by Ed and Roy concerning what Chester told them about an agreed boundary is self-serving hearsay. Generally, where a judge acts as a fact finder it is presumed that he or she will be able to disregard hearsay statements. *G.E.Y. v. Cabinet for Human Res.*, 701 S.W.2d 713, 715 (Ky. App. 1985). "However, where, as here, it is apparent that [the judge] relied on the hearsay in making his decision, the error in the admission of the unreliable evidence cannot be deemed harmless or nonprejudicial." *Id.*

this fact at trial, however, he was impeached by his prior deposition testimony, in which he testified that the old fence "had been there ever since before [Chester] owned [the Parent Tract] . . . ." Hudgins Dep. 24:1-2, Mar. 7, 2014. After being impeached, Roy conceded that his deposition testimony was accurate, but he attempted to explain the inconsistency by stating that Chester had maintained the fence as a result of his and Swartz's agreement. During Ed's testimony, Ed initially stated that he helped Chester build the old fence in 1973, after Chester showed him where the boundary line was. Later in his testimony, however, Ed stated that he had helped Chester build a fence around the back side of the Disputed Property, but had not built the entire fence. Based on the above, we must conclude that the trial court erred in concluding that there was clear evidence that Chester and Swartz had reached an agreement as to a boundary line. *See Embry*, 185 S.W.3d at 209 (finding that testimony that the parties had built adjacent fences and acquiesced in those fences constituting their respective properties' boundaries was insufficient to illustrate an actual agreement setting a boundary line).

When there is not clear proof of a parol agreement between parties setting a boundary line, a boundary line can still be deemed to be fixed by agreement, or acquiescence, when the applicable parties "each take possession to the agreed line and exercise possession for the statutory period[.]" *Faulkner*, 253 S.W.2d at 974. In such an instance, the fixing of the boundary line is not

considered enforcement of an agreement, but is "upon the theory that adverse possession precludes either party from claiming beyond the agreed line." *Id.* In the instant case, however, the trial court declined to address Roy's adverse possession claim, as it found the evidence presented concerning adverse possession was "conflicting, tedious, contradictory, and confusing." Having reviewed the record, we agree with this characterization of the evidence. Nonetheless, without clear evidence of an agreed-upon boundary line, a conclusion that Roy was the rightful owner of the Disputed Property by virtue of acquiescence would first require the trial court to undertake an adverse possession analysis. Because the trial court did not consider Roy's claim of adverse possession, we are unable to review it.

IV. CONCLUSION

In light of the foregoing, the order of the Green Circuit Court is reversed. On remand, the trial court is instructed to determine whether Roy has established a claim to the Disputed Property by virtue of adverse possession, taking more evidence if it deems necessary.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Luke R. Lawless
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BRIEF FOR APPELLEE:

John D. Henderson
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