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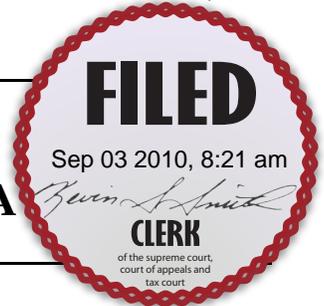
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**IN THE
COURT OF APPEALS OF INDIANA**



DANIEL E. HOAGLAND, KAREN S.)
HOAGLAND, and HOAGLAND)
FAMILY LIMITED PARTNERSHIP,)
)
Appellants/Defendants,)

vs.)

No. 76A03-0911-CV-521

DOROTHY H. MOSIER, JEFFREY MOSIER,)
GRIFFIN MOSIER, DAVID T. CALKINS,)
LONGENA M. CALKINS, the Unknown Heirs)
and Devises of Longena M. Calkins,)
JOHN JARRETT, and JAN JARRETT,)
)
Appellees/Plaintiffs.)

APPEAL FROM THE STEUBEN SUPERIOR COURT
The Honorable Allen N. Wheat, Special Judge
Cause No. 76D01-0708-MI-328

September 3, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

This appeal involves a boundary dispute among three neighbors who own adjacent lakefront lots. On the second day of trial, the neighbors agreed to a settlement, and the trial court dismissed the jury. The neighbors signed an agreement, and the trial court approved it and appointed a real estate expert to perform surveys and draft new property descriptions. The court held hearings to oversee the expert's progress, and when the expert was finished with the surveys and descriptions, the trial court issued a decree in accordance with the settlement agreement. The only difference was that the court did not order the exchange of deeds. Instead, based on the opinions of two experts, the court ordered that its decree, which contains the surveys and property descriptions, be placed on record in the county recorder's office.

Daniel E. Hoagland, Karen S. Hoagland, and the Hoagland Family Limited Partnership (collectively "the Hoaglands"), owners of the lot situated in the middle, now appeal, claiming that the agreement is unenforceable and that the trial court erred in issuing its decree and ordering that it be recorded. They argue that the trial court should have ordered the exchange of deeds. They also argue that the court-appointed expert should have been disqualified. Finding no error, we affirm.

Facts and Procedural History

Dorothy H. Mosier, the Hoaglands, and John and Jan Jarrett ("the Jarretts") own adjacent lakefront lots in the Town of Clear Lake in Steuben County. On August 31, 2007, Mosier filed an action against the Hoaglands, seeking to quiet title to the boundary line

between their respective lots.¹ She alleged that the Hoaglands had torn out bushes and erected a fence on the southern end of her property. At the time, the Hoaglands had an action pending against James and Cathleen Nevin (collectively “the Nevins”) regarding an easement across the Nevins’ property.² The action against the Nevins was venued to LaGrange County, and the LaGrange County trial court denied the Hoaglands’ subsequent motion to consolidate that action with the instant action.

On April 9, 2008, the Hoaglands filed a third-party complaint against Jeffrey and Griffin Mosier for alleged property damage. On January 22, 2009, the Jarretts filed a petition to intervene with a cross-claim against the Hoaglands. On February 17, 2009, the trial court granted the motion, and the Jarretts became parties to the instant action. A jury trial began on July 6, 2009. On the second day of trial, the Mosiers,³ the Hoaglands, and the Jarretts advised the court of settlement negotiations. At that time, the parties tendered to the trial court a memorandum of agreement (“MOA”), which provided in pertinent part:

At the conclusion of the negotiations, the parties, as evidenced by their signature (and their counsel[s’] signatures) below, have reached a full and final settlement of their dispute.

....

The terms and conditions of this settlement are as follows:

¹ The prior owner of the Hoaglands’ lot, Longena Calkins, was also named as a defendant, along with her unknown heirs and devisees. On November 1, 2007, the trial court entered a default judgment against these defendants. The Hoaglands named David T. Calkins as a cross-claim defendant. The record indicates that process was served but that Calkins never appeared in court; the disposition of the claim against him is unclear from the record. He has not filed a brief in this appeal.

