

RENDERED: JANUARY 20, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001272-MR

BILL WHEELER; and his wife,
MATTIE WHEELER

APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 98-CI-00938

DONTA EVANS; D. FRED ROMINGER, and his wife,
PAULA ROMINGER; GLENN F. REED, and
his wife, NANCY S. REED; and FIRST
NATIONAL BANK & TRUST OF LONDON,
KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.¹

VANMETER, JUDGE: Bill and Mattie Wheeler (the Wheelers) appeal from a judgment entered by the Laurel Circuit Court dismissing their claims of encroachment both for failure to prove the location and boundaries of their property, and pursuant to deed by estoppel. We affirm.

¹ Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Ellen Barnett (Mattie Wheeler's grandmother) issued a deed of conveyance to the Wheelers in 1966 for the following tract of land:

Lying andbeing [sic] in Laurel County, Kentucky, and on the waters of Gillis Creek, and beginning at two red oaks and a pin oak, corner to James Hogan 1000 acre tract or survey; thence N. 400 poles to a stake; thence E. 200 poles to a stake; thence W. 400 poles more or less to the point of the beginning, containing 119 acres be the same more or less.²

The Wheelers testified that although they lived in Indiana, they vacationed at this Laurel County property several times each year beginning in early 1967, when Barnett's son-in-law showed them the boundary lines of the property.³ After the Wheelers conveyed a portion of their property to the Wood Creek Water District in August 1967 for the construction of a lake, they were left with property located on the north and south sides of the lake.

Ellen Barnett died in September 1968. In order to divide her remaining land among her five children, surveyor Ace Hensley surveyed the land, divided it into five tracts marked with stakes and red paint, provided descriptions for the tracts,

² The Wheelers' surveyor, Charles Felts, admitted that this describes a plot of land that does not close; rather, it makes the shape of a "T". Mr. Felts closed the boundary description by adding a final call of some 7,379.02 feet.

³ The Wheelers continued to regularly visit their property until 1992, when Mrs. Wheeler's health problems prohibited them from doing so until 1995.

and created a plat of the tracts. Zema⁴ and Simon Delph (Mattie Wheeler's parents) were conveyed the fifth tract of land, which was described as follows by a deed dated August 1981:

Begin at a stake set on the west side of the county road at corner in Lot #3, the corner to Lot#1. Thence: N71°43' W 310.0 Feet, to stake; thence: S81°00'W. 600.0 Feet, to a stake; thence: South 500.0 Feet, a stake; thence: N88° 55' E. 510.6 Feet, to a stake; thence: N8°00 E. 300.0 Feet, to a stake; thence S71°43' E 330.00 Feet, to a stake at the road; thence: with the road, northward, as it meanders to the point of beginning containing 8.92 acre.

In hopes of developing the lakefront property, Donta Evans acquired an option to purchase the Wheelers' land on the north side of the lake. Evans testified, however, that he never exercised this option with the Wheelers, in part because their property boundaries could not be easily defined due to a vague description of the property in the deed. However, in October 1990 Evans did purchase the 8.92-acre Delph tract described above. The Wheelers joined in the deed to Evans by granting him a right of way over their land as follows:

Billy Wheeler and Mattie Wheeler grant a right of way across the property described in Deed book 178, at page 234 which right of way shall be a sufficient width to be accepted as a county road and right of way shall run from a roadway on top of the ridge across the Wheeler property to the Delph boundary line which right of way shall be

⁴ Zema Delph is sometimes referred to as Zena Delph in the record, notably in this 1981 deed.

from a point from roadway on top of the ridge to the Delph line that is the most readily accessible and which is the easiest way to allow construction of the road and ingress and egress for utilities easements within same [right] of way.

Shortly thereafter, Evans cleared, surveyed, divided, and built a road to the Delph property. Between February 1991 and February 1995, Evans conveyed .65-acre and .52-acre portions of the Delph tract to Glenn and Nancy Reed, as well as the remainder to Fred and Paula Rominger.

In May 1995, the Reeds began to build a home on the .65-acre tract. Later that month, the Wheelers visited their land for the first time since 1992 and discovered that the Reeds were building a house on land which the Wheelers believed was theirs. Although the Wheelers testified that they informed the Reeds during this visit that the Reeds' home was being built on the Wheelers' property, the Reeds testified that the Wheelers came to the property while their home was being built, but the Wheelers said nothing about the home's location until the Reeds were moving into the completed house. Further, the Wheelers testified that sometime in 1996 they informed the Romingers that the house the Romingers were building on the tract they purchased from Evans actually was located on the Wheelers' land.

The Wheelers filed suit on December 4, 1998, seeking ejectment of the Reeds and the Romingers, compensatory and

punitive damages, and quiet title to their property. After a February 2004 bench trial, the trial court entered a judgment dismissing the Wheelers' complaint, finding both that they had failed to prove the location of their property, and that they were estopped from asserting title to the disputed property. This appeal followed.

Because the trial court held a bench trial in the matter now before us, we must not set aside the court's findings unless they are clearly erroneous.⁵ Further, "[i]t is the rule that, where this Court cannot say on an appeal from the decree in an action involving a boundary dispute that the Chancellor's adjudication is against the weight of the evidence, the decree will not be disturbed."⁶ Given that standard, we cannot agree with the Wheelers' argument that the trial court erred in dismissing their complaint.

In *Kentucky River Coal Corp. v. Jones*⁷, Kentucky's highest court defined estoppel by deed

as the estoppel or bar which precludes a party from denying the truth of his deed * * *. It precludes a party to the deed and also those in privity with him from asserting against the other party thereto and his privies any right or title in

⁵ CR 52.01.

⁶ *Rowe v. Blackburn*, 253 S.W.2d 25, 27 (Ky. 1952).

⁷ 441 S.W.2d 409, 411 (Ky. 1969) (internal citations omitted).

derogation of the deed or from denying the truth of any material fact asserted in it.

As set forth above, the Wheelers joined in the 1981 Delph conveyance by deed which granted Evans a right of way over their property. As that deed contained a description of the conveyed Delph property which is consistent with the subsequent conveyances to and claims by the Reeds and Romingers, we agree with the trial court that the Wheelers are estopped by deed from claiming that the Reeds and Romingers do not own the land described in the Delph deed to Evans. We are not persuaded by the Wheelers' claim that estoppel is inapplicable to this situation because Evans acquired "unclean hands" when his business partner's law firm prepared the deed.

Because we agree with the trial court's conclusion that the Wheelers are estopped from claiming that the Reeds and Romingers do not own the land conveyed in the deed from Delph to Evans, and this conclusion is sufficient in and of itself to support the trial court's dismissal of the Wheeler's claims, we need not address the remaining arguments presented in the Wheelers' brief.

The judgment of the Laurel Circuit Court is affirmed.

TAYLOR, JUDGE, CONCURS.

POTTER, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE DONTA
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BRIEF FOR APPELLEES D. FRED
ROMINGER; PAULA ROMINGER;
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REED:

Phillip Lewis
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