

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001205-MR

GLENN BURTON, AND
BRENDA BURTON

APPELLANTS

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINARD, JR., JUDGE
ACTION NO. 17-CI-00214

WAYNE LUMBER COMPANY, INC.;
AND CUMBERLAND
WOODLANDS, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JONES, AND MAZE, JUDGES.

MAZE, JUDGE: Glenn and Brenda Burton (collectively, the Burtons) appeal from a judgment of the Wayne Circuit Court which quieted title to a disputed tract in the Appellees, Wayne Lumber Company, Inc., and Cumberland Woodlands, LLC.

The Burtons argue that the trial court's findings were not supported by substantial

evidence and were based upon inadmissible testimony. The Burtons further argue that the trial court erred by allowing the Appellees to pursue their claims to a portion of the property which had been sold, and to a portion of the property owned by a non-party. Finding no error, we affirm.

On June 11, 2007, the Appellees filed this action against the Burtons to quiet title to four tracts of real property located in an undeveloped section of Wayne County, Kentucky. The Appellees trace their title back to eleven patents of two hundred acres each granted to P.W. Hardin on January 4, 1870. The Burtons filed an answer and counterclaim also seeking to quiet title to the property in them. The Burtons claim title to two tracts of land encompassing approximately 290.10 acres. The Burtons base their title upon an 1891 patent from A.W. Miller, and covering much of the same area as the Hardin patents. However, they were unable to present deeds tracing their title back to the Miller patent. Rather, they trace their title back to a 1991 deed from Joseph and Juanita Hurst. That deed references an unrecorded 1926 deed from F.C. Miller, which purportedly traces back to the Miller patent. The 1926 deed was not introduced or proven by extrinsic evidence.

The matter came before the court for a bench trial in January 2013. The Appellants first presented the testimony of Sam White, who works for them in land management. He described the property as being very remote, rugged and mountainous land with sixty-foot cliffs. He also testified that he had found blocking lines from prior surveys performed by James West and Jake Staton.

The Appellants then presented the testimony of the surveyors, West and Staton. In 1979, West was hired to conduct a survey and prepare legal descriptions for Byron T. Bach, one of the Appellants' predecessors-in-title. He also conducted a survey of a different property owned by Bach but covered by one of the Hardin patents. In 2000, the Burtons hired West to conduct a survey of their property. While performing that survey, he realized that the Burtons' property overlapped the property he had previously surveyed for Bach. West testified that he reviewed his work in the 1979 survey, as well as the descriptions of the adjoining Hardin patents. Based upon that review, West concluded that his 1979 survey of the Bach property was correct, and that the Hardin patents overlapped the Burtons' property.

Staton testified that he was West's business partner at the time of the 1979 survey for Bach. In addition to that survey, Staton also surveyed other lines covered by several of the Hardin patents, and found marks on the ground left by previous surveys. Staton also reviewed the record of a 1909 lawsuit involving the 1870 Hardin patents. That record included the testimony of the original surveyors of the Hardin patents. In that litigation, the 1870 patents prevailed over a junior patent. Staton noted that the patent at issue in that case had common lines with the Miller patent. Based on all of this evidence, Staton concluded that the Miller patent under which the Burtons claim overlapped the senior Hardin patents.

Glenn Burton was the only witness to testify for the Burtons' claim. He has an associate degree in engineering, but he has no surveying experience. He

relied primarily on statements from Jerry Koger, an adjoining landowner, that there was no overlap between the Hardin and Miller patents. However, he conceded that he had seen the marks on the ground from prior surveys of the Hardin patents, and that West had told him about the overlap.

In his testimony, Jerry Koger denied making any representations to Glenn Burton. To the contrary, Koger testified that, in 1972, he had participated in a review of the deeds from the Miller and Hardin patents. He also personally assisted in the marking the corners of the Hardin patents during a survey at that time. Based upon this information, Koger concluded that the Hardin patents overlapped the property now claimed by the Burtons. Koger also testified that he had declined to purchase the property from the Hursts because he had reason to question the sufficiency of their title.