² The Nevins’ lot lay adjacent to the Mosiers’ lot. The Hoaglands also owned a non-lakefront lot across from the Nevins’ lot and had an easement across the Nevins’ lot, thus providing the Hoaglands with a direct route to the lake.

³ “The Mosiers” is the collective reference for Dorothy, Griffin, and Jeffrey.

As to the Hoagland/Jarrett settlement:

1. The Rowland survey shall control and title to the property described in the Franke survey report of June 1, 2009, shall be quieted in the Jarretts. The Jarrett[s'] property shall be described in accordance with Exhibit "A" attached hereto.
2. The parties shall recognize and observe the property lines of Exhibit "A" in regard to any and all maintenance and improvements.
3. All other claims between the Jarrett[s] and the Hoagland[s] shall be dismissed with prejudice.

As to the Hoagland/Mosier settlement:

1. [The] Hoagland[s] shall pay to Mosier the sum of \$100.00 for replacement of bushes.
2. Bruce Franke of Allen County Survey Consultants, Inc. shall perform a survey of the boundary line dividing 1114 Lake Drive from 1116 Lake Drive. The Hoagland[s] agree to pay the costs associated with this survey not to exceed \$1,500.00.
3. The line to be established by Franke shall conform, as closely as possible, to the attached survey, dated June 1, 2009, which had been submitted to the Steuben Superior Court in this matter as [P]laintiff's Exhibit 2. The line shall be a straight line, and shall begin by bisecting the gore⁴ as shown on the Franke survey, dated June 1, 2009, and shall run westerly through a point two (2) inches South of the southerly most point of the Mosier retaining wall as shown on the Franke survey, so as to avoid any encroachment, and the line thus established shall terminate at the westerly line established by the 1968 C. B. Wood survey.
4. The north line of the 1116 Lake Drive (Mosier [property]) shall be the line established by the 1968 C. B. Wood survey as determined by the Lojek survey dated September 8, 2004, and confirmed by the Burlage survey dated July 3, 2008. That portion of the easement created by the easement agreement, recorded ... in the office of the Steuben County

⁴ A gore is "[a] small (often triangular) piece of land, such as may be left between surveys that do not close." BLACK'S LAW DICTIONARY 715 (8th ed. 2004).

Recorder which lies south of the C. B. Wood line is of no effect as Mosier did not convey the easement.

5. The Mosiers agree to convey by Quit Claim Deed the West 20 [feet] of the property described in the 1968 C. B. Wood survey, established by a line parallel to the West line of said survey shall be extended through the East-West line established in paragraph 2 above. In addition, the land lying North and East of the point established in the proceeding sentence shall be conveyed to Mosier by [the] Hoagland[s], and the land lying South of said line shall be quieted in Hoagland Family Limited Partnership. The land of Mosier as determined by this survey shall be quieted in Mosier.
6. The parties agree that the real estate conveyed by this agreement shall be free of any liens or encumbrances.
7. Bruce Franke shall be commissioned by the Court to complete the survey of the lines and properties of the parties and report his findings and legal descriptions to the Court for its appropriate action. Franke will provide his electronic data to Mike Davis, RLS, of Hofer & Davis for review prior to finalizing the new descriptions for [the] Hoagland[s] and Mosier.
8. In the event of a breach of this settlement agreement, the Court shall appoint a commissioner to execute the appropriate documents at the expense of the breaching party.

The Court shall retain jurisdiction in this matter until the agreement has been effectuated. In the event of a default, the Court shall award reasonable attorney fees and costs to the prevailing party.

All signatories to this agreement, specifically agree that all other disputes between the parties in the above captioned cause are dismissed, with prejudice.

The parties have read and fully understand this agreement after consulting with their respective attorneys, and further understand that this agreement will finally and forever resolve all claims with any party had or may have asserted in the pending litigation in Steuben Circuit Court[.]

Appellants' App. Vol. III at 145-48.⁵ The signatories included Daniel Hoagland, Karen Hoagland, an agent of the Hoagland Family Limited Partnership, Dorothy Mosier, John Jarrett, Jan Jarrett, the Hoaglands' counsel, and counsel David Hawk as representative of Dorothy Mosier, Jeffrey Mosier, Griffin Mosier, John Jarrett, and Jan Jarrett.

