

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Cindy L. Watson,
Defendant Below, Petitioner**

vs) No. 11-0305 (Monongalia County No. 09-C-705)

**Stanley W. Kuykendall and Rose M. Kuykendall,
Plaintiffs Below, Respondents**

FILED

October 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Defendant below, Cindy L. Watson, appeals the circuit court's order denying her motion to alter or amend judgment. In the motion, Ms. Watson asked the circuit court to set aside a summary judgment order entered in favor of Plaintiffs Stanley W. Kuykendall and Rose M. Kuykendall in a boundary line dispute.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Factual and Procedural Background

Stanley and Rose Kuykendall own real property that abuts real property owned by Cindy Watson. The Kuykendalls assert that in 2009, Ms. Watson erected a chain link fence on the Kuykendalls' property. Ms. Watson asserts she owns the property upon which the fence is situated. The Kuykendalls filed suit against Watson on September 28, 2009. The Kuykendalls had the property surveyed on or about November 17, 2009. Their surveyor concluded that the fence is on their property.

On January 11, 2010, Ms. Watson's lawyer disclosed the name of the defense surveyor, Gary Clayton of Freelance Technical Associates, whom she chose as her expert

because he prepared a plat map of Watson's property in 2007. However, Mr. Clayton did not survey the property for purposes of this litigation or anytime since the fence was erected.

The discovery deadline was March 15, 2010. On March 31, 2010, the Kuykendalls filed a motion for summary judgment. The court heard the motion on June 2, 2010, and indicated that it could not grant the motion without an affidavit from the Kuykendalls' surveyor.

On July 30, 2010, Watson moved to extend discovery to allow her time to find a new expert. The motion stated,

The defendant thought she had a survey done as recent as 2007. Upon speaking to the Surveyor at Freelance Technical Associates, Ms. Watson was informed that he did not survey said property, he simply replaced a missing pin. Ms. Watson has attempted to find the Surveyor of the 1980 Survey to no avail. Thus, to properly litigate this matter, Ms. Waston [sic] believes that she must hire a new Surveyor.

This motion was filed four and one-half months after the discovery deadline, and three days before the August 2, 2010 pre-trial conference. In the meantime, the Kuykendalls had submitted to the court a sworn affidavit from their surveyor indicating that the fence was on their property. At the August 2, 2010 pre-trial conference, Watson presented her own affidavit stating that the boundary lines and pins that she used to erect the fence had been in the same place since 1980, and alleging that the Kuykendalls' surveyor was not qualified and had moved pins and boundaries.

On August 2, 2010, the court denied Watson's motion to extend discovery, ruling that she had had sufficient time to find and retain an expert. The court then granted the Kuykendalls' motion for summary judgment, finding that the Kuykendalls had provided evidence regarding the location of the fence, and Watson had failed to show a genuine issue of material fact. A written order was entered on August 17, 2010. The court ordered Watson to remove the fence from the Kuykendalls' property.

On August 27, 2010, Watson filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Although there was no supporting affidavit attached, the Rule 59 motion informed the court that snow on the ground and Mr. Clayton's ill health had prevented him from performing work for this litigation; that Clayton was unlikely to return to work due to his illness; and that Clayton's partner had declined to serve as the defense expert. In the Rule 59 motion, Watson stated that the parties had attempted to have their surveyors informally meet at the property, but the Kuykendalls'

surveyor had repeatedly delayed this meeting. In the motion, defense counsel admitted that she had learned of Mr. Clayton's illness on June 3, 2010, but had forgotten to tell the court about it.

By order of October 8, 2010, the circuit court denied the Rule 59 motion. The court found that Watson still had not provided expert or other evidence that contradicted the motion for summary judgment or that would tend to show where the fence is located.

This Appeal

Ms. Watson appeals the circuit court's order denying her Rule 59(e) motion. "The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syl. Pt. 1, *Wickland v. American Travellers Life Insurance Company*, 204 W.Va. 430, 513 S.E.2d 657 (1998). In this case, the underlying judgment was an order granting summary judgment to plaintiffs. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Ms. Watson argues that the court erroneously granted summary judgment and, instead, should have allowed her more time to obtain an expert opinion. She argues that Rule 29(b)(1) of the West Virginia Rules of Civil Procedure permits the modification of a discovery deadline for cause, and her expert's illness constitutes cause. This Court has addressed the burden on a party opposing a motion for summary judgment:

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). The party opposing summary judgment must offer "more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Id.*, 194 W.Va. at 60, 459 S.E.2d at 337 (citation omitted).

Upon a review of the record and the arguments of the parties, we conclude that summary judgment was properly granted to the Kuykendalls. The evidence that Ms. Watson

provided in response to the motion for summary judgment did not identify the location of the fence vis-à-vis the property line, thus it did not contradict the motion or indicate the existence of any outstanding genuine issue of material fact. Furthermore, in response to the motion for summary judgment, Ms. Watson did not submit an affidavit explaining why further discovery was necessary.

Ms. Watson did not advise the circuit court that her expert was ill or had difficulties because of snow until she filed the Rule 59(e) motion, which was after summary judgment had already been granted. Moreover, she blamed the opposing surveyor for delaying an informal meeting, but such a delay would not have prevented her own expert from completing his work. Finally, as the circuit court found, the Rule 59(e) motion still did not provide evidence about the location of the fence.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 11, 2011

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Margaret L. Workman
Justice Menis E. Ketchum