

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-001659-MR

DARRELL McINTOSH and  
BARBARA McINTOSH

APPELLANTS

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 95-CI-00554

ELDON GRIMES and  
ARLANDA GRIMES

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, McANULTY, and PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Darrell and Barbara McIntosh appeal from a judgment of the Laurel Circuit Court establishing a boundary line between properties owned by them and by Eldon Grimes and Arlanda Grimes. We affirm.

In 1995, after becoming aware that a portion of the residence the McIntoshes were building was on the property in dispute, the Grimeses filed a civil complaint in the Laurel

Circuit Court to quiet title and determine the boundary line between the properties owned by them and by the McIntoshes. The McIntoshes filed an answer and counterclaim asserting title ownership to the property or, alternatively, ownership by adverse possession. In June 1998, the trial court ordered the case to be tried by deposition and granted the parties 30 days after the completion of proof in which to file their briefs. Eldon Grimes, Arlanda Grimes, Nancy Hacker (the Grimeses' sister and previous owner of the property owned by the McIntoshes), James E. Manning (surveyor employed by the Grimeses), Darrell McIntosh, and Billy David Altizer (surveyor employed by the McIntoshes) testified. Following the completion of proof, the Grimeses' attorney filed a brief, but the McIntoshes' attorney did not.

The trial court's Findings of Fact, Conclusions of Law and Judgment were entered on July 5, 2001. The circuit court determined that the boundary line was located in accordance with a survey by the Grimeses' surveyor, James E. Manning. Further, the court determined that the McIntoshes failed to prove ownership by adverse possession. The McIntoshes then appealed the judgment.

"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<sup>1</sup> 52.01. This rule is applicable to boundary line disputes. Croley v. Alsip, Ky., 602 S.W.2d 418, 419 (1980). Furthermore, the court was free to choose between the conflicting opinions of the surveyors "so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors." Howard v. Kingmont Oil Co., Ky. App., 729 S.W.2d 183, 185 (1987).

Concerning the location of the boundary line between the properties, the court accepted the testimony of Surveyor Manning over Surveyor Altizer. As noted by this court in the Howard case, courts are free to do so. Howard, 729 S.W.2d at 185. Also, the testimony of Surveyor Manning does not appear to have been based upon erroneous assumptions or to have failed to take into account established factors. Rather, his survey and opinion was supported by the testimony of the property owners and an aerial photograph of the area taken in 1957 by a governmental agency.

Concerning the McIntoshes' claim of ownership by adverse possession, the court determined that "[a]s Darrell McIntosh, before 1990, used the property in dispute, at best as a 'work area,' with the only described use being the gathering of firewood, and this dispute having arose in the early 1990s, the Defendants have failed to prove ownership by adverse

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<sup>1</sup> Kentucky Rules of Civil Procedure.

possession." The five elements of adverse possession which must be satisfied in order to sustain such a claim are set forth in Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc., Ky., 824 S.W.2d 878, 880 (1992). Having reviewed the evidence, we conclude there was sufficient evidence to support the court's determination in this regard.

Finally, the McIntoshes allege that they received ineffective representation from their attorney because he did not file a brief or memorandum supporting their position following the completion of the taking of proof. They claim in their brief that their attorney suffered a severe illness and later died, although there is nothing in the record to support this assertion. Having reviewed the record, we note that their attorney asked for and received an extension of time to file a brief. However, none was filed.

"[L]itigants are, and should be, bound by the acts or omissions of their attorneys." Jones v. Phillips, Ky., 243 S.W.2d 890, 892 (1951). Further, in McKay v. McKay, Ky., 260 S.W.2d 945, 946 (1953), the court held that "neglect of counsel is imputable to the client and the latter is bound by the former's act in a lawsuit." The McIntoshes are not entitled to relief on this ground.

The judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Joe T. Roberts  
London, Kentucky

BRIEF FOR APPELLEES:

Tommie L. Weatherly  
London, Kentucky