12-0227

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JAN 23 2011
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IN THE CIRCUIT COURT OF SUMMERS COUNTY, WEST VIRGINIA

JOAN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO
PACK and MINNIE HARRIS,

Petitioners,

v. Civil Action No. 99-P-19

DAVID A. WALLACE,

Respondent.

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FINAL ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

On a prior day to-wit: September 20, 2011, came the Petitioners, Joan Pack, Darlo Pack, Dello Pack, Don Pack, Delso Pack and Minnie Harris in person and by counsel, E. Kent Hellems; the Respondent, David A. Wallace in person and by counsel, Thomas Lilly, pursuant to the Court's scheduling order and conducted a Bench Trial in this matter. Based on the evidence and testimony, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Petitioners' father, Ralph Pack, obtained title to real estate situate in Jumping Branch District, Summers County, West Virginia, by Deed dated March 10, 1926 which is recorded in Deed Book 55 at page 111 in the Office of the Clerk of the County Commission of Summers County.

2. Said Deed describes the Pack tract as follows:

> BEGINNING on a chestnut oak corner to Thomas Meador, thence S. E. to a white oak, S. to a white oak in a fork of the road, corner to T. N. Harvey's old tract, thence S. 39 poles to a white oak, corner to John Lilly (now Thomas Meador) thence S. 76 W. 62 poles to a white oak and red oak, thence S. 80 W. 44 poles to 2 chestnuts, S. 65 W. 13 poles to a hickory and white oak (flat rock) S. W. to a hickory, thence N. E. to a chestnut oak, thence N. E. to a chestnut oak and dogwood, S. 73 E. 18 poles to 2 chestnuts (from one root) S. 34 E. 38 poles to a gum, red oak and ironwood, N. 6 E. 50 poles to 2 chestnuts and locust, thence N. to a red oak on the end of a bench, N. E. to a beech on the west bank, E. to a chestnut oak, and thence to the beginning, and containing by original deed forty (40) acres, more or less, but assessed at 51.47 acres, but this is a sale by the boundary and not by the acre.

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3. Title to the Pack tract of land derived from a series of conveyances dating back to the following Deeds:

(a) Deed dated April 13, 1850 recorded in Deed Book 3 at page 259 (Mercer County) (471 acres).

(b) Deed dated May 4, 1868 recorded in Deed Book A at page 50 (Summers County) (75 acres more or less).

4. The description contained in the afore-noted Pack Deed is the exact same description contained in a Deed from Isaac Harvey and wife to James H. Harvey dated January 23, 1885, recorded in Deed Book G at page 342.

5. It is the undisputed evidence in this matter that the description for the Pack's forty (40) acre, more or less, tract of land has remained consistent and without change from the aforenoted deed, including but not limited to the conveyance to Ralph C. Pack, dated March 10, 1926 recorded in Deed Book 55 at page 111 (Summers County).

6. The Respondent, David A. Wallace, claims title to the disputed area by that Deed dated February 7, 1914 from James H. Harvey to C. C. Lilly, which Deed is recorded in the Office of the Clerk of the County Commission of Summers County in Deed Book 37 at page 60 (Summers County) which is a portion of the lands conveyed by Deed Book G at page 342, described as follows:

> Beginning at a large chestnut corner of J. H. Russell on a ridge thence S. E. Direction about 143 feet to a large white oak, thence E. direction about 300 feet to a small hickory near a branch, <u>thence up the hill S. E. direction 250 feet to a large stone on a ridge, thence S. E. direction about 250 feet to a double chestnut, thence N. E. direction 900 feet to two chestnut sprouts at side of county road, thence with said road N. direction 725 feet to a chestnut in line of J. W. Basham</u>, thence with line of said Basham S. 77, degree W. about 850 feet to a beech corner to the original survey thence, leaving said beech S. 5 degree, W. 36 polls to a red oak on a bench, thence S. 29 degree E. 25 polls to a chestnut on a ridge the place of beginning. (Underline added for future reference)

7. Respondent Wallace claims title to said tract by a series of conveyances ending with that certain deed to the Respondent dated February 12, 1991, recorded in Deed Book 169 at page 620 (part of Tract 11).

