[Cite as *Matheny v. Keister*, 2009-Ohio-5846.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
MICHAEL L. MATHENY, ET AL	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiffs-Appellants	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 09-CA-00002
GENE KEISTER, ET AL	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Perry County Court of Common Pleas, Case No. 07-CV-00474
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 4, 2009
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
GERALD J. TIBERIO, JR 50 North Fourth Street P. O. Box 1030 Zanesville, OH 43702-1030	MARK J. HOWDYSHELL 113 North Main Street, P.O. Box 508 New Lexington, OH 43764
	For City of New Lexington
	STEVEN DAVIS 11 S. Broad Street, Suite 209 Lancaster, OH 43130

Gwin, P.J.

{¶1} Plaintiffs-appellants Michael L. and Darla M. Matheny appeal a judgment of the Court of Common Pleas of Perry County, Ohio, which overruled their motion to set aside a surveyor's determination and for appointment of a different surveyor. The court ordered the survey of Kevin Cannon be effective as to the parties' settlement agreement. Defendants-appellees are The City of New Lexington, Gene and Betty Keister, Debra Wood, and Raymond and Mitzi Goodfellow.

{¶2} Appellants assign two errors to the trial court:

{¶3} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN NOT FULFILLING THE PRETRIAL AGREEMENT BECAUSE THE COURT-APPOINTED SURVEYOR DID NOT COMPLETE A SURVEY IN ACCORDANCE WITH OHIO LAWS.

{¶4} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO SET ASIDE SURVEYOR KNISELY'S DETERMINATION BECAUSE THE SURVEYOR'S WORK WAS NOT IN COMPLIANCE WITH THE MINIMUM STANDARDS FOR SURVEYING AND THE PLAINTIFFS ESTABLISHED BIAS ON THE PART OF THE SURVEYOR."

{¶5} This case arose as a dispute among the parties regarding the boundaries of their respective parcels of real estate and the City of New Lexington's right-of-way across them. The parties obtained several different surveys of the property, which did not agree on the location of the property lines. Appellants attached a survey done by Loren C. Camp to their complaint. They also had a survey completed by Bowman Surveying. Appellees had the properties surveyed by Cannon Land Surveying.

{¶6} On July 14, 2008, the court journalized a settlement agreement whereby the parties agreed the court would appoint an independent surveyor to make a determination as to the location of the property lines. The agreement stated in pertinent part: "It is the agreement of the parties herein that they shall abide by and settle this matter upon the findings of the surveyor chosen by this Court*** The signature of Counsel for all the parties involved herein hereby signifies the acquiescence of the parties to this agreement and they further acknowledge that they shall be bound by said agreement. ***"

{¶7} The trial court appointed Wayne A. Knisely of A&E Surveying. Knisely reported because it was an old platted subdivision with no original survey monumentation, there were potentially many problems locating property corners and boundary lines. Knisely refused to criticize any of the previous surveyors, but found the survey made by Cannon Land Surveying is in harmony with the majority of the survey monuments found in the area. The Cannon survey is the one originally presented by appellees.

{¶8} Appellants submitted the affidavit of Michael Matheny in support of the motion to set aside Knisely's report, and requested an oral hearing. Knisely filed an affidavit in response to the motion, and appellant Darla Matheny filed a responding affidavit disputing Knisely's statements, and elaborating on Michael Matheny's allegations.

{¶9} The trial court conducted an evidentiary hearing, and overruled the motion for a new survey. Appellants have not provided us with the transcript of the evidentiary

hearing. The only evidence in the record is the affidavits of the parties and other documents submitted by the parties.

{¶10} Where we have no transcript of the proceedings before the trial court, this court cannot resolve issues not part of the record on appeal. We must presume regularity in the trial court proceedings. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St. 2d 197.

I

{¶11} In their first assignment of error, appellants argue the trial court erred when it failed to require Knisely to submit a full survey. Appellants argue the parties agreed a licensed surveyor would fully survey the property in question and would make a determination as to the disputed property lines. Appellants assert the conditions of the settlement agreement were never met.

