

Traversing the Law: Ohio court lays down the law on retracement

by Jeffery N. Lucas, PLS, Esq.

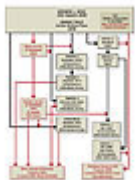
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Break out the champagne: The case I've been looking for is finally here.



The courts have finally articulated what I having been saying in this column for the past four years. Can it be possible that I will no longer have to listen to surveyors who insist that we are finders of facts only and not entitled to, or responsible for, opinions on the ultimate issue in a boundary dispute?

At least, it appears I won't have to listen to them in the state of Ohio. Ohio has gotten it right and, in the process, elevated the surveyor and the work we do to the status of legal authority. This is deference I have never seen in any case in any jurisdiction. Along with this new status, however, comes even greater responsibility to get it right. Fortunately, "getting it right" simply means following and applying the law.



Facts in the Case

The case, *Kennedy v. Rose*,^[1] is somewhat hard to follow. The chart on the right may be helpful in understanding the timeline of events. The parcel of land in controversy is 0.30 acres that gets lost in the shuffle. There was a parent tract owned by Rose in 1946. Parcel 1 was sold off in 1949 to Bradford (keep your eye on parcel 1). A survey of the remainder of the Rose parent tract was conducted in 1962 by Eberly (the Eberly survey). This is the first survey of any of the property in the record. Without having a copy of this survey to examine, we must accept what the court had to say about it. "[T]he 1962 survey was not performed to establish the actual boundaries of the original parent parcel or to determine the portion that was conveyed in 1949 to the Bradfords."^[2] Significantly, however, the Eberly survey showed the 0.30-acre parcel as remaining with the Rose parent tract. In 1971 Bradford sold parcel 1 to Kinney.

Parcel 2 was sold out of the parent tract in 1972 to Strickdorn utilizing the Eberly survey to describe the property. Keep in mind the court's comments on the Eberly survey. In 1974, parcel 2 was sold to Kennedy using the same description of property. Subsequent to this transaction (no date given) parcel 3 was also conveyed out of the parent tract to Kennedy utilizing the Eberly survey. In 1983, Rose commissioned Daniels to survey their remaining property (the Daniels survey). Daniels followed Eberly and, as the court put it, "the 1983 survey only

served to incorporate the 1962 boundaries.”[3] In accordance with the Daniels survey, Rose sold their remainder interest in the parent tract to Kennedy in 1983.

Kinney decided to sell parcel 1 to her daughter, Hill, in 1998. Kinney utilized the 1983 Daniels survey to describe the property (which, like the Eberly survey before it, identified the 0.30-acre parcel as unconveyed) and not the original description of the parcel as contained in the 1949 Bradford deed.[4] Hill believed, however, that the 0.30-acre parcel belonged to her. After this conveyance, Hill put Kennedy on notice to remove personal property that was on the 0.30-acre parcel. Kennedy fired back with an assertion that the 0.30-acre parcel belonged to them based on their deeds, the surveys that had been conducted over the years (Eberly and Daniels) and the fact that all remaining interest in the Rose property had been conveyed to them. Upon examination of all of the documentation, Hill believed the Eberly and Daniels surveys to be in error and, consequentially, so was her 1998 deed. She went back to her mother who quit-claimed all of her interest in parcel 1 utilizing the description from the 1949 deed and not the description derived from the 1983 Daniels survey.

Time marched on, and in 2002, Hill commissioned Harkness to survey her property. Harkness began where no other surveyor in the record had started before--with the parent tract description. He placed the parent tract on the ground and then--in accordance with the first conveyance out (senior rights), the 1949 deed--extracted Hill’s property. Harkness agreed with Hill that the Eberly and Daniels surveys were in error and that the 0.30-acre parcel belonged to Hill. The final survey in the record is Smart’s, who was commissioned in 2004 by Kennedy. [5] Smart “deferred to the surveys performed in 1962 (Eberly) and 1983 (Daniels) to reach the conclusion that the 0.30 acres in dispute belonged to the Kennedys; agreed with Eberly and Daniels, and opined that the 0.30-acre parcel belonged to Kennedy.”[6]

Legal Authority of Surveys

The trial court ruled in favor of Hill and the Harkness survey. In upholding the trial-court ruling on appeal, the Ohio Court of Appeals stated:

When boundary line disputes exist between adjacent property owners and the deed descriptions do not resolve the conflict, the dispute must be resolved in accordance with the minimum standards for boundary surveys. The Ohio State Board of Registration for Professional Engineers and Surveyors has established minimum standards for boundary surveys. See Ohio Adm.Code Chapter 4733-37. Ohio Adm. Code 4733-37-01 indicates that the rules adopted by the board are “intended to be the basis for all surveys relating to the establishment or retracement of property boundaries in the state of Ohio.”[7]

This statement by the court is nothing less than the elevation of the surveying profession to the status of legal authority in the determination of boundary lines

from ambiguous deeds in the state of Ohio. This doesn't mean, however, that any "sloppy Joe" survey, the likes of which I write about in this column on a regular basis, will be deserving of this distinction. The Eberly, Daniels and Smart surveys were not afforded this dignity. That's because none of these surveyors attempted to do what is and always has been the only purpose of a boundary survey—to determine the true property boundary between the coterminous landowners. This, in essence, renders their surveys worthless in the resolution of a property boundary dispute.

