

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

**Karen A. Hill,
Plaintiff Below, Appellee**

vs) No. 35695 (Kanawha County 09-C-1687)

**Kimberly L. Taylor
Defendant Below, Appellant**

FILED
September 9, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CORRECTED MEMORANDUM DECISION

Appellant Kimberly L. Taylor, by counsel, appeals from the circuit court's final order entered in favor of appellee Karen A. Hill in this action involving a boundary line dispute. Ms. Hill has filed a *pro se* response brief.

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 that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On September 11, 2009, appellee Karen Hill instituted the case-at-bar (Civil Action No. 09-C-1687) against appellant Kimberly Taylor in the Kanawha County Circuit Court. The action, which involves a boundary line dispute, was assigned to Judge Paul Zakaib, Jr.

Nearly a year earlier, on October 3, 2008, appellant Taylor had instituted a civil action in the Kanawha County Circuit Court (Civil Action No. 08-C-1924) against Shane Hill involving the same disputed property.¹ Ms. Taylor states that she sought various damages to her real property for trespass and nuisance in Civil Action No. 08-C-1924,

¹ Neither of the parties have filed any of the pleadings from Civil Action No. 08-C-1924 with this Court.

which was assigned to Judge Irene C. Berger. Shane Hill filed a timely answer to the complaint in Civil Action No. 08-C-1924.

On September 16, 2009, Ms. Taylor was served with the summons and complaint in the case *sub judice* (Civil Action No. 09-C-1687). On October 5, 2009, Ms. Taylor filed a motion to dismiss on the basis that the matters pending in the action filed by Ms. Hill were already pending in Ms. Taylor's earlier case (Civil Action No. 08-C-1924).

On October 28, 2009,² Ms. Taylor filed a motion to consolidate the case-at-bar (Civil Action No. 09-C-1687) with her earlier case (Civil Action No. 08-C-1924). The motion was apparently filed in Civil Action No. 08-C-1924, but was never ruled upon.³ Ms. Hill asserts that the two civil actions involve "completely different issues" and, therefore, they should not be consolidated.

Ms. Taylor represents that she filed and served an amended complaint in Civil Action No. 08-C-1924. Ms. Taylor adds that she learned that Shane Hill's ownership interest had been granted to appellee Karen Hill.⁴

Ms. Taylor states that on January 20, 2010, Judge Zakaib held a "hearing"⁵ in the case *sub judice*. Ms. Taylor states that Ms. Hill's surveyor testified during the hearing, but could not state who actually owned the subject property where adverse possession was

² In the petition for appeal, Ms. Taylor represents that the motion to consolidate was filed on "October 28, 2010;" however, based on the filing dates of pleadings in Civil Action No. 09-C-1687, which are in the record on appeal, it appears that this date, as well as others, are typographical errors in the petition for appeal.

³ Ms. Taylor states in her petition for appeal that Judge Zakaib was aware that Civil Action No. 08-C-1924 contained essentially the same issue that was pending in his court and that he was also aware of the motion to consolidate.

⁴ Shane Hill is apparently the husband of appellee Karen Hill herein.

⁵ There are no hearing transcripts in the record. Further, while Ms. Taylor refers to a "hearing," the "Final Order" entered by Judge Zakaib states that the matter had come on for "bench trial."

involved. Ms. Taylor adds that she testified during the hearing that she owned the “hollow;” that she had openly and notoriously maintained and cultivated it for fourteen years, as had her predecessors-in-title since 1976; and that her prior surveys showed that the “hollow” was her property. Ms. Taylor states that she also introduced photographs showing the trees she had planted in the “hollow” during her fourteen-year possession of it.

Ms. Hill states that she presented the survey of the property performed in June of 2009, as well as the testimony of her surveyor, during the hearing, all of which showed that she owns the disputed property. Ms. Hill asserts that Ms. Taylor’s only evidence was her own testimony that “she knows she owns the hollow.”⁶

On January 21, 2010, Judge Zakaib entered a “Final Order” in Civil Action No. 09-C-1687, wherein he stated that Ms. Taylor had failed to file an answer to the complaint and denied her motion to dismiss. Ms. Taylor states that after denying her motion to dismiss, Judge Zakaib refused to give her the requisite ten days⁷ in which to file an answer because she had not brought her motion to dismiss on for hearing, yet he had just held a hearing on her motion minutes earlier. Ms. Taylor adds that Judge Zakaib proceeded to “default” her for not having filed an answer. While the word “default” does not appear in Judge Zakaib’s “Final Order,” the order denied the motion to dismiss and entered judgment in favor of Ms. Hill finding that “the un rebutted testimony” of her surveyor and “the results of the conducted survey” established that the property was owned by Ms. Hill.

Based upon the record before this Court⁸, the circuit court’s two-page “Final Order” entered in the case *sub judice* (Civil Action No. 09-C-1687), and the arguments of the parties, it appears that Civil Action No. 08-C-1924 and Civil Action No. 09-C-1687 involve the same parties and the same disputed property. For these reasons, and because it appears that Ms. Taylor should have been given an opportunity to file an answer to the complaint following the denial of her motion to dismiss, we reverse the “Final Order” of

⁶ Again, there is no transcript of this hearing in the record on appeal.

⁷ Ms. Taylor cites Rule 12 of the West Virginia Rules of Civil Procedure as authority.

⁸ Again, the record on appeal does not contain any of the pleadings from Civil Action No. 08-C-1924.

the circuit court and remand this case with directions that Ms. Taylor be given an opportunity to file an answer and for entry of an order consolidating Case No. 09-C-1687 with Civil Action No. 08-C-1924.

Reversed and remanded with directions.

ISSUED: September 9, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh