RENDERED: SEPTEMBER 1, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1998-CA-002863-MR &
NO. 1998-CA-002865-MR

JUSTINE SWEENEY — APPELLANT/CROSS APPELLEE

v.

APPEAL AND CROSS APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 94-CI-00324

DANIEL LUSTER AND
LINDA LUSTER, HIS WIFE — APPELLEES/CROSS APPELLANTS

OPINION
(1) AFFIRMING IN PART, REVERSING IN PART AND REMANDING WITH DIRECTIONS ON APPEAL;
(2) AFFIRMING ON CROSS-APPEAL

** ** **

BEFORE: BARBER, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Justine Sweeney and Daniel and Linda Luster, owners of adjoining tracts of property on Coon Branch of Island Creek in Pike County, Kentucky, have appealed and cross-appealed, respectively, from the judgment of the Pike Circuit Court resolving their boundary line dispute. After reviewing the record, we agree with Sweeney that the placement of the boundary as determined by the trial court is supported by substantial evidence. We also find evidentiary support in the record for the

trial court's determination that Sweeney is estopped from enforcing her boundary. However, we reverse and remand for a determination of the appropriate compensation to be awarded to Sweeney.

The two tracts owned by the parties were previously part of a single tract owned by Roscoe Coleman. In 1936, Coleman divided the property into two parcels, using a hollow running through the property as the boundary. Coleman deeded twenty-five acres on the left side of the hollow to Landon Holt, one of the Lusters' predecessors in title, and 30 acres on the right side of the hollow to Nancy and Dave McCown, titleholders in Sweeney's chain of title. The Lusters obtained title to their property in 1984 and immediately began clearing the area in dispute.

In 1991 or 1992, Sweeney gave permission to Kinzer Drilling Company to come onto the property to drill for gas. The drilling company filled in the hollow. The property was then owned by Sweeney's mother, Opal Sweeney. After Justine Sweeney inherited the property in 1993, Sweeney placed a double-wide mobile home on the filled area which ultimately resulted in a dispute between the parties as to the actual location of the boundary between them. On March 7, 1994, the Lusters filed a lawsuit in which they alleged that Sweeney had "improperly, negligently and tortiously interfered with [their] real property rights," and "wrongfully attempted to adversely possess [their] real property [ ] by asserting an incorrect boundary line." The Lusters also claimed that Sweeney had caused damage to their property by the "placement of excess spoil or fill material,

negligent diversion of ground water and runoff." They asked the trial court to determine the correct boundary line and to make an award for their damages.

In her answer, Sweeney stated that the Lusters lacked title to the property they claimed and that she and her predecessors in title had actual title and possession of the area claimed. Sweeney also filed a counterclaim seeking ejectment of the Lusters from her property.

The matter was tried by the Pike Circuit Court by depositions. In addition to considering the testimony of several lay witnesses and two expert surveyors, John Justice who testified for the Lusters, and Luke Hatfield who testified on Sweeney's behalf, the trial court viewed the real property of the parties. On August 27, 1998, the trial court entered its Findings of Fact, Conclusions of Law and Judgment, in which it concluded as follows:

> The general rule is that the plaintiffs seeking to quiet their title must prove both title and possession. KRS[1] 411.120; Leach v. Taylor, 206 Ky. 28, 266 S.W. 894 (1924). They must succeed on the strength of their own title and not on the weakness of defendant's title. Barren Co. Board of Education v. Jordan, Ky., 249 S.W.2d 814 (1952). However, if the defendant counterclaims, it becomes the responsibility of the Court to determine the superior title. See Whitaker v. Shepherd, 280 Ky. 713, 134 S.W.2d 604 (1939).
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> After reviewing the expert testimony in this case, the Court concludes that Mr. Hatfield's survey more accurately reflects the boundary between the parties. He took Deeds of adjoining properties that

[1]Kentucky Revised Statutes.