Harkness was the only surveyor who came into court (either in person or on paper) with the right idea, and his opinion of survey was vindicated by the court in agreeable and approving language.

We find that the testimony of Charles Harkness established that he conducted his survey in accordance with surveying standards. Harkness researched and utilized other sources of information to determine the intent of the parties in creating the original boundary lines consistent with Ohio Adm. Code 4733-37-02. Furthermore, he relied on feasible monumentation both natural and artificial. Finally, he took into account common property usage in 1949 and the area of the property in question to plot a triangular parcel of approximately one acre in area which he testified belonged to Barbara Hill. For these reasons we find that the trial court did not err in relying on the testimony and the survey conducted by surveyor, Charles Harkness.[8]

What did Harkness do to deserve the approval of the court? He did what all other boundary surveyors should be doing. He understood and applied the law to resolve not just one possible location of a deed on the ground, but the identification and location of the true property line between the landowners in the case. The real credit, however, goes to the surveyors of the state of Ohio for promulgating minimum standards for boundary surveys that properly articulate the law. Reciting from the applicable code section, the court noted as follows:

Regarding research and investigation, Ohio Adm. Code 4733-37-02 provides:

(A) When the deed description of the subject property and the deed descriptions of adjoining properties do not resolve the unique locations of the corners and lines of the property being surveyed, the surveyor shall consult other sources of information in order to assemble the best possible set of written evidence of every corner and line of the property being surveyed. These sources include, but are not limited to: records of previous surveys, deed descriptions of adjacent properties, records of adjacent highways, railroads and public utility lines; also include subdivision plats, tax maps, topographic maps, aerial photographs, and other sources as may be appropriate.

(B) After all necessary written documents have been analyzed, the survey shall be based on a field investigation of the property. The surveyor shall make a thorough

search for physical monuments, analyze evidence of occupation and confer with the owner(s) of the property being surveyed. In addition, the surveyor shall, when necessary, confer with the owner(s) of the adjoining property and take statements.[9]

If you were looking for a textbook on how to survey a property boundary, this would be it. Other states would do well to follow Ohio's example here and prepare minimum standards for the retracement of existing property boundaries that actually follow the law as has been laid down by the courts for--literally--centuries.

The Paul Harvey "Rest of the Story"

Put the cork back in the bottle of champagne. Sometime between the events in this case and when I began writing this article, the powers that be in Ohio dumbed down the code section, especially paragraph (A). There is no longer a requirement to "resolve the unique locations of the corners and lines of the property being surveyed." This completely neuters the effect of the code section. Now we are back to slapping any line we please on the ground and calling it a boundary survey.

Prior to submitting this article to the editors at POB, I attempted to find out the "how-when-where-why" answers to the changes in the code. No answers were forthcoming, so I am left to my own imagination. I can only imagine that the same whiners who complain because I regularly point out the shortcomings of boundary surveyors also complained to the Ohio board that the requirements of the standards were too strenuous and actually forced land surveyors to make a well-reasoned opinion on property boundaries. This is only speculation on my part based on actual wailing and gnashing of teeth I personally have to endure.

In addition, I can only speculate as to how the Ohio courts will react in future cases. I know how I reacted. Once again, confronted with an opportunity to move forward as a respected and trusted profession, we found a way to avoid that distinction.

Author's note: For a more in-depth study of the legal principles that affect our everyday practice, subscribe to "The Lucas Letter" at www.jnlucaspls.com/TheLucasLetter.html.

Neither the author nor POB intend this column to be a source of legal advice for surveyors or their clients. The law changes and differs in important respects for different jurisdictions. If you have a specific legal problem, the best source of advice is an attorney admitted to the bar in your jurisdiction.

This column is a forum for analysis and discussion of closed court cases. Facts and information cited are limited to what is contained in the published legal documents. It is not POB nor the author's intent to re-try cases that have already been resolved and closed by the court system.

References

1- Kennedy v. Rose, 2008 Ohio App. LEXIS 3327 (OhioApp. 2008).

2- Id. at 14.

3- Id.

4- Rewriting legal descriptions can lead to title problems, especially when not done with requisite care. I suspect the description was rewritten by the attorney who prepared the Kinney to Hill conveyance. However, the real root of the problem is the Eberly survey that, in the words of the court, "was not performed to establish the actual boundaries." This begs the question: "Why was it performed?"

5- In all fairness to Smart, he may have been commissioned by Kennedy's attorney to perform a forensic survey of the property for the court proceedings in order to demonstrate the effect of the Eberly and Daniels survey. This leads to other questions, including why we perform surveys of property and why we perform surveys for forensic reasons, which cannot be fully developed in this brief article. Another possibility exists that Smart was working under the revised and dumbed-down code section, as discussed in the last section of this article. This affords him the opportunity to slap any boundary on the ground and not have to resolve the "unique" boundary question. Nevertheless, the language in the court opinion leads us to believe that Smart made an opinion on the property lines in question.

6- Kennedy v. Rose, at 7.

7- Id. at 9, 10.

8- Id. at 17, 18.

9- Id. at 10, 11.

Jeffery N. Lucas, PLS, Esq.

Jeff Lucas is a licensed land surveyor and attorney in private practice in Birmingham, Ala.