

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000963-MR

DEAN COOK AND BETTY COOK

APPELLANTS

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 97-CI-00615

JAMES EDGAR SHARPE II; SHERRY
SHARP; AND JEFFREY P. LEWIS

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, HUDDLESTON, AND McANULTY, JUDGES.

McANULTY, JUDGE. Dean and Betty Cook appeal from the judgment of the Pulaski Circuit Court establishing a boundary line between the parties' property based on the survey prepared for the appellees. After reviewing the record and the arguments of counsel, we affirm.

In 1984, the heirs of Herbert Godby decided to sell a piece of property along Beech Grove Road (later changed to Clifty Road) containing approximately 36.42 acres in Pulaski County. They hired Bobby Hudson to produce a survey of the property and to divide it into three Tracts #1-#3. In July 1984, Thomas and Glenda Adams purchased the property at an auction. On July 22,

1994, the Adamses sold Tracts #2 and #3, containing approximately 24.5259 acres to the Cooks. On the same day, the Adamses sold Tract #1, which was adjacent to Tract #2 and contained approximately 11.896 acres, to Michael and Sherry Green. The Cooks and Greens agreed to allow both parties' cattle to graze on all three tracts.

Shortly after purchasing their respective tracts, the Cooks and Greens hired Jack Stigall to perform a survey of their properties. While conducting his survey, Stigall discovered that the survey prepared by Hudson in 1984 was inaccurate. The boundary line separating Tracts #1 and #2 was approximately 78 feet too long and the bearings were off approximately 3 degrees. Stigall adjusted the boundary lines in order to have them close at the necessary points. Stigall marked the boundary line between Tracts #1 and #2 by placing a pin at the southwest corner of Beech Grove Road. No fence was placed to mark the boundary but a partial fence was placed near a well used by the Greens ostensibly to keep the cattle away. The well and a portion of land east of the fence used by the Greens near their home was within Tract #2 according to the Stigall survey.

On January 10, 1997, the Greens sold their property to James and Sherry Sharpe, who intended to stable their horses on it. Shortly thereafter, the Sharpes had a survey performed by Mohammad Bodarian. They then erected a fence extending the entire length of their property along the boundary line with the Cook's tract as designated by the Bodarian survey. This created a dispute between the parties because the Bodarian line was approximately 39 feet west at the northeast corner from the line

designated by Stigall. Prior to resolving this dispute, the Sharpes sold their tract to Jeffrey Lewis on April 18, 1997.

On August 12, 1997, the Cooks filed a complaint against the Sharpes and Jeffrey Lewis seeking to quiet title to the triangular strip of property in dispute generated by the variance between the Stigall and Bodarian surveys. On August 26, 1999, the circuit court conducted a bench trial at which the witnesses included Bobby Hudson, Dean Cook, Michael and Sherry Green, Jack Stigall, James Sharpe and Mohammad Bodarian. On September 28, 1999, the circuit court entered findings of fact, conclusions of law and judgment quieting title to the disputed land to the Sharpes/Lewis as shown in the survey by Mohammad Bodarian. The court noted that Bobby Hudson admitted that his survey contained errors in measuring the division line between Tract #1 (Green/Sharpe/Lewis property) and Tract #2 (Cook property).

On October 5, 1999, the Cooks filed a CR 59.05 motion to alter, amend or vacate the judgment. They argued that the Stigall survey was more consistent with the Hudson survey than the Bodarian survey. They pointed specifically to a "marked tree" referenced on the 1984 Hudson survey as a corner point of reference that Stigall also utilized, but which was not used by Mohammad Bodarian. They also contended that there was an agreement between the Cooks and Greens on the boundary line as found by Stigall. Following a response by the appellees and a trip to the area where the judge was unable to locate the "marked tree," the court denied the CR 59.05 motion on March 22, 2000.

On March 31, 2000, the Cooks filed a second motion asking the court to reconsider its ruling on the prior motion.

The Sharpes filed a response challenging the "Motion to Reconsider" on substantive and procedural grounds. The judge viewed the area a second time and did find the "marked tree," but denied the motion stating the original judgment was correct. This appeal followed.