On July 7, 2009, the trial court approved the MOA, appointed Bruce Franke as commissioner, administered an oath to Franke, and dismissed the jury. The trial court held status conferences in July, August, and September 2009 to monitor progress and compliance with the MOA. On October 6, 2009, the trial court issued an order and entered judgment quieting title to the real property. The trial court entered extensive findings of fact, which include in pertinent part:

1. That the Report of the Commissioner, the survey and legal descriptions attached thereto, has been performed in accordance with the [MOA] of the parties, and is approved by the Court.
-
3. Dorothy H. Mosier ("Mosier") acquired title to the real estate commonly known as 1116 Drive ... by virtue of a Warranty Deed dated July 24, 1976[.]
4. The Hoagland Family Limited Partnership ("HFLP") ... acquired title to the real estate commonly known as 1114 Lake Drive ... by virtue of a Quit-Claim Deed from Daniel E. Hoagland and Karen S. Hoagland dated September 12, 1996[.]
5. John Jarrett and Jan Jarrett ("the Jarrett[s]"), as husband and wife, acquired title to the real estate commonly known as 1112 Lake Drive ...

⁵ The appellants' appendix contains multiple volumes. The Hoaglands have failed to use consecutive pagination as required by Indiana Appellate Rule 51(C), but instead have separately paginated each of the five volumes. Thus, we will cite to the appellants' appendix by reference to each volume number and page number.

by Warranty Deed dated July 17, 1976 ... and Warranty Deed dated July 10, 1979[.]

6. Mosier, [the Hoaglands], and [the] Jarretts have each filed complaints to quiet title by adverse possession and by acquiescence to their respective properties.
7. George S. McCracken and Beth W. McCracken ... owners of real estate commonly known as 1110 Lake Drive ... have entered into a Boundary Line Agreement with [the Jarretts], to establish the boundary line between the McCracken property at 1110 Lake Drive on the south, and the Jarrett property at 1112 Lake Drive on the north[.]
8. [The Nevins] ... owners of real estate commonly known as 1120 Lake Drive ... have entered into a Boundary Line Agreement with Dorothy H. Mosier, to establish the boundary line between the Nevin property at 1120 Lake Drive on the north, and the Mosier property at 1116 Lake Drive on the south[.]
9. [The Hoaglands] and Mosier have agreed that the north line of 1116 Lake Drive is a line established [and confirmed] by the [three recorded surveys] ... that any portion of the easement created by an Easement agreement recorded ... in the office of the Recorder of Steuben County, Indiana, which lies south of said C. B. Wood line is of no effect as Mosier did not convey the easement; and, all parties have further agreed that there are no liens or encumbrances which effect [sic] any of their properties.
10. Mosier, [the Hoaglands], and [the] Jarrett[s] have agreed to boundaries between their respective properties, and that each is entitled to quiet title to their respective properties, the boundaries and legal descriptions of which have been determined by the Court appointed Commissioner, Bruce Franke, RLS, whose survey of the properties of Mosier, [the Hoaglands], and [the] Jarrett[s], dated September 18, 2009, and recorded in the office of the Recorder of Steuben County, Indiana ... is correct and hereby approved.

Appellant's App. Vol. I at 35-38. The order quieted title to each party's lot and included the respective property descriptions, as provided by Commissioner Franke. The trial court also reduced to judgment the \$1500.00 sum the Hoaglands were ordered to pay Franke for his

services. Finally, the trial court “dismissed with prejudice” all remaining claims between the parties. *Id.* at 44.

The Hoaglands now appeal. Additional facts will be provided as necessary.

Discussion and Decision

I. Legal Effect of MOA

The Hoaglands contend that the MOA is void, voidable, or otherwise unenforceable. At the outset, we note that on the one hand they assert that the MOA is not an agreed judgment or settlement agreement and that it is unenforceable. *See* Appellants’ Br. at 7 (describing the MOA as “outlin[ing] a course of events intended to reach a final resolution, and ... not the final resolution in and of themselves”). On the other hand, the Hoaglands assert that “[w]hen, on July 7, 2009, the parties entered into their [MOA], they had created a settlement agreement with regard to the pending litigation ... [which], when delivered to the court as the resolution to pending litigation are considered agreed judgments.” *Id.* at 22. The Hoaglands then use this latter assertion as the basis for their argument that the trial court erred in entering a new order instead of merely entering judgment on the MOA, which we address in section II, *infra*.

