

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-002105-MR

GLEN HOLBROOK

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 03-CI-00100

EARL R. HOLBROOK; ELEANOR HOLBROOK
AND BRANDON HOLBROOK

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ACREE, JUDGE: Glen Holbrook appeals from a judgment of the Morgan Circuit Court which awarded a disputed tract of land to his aunt and uncle, Earl and Eleanor Holbrook. Glen argues that the trial court's conclusion is not supported by substantial evidence. We disagree and affirm the Morgan Circuit Court.

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The original action was filed by Glen to sell certain properties that had been deeded and/or devised by Edward Holbrook, Sr., and his wife, Bessie, to their eight children. Earl, one of those children, and Eleanor filed a counterclaim against Glen to resolve a boundary line dispute involving one of the tracts to be sold.

The boundary line dispute involves a tract of property that Edward and Bessie conveyed to Earl and Eleanor in a deed dated January 27, 1959, and an adjoining tract of property (the partnership tract) that was deeded from Bessie to her sons, Earl, Ed Holbrook, Jr., and Bertrum Holbrook, on July 21, 1976.

Ed devised his share of the partnership tract to his son, Glen, by will, probated in August of 2001. Glen's son, Brandon, purchased Bertrum's one-third share in April of 2004.

The disputed area is a small tract of land, consisting of less than an acre. Earl and Glen disagree over the physical objects and markers described in the deed establishing the boundaries of Earl's property and whether it includes the disputed tract.

Earl, Bertrum, and Glen were deposed, as well as Joe Curd, a surveyor Glen hired to determine the boundaries of Earl's property. Earl and Bertrum testified that in 1959, when Edward deeded the property to Earl and Eleanor, their father showed the two of them and Ed the boundary lines of the property. Bertrum supported Earl's interpretation of the deed.

Joe Curd's interpretation favored Glen's ownership of the disputed land and created further disagreements over the location of a locust post described in the deed.

The trial court took the depositions and briefs filed by the parties under submission before making its ruling in favor of Earl and Eleanor.

The issue we must address in this case is whether the trial court correctly held that Earl and Eleanor's deed included the disputed tract of land, based on its finding that ambiguities existed within the deed, and its admission of Earl and Bertrum's testimony.

Glen contends that the deed is not ambiguous and as such, no extrinsic evidence should have been allowed to aid in its interpretation. He argues that the language of the deed and his surveyor's testimony should have been the only evidence considered by the trial court.

We agree that extrinsic evidence cannot be admitted to vary the terms of a written instrument in the absence of an ambiguous deed. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000); *Sword v. Sword*, 252 S.W.2d 869 (Ky. 1952). Moreover, parol evidence is admissible only to explain a latent ambiguity in a deed. A latent ambiguity is one which does not appear upon the face of the words used, and it is not known to exist until the words are considered in light of the collateral facts. *Thornhill Baptist Church v. Smither*, 273 S.W.2d 560, 562 (Ky. 1954), citing *Carroll v. Cave Hill Cemetery Co.*, 172 Ky. 204, 189 S.W. 186, 190 (1916).

The deed to Earl and Eleanor's property does not specifically describe their tract. The deed contains no calls or measurements, but bases its description on the location of physical objects and markers. The boundary description describes the disputed boundary as follows:

BEGINNING at Ky State Black top road middle of approach leading from Black top road #1000 to shop house branch; thence with 20 foot private road reserved to (tobacco barn #2) to locust post in corner of plot; then E course with present wire fence to new barn; thence to e end barn corner; thence south course to electric post corners; thence east with old cross fence to Vance Fork crossing Vance Fork to marked cliff corner reservation; thence south with reservation to Bertrum H. Holbrook and Wilma Holbrook, his wife, to black walnut (marked); on bank of Vance Fork;

thence a west course crossing Vance Ford to a marked hickory corner, Bertrum Holbrook and Earl R. Holbrook and Elnora P. Holbrook, his wife; thence straight line west to a set post and stone corner fence; thence south with fence to blown ditch; thence west course with ditch to marked culvert corner Ky #1000; thence northeast course running with Ky #1000 black top road to the beginning, containing 5 acres, more or less.

The parties disagree over the exact location of the locust post referenced in the deed. This discrepancy creates a latent ambiguity in the deed. Extrinsic evidence is admissible to resolve this ambiguity and it was not inappropriate for the trial court to consider the testimony of Earl and Bertrum as to the post's location and the tract's boundaries.

Next, Glen challenges the trial court's reliance on Earl and Bertrum's testimony, as opposed to the expert opinion of Mr. Curd. Glen hired Mr. Curd to determine the boundaries based upon the deed description. However, Mr. Curd also based his determination on the extrinsic evidence provided by Glen, including the location of the objects and markers referenced in the deed, and that includes the locust post.

Since this case was tried before the court, 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[.]" Kentucky Rules of Civil Procedure (CR) 52.01. This rule applies to boundary disputes. See *Crosley v. Alsyp*, 602 S.W.2d 418, 419 (Ky. 1980). A factual finding is not clearly erroneous if it is supported by substantial evidence. See *West v. Keckley*, 474 S.W.2d 87, 88 (Ky. 1971)(involving a boundary dispute); *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Furthermore, "[i]t is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991). With respect

to property title issues, the appropriate standard of review is whether or not the circuit court clearly erred or abused its discretion, and we will not substitute our opinion for that of the circuit court absent clear error. *Church and Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 323 (Ky. 1992); *Cole v. Gilvin*, 59 S.W.3d 468, 473 (Ky.App. 2001).

Here the trial court heard testimony from a qualified surveyor and also from two men who were present when the deed's grantor pointed out the boundary lines. The trial court was free to determine the credibility of the witnesses and the weight to be given that evidence, including the lay and expert testimony, and its view of the property. From our examination of the record, we can not say that it was clearly erroneous for the trial court to find that the disputed land was part of Earl and Eleanor's property. There was no abuse of discretion.

The circuit court therefore did not clearly err by making the factual determination that the language in the deed was ambiguous, by admitting extrinsic evidence regarding the objects and markers referenced in the deed, or by concluding that the disputed area belonged to Earl and Eleanor.

Therefore the judgment of the Morgan Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ira S. Kilburn
Salt Lick, Kentucky

BRIEF FOR APPELLEES, EARL R.
HOLBROOK AND ELEANOR
HOLBROOK:

John C. Collins
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NO BRIEF FOR BRANDON
HOLBROOK