8. Both the Pack tract and the Wallace tract have a common source of title. See Deed dated January 23, 1885 from Isaac Harvey and wife to James H. Harvey recorded in Deed Book G at page 342 (Summers County).

9. By deed dated December 12, 1835, recorded in the Office of the Clerk of the County Commission of Giles County, Virginia, in Deed Book D at page 662, Alfred Beckley conveyed a large tract of land to John Lilly (a predecessor in title to Defendant Wallace's property to the east of the Pack property).

10. The title to the Pack and Wallace properties refer to the John Lilly tract as a boundary line and reference some of its corners. Both surveyors agreed this was the "grandfather" deed and established key lines and corners.

11. The title to the Wallace chain is more ancient than the tract from which the Pack property derives.

12. The Respondent's expert, Jim Wentz, testified under oath that the line which he prepared and which is reflected on his map does not follow the underlined calls in the Wallace chain (see description of Deed Book 37 at page 60 noted in paragraph 6 above). Specifically Mr. Wentz extended the Wallace line 425 feet (250 feet called for from a flat rock) and to 1100 feet (as opposed to 900 feet called for to the county road) and ignored the call of 725 feet with the county road (see Deeds recorded in Deed Book 37 at pages 60, 59, 288; Deed Book 61 page 151 [tax deed], Deed Book 78 page 434 [received as exhibits], and Respondent's exhibit, the Wentz map dated September 27, 2002).

13. Conversely the line claimed by the Packs (which was testified to and based upon the survey of David Holz) generally follows the calls set forth in the afore-referenced deeds in the Wallace chain (see also Petitioners' exhibit, the Holz map). Furthermore the Holz survey gives credence and consideration to the county road and two natural monuments referenced in the Pack and Wallace chains of title and the John Lilly line (the chestnut oak on a steep hillside [now down with hack marks] and the white oak near a knob [now dead, leaning with

hack marks]).

14. The Holz survey, in addition to paying homage to the natural monuments, also follows the historical boundaries of the pack property, (particularly the path which was agreed to be the south western border of the Pack property).

15. The Court finds the testimony of Delso Pack, Darlo Pack, Dello Pack, Don Pack and Minnie Harris pertaining to the boundary and uses of the property to be reliable, persuasive and largely uncontradicted. The Pack family were subsistence farmers on the entire tract (including the overlap of 27.682 acres claimed by Wallace) from 1926 – 1956.

16. The Pack family lived on this land (the entire tract, which was originally described as 40 acres, by subsequent survey was found to consist of a much larger tract of land (110 acres more or less)) until they moved away from the property in about 1956 of 1957 to a house that was more conveniently located to the public road (known as the Jack Lilly property).

17. During the time Ralph Pack and his family lived there they made their living from this land. It was a subsistence lifestyle; they enclosed portions of the land in question with fences, they had livestock on the property (including horses, cattle, hogs, sheep), they grew crops, (which included sorghum for molasses, corn, green beans), they had fruit trees, they picked berries on the property, they cut firewood (for heat and cooking), they cut posts and other timber, they operated a small sawmill known as a wedge mill, they cut timber from the property and produced wedges which they sold to the mines. Basically they made their living from this property, producing pretty much everything that they used, (except salt and soda, which they purchased) from the property for the period of 1926 through 1956 or 1957.

18. The father of the Pack family, Mr. Ralph Pack, was particular about the boundaries; he showed his children where he understood the boundaries to be. They testified as to their understanding of these boundaries. Ralph Pack wanted his children to be

careful not to trespass on the neighbors land when they were cutting firewood, farming, taking other actions consistent with their ownership of the property.

19. No one objected or raised any objection or claim to the property or interfered with the Pack family's occupancy of the entire property in any way during that period.

