[Cite as *Turner v. Albert,* 2015-Ohio-809.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

RICHARD SCOTT TURNER, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	
- vs -	:	**CASE NO. 2014-A-0051**
KATHLEEN D. ALBERT, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2012 CV 751.

Judgment: Affirmed.

Christopher M. Newcomb, Christopher M. Newcomb, Esq., LLC, 213 Washington Street, Conneaut, OH 44030 (For Plaintiffs-Appellees).

Neil W. Siegel, Neil W. Siegel, Attorney at Law, and *Frank P. Giaimo,* Frank P. Giaimo, Attorney at Law, 24400 Chagrin Boulevard, Suite 300, Beachwood, OH 44122 (For Defendants-Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Kathleen D. Albert, et al., appeal the judgment of the Ashtabula County Court of Common Pleas enforcing the Agreed Judgment Entry appellants entered with appellees, Richard Scott Turner, et. al., which incorporated the parties' settlement agreement. At issue is whether appellants, by settling this case and incorporating the settlement agreement in the Agreed Judgment Entry, waived the right

to appeal the trial court's later judgment enforcing the Agreed Judgment Entry. For the reasons that follow, we affirm.

{¶2} Plaintiffs-Appellees, Richard Scott Turner and Susan R. Turner, own and reside on property located on Padanarum Road, Geneva, Ashtabula County. Plaintiffs-Appelles, Charles L. Copeman and Julie M. Copeman, own and reside on a nearby parcel on said road. Defendants-Appellants, Kathleen D. Albert and Mary Chlam, also own and reside on Padanarum Road. A dispute arose among the parties concerning the correct location of a boundary line that affected and controlled the boundary lines of their properties. Appellees claimed that appellants were encroaching on their property in violation of the boundary line separating their parcels.

{¶3} On August 23, 2012, appellees filed a complaint against appellants, asserting claims for quiet title/declaratory relief, trespass, nuisance, and emotional distress. Appellants filed a joint answer, denying the material allegations of the complaint and asserting counterclaims for nuisance, emotional distress, and invasion of privacy.

{¶4} During the litigation, the parties retained surveyors. Appellees retained Scott Raypholtz and appellants retained Jerry Slay. The two surveyors disagreed about the location of the disputed property line.

{¶5} The case was referred to mediation, as a result of which, on April 1, 2013, the parties entered a consent judgment dismissing all claims and counterclaims, except the property line issue in appellees' first claim (quiet title/declaratory judgment) and the fence dispute in the second claim (trespass) as alleged in the complaint.

{¶6} Thereafter, the parties also reached an agreement regarding the disposition of the property line and fence issues and incorporated this agreement in a proposed Agreed Judgment Entry. On May 14, 2013, the parties filed a joint motion asking the court to approve the Agreed Judgment Entry. In that motion, the parties stated they "have entered into an agreement whereby a third surveyor, Eric Westfall, will be jointly retained by the parties to make a binding determination as to the proper location of the boundary line in dispute. * * * Mr. Westfall's involvement as an independent surveyor to provide a binding decision obviates the need for * * * a trial in this case."

{¶7} On May 16, 2013, the trial court approved and filed the Agreed Judgment Entry reflecting the parties' agreement regarding the resolution of the property line and fence issues. According to the Agreed Judgment Entry, the parties agreed "that Mr. Westfall's survey and determination of the boundary lines *shall be binding on the parties and not subject to objection or appeal in any manner*." (Emphasis added.) The judgment provided that if Mr. Westfall determined that a new survey map and legal descriptions are necessary to correct any defects regarding the boundary lines, the parties shall execute quit-claim deeds prepared by appellees' counsel incorporating the legal descriptions as determined by Mr. Westfall. The parties agreed that if appellants failed to execute any quit-claim deed necessary to correct a defect, appellants will be subject to contempt proceedings and the court, on notice, shall enter an order, to be filed with the county recorder, to correct the defect. Further, the parties agreed that if Mr. Westfall determined that the property line is such that appellants' fence is on appellees' property, appellants shall remove the fence. Finally, the Agreed Judgment

Entry provided that the parties would notify the court of Mr. Westfall's determination and then "dismiss this action."

{¶8} Thereafter, based on information provided by counsel, the court entered a judgment on August 9, 2013, in which the court stated that Mr. Westfall was unavailable to perform the survey and that the parties agreed to jointly retain another surveyor as a substitute for Mr. Westfall to perform the independent survey. The judgment entry reaffirmed that all issues had been resolved pursuant to the May 16, 2013 Agreed Judgment Entry, which the parties were continuing to implement. Further, the August 9, 2013 judgment provided that if a party failed to perform any obligation imposed by the May 16, 2013 Agreed Judgment Entry, the opposing party may file a motion to enforce that judgment.

{¶9} Thereafter, the parties jointly retained Charles Sharp, a licensed surveyor, to perform the survey in place of Mr. Westfall. Mr. Sharp determined the controlling boundary line of the parties' properties and prepared a new survey map and legal descriptions. Pursuant to the May 16, 2013 Agreed Judgment Entry, appellees' counsel prepared quit-claim deeds incorporating Mr. Sharp's legal descriptions and forwarded them to appellants' attorney for execution. However, appellants refused to sign the deeds because appellants did not agree with Mr. Sharp's survey.