> established a line for the county right of way. A fence is not necessarily a boundary line.
>
> However, [Sweeney] cannot enforce her line. A landowner who knows the true line and silently permits an adjoining owner to make substantial improvements unknowingly past the line is estopped to claim to [sic] the true boundary. Faulkner v. Lloyd, Ky., 253 S.W.2d 972, 974 (1952). [Sweeney's] predecessor in title stood by, watched the [Lusters] fill in the hollow and make improvements to the property, and even provided a power source for the [Lusters'] power tools.

Having concluded that Sweeney was estopped from enforcing her boundary line, the trial court established a new boundary from a marked hornbeam at the top of the hollow and then along a new fence constructed by the Lusters. This line prevented either of the parties from having to move any out-buildings or mobile homes. Both Sweeney and the Lusters are unsatisfied with the judgment, resulting in this appeal and cross-appeal.

In her appeal, Sweeney is critical of the trial court's equitable resolution of the boundary line dispute and its reliance on Faulkner, supra, a case she describes as "strange enough." First, she insists that the trial court was precluded from reaching an equitable remedy since estoppel was not pled by the Lusters. She relies on Stansbury v. Smith[2], where the appellants argued that an insurance company was estopped from asserting a statute of limitations defense, and Kelly v. Kelly[3],

[2]Ky., 424 S.W.2d 571 (1968).

[3]293 Ky. 42, 168 S.W.2d 339 (1943).

where the appellant was unsuccessful in obtaining a judgment for improvements made on defendant's land under color of title. In Stansbury, the appellate court noted that there was "no evidence of any action on the part of [the insurer] which justifies any application of these unusual equitable devices" and further held, as Sweeney points out, that since "equitable remedies were not pleaded," they were "not available in any event."[4] In Kelly, equitable estoppel was pled, but not established by the evidence. Thus, we do not find Kelly to have any application to Sweeney's argument that the trial court was without authority to fashion the particular remedy contained in its judgment.

We agree that generally equitable defenses must be pled. However, we do not believe that the trial court was precluded from either invoking equitable principles or from applying those principles to the facts of this case. In her counterclaim, Sweeney sought to permanently eject the Lusters from her property and to require the removal of their offending structures, including a carport and mobile home. Such a request has been treated as a request in equity for an injunction.[5] Having sought "equitable relief from the court," Sweeney allowed the trial court "to consider the equities of the situation" when resolving the boundary line issue despite the Lusters failure to seek an equitable remedy.[6] Further, unlike the situation in

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[4]Stansbury, supra at 572-573.

[5]See Bartman v. Shobe, Ky., 353 S.W.2d 550 (1962).

[6]Young v. Tennessee Gas & Transmission Co., Ky., 367 S.W.2d 270, 273 (1963). See also W. T. Grant Co. v. Indian Trail

(continued...)

Stansbury, supra, there was substantial evidence presented in the case sub judice justifying the trial court's resolution of the issue. Indeed, the facts are nearly identical to those in Faulkner, supra, where the parties were mutually mistaken about the exact location of the boundary between their properties.

We also note that Sweeney has not stated in her brief where this error was preserved for our review.[7] It is possible since the Lusters did not plead equitable estoppel, or refer to Faulkner, supra, in their memoranda to the trial court, that Sweeney did not anticipate the nature of the relief the trial court afforded the Lusters. However, she did not make any argument that the trial court erred in this regard in her motion to alter, amend or vacate the judgment. Generally, in order to preserve an issue for this Court's review, it is necessary to give the trial court the opportunity to consider the issue.[8] Moreover, it is settled that where an issue not raised by the pleadings is tried by the express or implied consent of the parties with no objection, the issue is treated as if it had been

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[6](...continued)
Trading Post, Inc., Ky., 438 S.W.2d 91, 92 (1968) ("when a litigant selects an equitable remedy he necessarily submits the enforcement of his rights to the traditional discretionary powers of equity").