First, we address the legal effect of the MOA. If it is an agreed judgment, then absent fraud or lack of consent, the trial court was obligated to approve it, and we do not have authority to review it. *Pond v. McNellis*, 845 N.E.2d 1043, 1061 (Ind. Ct. App. 2006), *trans. denied*; *see also Siegel v. Williams*, 818 N.E.2d 510, 514 (Ind. Ct. App. 2004) (stating that agreed judgments do not represent the judgment of the court; rather, the court merely records

the agreement of the parties). “If interpretation, review[,] and appeal of agreed judgments are permitted, the entire purpose of agreed judgments is defeated.” *Pond*, 845 N.E.2d at 1062 (citation and quotation marks omitted). Agreed judgments are binding as to those who are a party to them. *Id.*

Here, the MOA repeatedly referenced the intent and understanding of the parties regarding the finality of their agreement. For example, the signature of each party and of counsel was evidence that they had reached a “full and final settlement of their dispute.” Appellants’ App. Vol. III at 145. Moreover, the MOA states that “all other disputes between the parties ... are to be dismissed, with prejudice.” *Id.* at 148. The MOA concludes with the statement that the parties “further understand that this agreement will finally and forever resolve all claims which any party has or may have asserted in the pending litigation[.]” *Id.* Thus, absent fraud or some illegality, the parties clearly are bound by the terms of their agreement.

Although the Hoaglands make no claim of fraud, they argue that the MOA represents an unlawful usurpation of the Clear Lake subdivision ordinance. They claim that the MOA creates a “subdivision” within the language of the ordinance:

SUBDIVISION. A division of a lot, tract or parcel of land into two or more lots or other divisions of land for the purpose, immediate or future, of transfer of ownership or development, including all changes in street or lot lines.

Town of Clear Lake Subdivision Control Regulations Ordinance, § 151.04; Appellants’ App. Vol. IV at 175. This agreement does not create a subdivision; rather, it is merely a private settlement agreement entered into between adjacent landowners to quiet title. These parties

were not subdividing or developing a tract; they were settling the boundary lines to property they already owned. *See* Ind. Code ch. 32-30-3 (allowing landowners to bring proceedings in state court to quiet title to real estate). The Hoaglands cite a case for the proposition that contracts that contradict an ordinance are unenforceable, but they have failed to cite to any provision in the ordinance that would prohibit private parties from settling boundary disputes without first obtaining the approval of the town. As such, they have failed to develop a cogent argument and have waived this issue on appeal. Ind. Appellate Rule 46(A)(8); *Evansville Outdoor Adver., Inc. v. Princeton (City) Plan Comm'n*, 849 N.E.2d 630, 636 (Ind. Ct. App. 2006), *on reh'g, trans. denied*.

The Hoaglands also contend that the MOA is unenforceable in disposing of their claims against Griffin and Jeffrey Mosier. However, we note that the MOA clearly states that Griffin and Jeffrey are parties thereto as represented by counsel's signature and that the MOA is the full and final settlement of all claims between the parties. Thus, the Hoaglands, by their *own* signatures, agreed to dismiss with prejudice *their* claims against Griffin and Jeffrey irrespective of Griffin's and Jeffrey's signatures, and only Griffin and Jeffrey have standing to argue that their rights were not adequately represented.⁶

II. Entry of Judgment

⁶ Moreover, the Hoaglands lack standing to assert claims of the nonparty mortgagee on the Nevins' property. *See In re Estate of Eguia*, 917 N.E.2d 166, 169 (Ind. Ct. App. 2009) (stating that a party has no standing to assert claim or error on behalf of nonparty mortgagee who might lose collateral if agreement is upheld). Even if standing existed, their challenge is misplaced. The MOA states that "the real estate conveyed by this agreement shall be free of any liens or encumbrances." Appellants' App. Vol. III at 147. Such statement cannot be interpreted as an unlawful attempt to extinguish the mortgagee's interest in the Nevins' property when the Nevins' property was not the subject of the MOA. Rather, the MOA covers only those lots owned by parties to the agreement: the Mosiers, the Hoaglands, and the Jarretts.

