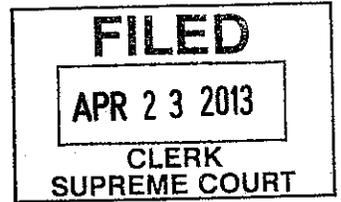


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-165-D
(2010 -CA- 000693 & 2010-CA-000730)



JOSEPH B. CURD, JR.

APPELLANT

V.

FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 09-CI-231

KENTUCKY STATE BOARD OF LICENSURE,
FOR PROFESSIONAL ENGINEERS AND
LAND SURVEYORS

APPELLEE

REPLY BRIEF FOR APPELLANT

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert V. Bullock".

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I hereby certify that on this 23 day of April, 2013, an original and ten copies of the foregoing was hand delivered to:

The Clerk of the Supreme Court of Kentucky, The Capitol, Frankfort, KY 40601

A true copy of the foregoing was mailed to: Honorable Thomas D. Wingate, Judge, Franklin Circuit Court, Division II, Franklin County Judicial Building, 669 Chamberlain Avenue, Frankfort, KY 40601; The Clerk of the Court of Appeals, 360 Democrat Drive,

and

Honorable Jonathan Doran Buckley, Kentucky State Board of Licensure for Professional Engineers and Land Surveyors, 160 Democrat Drive, Frankfort, KY 40601.

A handwritten signature in cursive script, appearing to read "Robert V. Bullock".

Robert V. Bullock

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APPELLANT'S REPLY BRIEF

INTRODUCTION

This is the Reply Brief for Appellant in *Joseph B. Curd, Jr. v. Kentucky State Board of Licensure for Professional Engineers and Land Surveyors*, (2012-SC-165-D).

ARGUMENT

I.

THE BOARD'S STATUTES AND REGULATIONS WERE UNCONSTITUTIONALLY VAGUE AS APPLIED TO MR. CURD

K.R.S. 322.180(2)(12) states that the Board may suspend a land surveyor's license if the surveyor engages in gross negligence, incompetence or misconduct in the practice of land surveying, or engages in conduct likely to deceive or defraud the public. 201 KAR 18:142(3), which is the primary regulation in this appeal, reads:

A licensed land surveyor serving as an expert or technical witness before any tribunal, shall express an opinion only if it is founded on adequate knowledge of the facts in issue, and upon honest conviction of the accuracy and propriety of that testimony. A licensee in so testifying is required to act with objectivity and impartiality, and shall include in that testimony, all material facts, and not ignore or suppress a material fact.

The Court of Appeals erroneously found the statute and regulation above to be constitutional as applied and reversed part of the Franklin Circuit Court determination.

An opinion is an opinion. It is the opinion of the individual giving it, and not the opinion of a Board or other person. Whether it is right or wrong, the opinion is personal and cannot be second guessed absent extraordinary circumstances. The above regulation might be suitable for an advisory on ethics, but it is not suitable for a standard that could

cause a person to lose a license. It does not contain sufficient criteria or standard and is not logical as applied. The regulation is so unintelligible as to be incapable of judicial interpretation. *Board of Trustees of the Judicial Form Retirement System, et. al. v. Attorney General*, 132 S.W.3d 770, 778 (Ky. 2003).

It must be remembered that the testimony in question primarily involved Mr. Curd's opinion regarding the competence of an adverse licensee's research and survey. Mr. Curd's opinion regarding the calls and distances was also questioned. Those opinions, which were accepted into evidence by a Circuit Judge, could not possibly qualify as a violation of the above statutes and regulations. They were his opinion as an expert and were personal as to him. It is impossible to police a statute or regulation which purports to discipline a licensee for his or her expert opinion given in a court of law.

II.

VAGUENESS AND OVERBREADTH.

Appellee Board appears to contend that the statutes and regulations in question may be overbroad, but not vague. The statutes and regulations are vague as applied and may also be overbroad. The one does not preclude analysis of the other.

By citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 102 S.Ct. 1186,1191 (U.S. Ill., 1982), the Appellee Board on page 13 of its brief appears to contend that the statutes and regulations in question do not involve First Amendment rights and that therefore a different or more lenient standard should apply. The Board overlooks the fact that the issue herein involves Mr. Curd's expert opinion.

To require Mr. Curd to opine that James West did adequate research, when in fact he believed he did not, would infringe on Mr. Curd's First Amendment rights. Likewise, to prohibit him from answering an attorney's question relating to the course and distances found in a deed description and placed as a deed plot on a Topo map, would not only put him at odds with the Circuit Court Judge and Court Rules, but would also infringe on his First Amendment Rights. The application of the statutes and regulations in question must therefore receive close scrutiny in order to pass constitutional muster. Since they fail in this regard, they were unconstitutional as applied.

III.

THE TERMS INCOMPETENCE, MISCONDUCT, GROSS NEGLIGENCE AND DISHONESTY

The Appellee Board has listed the words "incompetence", "misconduct", and "gross negligence" and categorized them with the word "dishonesty". It then takes the position that these words have a common and ordinary meaning so that Mr. Curd should understand that his opinion on Mr. West's survey and the placement of calls and distances on a Topo map could subject him to disciplinary action if the Board should differ with his opinion. (Board's Appellee Brief, p. 19). The term "dishonesty" cannot be logically married with the term "opinion" in circumstances such as this. No amount of dictionary definitions can change that. An "opinion" is an opinion and not a statement of fact. Mr. Curd cannot be disciplined for giving or defending his expert opinion under the supervision of a Circuit Judge pursuant to the Rules of Civil Procedure.

IV.