[7]Sweeney has failed to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv) that requires the appellant to provide "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

[8]See Hoy v. Kentucky Industrial Revitalization Authority, Ky., 907 S.W.2d 766, 769 (1995).

raised in the pleadings.[9] Thus, we hold that the trial court did not err in its application of Faulkner, supra, and Sweeney is not entitled to a reversal of the judgment because of any deficiency in the Lusters' pleadings.

Next, Sweeney argues that there was no evidence that her mother was silent when the Lusters made improvements on her property, or any evidence that her mother "induced" the Lusters to build on her property. We disagree. Clearly, there was evidence, which was recited by the trial court in its judgment, that Opal Sweeney was aware that the Lusters were building a garage or storage building and that she did not voice any complaint and even allowed the Lusters to use her electricity to do it.[10]

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[9]See CR 15.02 and Collins v. Castleton Farms, Inc., Ky.App., 560 S.W.2d 830 (1977).

[10]Daniel Luster testified as follows:

> Q. Have you built any other improvements on the property?
> A. Well, the building I built it's 24 x 24 the one they're hollering and complaining about now. I built it in '85, that building was built in '85.
> Q. Well, let's go back to the '85 then. What kind of building is that?
> A. It's a storage building and I've got a carport under it.
> Q. What did you use that for?
> A. I use it for storage and stuff like that and then right now I park a vehicle under it and that's what I used the building for.
> Q. So who helped you build that building?
> A. Me and my boys and Ronnie Bevins, just whoever I could get.
> Q. So that's a garage like --
> A. It's a garage with a storage building on it, yes. And at that time I didn't have no power and I got the power from Justine's

(continued...)

Further, Sweeney insists that under the holding in Faulkner, supra, it is necessary that the party who made the improvements to have done so without knowing that he was traversing his boundary line. Again, there was testimony that both the Lusters and Opal Sweeney believed the hollow defined their common boundary. This constitutes substantial evidence to support a finding that Opal failed to protest and that the Lusters' believed that they were building on their own property.[11]

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[10](...continued)

> mother, Opal. I run a cord from up there and used it for power, because I didn't have no power on the property.
> Q. Did you pay her for that?
> A. I offered to pay her and she did not charge me.
> Q. So you just ran an extension cord down there?
> A. I run a cord from her house and got power, you know, to build it.

[11]Again, Daniel Luster's testimony provides the evidence supporting the trial court's ruling in this regard:

> Q. How long had Opal been there, do you know?
> A. Ever since I've knowed Chrystine [another of Opal's daughters] Opal's been there.
> Q. So 10, 20 years, 30 years?
> A. Yeah, something like that, but now I've knowed Opal several years.
> Q. And did she tell you where the boundary line was?
> A. Yes.
> Q. On how many occasions?
> A. Well, it was [on] several different occasions, about every time I was up there me and Opal did talk because we got along real good.
> Q. And where did Opal say the boundary line was?

(continued...)

Finally, Sweeney contends that the trial court erred in failing to require that the Lusters compensate her for the property taken from her. This issue was preserved in her post-judgment motion which the trial court denied without explanation. While we affirm the trial court's application of the doctrine of equitable estoppel so as to prevent Sweeney from enforcing her boundary as set forth in Faulkner, supra, we agree with Sweeney that the trial court erred in failing to apply the entire holding of that case, including the requirement that she be compensated for the taking of her property.

> This action is pending in equity, and the court under its broad powers is not bound by inflexible rules in balancing the rights of the parties. Particularly is this true when an equitable principle such as estoppel in invoked. Even though appellants may have by their silence or assertions permitted or induced the construction of appellees' garage beyond the correct line, the appellants were

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[11](...continued)
A. She said it come down with the fence at near the hollow. The fence did come down the hollow and the most of the wire and stuff is gone now, the post.
Q. Because it's covered up?
A. Yes.
Q. With the fill that Ms. Sweeney put in there for her new double wide?
A. Yeah.
Q. Let me ask you. Was Opal Sweeney able to get around when you were up there building that garage?
A. Yeah, Opal got around. Opal was sick, she was sick, she got around.
Q. I mean she knew you were building a garage down there didn't she?
A. Yes, she did.
Q. Did she ever indicate to you you were over the line?
A. No, sir.

