

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-002279-MR

JOE OLIVER HUTCHISON,  
BILLY HUTCHISON, JANIE  
HUTCHISON, AND LUCY  
HUTCHISON

APPELLANTS

v. APPEAL FROM WAYNE CIRCUIT COURT  
HONORABLE VERNON MINIARD, JR., JUDGE  
ACTION NO. 02-CI-00202

JUDY COWAN, INDIVIDUALLY, AND  
JUDITH COWAN, ADMINISTRATRIX OF  
THE ESTATE OF CHARLES COWAN

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND KNOPF, JUDGES; POTTER, SENIOR JUDGE.<sup>1</sup>

POTTER, SENIOR JUDGE: This appeal stems the entry of summary judgment in a dispute between abutting landowners over the location of a north-south boundary line dividing wooded property. We affirm.

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<sup>1</sup> 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.

Although the case has a convoluted history, the facts necessary for resolution of the issues advanced in this appeal can be simply summarized. Appellants, Mr. Joe Oliver Hutchison and his family members, own the property on the east or uphill side of the disputed boundary line and appellees, Judy Cowan in her individual capacity and as executrix of her husband's estate, own the property on the west or downhill side. Prior to 1983, Mr. Hutchison owned the property on both sides of the boundary. In that year, using a metes and bounds description keyed to certain physical monuments, Mr. Hutchison transferred a portion of his property west of the boundary to a son. In 1986, the son lost possession of the property through foreclosure to the Monticello Banking Company. Shortly thereafter, the bank had the son's former property, along with some adjoining property, surveyed. Because the surveyor could not locate any of the monuments for the boundary in issue here, it was determined from monuments elsewhere on the property's perimeter. The bank used the new description created through the survey when it sold the property now owned by Mrs. Cowan.

Mr. Hutchison's decision to timber his property called into question the exact location of the boundary between the two tracts and precipitated the action which culminated in this appeal.

In 1961, Mr. Hutchison's father and his predecessors in title were involved in a lawsuit involving his property. Although the exact nature of the 1961 lawsuit is not apparent from a review of the record in this case, the parties below were apparently fully familiar with it. As part of the 1961 litigation, a boundary line was determined and marked on the ground by a surveyor using painted rocks and blazed trees.

In this action, the depositions of Mr. Hutchison, Mr. Cowan<sup>2</sup> and the surveyor who had surveyed the property for the bank were taken. In addition to locating the boundary line he had determined for the bank, the surveyor located a line which Mr. Hutchison described for him as being the line marked as a result of the 1961 action. Remnants of paint and blazes were still visible to bolster Mr. Hutchison's memory; however, none of the physical monuments described in the 1983 deed were discovered. This 1961 line mimicked the calls in the portion of the 1983 deed, but it was approximately 400 feet west or downhill of the line in the 1986 survey done for the bank.

A month before the case was to be tried by the court, the Cowans made a motion for summary judgment. The court was presented with a choice between two parallel zigzag lines,

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<sup>2</sup> Mr. Charles Cowan, the husband of appellee Judy Cowan, died intestate prior to the entry of judgment in this case. Judith Cowan was substituted as a party in her capacity as administratrix of Mr. Cowan's estate. Although it is not entirely clear from the record, the Court assumes that Judy Cowan and Judith Cowan are one and the same.

approximately 400 feet apart. The trial court selected the eastern line which was the result of the 1986 survey done for the bank, granting the Cowans' motion. This appeal followed.

Mr. Hutchison's argument in this Court is that there was some evidence from which a fact-finder could conclude that the boundary described in the 1983 deed was the line which had been laid out on the ground as result of the 1961 lawsuit. He seeks the rather Pyrrhic victory of sending the case back for a bench trial.

The law with respect to summary judgments is very well-settled in this Commonwealth. The summary judgment procedure is designed to provide trial courts with an avenue to "terminate litigation when it appears there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law." Com. v. R.J. Corman Railroad Co./Memphis Line, 116 S.W.3d 488, 497 (Ky. 2003). The procedure as described in Steelvest, Inc. v. Scansteel Service Ctr., Inc., 807 S.W.2d 476, 482 (Ky. 1991), allows the trial judge to "expedite the disposition of cases and to avoid unnecessary trials where no genuine issues of material fact are raised." In R.J. Corman Railroad, supra, the Supreme Court of Kentucky clearly defined the proper utilization of the rule:

Our decisions have stressed that summary judgment is not a substitute for trial, and is only appropriate "when it

appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor." When faced with a motion for summary judgment, the role of the trial judge is not to decide issues of fact, but instead he or she must determine whether a real issue exists. [Citations omitted.]

However, Kentucky courts have consistently held that "a party opposing a properly documented summary judgment cannot defeat it without presenting at least some affirmative evidence indicating that there is a genuine issue of a material fact." Pearson ex rel. Trent v. National Feeding Systems, Inc., 90 S.W.3d 46, \*49 (Ky. 2002). Applying these principles to the evidence before the trial judge in this case, it is clear that no real issue requiring trial exists. We are therefore convinced that there was no error in terminating the litigation by summary judgment.

The only evidence concerning the boundary described in the 1983 deed from Mr. Hutchison to his son was that the deed described the eastern boundary. Mr. Hutchison's belief that the deed to his son described the western boundary, the line marked on the ground as a result of the 1961 suit, does not necessarily contradict this evidence. As Mr. Hutchison colorfully put it to the court below:

That shape [the shape of the boundary line] can be placed anywhere on the planet and still retain the same shape. It can still retain the same calls no matter where the property is in Wayne County, Kentucky, in

the middle of the Mojave Desert, or on the South Pole.

What Mr. Hutchison failed to identify to the trial judge, and fails to demonstrate to this Court, is precisely what additional evidence he could have provided had the case been allowed to proceed to a bench trial. Specifically, there was no evidence that the 1961 line was the boundary described in the 1983 deed. It appears to this court that the evidence was what it was and the trial judge's only function was to make a legal decision as to the effect of that evidence. The only evidence in the record, and the only evidence to be produced at trial, was that the 1983 deed described the eastern boundary line.

On this state of the evidence, we find no error in the decision of the trial judge and affirm the entry of summary judgment in this case.

GUIDUGLI, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING IN RESULT: Under different circumstances, I might agree with the Hutchisons that summary judgment was inappropriate. The Hutchisons did present evidence that the boundary line between the two tracts was the same boundary as was determined in the 1961 litigation. Evidence from the 1961 survey was still on the ground and the description in the 1983 deed mimicked the line set in the 1961 survey.

While it may be a "pyrrhic victory" to remand this case for a bench trial based on the same evidence, I would conclude that the evidence which the Hutchisons presented was sufficient to survive a motion for summary judgment.

However, the trial court found that the Hutchisons were estopped from relying on evidence of the 1961 survey. The bank's surveyor, James West, found that the description in the 1983 deed matches with the descriptions contained in the deeds of the adjoining property owners. Likewise, the acreage described in the 1983 deed matches to the line determined in West's survey. On the other hand, the line from the 1961 survey does not meet up with the corners described in the 1983 deed. Furthermore, it is important to note that the line determined in the 1961 litigation does not appear anywhere in the chain of title. Therefore, I agree with the trial court that the Hutchisons were estopped from relying on evidence of the 1961 survey based upon the description in the 1983 deed. Kentucky River Coal Corp. v. Jones, 441 S.W.2d 409, 411 (Ky. 1969). Consequently, the trial court properly granted summary judgment for the Cowans.

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