

RENDERED: JANUARY 8, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002025-MR

CHRISTINE SIZEMORE

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR GAYLE HOUSE, JUDGE
ACTION NO. 05-CI-00413

EUGENE SIZEMORE AND
HIS WIFE, LINDA SIZEMORE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Christine Sizemore brings this appeal from a September 25, 2008, judgment of the Clay Circuit Court following a bench trial whereupon the trial court adjudicated a boundary line dispute in favor of Eugene Sizemore and his wife, Linda Sizemore. For the reasons stated, we affirm.

Clarence and Evelyn Sizemore purchased a tract of land located in Clay County, Kentucky, on September 7, 1967 (Sizemore property).¹ Clarence and Evelyn subsequently divorced, and Evelyn died intestate on January 31, 1986. Evelyn was survived by her three children, Judy Sizemore Scalf, Jerry Sizemore and Eugene Sizemore. Her children were her sole heirs at law. Upon her death, Evelyn's undivided, one-half interest in the Sizemore property passed to her heirs at law.

By deed dated March 27, 1986, Clarence, his present wife, Christine (unrelated to appellant), Evelyn's children and the childrens' respective spouses conveyed an approximate one-half acre tract from the Sizemore property to Rebecca Sizemore, the daughter of Eugene Sizemore (appellee) and his former wife, Christine (appellant). Rebecca and her husband, Dale Smith, subsequently conveyed the property to Rebecca's mother, Christine (appellant), by deed dated March 1, 1989. The remaining Sizemore property (approximately 27 acres) was conveyed in fee to Eugene and Jerry as joint owners in May 2004. In January 2005, Eugene and Jerry divided the property by partition deed, with Eugene and his wife acquiring 14.41 acres. Eugene's property adjoined the ½ acre tract that had been acquired by his former wife from his daughter.

After Eugene acquired his 14.41 acre tract, a dispute arose between Eugene and Christine over the location of a chain-link fence around the perimeter of Christine's property. Eugene asserted that the fence was placed on property

¹ Based on a review of the deeds and plats filed of record, the Sizemore property consisted of approximately 27 ½ acres.

owned by him and Linda. The parties were unable to reach an amicable settlement of their dispute. Eugene and Linda initiated this action in the Clay Circuit Court against Christine. Therein, they sought removal of the fence and a determination of the boundary line between the parties' property. Christine answered and counterclaimed asserting, *inter alia*, title to the disputed property by adverse possession.

Following a bench trial, the circuit court rendered judgment in favor of Eugene and Christine. In so doing, the circuit court held:

The Court FINDS that the disputed property line(s) are as described in the survey performed by James Q. Meredith. Professional Land Surveyor, of Meredith General Surveys, Inc., on behalf of [Eugene Sizemore and his wife, Linda Sizemore]. A copy of the survey, marked Exhibit A, is attached hereto and incorporated herein by this reference.

This appeal follows.

Christine contends that the circuit court erred by rendering judgment in favor of Eugene and Linda. Specifically, Christine asserts:

As the testimony and evidence at the trial of this civil action proved [Christine Sizemore's] ownership of the disputed realty via adverse possession by clear and convincing evidence, Judge House abused his discretion and/or was clearly erroneous when he executed the Judgment and Order in this civil action on September 22, 2008

Appellant's Brief at 20. Christine's primary argument on appeal is that she acquired title to the disputed property by adverse possession and the circuit court erred by requiring her to remove the fence from such adversely acquired property.

In this case, the circuit court conducted a bench trial. Pursuant to Kentucky Rules of Civil Procedure (CR) 52.01, the court is required to “find the facts specifically and state separately its conclusions of law.” The circuit court made findings of fact and conclusions of law regarding the disputed boundary line. The court ultimately found that the parties’ respective boundary line was properly set forth in a survey conducted by James Meredith. The circuit court incorporated the survey as part of its judgment. The circuit court, as a fact-finder, may rely upon the opinion of a surveyor in a boundary dispute as long as the opinion relied upon is not based upon erroneous assumptions and does not ignore established factors. *Webb v. Compton*, 98 S.W.3d 513 (Ky. App. 2002). There is no evidence in the record refuting Meredith’s survey. Accordingly, based upon our review of the record, we do not believe that the circuit court made clearly erroneous findings or conclusions in relying upon the Meredith survey in rendering its judgment.

The final judgment and order of the trial court does not make any findings of fact or conclusions of law upon the claim of adverse possession asserted by Christine. It is well-established that CR 52.04 provides that a judgment will not be reversed due to the circuit court’s failure to make findings of fact on an essential issue unless such failure is brought to the court’s attention by a written request for such a finding or by a motion under CR 52.02. Succinctly stated, the court’s failure to make an essential finding of fact must be brought to the attention of the circuit court or the issue is deemed waived upon appellate review. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

The record reveals that Christine neither requested more definite findings of fact under CR 52.02 nor requested a specific ruling upon her adverse possession claim. The law is clear that Christine's failure to do so resulted in a waiver of the issue. *See Cherry*, 634 S.W.2d 423. As such, we conclude that any argument pertaining to adverse possession was not properly preserved, thus precluding our review of such argument upon the merits. *See Crain v. Dean*, 741 S.W.2d 655 (Ky. 1987); *Johnson v. Johnson*, 232 S.W.3d 571 (Ky. App. 2007).² As Christine's only arguments on appeal pertain to her adverse possession claim, we do not reach the merits thereof.

Finally, we note in the circuit court's judgment that an award of attorney's fees was made to Eugene and Linda. The judgment does not state the basis for this award of attorney's fees. It is well-established that in the absence of a statute or contract expressly providing for attorney's fees, the same will not be allowed as costs and are not otherwise recoverable as damages. *Cummings v. Covey*, 229 S.W.3d 59 (Ky. App. 2007).

However, Christine does not address this issue on appeal. Additionally, Christine failed to specifically identify the attorney fee ruling as an issue on appeal in her prehearing statement filed with this Court as required by CR 76.03(8). The rule specifically limits issues to be considered on appeal to those issues set forth in the prehearing statement. Since the attorney fee issue was not

² We also note that Christine Sizemore did not request our review of this omission below pursuant to Kentucky Rules of Civil Procedure 61.02.

raised in the prehearing statement, the matter is not properly before this Court at this time for review. *Sallee v. Sallee*, 142 S.W.3d 697 (Ky. App. 2004).

For the foregoing reasons, the judgment of the Clay Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Stella B. House
Manchester, Kentucky

BRIEF FOR APPELLEES:

Raleigh P. Shepherd
Manchester, Kentucky