{¶12} Wayne Knisely ‘s affidavit in response to the motion to set aside his report stated he reviewed the surveys completed by Camp and Cannon, examined the plats of the subdivision in question, and conducted field work to determine the accuracy of the surveys. He submitted a written opinion to the court that each survey contained errors but of the two, the Cannon survey was more accurate. Knisely stated it was not his understanding that the court wanted a new survey with new survey monumentations, but only wanted his opinion on the previous surveys. Knisely indicated he would complete a certified survey of the lots in question, at his usual and customary rate, giving credit for the survey work he had already done.

{¶13} We have reviewed the settlement agreement, and find it does not require the appointed surveyor to prepare a new complete certified survey. The agreement

refers to the appointed surveyor's "findings" and "determinations", which Knisely submitted in his written report. Knisely stated he had reviewed the prior surveyors' work, and had examined the property. We conclude the documentation supplied by Knisely met the requirements of the settlement agreement.

{¶14} The first assignment of error is overruled.

II

{¶15} In their second assignment of error, appellants argue the court erred in refusing to set aside Knisely's report because appellants had established he was biased against them.

{¶16} Appellant Michael Matheny's affidavit in support of his motion to set aside the survey stated when the boundary dispute first arose, he contacted Knisely by telephone looking for a surveyor. The affidavit states Knisely asked appellant who the adjoining property owners were, and when he learned their names, he refused to do the survey. Matheny testified in his affidavit Knisely told him he was friends with the neighbors and would not do work that would adversely affect them. Matheny asserted he did not believe Knisely could render a fair and impartial opinion to the court, and he had reported Knisely to the State of Ohio Engineers and Surveyors Board.

{¶17} In addition to detailing how he prepared his report, Knisely's affidavit stated he had never met, talked to on the telephone or in person, or ever heard of appellant Michael L. Matheny. He stated he was not familiar with or friends of any of the parties to the action. Knisely's affidavit testified he had no reason to render any opinion other than one supported by his independent findings based upon generally accepted professional surveying standards.

{¶18} Appellant Darla Matheny submitted an affidavit in response to Knisely's affidavit. Her affidavit stated she personally contacted Knisely by telephone, and spoke to his son, who told her Knisely was on vacation. She called a second time and spoke to Knisely, and then gave the telephone to Michael Matheny. Her affidavit asserted Michael Matheny and Knisely talked on the telephone for 20 to 30 minutes, and after this conversation, she and Michael Matheny searched for other surveyors because Knisely had refused to do the work.

{¶19} Appellants' argument is essentially that the trial court's decision was against the manifest weight of the evidence. A reviewing court will not disturb the trial court's decision as against the manifest weight of the evidence if the decision is supported by some competent, credible evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. The Supreme Court has repeatedly held an abuse of discretion implies the court's attitude is unreasonable, arbitrary, or unconscionable, *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶20} We may not substitute our judgment for that of the trier of fact. *Pons v. Ohio State Med. Bd*. (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal, especially to the extent where the appellate court relies on unchallenged, excluded

evidence in order to justify its reversal." *Seasons Coal Company v. City of Cleveland* (1984), 10 Ohio St. 3d 77, 461 N.E.2d 1273.

{¶21} The court made a factual determination that appellants had not met their burden of showing Knisely was biased against them. Appellee argues appellants did not request findings of fact and conclusions of law, which might have elaborated on the trial court's determination.

{¶22} We find there is sufficient competent and credible evidence in the record to support the trial court's decision. The second assignment of error is overruled.

{¶23} For the foregoing reasons, the judgment of the Court of Common Pleas of Perry County, Ohio, is affirmed.

By Gwin, P.J.,

Wise, J., and

Edwards, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. JULIE A. EDWARDS

WSG:clw 1015

[Cite as *Matheny v. Keister*, 2009-Ohio-5846.]

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

MICHAEL L. MATHENY, ET AL	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
GENE KEISTER, ET AL	:	
Defendants-Appellees	:	CASE NO. 09-CA-00002

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Perry County, Ohio, is affirmed. Costs to appellants.

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. JULIE A. EDWARDS