The Hoaglands also assert that the trial court erred in issuing and entering judgment on a new decree instead of merely entering judgment on the MOA. “As in all final judgments, a problem in the enforcement of the consent decree does not vitiate the decree ...; [rather, it] is a recognition and acknowledgement by the parties that problems may arise in any final judgment.” *Elder v. Dep’t of Natural Res.*, 482 N.E.2d 1383, 1390 (Ind. Ct. App. 1985), *trans. denied* (1986). Although a court lacks authority to modify or change an agreed judgment in any essential or material matter, it may make a modification regarding a nonmaterial matter. *Hendrickson v. Hendrickson*, 531 N.E.2d 544, 546 (Ind. Ct. App. 1988), *trans. denied* (1989).

We thus examine the record to determine whether the trial court’s findings and conclusions are in accord with the material terms of the MOA. First, the Hoaglands argue that the trial court erred in ordering them to pay Franke’s \$1500.00 fee. The MOA states that “[t]he Hoaglands agree to pay the costs associated with th[e] survey [designating the boundary line between their lot and the Mosiers’ lot] not to exceed \$1,500.00.” Appellants’ App. Vol. III at 146. Thus, the fee imposed does not contradict the MOA. The Hoaglands base their argument on notations on Franke’s invoice referencing the addresses of all three lots at issue. Appellants’ App. Vol. IV at 102. They correctly point out that the MOA provision requiring them to pay Franke’s fees pertains to work performed in association with the Mosiers’ and Hoaglands’ lots, not the Jarretts’ lot. However, at the September 25, 2009 status hearing, Franke testified extensively at the September 25, 2009 hearing regarding the difficulty he encountered in attempting to establish the boundary line between the Mosiers’

and the Hoaglands' lots because of the "dense wood brush area," the necessity of "bisect[ing] the gore along the lake frontage area," and the fact that the parties were "arguing over fractions of an inch." Tr. at 31-33. He testified that he spent eight hours at \$125.00 per hour doing field work associated with that boundary line and that he spent another four hours at \$100.00 per hour performing office work pertaining to it. *Id.* at 34-35. Based on this \$1400.00 sum, plus recording fees for the surveys and property descriptions pertaining to the Mosier and Hoagland lots,⁷ we find no basis for reversing the trial court's \$1500.00 fee award.

The Hoaglands also argue that Franke exceeded his powers granted to him pursuant to the MOA by creating new property descriptions. However, the terms of the agreement clearly call for property descriptions. *See id.* at 145 (stating "title to the *property described* in the Franke survey report"); *id.* (stating that "[t]he Jarrett[s'] property *shall be described*"); *id.* at 147 (stating that "Franke shall ... report his findings and *legal descriptions* to the court ... [and] provide his electronic data to Mike Davis ... for review prior to finalizing the *new descriptions*") (emphases added). Moreover, the MOA clearly states that title shall be quieted as to each of the three adjoining lots. *Id.* The Hoaglands argue that Franke had no authority to establish the north boundary line separating the Mosiers' and the Nevins' properties, because the Nevins were not parties to the agreement. However, it is difficult to see how Franke could have provided complete and accurate property descriptions or quieted

⁷ The statutory basis for the trial court's action in ordering the recording of its decree is discussed in section V, *infra*.

title to the Mosiers' parcel absent such a determination. Also, the record indicates that the Nevins entered into a boundary line agreement with the Mosiers to establish that line. Finally, we note that it was the *Hoaglands* who raised the issue of the Mosiers' northern boundary and the adjacent easement by filing a counterclaim against the Mosiers for interfering with their easement by installing fencing, stone, and landscaping. Thus, any error was invited by the Hoaglands.

