

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**McKimmon Graham and
Darlene Graham, husband and
wife; and Hillard Dolin and Evelyn
Dolin, husband and wife,
Defendants Below, Petitioners**

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-0999 (Greenbrier County 09-C-274)

**Wilson B. Rider
Plaintiff Below, Respondent**

MEMORANDUM DECISION

Petitioners, by counsel James R. Sheatsley, appeal the order of the Circuit Court of Greenbrier County entered on May 19, 2011, granting the declaratory relief sought by the respondent in regard to the parties' boundary line dispute. Respondent, by counsel Christine B. Stump, has filed a response. Petitioners have filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioners and respondent own adjoining properties in Greenbrier County, West Virginia. Respondent acquired his property as a result of a partition sale in 1979. In August of 2008, petitioners also acquired their property as a result of a partition sale. Prior to the 2008 sale, the Special Commissioners who were responsible for selling the property hired a surveyor, William Dilley, to survey the property ultimately purchased by petitioners. Respondent indicates that he noticed that the stakes set out by that surveyor encroached upon his property. Respondent attended the sale of the property and voiced his concern to those present at the partition sale that the survey performed by Mr. Dilley was incorrect and encroached upon respondent's property. Shortly after the sale, respondent had a survey of the property performed by David Holz, who found that the Dilley survey incorrectly located the boundary line between the two properties so as to encroach upon the property of respondent. Respondent filed a declaratory judgment action against petitioners seeking a declaration of the proper boundary line between the properties.

The circuit court conducted a bench trial at which time respondent presented his own testimony and the expert testimony of his surveyor David Holz. Petitioners presented the lay testimony of respondent McKimmon Graham and respondent Hillard Dolin. Petitioners did not present any expert testimony. The parties also submitted exhibits and a view of the property was conducted. The matter was submitted to the circuit court with proposed findings of fact and conclusions of law from both parties. Ultimately, the circuit court found in favor of respondent, concluding that the survey conducted by William Dilley was in error and that the survey conducted by David Holz established the true boundary line.

This Court has recognized the following standard of review:

“In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” Syllabus point 1, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

Syl.Pt. 1, *Smith v. Smith*, 219 W.Va. 619, 639 S.E.2d 711 (2006).

Petitioners argue that the circuit court erred in not adopting their proposed findings of fact and conclusions of law. Petitioners contend that the circuit court failed to “address numerous factual issues” including those concerning the doctrine of laches and that this matter should be remanded to correct this alleged error. Respondent responds that the circuit court issued its own findings of fact and conclusions of law which meet all the requirements of Rule 52 of the West Virginia Rules of Civil Procedure. Respondent notes that contrary to petitioners’ assertions, the circuit court did not ignore the defense of laches but properly found that it did not apply in the present case. After reviewing the arguments of the parties and the appendix record, the Court concludes that the circuit court did not err in its manner of handling the proposed findings of fact and conclusions of law offered by the parties or in its entry of its own findings of fact and conclusions of law.

Petitioners next argue that the circuit court erred in placing no weight on the survey performed by William Dilley “simply because of Mr. Dilley’s demise and hence inability to appear in Court to testify regarding said survey.” Respondent argues that petitioners failed to present any expert testimony to counter the testimony of his expert surveyor Mr. Holz. Although Mr. Dilley was deceased, respondent argues that nothing precluded petitioners from having a licensed surveyor review the Dilley survey and testify in support of the correctness of that survey. The circuit court heard the testimony of Mr. Holz that he had located a historical corner which the Dilley survey had not relied upon in reaching its conclusion as to the boundary line between the parties and that this was the error which Mr. Holz found in the Dilley survey. The circuit court noted its conclusion that “Mr. Holz did an excellent job explaining how he arrived at his conclusion that the survey of William E. Dilley was in error and how he determined the

boundary line between the parties.” As the trier of fact, it was the circuit court’s duty to evaluate the evidence. The Court finds no error in the circuit court’s determination that respondent proved through the testimony of Mr. Holz that the boundary line was as established by the Holz survey.

Petitioners argue that the circuit court erred in entirely disregarding issues of common and customary usage and occupation lines commonly relied upon by surveyors. Petitioners argue that the fence line in the area of the boundary dispute supports petitioners’ position regarding the boundary as does the placement of the home of Mr. Charles Ryder, an adjoining neighbor. Respondent notes in response that he testified that the fence in question was placed so as to contain cattle and was not a boundary fence. As for the encroachment of Mr. Ryder’s improvements upon respondent’s property, respondent testified that he has an agreement with Mr. Ryder as to such encroachment. The circuit court recognized that respondent denied that the fencing was ever the boundary line and that respondent indicated that the fence was constructed solely for the purpose of containing cattle. The circuit court also recognized that respondent was aware of the encroachment by Mr. Ryder and that they had an agreement that permitted the encroachment and use. The circuit court acknowledges these factors in the order. However, the circuit court did not rely upon the fence line or the position of the Ryder encroachment but instead, concluded that the Holz survey properly established the boundary line based upon its location and use of an original corner marker to determine the proper boundary. The Court concludes that the circuit court did not err in reaching this conclusion.

Petitioners last argue that the circuit court erred in not finding that laches barred the relief sought by respondent. “Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.’ Syllabus Point 2, *Bank of Marlinton v. McLaughlin*, 123 W.Va. 608, 17 S.E.2d 213 (1941).” Syl. Pt. 6, *Shaffer v. Stanley*, 215 W.Va. 58, 593 S.E.2d 629 (2003). Petitioners assert that respondent acknowledged at trial that he was told by a surveyor at some point after taking title to his property in 1979 that he had some of the adjoining land “under fence” which he disputed. At some point thereafter, the circuit court found that “[respondent] admitted that he has attempted to survey his property on one prior occasion, he paid for the survey but never received it.” Petitioners argue that respondent knew about the 2008 partition sale of the property which petitioners ultimately bought but “made no efforts to engage counsel or enjoin the Special Commissioners’ Sale” Respondent notes that he attended this sale and verbalized his dispute as to the boundary to those present. Respondent asserts that he then had the survey performed by Mr. Holz done shortly thereafter, and filed the present action several months later. Despite these facts, petitioners argue that laches bars relief to the respondent. The circuit court disagreed, holding that “[respondent] has always disputed the boundary line advocated by the [petitioners] therefore laches does not apply.” The Court finds no error in the circuit court’s conclusion that laches was not applicable.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh