

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002609-MR
AND
NO. 2004-CA-000096-MR

WILLIAM HITCHCOCK AND
KIMBERLY HITCHCOCK

APPELLANTS

v. APPEALS FROM LAWRENCE CIRCUIT COURT
HONORABLE DANIEL R. SPARKS, JUDGE
HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 99-CI-00249

IRENE CASTLE DICKERSON;
MICHAEL CASTLE; AND GARRY CASTLE

APPELLEES

OPINION AFFIRMING

** ** * * *

BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

JOHNSON, JUDGE: William Hitchcock and his wife, Kimberly Hitchcock, (the Hitchcocks) have appealed from an order of the Lawrence Circuit Court entered on May 30, 2002, which adopted a Master Commissioner report filed on May 15, 2001, and from an order of the Lawrence Circuit Court entered on December 23,

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

2003, which denied their CR² 60.02 motion.³ Having concluded that the circuit court's judgment establishing the boundary line between the parties is not clearly erroneous as it is supported by substantial evidence and that the circuit court did not abuse its discretion by denying the CR 60.02 motion, we affirm.

This case arises from a boundary line dispute between adjoining landowners, the Hitchcocks and the appellees, Irene Castle Dickerson and her sons, Garry Castle and Michael Castle (collectively the Castles). The property at issue in this litigation was originally owned by Lewis Borders in the early 1900's. There is no dispute as to the validity of the parties' recorded deeds; the dispute concerns the descriptions contained in the deeds.

The property claimed by the Hitchcocks was originally inherited by Kimberly⁴ upon the death of her father, William R. Whitaker, on or about August 30, 1995. The description of this land, as set out in Whitaker's deed, indicates that it began at a point on the Old County Road, then ran northwest for a distance of 147 feet to a point, then north 398 feet to a point,

² Kentucky Rules of Civil Procedure.

³ The two appeals were consolidated for our review by an order entered by this Court on March 22, 2004.

⁴ At the time Kimberly inherited this land from her father, she was not married. She married William Hitchcock before this action commenced.

then east 50 feet to point, then south 487 feet to the Old County Road, then west 95 feet to the beginning.⁵

Irene was deeded her parcel of land on or about September 5, 1968. Then, on or about October 20, 1993, she conveyed it to her sons, Michael and Garry, reserving for herself a life estate.⁶ This property description is as follows:

Beginning on the south side at the corner of Ed Preston line and the Big Sandy River; thence up the river in a westerly direction to the mouth of Dean Branch; thence up the branch in a northwesterly direction to the middle road at an iron stake; thence following the middle road in a northeasterly direction to the main Lawrence County road at an iron stake; thence following the old main road to the Ed Preston line; thence following the Ed Preston line in a southerly direction to the river, the point of beginning [emphases added].

The Johnson County Fiscal Court had previously conveyed to Irene by quit claim deed⁷ "[a]ll of that certain county road which goes

⁵ The description of the Hitchcock property contained in a deed dated June 9, 1973, between Kermit and Beatrice Wallen and Estill and Roma Stepp and recorded in Deed Book 158, page 507, in the Lawrence County Court Clerk's Office reads as follows:

BEGINNING at the old County Road on Dean Branch; thence running N. W. 147 feet to a rock marked with an "X"; thence running North 398 feet to a rock marked with an "X"; thence running east fifty (50) feet to a rock marked with an "X"; thence running South 487 feet to the County Road; thence running with the County Road West 95 feet back to the beginning.

⁶ This deed is recorded in Deed Book 324, page 258, in the Johnson County Court Clerk's Office.

⁷ This deed, dated December 30, 1981, is to an abandoned road referred to in this case as the "middle road".

through the property of the Grantees as described by deed dated September 5, 1968"

This action commenced on October 19, 1999, when the Hitchcocks filed a complaint in the Lawrence Circuit Court after Michael placed a mobile home on property the Hitchcocks claim to own. A hearing was held before a Master Commissioner on September 19, 2001, to determine the proper boundary line between the parties' land. Evidence was introduced that three roads have existed on the land now owned by the Hitchcocks and the Castles. The first road, the Old County Road,⁸ was in use when Borders owned the property and conveyed his interests therein through the 1919⁹ and 1925¹⁰ deeds. The second road, the "middle road," ran through the center of the Castles's property and around an old barn.¹¹ The third road, State Route 581, was constructed in 1968, and is the main thoroughfare currently in use near the properties. The disputed parcel of land is approximately a one and one-half acre tract situated north of the "middle road" and south of the Old County Road. It is

⁸ Sections of this road are still visible on the aerial photographs; however, the entire road is no longer in existence.

⁹ The 1919 deed was from Lewis Borders to Ham and Miranda Wallen; the land is now owned by the Hitchcocks.

¹⁰ The 1925 deed was from Lewis Borders to John and Wrae Meek; the land is now owned by the Castles.

¹¹ This barn was used by the Castles to store their tobacco crop. The barn was torn down in the late 1970s; however, the stone footers used as the foundation of the barn still remain.

located along the southern portion of the Hitchcocks's land and the northern portion of the Castles's land.

