

RENDERED: JANUARY 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001412-MR

JEFFREY HARRIS AND BARBARA HARRIS

APPELLANTS

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 07-CI-00767

MICKEY G. KERR

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: Jeffery and Barbara Harris (the “Harrises”) appeal from the Barren Circuit Court’s findings of fact, conclusions of law and judgment in which the trial court adjudicated the parties’ property dispute in favor of Mickey G. Kerr. After a thorough review of the record, the parties’ arguments, and the applicable law, we find no error on behalf of the trial court and accordingly, affirm.

The facts that give rise to the instant appeal before this Court may be briefly summarized. A boundary line dispute arose after Kerr purchased a tract of real estate adjacent to the Harrises' land in the vicinity of Crabtree Road and Skaggs Creek in Barren County. Kerr argues that his property abuts the right-of-way on the east side of Crabtree Road. The Harrises argue that their property continued across Crabtree Road and ended at Kerr's existing fence line. The total land in dispute is 400 feet in length and varies from 1 foot wide to 6 feet wide. The matter was heard before the trial court at a bench trial on June 3, 2008.

At trial the parties' presented conflicting evidence on the position of the boundary line. Both parties offered their respective deeds and the corresponding chain of title to support their arguments as to the location of the boundary line. The parties' arguments and the language contained in the deeds gave rise to two issues before the trial court: 1) whether the "Paul Luster survey" conducted in the 1980s for Kerr's predecessor in title was proper and supported Kerr's position of the boundary line; and 2) whether Crabtree Road had been expanded which would then impact the Harrises' claimed boundary line.

With these two issues in mind, the parties presented conflicting testimony from multiple witnesses. First, Chester Bishop testified as to the Paul Luster land survey. Bishop had worked in the surveying field for over fifty years. He testified that the calls in the Harrises' deed place the eastern boundary of their property one foot past the center line of Crabtree Road and that the Paul Luster survey places the western boundary of the Kerr property with the center of

Crabtree Road. Bishop further testified as to the issues surrounding the parties' surveys and deeds¹ and explained how he arrived at his conclusion that the Paul Luster survey was proper and supported Kerr's opinion as to the location of the boundary line.

Next, Billy Crabtree, a former owner of the Harrises' land, testified that Crabtree Road was improved and widened between 1967 and 1968 which resulted in the eastern edge of the road shifting further to the east. However, John R. Miller, the former magistrate for the district, testified that the road was not widened or moved except where it crosses the creek.

After the bench trial, the trial court issued its findings of fact, conclusions of law, and judgment in which it found that the Paul Luster survey, which was corroborated by the testimony of Chester Bishop, was compelling regarding the location of the boundary line. Additionally, the trial court found that the testimony of Billy Crabtree with regard to the improvement and widening of Crabtree Road provided a credible explanation for Crabtree Road extending beyond the Harrises' boundary line even though the property description in their deed describes Crabtree Road as contained within their property boundary.

The trial court further noted that in an action to quiet title, Kerr, as the plaintiff, bore the burden to make out his or her case by a preponderance of the evidence. The trial court found that the evidence introduced at the bench trial

¹ Bishop testified to the mistakes contained in both deeds. This included clerical and missing or inaccurate calls in the deeds. Bishop also testified to the width of the right-of-way of the road used during the Paul Luster survey, with which the Harrises take issue.

supported the finding that title to the disputed property should be granted to Kerr. Thus, the boundary line of Kerr's property was set according to the survey made by Paul Luster. It is from this judgment that the Harrises now appeal.

The Harrises present one argument on appeal,² which we have more clearly characterized as the argument that the trial court erred in its determination of the boundary line. In support thereof, the Harrises argue that Kerr had the burden of locating the property line and proving that the disputed land was within that boundary; that the trial court was required to adopt the construction which was most against Kerr; and that the trial court failed to consider and comply with the rules for establishment of the correct boundary line.

Kerr responds that the judgment of the Barren Circuit Court locating Kerr's boundary line is supported by substantial evidence and that, accordingly, we must affirm its judgment. With these arguments in mind we turn to the applicable jurisprudence.

As this matter was tried without a jury, the “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Kentucky Rules of Civil Procedure (CR) 52.01. This rule is applicable to boundary disputes.

Webb v. Compton, 98 S.W.3d 513, 517 (Ky.App. 2002). *See also Cole v. Gilvin*,

² Specifically the Harrises argue that “a survey based upon an assumed starting point without reference to known existing monuments is an erroneous assumption as to the width of a public road right-of-way, that did not conform with the existing monuments and containing four directions and distances, none of which were remotely close to the prior directions and distances was unclear, uncertain, and invalid, and should have been construed against the party claiming under such a survey.”

59 S.W.3d 468, 473 (Ky.App. 2001). “With respect to property title issues, the appropriate standard of review is whether the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for that of the trial court absent clear error.” A finding supported by substantial evidence is not clearly erroneous. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 955 (Ky. 1965). Substantial evidence is “that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky.App. 1994). In assessing whether the findings of fact are supported by substantial evidence, we will not substitute our judgment for that of the trial court. *Bickel v. Bickel*, 95 S.W.3d 925, 928 (Ky.App. 2002). *See also Cole* at 473. (It has long been the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence).

With this standard in mind we turn to the Harrises’ argument. The Harrises are correct that Kerr carried the burden of proof in regard to establishing the boundary line. *Meece v. Feldman Lumber Co.*, 290 S.W.3d 631, 636 (Ky. 2009). The Harrises are also correct that a trial court should adopt “the construction which is most against the party claiming under an uncertain survey” and that “under no circumstances ought a doubtful title prevail against a clear one.” *Kentweva Coal & Lumber Co. v. Helton*, 185 S.W. 838 (Ky. 1916). However, we are mindful that the evidence presented at the bench trial was such that the trial

court could conclude that the Paul Luster survey was not uncertain and that the Kerr title was not doubtful.

The Harrises certainly presented evidence questioning the accuracy of the Paul Luster survey and Kerr's claimed boundary line. However, the trial court was also presented evidence establishing the accuracy of the Paul Luster survey and testimony explaining how the confusion of the boundary line arose, namely with respect to the expansion of Crabtree Road and the errors contained in both deeds. Based on the evidence presented at trial, we agree with Kerr that the trial court's factual findings were based on substantial evidence and were not clearly erroneous.

Moreover, in the case *sub judice*, the trial court as fact-finder was free to choose between "conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions" or does not ignore established factors. *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky.App. 2002)(quoting *Howard v. Kingmont Oil Co.*, 729 S.W.2d 184-85 (Ky.App. 1987)).³ The Harrises argue that the Paul Luster survey's starting point was inaccurate; however, the trial court was presented evidence that the survey was correct and that both the Harrises' and Kerr's deeds and accompanying chains of title contained errors. Based on our review, we cannot say that the trial court erred in its determination.

³ Evidence at trial suggested that the Harris survey was dated around the 1920s, however the widening of the road after the preparation of their survey amply explained why the current description contained within their deed based on the 1920s survey could be mistaken.

Finding no error we hereby affirm the Barren Circuit Court's findings of fact, conclusions of law and judgment of June 23, 2008.

ALL CONCUR.

BRIEF FOR APPELLANT:

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