The Cooks contend the trial court erred by adopting the Bodarian survey rather than the Stigall survey. They contend the Stigall survey is more consistent with the original 1984 survey performed by Bobby Hudson. They assert that Stigall used the "marked tree" referenced in the Hudson survey, while Bodarian used a set stone at the same point. Finally, the Cooks state that they had an agreement with the Greens establishing the boundary line according to the Stigall survey, which allegedly was identified to Jack Sharpe by Sherry Green.

Since this case was tried before the court without a jury, its factual findings "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" CR 52.01. See also Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995); A & A Mechanical v. Thermal Equip. Sales, Inc., Ky. App., 998 S.W.2d 505, 509 (1999). A factual finding is not clearly erroneous if it is supported by substantial evidence. Owens-Corning Fiberglass Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Faulkner Drilling Co. v. Gross, Ky. App., 943 S.W.2d 634, 638 (1997); Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991). Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. Golightly, 976 S.W.2d at 414;

Janakakis-Kostun v. Janakakis, Ky. App., 6 S.W.3d 843, 852 (1999) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972)). "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." Garland, 805 S.W.2d at 118. With respect to property title issues, the appropriate standard of review is whether or not 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. Church and Mullins Corp. v. Bethlehem Minerals Co., Ky., 887 S.W.2d 321, 323 (1992), cert. denied, 514 U.S. 1110, 115 S.Ct. 1962, 131 L.Ed.2d 853 (1995). A trial court's determination of a boundary line should be upheld unless it is clearly against the weight of the evidence. Croley v. Alsip, Ky., 602 S.W.2d 418, 419 (1980) (quoting Rowe v. Blackburn, Ky., 253 S.W.2d 25, 27 (1952)). 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). When the opinions of the expert witnesses conflict, a fact finder's choice of which witness to believe "rarely can be held 'clearly erroneous.'" Gatliff v. White, Ky., 424 S.W.2d 843, 844 (1968).

In the case sub judice, the trial court accepted the Bodarian survey over the Stigall survey. Mohammad Bodarian

testified¹ that he found and utilized all of the monument markers identified in the Greens' deed in conducting his survey. He stated that he used a set stone at the northeast corner of Tract #1 as a beginning point and that he was unable to locate a "marked tree" referenced in the Hudson survey. Meanwhile, Jack Stigall stated that in 1994 he was unable to locate the set stone at the northeast corner but did find the "marked tree."

Our review of the deeds and surveys admitted into evidence at the trial indicates that the Cooks' reliance on the "marked tree" is misplaced. The survey exhibit used by Stigall during his testimony² reveals that Stigall and Bodarian did not differ significantly on the placement of the northwest boundary point, which is the point referenced by Hudson's survey by a "marked tree." While Bodarian utilized a different marker, the location of the northwest point is virtually the same in both surveys. The area of controversy is the southwest corner and the call N 68° 51' 12' W 113.41 feet, which Bodarian modified by lengthening it to 151.37 feet in order to close the property lines. Bodarian relied upon a stone monument, while Stigall merely used courses and distances.³ It is well-established that monuments take precedence over courses and distances. See Marcum v. Cantrell, Ky., 409 S.W.2d 159 (1966); Lainhart v. Shepherd,

¹ Unfortunately, our review is hampered by the fact that the circuit court clerk "lost" the videotape record of the trial. Therefore, the parties prepared and the trial court approved a narrative statement of the trial testimony. See CR 75.13.

² The record does not contain Stigall's original 1994 survey.

³ We note that the Hudson survey refers to a "rock" at this point as a marker.

Ky., 246 S.W.2d 460 (1952); Wagers v. Wagers, Ky., 238 S.W.2d 125 (1951). Bodarian testified that he found and used the monuments stated in the property description in the Adams, Green, and Sharpe deeds, which all contained the same description. The Hudson survey was not recorded and the only reference to a "marked tree" in the deeds appears in the Cooks' deed for a different call or reference point than the one at issue in this case. The Green and Sharpe deeds do not refer to the "marked tree" noted in the Hudson survey as a monument in their description of Tract #1. It also is unclear whether the "marked tree" identified by the Cooks is the same one used by Hudson in his 1984 survey. As a result, we cannot say the trial court abused its discretion or was clearly erroneous in accepting the Bodarian survey over the Stigall survey.