SEPARATION OF POWERS

This issue is not about honesty or dishonesty, it is about expert testimony given before a Judge in a Circuit Court. The question is whether such an expert can be later disciplined by an administrative agency if that agency disagrees with the expert's testimony. To permit such post trial discipline would inhibit testimony in Court. In this case, Mr. Curd acknowledged that the monumentation of a highway would generally control, but noted that this might not be true if there was adverse possession. Mr. Curd used the exact course and distance that was in the deeds. (Transcript of Court Testimony, Board Exhibit 2, pp. 31, 32) It was never a question of ignoring the highway in question (Eadsville Highway), it was a question of its significance when discussing courses and distances. In this case courses and distances were important because of adverse possession.

The legislative function cannot be so exercised as to interfere unreasonably with the functioning of the courts. *Ex Parte Auditor of Public Accounts*, 609 S.W.2d 682, 688 (Ky., 1980) The Kentucky Constitution contains explicit provisions which mandate separation among the three branches of government and specifically prohibit incursion of one branch of government into the powers and functions of the others. *Legislative Research Commission v. Brown*, Ky., 664 S.W.2d 907 (1984). (See also *Chambers v. Stengel*, 37 S.W.3d 741, 742 (Ky., 2001)). The statute and regulations are unconstitutional as applied.

A.

The Attorneys and the Court ask the questions, the expert answers.

The Appellee Board maintains that this is not preserved for appeal. The Appellant Curd maintains that it is part of the Separation of Powers issue which was clearly preserved.

In our Courts of Justice, the attorneys and the court ask the questions and the witness answers. If something is unclear or it appears to be untrue, it is up to the Court or attorneys to clarify through cross examination. Pursuant to our Constitution this is controlled by the Court and therefore a witness is not required to volunteer testimony that is not called for.

The Appellee Board contends that the Board is not dictating the content of any expert testimony. (Appellee Board's brief p. 31). It should be noted; however, that Mr. Curd was disciplined, under the Hearing Officer's Conclusion 27, for failing to advise the court that the Southwoods' boundary line could not have been South of the Eadesville Highway or West to the Matthews tract. Of course it could have if the Southwoods had proven adverse possession. Under the Separation of Powers doctrine, Mr. Curd could not have been required to volunteer a conclusion or opinion which might not have been true.

B.

**Addressing non-constitutional issues before addressing
the constitutionality of the statutes and regulations.**

On page 28 of the Appellee Board's Brief, the Board complains that the Court of Appeals failed to address what matters had been preserved for appeal before moving on

to any constitutional determination. It acknowledges; however, that perhaps the constitutional issue would have remained to some degree, but suggests it might have been narrowed. It should be noted that there has never been a serious suggestion that the Vagueness and Separation of Powers issues were not preserved. The Court was not in error in moving to consideration of the constitutional issues.

V.

LACK OF SUBSTANTIAL EVIDENCE AND ARBITRARY CONCLUSIONS

A.

Boundary Testimony

Unquestionably, if you use courses and distances, the deed plot line crosses the Eadsville Highway. (See Board Hearing Exhibit #10, Curd Topo map with deed plot. Exhibit 10 is reproduced in the Appendix to this Brief, see also testimony at Board Hearing Vol. # 5, p. 32). The Eadsville Highway is clearly shown on Exhibit 10. It was not ignored, but was irrelevant in describing the courses and distances called for in the Southwood deed. Mr. Curd's placement of the course and distance line and his reasons for choosing the "forks of the drain" as a starting point were subject to cross examination in the Circuit Court. Essentially it was his opinion as an expert.

There are no minimum standards on preparing deed plots or Topo maps. A surveyor gives his opinion, the courts decide ownership. (Hearing testimony of Board Witness Kyle Elliott, Hearing before the Board, Vol. II, pp. 61-62). Mr. Curd was brought to Court with his deed plot in order to support the Southwood's adverse possession claim. (Curd Testimony before the Board, Vol. 5, p. 29).

B.

Testimony regarding the research work of Mr. West.

Further argument by Appellant on this issue is not necessary. Mr. Curd stands on his brief.

C.

Testimony regarding Mr. Curd's employment as an investigator.

The Board acknowledged that Mr. Curd's testimony regarding his status as an investigator for the Board would not normally be one that would generate any significant disciplinary action. (Hearing Officer Conclusion # 46, P. 20). The Board's Order disciplining Mr. Curd for this statement was therefore clearly arbitrary.

D.

Mr. Curd was at the site.

The Board does not appear to be seriously suggesting that Mr. Curd was not at the site. The question cited in their brief P. 42, was whether he had ignored monumentation. He responded by stating that he was not ignoring the monumentation, but that he had not been to the site to specifically look for it. The question and response does not suggest that he had not been to the site. He was stating that he was not at the site to look for monumentation. (Board's Findings of Fact, Nos 37, 39 and 40, P. 8 of the Hearing Officers Findings) The findings of the Board were clearly erroneous and are not supported by substantial evidence.

CONCLUSION

The issue is not whether Mr. Curd's opinions were right or wrong. The issue is whether Mr. Curd can be later disciplined by an administrative agency when those opinions were given in a Court of Law under the control of a Circuit Judge and subject to examination and cross-examination by attorneys for both parties. Any statute or regulation that prohibits an expert from giving his opinion in a court of law, or penalizes that expert when they disagree with that opinion is unconstitutionally vague as applied and violates the Separation of Powers doctrine of the Kentucky Constitution. This Court should find accordingly.

Respectfully submitted,



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APPENDIX

1. Wayne Circuit Court - Denny v. Southwood trial exhibit- Topo Map with deed plot annotated by Mr. Curd entered as Board Hearing Exhibit 10.