

Commonwealth Of Kentucky

Court Of Appeals

NOS. 1998-CA-000775-MR
AND 1998-CA-000805-MR

JEFF MAYS

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 91-CI-00721

DARE ROBERSON AND
BESSIE ROBERSON

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal and cross-appeal from a judgment of the Boyd Circuit Court establishing the boundary line in a property dispute and denying damages to the appellant. The property in question is owned by the appellant/cross-appellee, Jeff Mays ("Mays"), and the appellees/cross-appellants, Dare and Bessie Roberson ("Roberson"). The court below established a boundary line favoring Mays but declined to award him damages based on his claim that interference by the Robersons prevented him from completing his obligations under a lease agreement with a third party for the property in question. Mays argues the

court below erred in not awarding damages, and the Robersons argue the court below erred in establishing the boundary line based upon a survey by Mays's expert, which was based upon erroneous right-of-way width and inaccurate property line calls. We disagree and affirm with regard to both of the appeals presented.

The facts of the case are as follows: the parties owned adjoining tracts of land in Boyd County, Kentucky. The dispute over this property first arose in 1991 when Randolph Steele, Mays's predecessor in interest, erected a fence on the property. The Robersons contended the fence encroached onto their property, and in 1994 the court awarded the Robersons an injunction which allowed them to occupy the land and ordered Mr. Steele to remove his fence from the property. At that time, the court left open the determination of the exact boundary line of the property, but the Robersons subsequently erected a fence of their own and asserted ownership of the disputed property. On or about May 3, 1996, Mays purchased the property from Steele and subsequently became aware of the dispute between Steele and the Robersons, which was still being litigated. On May 29, 1996, Mays moved the court to intervene in the suit between the Robersons and Steele since he had become the record owner of the property, and the motion by Mays was granted. In his intervening complaint, Mays asked the court to determine the exact boundary line so that he might proceed with an agreement to lease the property to a third party entered into on May 16, 1996.

On April 17, 1997, the court heard testimony concerning two different surveys of the property. A survey conducted by

Kelvin Barker of Tri-State Land Development yielded the same result as a 1979 survey of the same property by Joseph Harris and indicated that Mays was correct as to the location of the boundary line. The Tri-State survey, according to the record, began with an iron pin that had been placed on the southwest corner of the property; on the other hand, a survey by John Charles indicated that the Robersons were correct as to the proper location of the boundary. According to the record, Charles determined the widths of the right-of-way and began his survey from the right-of-way using the metes and bounds description of the property contained in the deed. Although the court determined both surveys used the correct numerical calls from the appropriate deeds, the court ultimately determined the Tri-State survey reflected the true location of the boundary line. The court concluded in pertinent part:

It is clear to this Court that Barker took the correct approach. The iron pin shown to Plaintiff by Lyons many years ago is an exact point which can be located with certainty and never varies. The method of approximating the right of way width used by Charles involves estimations and subjective opinion and could never yield as accurate a starting place as the southwest iron pin.

Following the court's determination of the boundary line issue in his favor, Mays moved for a hearing on the issue of damages, since he had been unable to complete his obligations under the proposed lease agreement of May 16, 1996. A hearing on damages was conducted on October 31, 1997, and the court entered an order denying Mays's claims for damages on February 17, 1998. Mays filed a motion to amend, alter or vacate the February 17 order, and on February 27, 1998, the court entered an order

clarifying the order of February 17, but once again denied Mays's claim for damages. In the order of February 17, the court indicated Mays knew of the clouded title when he purchased the property, and the Robersons had occupied the disputed property under a claim of right as a result of the 1991 legal proceedings involving Randolph Steele. The court further indicated Mays had purchased the property and intervened in the case too close in time to the date for completion of the lease agreement; thus, Mays was solely responsible for his failure to complete the terms of the lease agreement. In its order of February 27, the court clarified its position that damages sought by Mays were not causally related to the encroachment by the Robersons onto the Mays's property. The court did not, however, alter the findings regarding the proper boundary line determined on April 17, 1997. Mays's claim for damages was once again denied, and this appeal and cross-appeal followed. Mays appeals the denial of damages in this case, and the Robersons have filed a cross-appeal on the issue of the location of the boundary line as determined by the court below.