The Hitchcocks contend that the Castles's property extends only to the "middle road" as described in the 1968¹² and 1993¹³ deeds, and that the Castles do not own any land north of the "middle road". The Castles, on the other hand, argue that the northern boundary line of their land is the center of the Old County Road since it was the only county road that existed in this area at the time the original deeds were written.

Two land surveyors, Larry Fitch and Randall Thompson, testified that the deeds at issue were not written according to metes and bounds, with reference to any bearings or distances that can be located on the land today. Instead, the deeds used trees and rocks as landmarks which are no longer in existence. Thus, because of the language contained in the deeds, the surveyors in determining the boundary line had to rely on additional information, including aerial photographs of the subject real estate and statements made by residents who have knowledge of the land in dispute.

The Hitchcocks introduced testimony regarding a deed which conveyed a small parcel of the Hitchcock land, previously

¹² The 1968 deed was from Cora Meek to Irene.

¹³ The 1993 deed was from Irene to her sons.

owned by Estill and Roma Stepp, to Elizabeth Ward.¹⁴ The description of the land contained in the deed to Ward reads as follows:

BEGINNING at an iron stake at the Old County Road; thence a straight line running back from the road a distance of 100 feet to an iron stake; thence a straight line down the creek a distance of 100 feet to an iron stake; thence a straight line back to the Old County Road and iron stake a distance of 50 feet; thence following the Old County Road a distance of 100 feet to the iron stake, the point of beginning [emphases added].

Thompson testified that, usually, if a parcel of land owned by one person joins another person's land, the deed will state the name of the owner of the common boundary line. The Hitchcocks emphasized the fact that the description of the Ward land does not indicate that its southern boundary line was shared with the Castles's northern boundary line. Instead, the deed states that the boundary line is the Old County Road.

However, Robert Page¹⁵ testified that he had helped Stepp¹⁶ put stakes into the ground to mark off the boundary line of the Ward land. Page testified that, to his knowledge, the Ward boundary was also the Castles's boundary, and that there was not any land retained by Stepp situated between Ward and the

¹⁴ This deed is dated August 25, 1983, and is of record in Deed Book 231, page 305, in the office of the Johnson County Court Clerk. The Ward property was approximately 100 feet by 50 feet in size.

¹⁵ Robert Page is a resident in the area who lived across the road from Irene for approximately eight years.

¹⁶ Estill Stepp was deceased at the time the hearing was held.

Castles. In assessing the testimony by Page, the Commissioner, and the circuit court by its adoption, stated:

The most convincing testimony was that of Robert Page who testified he assisted Estill Stepp in the placement of the boundary stakes for the Ward property. His testimony was that the Ward property adjoined that of the [Castles].¹⁷

The circuit court made the following findings:

1. The Plaintiffs, William and Kimberly Hitchcock, do not own any farther toward the Defendants than the location of the old county road as placed and located on the map of surveyor Larry Fitch. The [Hitchcocks] provided no proof or evidence consistent with the claim of adverse possession.
2. The [Castles], by history, hold title extending out to the old county road which was in existence in 1925, the time in which their portion was transferred by the common grantor of these two tracts. No deed or conveyance in the chain of [the Castles's] title since that time lists the property to be conveyed as being "a part of" the property conveyed in 1925 or any other similar language which would suggest the property to be conveyed was less than that conveyed in 1925. The use of the property by the [Castles] since 1968 is consistent with this conclusion.
3. The boundary line between the parties is the old county road as marked on the Larry Fitch survey plat. Deeds to each of the parties should be made through the Master Commissioner consistent with this finding.

. . .

¹⁷ The Ward property was subsequently reacquired by the Hitchcocks and their predecessors.

It is the [] Judgment of the [Lawrence Circuit Court] that the boundary line between the [Hitchcocks] and [the Castles] be located in the area of the survey map of Larry Fitch delineating the center of the Old County Road as marked on said map.

On November 26, 2001, the Hitchcocks filed exceptions to the Commissioner's recommendations. In an order dated May 29, 2002, the circuit court overruled the exceptions and accepted the Commissioner's recommendations as the circuit court's final judgment.

On June 6, 2002, the Hitchcocks filed a motion to alter or amend¹⁸ the circuit court's judgment, asserting that they should be granted an easement across the disputed land to allow access to their private driveway.¹⁹ On June 7, 2002, the Hitchcocks filed a supplemental motion to alter, amend, or vacate, arguing that the Commissioner's recommendations were not supported by the evidence presented at the hearing. In their supplemental motion, the Hitchcocks claim to have obtained a deed to the land between the "middle road" and the Old County Road.²⁰ The Castles argue that the submission of this deed as evidence was untimely. The circuit court, in an order entered

¹⁸ This motion is not an issue on appeal before this Court.

¹⁹ The private driveway is the only access the Hitchcocks have to their residence and to a family cemetery located on their land.