The decree upon which the trial court entered judgment merely incorporated all the information agreed to by the parties at the time they executed the MOA and enforced the provisions. Thus, it carried out the intent of the parties as manifested in the MOA. As such, the trial court did not err in entering the decree.⁸

III. Request to Disqualify Commissioner

The Hoaglands filed a request to disqualify Commissioner Franke based on alleged ex parte communications between Franke and opposing counsel Hawk. They claim that opposing counsel essentially instructed Franke on how to perform his duties, and, as such, they now challenge trial court's denial of their request to disqualify. They predicate their

⁸ To the extent the Hoaglands claim that the trial court lacked subject matter jurisdiction to enter a decree because of an alleged notice defect, we find that they have waived this issue for failure to develop a cogent argument. Ind. Appellate Rule 46(A)(8); *Evansville Outdoor Adver., Inc.*, 849 N.E.2d at 636. Waiver notwithstanding, the Hoaglands themselves invoked the court's jurisdiction by filing an affidavit in compliance with Indiana Code section 32-30-3-14(e). Moreover, the chronological case summary indicates that even the unknown heirs and devisees of the potential claimant of record—Longena Calkins—were given notice by publication sufficient to invoke the court's jurisdiction. Ind. Code 32-30-3-14(e)(2)(E). Further, the Jarretts filed their affidavit when they intervened, which was after the Hoaglands had made it clear that they were asserting a claim against a portion of the Jarretts' property.

claim on Canon 2.9 of the Code of Judicial Conduct, which states in part, “If a judge inadvertently receives an unauthorized ex parte communication *bearing upon* the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.” (Emphasis added.) Canon 2.9 also states, “A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, *court officials*, and others subject to the judge’s direction and control.” (Emphasis added.)

The Hoaglands argue that “the performance of Mr. Franke’s duties as Commissioner were [sic] being directed by Mr. Hawk.” Appellant’s Br. at 17. Franke admitted that he had been in communication with counsel Hawk. Assuming that Franke is a court-commissioned official subject to Canon 2.9 and assuming that his communications with counsel Hawk bore upon the substance of the case and thus required notice to the Hoaglands, we nonetheless find no basis for reversal. The record shows that in executing his commissioner duties, Franke relied on his own expertise as well as the expertise of Davis, the Hoaglands’ expert, who performed an independent on-site investigation and confirmed that the descriptions contained in the decree were correct and created in compliance with the MOA. Davis stated that Franke came to his office, and the two conferred regarding their findings. Davis concluded that Franke did “what I would have done in his place.” Tr. at 98. Thus, the record does not support the Hoaglands’ assertion that Franke should have been disqualified.

IV. Enforcement of Quitclaim Provision

The Hoaglands assert that the trial court erred in failing to enforce the MOA provision requiring Dorothy Mosier and the Hoaglands to exchange quitclaim deeds. At the July 23, 2009 status hearing, the trial court addressed the issue of the quitclaim deeds and concluded, without objection, that such deeds were unnecessary due to its quieting of title based on Franke's property descriptions, which would themselves be placed on record in the county recorder's office. We also reiterate that the Hoaglands' expert, Davis, conferred with Franke regarding his work and found it to be in conformity with the MOA. On the issue of whether to dispense with the exchange of quitclaim deeds, Davis testified, "I think I also agree with Mr. Franke and you that this is the cleanest way to do it . . . with the creation of the sliver, you know, you create one parcel here, now he creates another, you'd have to exchange two or three or four Quit Claim Deeds to clean up a property that would just make an absolute mess[,] which is what we are trying to avoid." *Id.* at 108. Thus, the record supports the trial court's decision to dispense with the exchange of quitclaim deeds in favor of the recorded judgment containing legal descriptions of the lots to which it quieted title.

V. Recording the Judgment

Finally, the Hoaglands contend that the trial court erred in ordering that the judgment be recorded in the county real estate records. Indiana Code Section 32-30-3-17(a) provides in pertinent part:

The clerk of a court shall enter in the civil order book all orders and decrees in any suit to quiet title to real estate. After a court enters final judgment in a proceeding, the clerk shall certify a copy of the final judgment and deliver the certified copy to the county recorder.

We reiterate that the MOA clearly called for title to be quieted in the Mosiers, the Hoaglands, and the Jarretts, and the trial court's decree was entered in accordance therewith. Thus, the trial court merely followed the statutory procedure when it ordered the recording of the judgment. Accordingly, we affirm.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.