{¶10} Consequently, on February 24, 2014, appellees filed a motion to enforce the May 16, 2013 Agreed Judgment Entry pursuant to Mr. Sharp's survey. Appellants did not file a brief in opposition.

{¶11} The trial court held a hearing on the motion to enforce. The parties stipulated that Mr. Sharp was the licensed surveyor they jointly retained and paid

pursuant to the May 16, 2013 and the August 9, 2013 judgment entries; that Mr. Sharp completed the survey contemplated by those judgment entries; that Mr. Sharp prepared legal descriptions and maps associated with the parties' properties; and that appellees' counsel prepared quit-claim deeds incorporating Mr. Sharp's legal descriptions and submitted them to appellants for execution, as contemplated by the May 16, 2013 judgment. At the hearing, appellants' surveyor, Jerry Slay, testified on their behalf, indicating he disagreed with Mr. Sharp's survey. Mr. Sharp did not testify, but his survey and report were admitted in evidence without objection.

{¶12} Following the hearing, in a judgment, dated July 18, 2014, the trial court granted appellees' motion to enforce the Agreed Judgment Entry. In the July 18, 2014 judgment, the court noted that because the experts retained by the parties (Mr. Slay, for appellants, and Mr. Raypholtz, for appellees) arrived at conflicting opinions regarding the property lines of their properties, the parties agreed to be bound by the determination of a third surveyor, Eric Westfall. The court noted that, because Mr. Westfall was unavailable, the parties agreed to retain Charles Sharp as a substitute for Mr. Westfall to perform the survey.

{¶13} The court noted that appellants believe Mr. Sharp is either mistaken or did not follow accepted surveying practices in arriving at his opinions. However, the court noted that land surveying is not always an exact science and that qualified and experienced surveyors can and sometimes do arrive at different conclusions in interpreting legal descriptions in deeds and reconciling those descriptions with monuments observed on the property. The court stated that, due to such differences of opinion, the parties agreed to engage a "third, independent, and unbiased surveyor to

settle the dispute." The court noted that the explanation given by Mr. Sharp for the conclusion in his report (that he retraced the legal description in prior deeds) is logical and in accord with accepted surveying practices and principles. The court stated, "[h]aving determined that the Sharp survey is not mistaken or otherwise in error, the Court holds that the result of the survey is binding on the parties, *in accord with their settlement agreement in this case*." (Emphasis added.) The court ordered appellants to execute appropriate quit-claim deeds and to otherwise comply with the May 16, 2013 Agreed Judgment Entry. Appellants appeal the trial court's judgment, asserting the following for their sole assignment of error:

{¶14} "The trial court erred in granting the plaintiffs' motion to enforce as the record facts and the law do not support the Sharp boundary line."

{¶15} Appellants contend that because they do not agree with the conclusion reached by the independent expert, Mr. Sharp, they are entitled to ignore it. Appellants recount in great detail why, according to their expert, Mr. Sharp's conclusion is incorrect. However, in doing so, appellants ignore the fact that the parties jointly retained Mr. Sharp as an independent expert pursuant to their settlement agreement and that the parties agreed – without qualification – to be bound by his survey.

{¶16} A settlement agreement is a type of contract designed to terminate claims by ending litigation. *Mentor v. Molk*, 11th Dist. Lake No. 2012-L-138, 2013-Ohio-3975, ¶7. Such agreements are valid and enforceable by either party. *Id.*, citing *Continental W. Condominium Unit Owners Ass'n v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502 (1995).

{¶17} The parties' May 16, 2013 Agreed Judgment Entry incorporated the parties' settlement agreement. Their agreement was clearly a settlement agreement because it was designed to terminate appellees' two remaining claims by ending this litigation. In any event, appellants do not dispute that the agreement to resolve this action incorporated in the Agreed Judgment Entry is a settlement agreement. Further, the Agreed Judgment Entry expressly provided "that Mr. [Sharp's] survey and determination of the boundary lines shall be binding on the parties and not subject to objection or appeal in any manner." Moreover, according to that entry, the parties agreed to notify the court of Mr. Sharp's determination and then dismiss this action.

{¶18} Because the parties' settlement agreement resolved the remaining issues in the case and the settlement agreement was incorporated in an agreed judgment entry, appellants waived the right to appeal the judgment enforcing the Agreed Judgment Entry. Moreover, appellants' waiver was express because appellants specifically agreed in the Agreed Judgment Entry that Mr. Sharp's survey and determination of the boundary lines would not be subject to objection or appeal in any manner.

{¶19} We note that appellants do not dispute they had an opportunity to evaluate Mr. Sharp's expertise before agreeing to be bound by his findings. Further, while the trial court was not required to do so, the court found in its July 18, 2014 entry that Mr. Sharp was a reputable surveyor and that the explanation he gave for his conclusions was logical and in accord with accepted surveying practices and principles.

{¶20} We agree with the trial court's finding that this is a case where appellants simply prefer to adopt their own expert's opinion because Mr. Sharp's survey was not favorable to them.

{¶21} We therefore hold that appellants waived the right to appeal the court's judgment enforcing the parties' Agreed Judgment Entry.

{¶22} For the reasons stated in this opinion, appellants' assignment of error lacks merit and is overruled. It is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

cncur.