The Cooks also alleged the existence of a boundary line agreement with the Greens consistent with the Stigall survey. Their appellate brief provides little legal analysis and no case citations on this issue.

It is well-established that owners of adjacent property may settle a bona fide boundary line dispute by oral agreement. See Faulkner v. Lloyd, Ky., 253 S.W.2d 972 (1952); Redman v. Redman, Ky., 240 S.W.2d 553 (1951); Steele v. University of Kentucky, 295 Ky. 187, 174 S.W.2d 129 (1943). A valid oral agreement on a boundary line is binding on the parties' successors in title. Bringardner Lumber Co. v. Bingham, Ky., 251 S.W.2d 273, 275 (1952); Kentucky Harlan Coal Co. v. Harlan Gas Coal Co., 245 Ky. 234, 53 S.W.2d 538, 541 (1932). However, in order to establish a valid oral agreement under the agreed

boundary doctrine, a claimant must show (1) a bona fide controversy over the location of the boundary line between the properties; (2) an agreement between the parties with the line being marked; (3) actual possession of the disputed land in accordance with the agreement; and (4) continuing acquiescence or mutual recognition by the parties for a considerable length of time. See Redman, 240 S.W.2d at 553-54; Steele, 174 S.W.2d at 132; Bringardner, 251 S.W.2d at 274. The agreed boundary doctrine was developed to avoid the prescriptions of the statute of frauds. See, e.g., Wolf v. Harper, 313 Ky. 688, 233 S.W.2d 409 (1950). In Moran v. Choate, 253 Ky. 470, 69 S.W.2d 994, 995-96 (1934), the court noted that the existence of a dispute or doubt about the true location of a boundary line and relinquishment of the claim provides the necessary consideration for the agreement. See also Hotze v. Ring, 273 Ky. 48, 115 S.W.2d 311 (1938). Factors such as the marking of the agreed boundary line, the taking of actual possession of land, and the acquiescence of the parties in the possession provide evidentiary support for creating a presumption that there was an agreement. See, e.g., Hotze, supra; Wolf, supra; Carver v. Turner; 310 Ky. 99, 219 S.W.2d 409 (1949).

The Cooks argue that they had an agreement with the Greens to adopt the boundary line between their properties as designated by Jack Stigall in his 1994 survey. Dean Cook, Michael Green, and Sherry Green all testified that they agreed to this boundary line and that Stigall placed a steel pin to mark the southeast corner of Tract #1. After reviewing the record, we

believe this argument fails on both procedural and substantive grounds.

First, this issue was not properly preserved. The trial court's opinion refers to testimony on the alleged agreement but the court made no findings of fact or conclusions of law on this subject. The court's opinion merely states that it was adopting the Bodarian survey. While the Cooks' first CR 59.05 motion to alter, amend or vacate mentions the alleged agreement, the second motion to reconsider does not and they did not ask the trial court for factual findings or a specific ruling on this issue. The absence of a request for additional findings of fact constitutes a failure to preserve the issue and is fatal to an appeal based on this issue. See Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997); CR 52.04.

Second, the Cooks failed to present sufficient evidence to establish a binding agreement under the agreed boundary doctrine. Although the discrepancies in the parties' deeds created some uncertainty surrounding the boundary line, it is unclear why Jack Stigall was hired to prepare his survey in 1994. The Cooks and Greens apparently cooperated in using all three tracts for raising their cattle and there is no evidence of a dispute or controversy over the boundary line in 1994.⁴ In addition, the Greens had possession of the thirty-nine foot strip of land currently in dispute, placed a partial fence restricting access to this area, and used the well on this land. The Greens did not change the property description in their deed to the

⁴ The Cooks and Greens were related by marriage.

Sharpe to reflect a boundary agreement. While the Cooks state the Greens had their permission to use this land, the Greens' acts are inconsistent with the Cooks' claim of ownership. The only evidence of the agreement was the alleged steel pin placed by Stigall but both James Sharpe and Mohammad Bodarian testified that they did not see the steel pin. Consequently, the Cooks have not shown the existence of a boundary agreement that would bind subsequent purchasers of the properties.

For the foregoing reasons, we affirm the judgment of the Pulaski Circuit Court.

HUDDLESTON, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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