With regard to the cross-appeal by the Robersons, the court below was presented with conflicting testimony from two surveyors, and after hearing the testimony and reviewing the exhibits offered by the witnesses, the court found Kelvin Barker's survey, which supported the claim of Mays, to be more credible. On their cross-appeal, the Robersons simply argue that the trial court should have accepted the survey supporting their view. The standard to be applied in this case is clearly set out in Croley v. Alsip, Ky., 602 S.W.2d 418, 419 (1980):

The law is clear that "findings of fact [of the trial judge] shall not be set aside unless clearly erroneous." CR 52.01; 7 Clay, Kentucky Practice, Rule 52.01, comment 8. This court has applied this rule in boundary disputes. "It is the rule that, where this court cannot say on an appeal from the decree in an action involving a boundary dispute that the Chancellor's adjudication is against the weight of the evidence, the decree will not be disturbed."

Moreover, "a fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors." Howard v. Kingmont Oil Co., Ky. App., 729 S.W.2d 183, 184-85 (1987).

Our review of the evidence in this case convinces us that the court below has met the Croley standard. The trial court simply found the evidence supplied by Mays, through the surveyor Barker, to be more credible. The Robersons have not established that the survey work by Barker was based on any "erroneous assumption" or failed to "take into account established factors." As a result, the decision of the Boyd Circuit Court is affirmed as to the location of the boundary line.

With regard to the Mays's appeal of the denial of damages, there is simply an unsupported claim by the appellant that the court below erred. We agree with the appellees and believe the lease agreement entered into on May 16, 1996, was a champertous conveyance under KRS 372.070, the so-called champerty statute, that was void, and the Robersons will not be liable for Mays's damages.

KRS 372.070(1) states in pertinent part:

Any sale or conveyance, including those made under execution, of any land, or the pretended right or title thereto, of which any other person has adverse possession at the time of the sale or conveyance is void. . . .

At the time of the lease agreement, it is clear that the Robersons were in adverse possession of a twelve-foot strip of land that Mays attempted to include in the lease agreement. In fact, the Robersons had erected their own fence to include the disputed strip in their property and had rejected Mays's request to remove the fence. Although the Robersons had not held the disputed land long enough to gain title by adverse possession, "adverse possession" is simply possession that would in the statutory period ripen into title by adverse possession.

Tankersley v. Sell, Ky., 226 S.W.2d 17 (1950). Furthermore, a conveyance (or lease) of land is void to the extent it includes land held by one other than the grantor, in such a manner that if held for the statutory period, the holding would ripen into title, even though the adverse holding originated because of a mistaken belief by the adverse holder as to the true location of the boundary line. Johnson v. Kirk, Ky. App., 648 S.W.2d 878 (1983). This is exactly what happened in the case at bar.

Although the boundary line had not been determined at the time Mays sought to enter into the lease agreement, the Robersons believed they were entitled to the twelve feet in question and were adverse holders of the disputed property. Ultimately, the Robersons were mistaken as to the boundary of their property, but this mistaken belief does not change the character of Mays's attempted conveyance through the lease agreement. Id. The

champerty statute has been satisfied, and the attempted lease by Mays is void.

We note that the original conveyance between Randolph Steele and Mays was not champertous. Steele was already involved in litigation with the Robersons when he conveyed his interest to Mays; therefore, this conveyance did not run afoul of the purpose of the champerty statute--prohibiting one who is not willing to sue to clear doubtful title to the property from selling it to another person, thereby encouraging strife. Mays merely stepped into the shoes of Steele, who was already a party to the litigation. Strunk v. Perry, Ky., 236 S.W.2d 912 (1951). With his attempted lease agreement, on the other hand, Mays created a new action and asserted new rights not derived from Steele, and we believe his attempted conveyance violated the champerty statute. As such, the lease agreement is void, and the Robersons cannot be held liable for any damage suffered by Mays.

For the reasons stated above, the decision of the Boyd Circuit Court is affirmed on both the appeal and the cross-appeal.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Jeffrey L. Preston
Catlettsburg, Kentucky

BRIEF FOR APPELLEES/CROSS-
APPELLANTS:

Rodney S. Justice
Ashland, Kentucky