After reviewing the evidence, the trial court found that the Appellees had successfully traced their title in an unbroken chain to the 1870 Hardin patents. The court further found that the Burtons had failed to trace their title back to the Miller patent, which in any event was junior to the Hardin patent. The trial court further found that the plat prepared by West showing the overlap of the 1891 Miller patent upon the 1870 Hardin patents correctly located those properties on the ground. Consequently, the trial court entered a judgment quieting title to the disputed property in the Appellees. Subsequently, the trial court denied the Burtons' motion to alter, amend or vacate the judgment. This appeal followed.

As this matter was tried before the circuit court without a jury, our review of factual determinations is under the clearly erroneous rule. CR¹ 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence, which is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). It is within the province of the trial court as the fact-finder to determine the credibility of the witnesses and the weight given to the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). This rule applies with equal force on an appeal from a judgment in an action involving a boundary dispute. *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980). Furthermore, 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. *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky. App. 2002), quoting *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184–85 (Ky. App. 1987).

The Burtons concede that the 1870 Hardin patents are senior to the 1891 Miller patent. Furthermore, the Burtons do not contest the trial court’s finding that they failed to trace their title in an unbroken chain to the Miller patent from which they claim. However, the Burtons argue that the Appellees failed to prove their superior title and that they failed to establish the corners and boundaries of their claimed property with reasonable certainty.

¹ Kentucky Rules of Civil Procedure.

Rather, the Burtons primarily challenge the trial court's reliance upon the testimony by Surveyors West and Staton. We find no indication in the record that their conclusions were based upon erroneous assumptions or failed to take established factors into account. To the contrary, their opinions were based upon their own surveys of the boundaries at issue, as well as evidence of prior surveys on the ground. Furthermore, Staton reviewed all of the deeds covering the property at issue, as well as West's deposition testimony and the deposition testimony of the original surveyor of the eleven Hardin patents.

The Burtons also contend that Staton's retracement survey from the 1892 survey failed to comply with the requirements of 201 KAR² 18:150. However, they presented no evidence to dispute the methodology supporting his opinions. Under the circumstances, we find that there was substantial evidence to support the trial court's factual findings.

The Burtons next argue that the trial court erred in holding that the Appellees could pursue their claim to a part of the property which had been sold. In response to the pre-trial motion, the Appellees recorded a corrected deed stating that the property had been sold in error. The Burtons contend that the corrected deed was insufficient, and that the purchaser of that tract was an indispensable party to the action. Consequently, the Burtons maintain that the trial court erred by denying their motion to dismiss the Appellee's petition with respect to that tract.

² Kentucky Administrative Regulations.

We disagree. The transaction at issue involved the Appellees' sale of certain property to Cumberland Forestlands, LLC. The escrow agreement and closing statement executed at the time of the conveyance specifically excepted any lands which were the subject of this litigation. The original deed referred to an exception but did not identify the property which was withheld from the conveyance. The corrected deed specifically identified the property which was excepted. Based on this evidence, the trial court concluded that the parties to the transaction did not intend to convey the property at issue, and consequently, the Appellees still had standing to pursue this action with respect to that property. We find no basis to disturb the trial court's findings as to this matter.

Finally, the Burtons argue that the trial court's judgment improperly awarded property to the Appellees. During the trial, the Burtons moved to dismiss any claim to property which was jointly owned by Glenn Burton and his father, Darrell Burton. The Appellees conceded that they were not claiming any portion of the property owned by Darrell Burton. Nevertheless, the Burtons contend that the trial court's findings and judgment encompassed that tract.

The trial court's judgment found that "the plat prepared by Mr. James West showing the overlap of the 1891 F.C. Miller patent upon the 1870 P.W. Hardin patents 49024, 48926, 48929 and 48931, correctly locates these properties on the ground." The Burtons allege that this overlap includes most of the tract jointly owned by Glenn and Darrell Burton. However, the Burtons do not show how the description includes that property, nor did they provide an alternative

description which excluded that property. In the absence of any definitive showing that the judgment included the property which is jointly owned by Glenn and Darrell Burton, we decline to disturb the trial court's findings or judgment.

Accordingly, the judgment of the Wayne Circuit Court quieting title to the disputed property in Wayne Lumber Company, Inc. and Cumberland Woodlands, LLC is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

David M. Cross
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James M. Frazer
Monticello, Kentucky

BRIEF FOR APPELLEES:

John T. Mandt
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