²⁰ This deed is from the heirs of John and Wrae Meek, and it is dated January 28, 2002.

on November 21, 2003, denied the Hitchcocks's motions to alter, amend, or vacate. This appeal in Case No. 2003-CA-002609-MR followed.²¹

Meanwhile, on December 3, 2003, the Hitchcocks filed a motion pursuant to CR 60.02(c),²² asserting that when Fitch testified before the Commissioner, his surveying license had been suspended. The Hitchcocks claim that since Fitch testified falsely that he was a licensed surveyor, the circuit court's judgment should be set aside because of the perjured testimony.

In an order entered on December 23, 2003, the circuit court denied the Hitchcocks's CR 60.02(c) motion. The circuit court reasoned that at the time Fitch performed the survey for the Castles, he was in good standing with the Kentucky State Board of Licensure for Professional Engineers and Public Land Surveyors; his license had been suspended afterwards only because he did not attend the required continuing education courses. In support of its decision to deny the Hitchcocks's motion, the circuit court stated that when Thompson testified before the Commissioner his surveying license had also been

²¹ This Court granted a motion by Lawrence County to file an amicus curiae brief.

²² CR 60.02(c) states:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (c) perjury or falsified evidence[.]

suspended by the Board of Licensure. The circuit court reasoned that since both surveyors were licensed at the time they completed their survey, but each had his license suspended when he testified before the Commissioner, each party was similarly situated, and vacating the court's judgment was not warranted. This appeal in Case No. 2004-CA-000096-MR followed.

This Court cannot disturb a lower court's finding of fact unless the judgment is clearly erroneous.²³ We cannot substitute our judgment for that of a lower court if the lower court's decision is supported by substantial evidence.²⁴ Substantial evidence is evidence of sufficient probative value to induce conviction in the mind of a reasonable person.²⁵

In its findings the circuit court indicated that it was persuaded by evidence from Robert Page, who testified that the southern boundary of the Ward property as an off-conveyance from the Hitchcock property shared a common boundary line with the Castles's northern boundary line. The circuit court also relied on Michael's testimony that "an old ditch line" had been the proper boundary line between the Castles's property and the Ward property that had been conveyed by the Hitchcocks's

²³ CR 52.01. See also Hoffman v. Russell Federal Savings & Loan, 390 S.W.2d 644, 647 (Ky.App. 1965).

²⁴ Leveridge v. Leveridge, 997 S.W.2d 1, 2 (Ky. 1999)(citing Combs v. Combs, 787 S.W.2d 260, 262 (Ky. 1990)). See also Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986).

²⁵ Blankenship v. Lloyd Blankenship Coal Co., 463 S.W.2d 62, 64 (Ky. 1970).

predecessor; and that the ditch is in the location of the Old County Road.²⁶ Further, Michael stated that this boundary line was recognized by both the Castles and by Ward.

Based on the extensive review by the circuit court, and the testimony given during the Commissioner's hearing, we conclude that the circuit court's judgment is supported by substantial evidence and it did not err in determining that the proper location for the boundary line was the Old County Road.

In the second appeal, the Hitchcocks claim the circuit court abused its discretion by denying their CR 60.02(c) motion.²⁷ To be entitled to relief under CR 60.02, a party must demonstrate "some significant defect in the trial proceeding or evidence at trial, . . . such that 'a substantial miscarriage of justice will result from the effect of the final judgment.'"²⁸

The Hitchcocks claim that since the surveyor hired by the Castles testified that he was a licensed land surveyor, when, in fact, his license had been suspended at the time he testified, the circuit court relied on perjured testimony in making its judgment. However, as noted by the circuit court, since both parties were similarly situated and neither was

²⁶ As indicated previously, the Ward property was subsequently reacquired by the Hitchcocks and their predecessors.

²⁷ Schott v. Citizens Fidelity Bank & Trust Co., 692 S.W.2d 810, 814 (Ky.App. 1985).

²⁸ Wine v. Commonwealth, 699 S.W.2d 752, 754 (Ky.App. 1985) (quoting Wilson v. Commonwealth, 403 S.W.2d 710, 712 (Ky. 1966)).

disadvantaged by permitting the testimony into evidence, the final judgment did not result in a substantial miscarriage of justice. Both surveyors were allowed to testify as to their observations and opinions regarding the location of the boundary line; and both were clearly qualified to provide expert opinion even though they subsequently encountered licensing problems due to their failure to obtain the required continuing education credits. Therefore, the circuit court did not abuse its discretion in denying the Hitchcocks' motion, and we affirm the circuit court's decision.

In addressing the amicus curiae brief filed on behalf of Lawrence County, we conclude that the circuit court did not move the boundary line of Lawrence County, instead it moved the boundary line of the parties in the action, regardless of which county the property lies in. Therefore, we find no merit in the arguments raised in the amicus curiae brief.

Having concluded that the circuit court judgment setting the boundary line was based on substantial evidence and not clearly erroneous; and that the circuit court did not abuse its discretion by denying the Hitchcocks's motion pursuant to CR 60.02(c), the Lawrence Circuit Court's judgment and order are affirmed.

ALL CONCUR.

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