20. During that period, the Court concludes that the Pack family occupied the property openly, hostilely, adversely, continuously, under color of title or claim of right for the period from 1926 to about 1956 or 1957. Since that time, the Pack family has moved away from the property. They have not lived on the property, but they've gone back to the property on a routine basis throughout the years since then. They have hunted on the property, that they've cut some timber products on the property, they have cut their own firewood on it from time to time. Although they no longer lived there, they still utilized the property, including using it for camping, for family gatherings, and other purposes that are consistent with a non-resident landowner. The Pack family never abandoned the property or moved away from it or took any action that would inconsistent with the activities of an owner of the property.

21. The Court further finds that during that period after the Packs moved, that no one else has been in possession of the property other than the Pack family, that the Packs have not been ousted and that no one else has taken any action adverse to their ownership of it. There was some testimony from one or two of the witnesses that there may have been some timber cut either on the 27.682 parcel or on a nearby tract. It was not established if the timber was cut on the Pack property or some adjoining property (to the west).

22. The Court concludes from all of the testimony that to the extent that they didn't have superior record title, the Packs established title to the property by their occupancy and use of it from 1926 through 1957.

23. The Court further finds that there have been no acts which would constitute an ouster of the Packs from the property since then. No one else has gone into possession of it or taken action that amounts to adverse possession during that time period or since. The Court concludes that the Packs clearly and convincingly established title through adverse possession.

24. The Pack's use of the property (including but not limited to farming, cutting fire wood, hunting, timbering, wedge cutting, gathering, general occupation and use) were all open, notorious, hostile, exclusive, continuous and under color of title for a period in excess of the statutorily prescribed 10 years. Additionally the Court finds that the Packs use of the property was consistent with the ordinary uses the property was suited for.

25. It is clear that the boundary contended for by the Packs ~~matter~~ RAY and established by the Holz survey is the true and actual boundary between the Pack and Wallace properties, as it gives credence and respect to the natural monuments existing in the chain of title and was established by the evidence.

26. The "pine flat" was a sacred place for the Pack family. Their father, Ralph, had always (uncontradicted) promised to give it to any family member if they would build a house there. They Packs used it for picnics or a place to watch squirrels. It was a place they went to because they liked it.

27. It should be noted that upon the Court's view of the property it was noted that a corner set by Mr. Holz near some rail fence (on the pine flat), claimed by the Packs to be a boundary extended near the actual division of the Pack and Wallace tracts. This was also persuasive to the Court in establishing the boundary of the property in question.

28. There was evidence of an old wire fence set along the edge of the hillside and the "pine flat," which would be consistent with the Albrechts (now Wallace to the east of Pack) line. There was testimony that the Albrechts used that area up to the fence as pasture and that they only pastured up to the top of the hill. It is apparent to the Court that if the Albrechts

had a claim beyond the edge of the ridge, the fence would not have been set along the edge. It would have included the flat land ("pine flat") on top of the hill. The flat would be well suited for grazing and 100 years ago, it may have been a location that you would have even considered planting corn or other crops on.

CONCLUSIONS OF LAW

1. The burden of proof in establishing a boundary in this matter lies with the Petitioner. Said burden of proof to establish a boundary must be met by a preponderance of the evidence.

2. The burden of proof in establishing all elements of adverse possession also lies with the Petitioner; however it is by clear and convincing evidence. See Brown v. Gobble, 474, S.E.2d 489 (W.Va. 1996).

3. The law in the State of West Virginia is clear; in order of priority, natural monuments are the first thing to be considered by the Court in establishing a boundary followed by artificial monuments. Courses and distances are one of the last matters to be considered when establishing a boundary. See e.g. Somon v. Murphy, 232 S.E.2d 534 (W.Va. 1977).

4. Clearly the natural monuments which were in existence and remain unchanged as pertaining to the subject litigation are the dead white oak near a knob (with hack marks found), the chestnut oak on a steep hillside (now down with hack marks found), and the county road.

5. Based upon the totality of the evidence in this matter and exhibits received in evidence, the Petitioner has established adverse possession of the subject property (27.682 acres shown on the Holz map) by clear and convincing evidence. The uses which the Petitioners have established: farming, cutting fire wood, hunting, timbering, wedge cutting, gathering, general occupation and use were all open, notorious, under color of title, hostile,

exclusive and existed for a period in excess of 10 years.