> admittedly as ignorant as the appellees of its true location. Each had the same opportunities to ascertain the correct location of the line. We think under the circumstances the court should have ascertained by proof the reasonable value of the strip of land taken and required its conveyance to appellees upon their payment of the sum fixed. After the value is ascertained, the appellees should be given the choice of paying the reasonable value and requiring a conveyance or of removing the improvements.[12]

Accordingly, we hold that the trial court's findings of fact are supported by substantial evidence and will not be disturbed.[13] However, the trial court's application of the law to the facts was incomplete and the matter must be remanded for the purpose of establishing the compensation to which Sweeney is entitled.

In their cross appeal, the Lusters are adamant that the trial court erred in establishing their boundary with Sweeney as being other than the hollow. They ask that this Court remand the matter and order the trial court to establish the "original boundary line" as the "true and lawful" dividing line between the properties. However, despite their insistence to the contrary, the record has abundant evidence to support the trial court's findings with respect to the proper location of the boundary.

As stated earlier, the hollow was originally the dividing line between the two tracts conveyed to the parties' predecessors in title. However, there was a conveyance by the

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[12]Faulkner, supra at 974.

[13]CR 52.01 and Largent v. Largent, Ky., 643 S.W.2d 261, 263 (1982) (standard of review requiring that factual findings not be disturbed unless clearly erroneous applicable to cases whether tried by deposition or personal attendance).

Lusters' predecessor-in-title, Landon Holt, in 1940 that the Lusters simply refuse to acknowledge. In the 1936 deed in which Roscoe Colemen conveyed 25 acres to Landon Holt, the property was described as "[b]eginning at a sweet gum, on straight across the bottom to the hollow, then with the hollow to the top of the hill, to Colbert Compton's line. . . ." On September 10, 1940, London Holt conveyed 1 ½ acres of the 25 acre tract to Elijah Adams. This acreage, eventually known as the "Madden tract," was part of the property inherited by Opal Sweeney and passed on to Justine Sweeney.

The Lusters' expert testified that the Madden tract was upstream and did not impact this property. However, Sweeney's expert, Luke Hatfield, testified that it encompassed the area next to the hollow which is in dispute in this lawsuit. The trial court was more impressed with Sweeney's expert's opinion. Clearly, this evidence alone was more than sufficient to support the trial court's determination of the location of the boundary. However, there is considerable other evidence to support the judgment. The deeds to the Lusters' predecessors in title did not contain a description of the boundary as did the 1936 deed describing the line as "straight across the bottom of the hollow." Instead, the common line starts at a redbud tree along the creek and runs to a stone in the hollow, then up the hollow to a hornbeam. Additional evidence includes a deed from Landon Holt made to Pike County in 1945 in which he conveyed a strip of land 16 feet by 125 feet for the purpose of making a county road. As Mr. Hatfield explained in his deposition, measuring 125 feet

from the known corner with his other neighbors places the boundary exactly where Sweeney claims it to be.

Despite all the evidence that supports the trial court's findings, the Lusters claim that Sweeney cannot claim the disputed property because a deed she obtained from the Madden heirs in 1994 is void and champertous. This argument is unavailing for two reasons. First, although Sweeney did obtain a deed from the Madden heirs, the record reveals that her mother owned the property and Sweeney obtained title to it upon her mother's death. Second, the law is settled, as the trial court noted, that the Lusters were required to establish their entitlement to the property on the strength of their own title, not the perceived weakness in Sweeney's title.[14]

Accordingly, the judgment of the Pike Circuit Court is affirmed in part and reversed in part and the matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Laurence R. Webster<br>Pikeville, KY | Steven D. Combs<br>Pikeville, KY |

[14] Stewart Lumber Co. v. Fields, Ky., 445 S.W.2d 140, 142 (1969).