DIRT LAW AT GROUND LEVEL

"WHAT WE HAVE HERE…"
by W. Christopher Barrier
Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

In the iconic movie "Cool Hand Luke" (which, by coincidence, is the exact same age as my law license), the superb character actor Strother Martin has a classic line: "What we have here is a failure to communicate."

Several recent Arkansas appellate decisions illustrate how hard that can sometimes be, when the explainer is a lawyer trying to communicate to a client just why a case was lost, without falling back on the lame excuse of "a technicality."

In **Stevens v. Stair**, the client received a deed which recited that it conveyed "ten acres, more or less" and the client wanted ten acres. Unfortunately, the legal description in the contract and the deed, represented closer to six acres, which legal description controlled. What the

lawyer probably needed most to communicate was the havoc that would be played if the rule were the opposite.

In **Laster vs. Williams**, the purchasing client needed to understand why a fence line acquiesced in by previous owners in the distant past was binding on the purchaser, current surveys not withstanding.

And why, in **Merryman vs. Cargile,** the result seemed just the opposite. That case involved a mutual mistake of fact as part of an eighteen-year-old probate proceeding as to where a leasehold's boundary line lay relative to a county road.

The explainer at law would need to communicate why the court still had jurisdiction, why severed mineral interests typically can't be adversely possessed, and why courts in some instance have to be able to fix past mistakes, if they are to be fixed at all..

These are not, of course, all of the decisions that lawyers (and sometimes realtors) may be called upon to explicate, but surely **Benefit Bank vs. Rogers** is apt to be among the most emotionally charged ones for parties, lawyers and judges.

The trial judge in the Rogers' divorce, per their agreement, entered an order or decree imposing a lien on certain property of the former husband to secure the payment of future alimony. The lien was in-validated, to the Bank's benefit, largely because such a lien would have an indefinite pay-off, supposedly making it impossible to sell the property, judicially or otherwise. The Arkansas Court of Appeals affirmed the trial court, citing established law to the effect that such liens are not permissible. The Arkansas Supreme Court said "Sure they are, if you do it right!" Start with a lis pendens. A lis pendens would indeed have directed the Bank to the divorce case file---that is the litigation to which the notice would relate. A lis pendens gets file stamped, not recorded. Further, husband could have created a lien in wife's favor for an

indeterminate amount outside of the proceedings by agreement of the parties, with a simple mortgage, possibly one with an ironclad "dragnet cause"---that is to say, it could have secured anything at all that husband owed wife, at any time, and the Bank should have known better.

Could the problem have been avoided by using a recorded mortgage with a "dragnet" clause instead, especially if the monthly alimony payments had a sunset provisions and, hence, a type of payoff? Maybe, but a couple of more steps would probably be required to make it work. And that would require some heavy duty explaining of the highest order.

CHRIS BARRIER practices real estate law at Mitchell Williams in Little Rock.