6. The evidence of adverse possession of the property by the Pack family meets the legal standard of clear and convincing evidence. In fact the Packs' evidence was credible, reliable and largely uncontroverted.

7. In light of the foregoing the Court concludes that the Packs have met their burden of proof to establish that the Holz survey is a true and actual boundary of the property. The Court further finds that the true and actual boundary between the Pack and Respondent David A. Wallace is that contended for by the Petitioners in this matter and is set forth in the map prepared by David Holz which was received as one of the Petitioners' exhibits in this matter. The southwestern boundary begins at the fork in the road and follows the path. This was generally agreed to by the parties during the Court's view of the property. The Court makes no finding as to the boundary between the Packs and any adjoining land owner other than the Respondent David A. Wallace (particularly Marsha Farrish).

8. The Court further finds that the Packs have established adverse possession of the disputed area or overlap shown as 27.682 acres on the Holz map by clear and convincing evidence as required by West Virginia Law. The uses which the Petitioners established were open, notorious, hostile, exclusive, continuous and under color of title for a period in excess of the statutorily prescribed 10 years. In fact, the testimony as to the adverse possession was largely unchallenged from 1926 – 1956.

9. The findings of fact and conclusions of law recited by the Court and which are set forth in the attached transcript are adopted herein.

10. It is therefore the **ORDER** of the Court that title to the 27.682 acre tract shown on the Holz map or the area of overlap between the parties be quieted in favor of the Petitioners and the other heirs of Ralph C. Pack who have not otherwise conveyed their interest to the Petitioners.

11. It is the further **ORDER** of the Court that the boundary established on the Holz

map between the Respondent and the Petitioners be and the same is hereby adjudicated to be the common boundary between the litigants. The Court makes no finding as to the boundary between the Petitioners and any other person including but not limited to Marsha Farrish.

12. It is the further **ORDER** of the Court that the Order requiring the Petitioners' to remove a camper and personal property from the disputed land by Order entered on February 8, 2008 in this matter is hereby **DISSOLVED** and **TERMINATED** and rendered moot by the Court's final order.

13. It is the further **ORDER** of the Court that the prescriptive easement granted to Petitioners by prior Order dated June 8, 2006 be and the same is hereby amended pursuant to Rule 60 of the West Virginia Rules of Civil Procedure to be an easement of a width determined by the use thereof and not for the stated 10 foot width set forth in the Court's prior Order.

14. It is the further **ORDER** of the Court that a copy of this Order (without the transcript) and a copy of the Holz map received in evidence be recorded in the Office of the Clerk of the County Commission of Summers County. It is the further **ORDER** of the Court that the tax and assessors records be revised to document the actual ownership. The Packs should be assessed for 110 acres more or less (currently shown as Tax Map 19 Parcel 42, "40 acres Bluestone Hills") and David Wallace should not be taxed for the 40 acres more or less tract he obtained by Deed recorded in Deed Book 169 at page 620 (part of Tract 11) (now shown on Tax Map 18 Parcel 33, "50 acres Jumping Branch") Wallace retains the 12 acre (more or less) Russell Tract, also described in said deed as part of Tract 11 which is also currently shown as part of Tax Map 18 at Parcel 33.

15. It is the further **ORDER** of the Court that the costs of this matter be taxed to the Respondent.

16. By prior **ORDER** the Petitioners were awarded attorney fees relating to their

Motion to Preclude the Respondent from calling David Huffman as an expert witness at trial. The Court having reviewed an Affidavit of counsel hereby **AWARDS** the Petitioners' attorney fees of $1,000.00. Said sum shall be paid forthwith and made payable to E. Kent Hellems Client Trust.

17. The objection and exception of the Respondent to all the foregoing in hereby noted.

18. The clerk is directed to provide a copy of this order to counsel.

ENTER:

JUDGE ROBERT IRONS

DATE: Jan. 20, 2012

A TRUE COPY:
ATTEST:
Linda S. Brumit
CLERK, CIRCUIT COURT
SUMMERS CO., WV

Prepared for entry by:

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