

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002187

NANCY FLEMING and
PAUL FLEMING

APPELLANTS

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 02-CI-00352

GARY JESSEY and
ESTHER JESSEY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Nancy and Paul Fleming appeal from a judgment of the Letcher Circuit Court in favor of their neighbors, Gary and Esther Jessey, regarding a boundary and quiet title dispute. The Flemings also appeal a

November 3, 2009 order overruling their motion to alter, amend, or vacate the February 12, 2009 judgment, but do not argue that order in their brief. For the reasons stated hereafter, we affirm.

I. STATEMENT OF THE CASE/PROCEDURAL HISTORY

It is not disputed that the Flemings and the Jesseys each own adjoining tracts in a subdivision located in Letcher County, Kentucky. Furthermore, it is not disputed that their respective titles trace back to a common source, *i.e.*, a larger tract formerly owned by Consolidation Coal Company, and that the boundaries described in their respective deeds refer to a common subdivision map and plat book.¹ What is in dispute is the location of their common boundary line.

On September 4, 2002, the Jesseys filed suit against the Flemings to establish their common boundary, to establish that their own tract included approximately two feet of property between their garage and the fence line, and to quiet title to the portions of their property they contended intersected with that

¹ Both deeds refer to neighboring lots contained in “Block No. 8, containing .30 acres, more or less, as designated and described on Jenkins Subdivision Map No. 8, recorded in Plat Book No. 1, page 108-109, et seq., in the Letcher County Court Clerk’s Office, to which Map specific reference is made for greater certainty and a more accurate description.” The Jesseys own a tract designated “Lot No. 10.” The Flemings own a tract designated “Lot No. 11.”

fence line.² In support, the Jesseys entered into the record a document, styled a “mortgage inspection,” which was completed in 1985 by a licensed surveyor, Douglas Blakely.

The Flemings counterclaimed, alleging that their common boundary with the Jesseys was actually two feet closer to the Jesseys’ property than where the fence was located and that the Jesseys’ shed encroached upon that boundary. Rather than holding a trial of this matter, however, the Jesseys and the Flemings agreed that Richard Hall, the Letcher County Surveyor, would decide the location of the boundary between their adjoining properties. In a September 16, 2004 order, the trial court directed Hall to conduct this survey and recited that (1) the Flemings and Jesseys had agreed to be “finally bound by the decision of the Letcher County Surveyor as if by Judgment of this Court,” and (2) the Flemings and Jesseys had agreed to equally split the surveyor fee.

However, in spite of this order and a December 14, 2007 order restating these directives, Hall did not complete any survey of the Flemings’ and

² Pursuant to Kentucky Revised Statute (KRS) 411.120:

Any person having both the legal title and possession of land may prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. If the plaintiff establishes his title to the land the court shall order the defendant to release his claim to it and to pay the plaintiff his costs, unless the defendant by his answer disclaims all title to the land and offers to give such release to the plaintiff, in which case the plaintiff shall pay the defendant’s costs, unless for special reasons the court decrees otherwise respecting the costs.

Jesseys' common boundary line. And, on April 2, 2008, the trial court vacated its appointment of Hall to perform this survey and released Hall from this case.

On April 4, 2008, the Jesseys moved the trial court to accept Blakely's mortgage inspection as the accurate depiction of the common boundary between the Jesseys' and Flemings' tracts. In response, the trial court entered a May 2, 2008 order which provided:

IT IS HEREBY FOUND AND ORDERED the [Flemings] shall have thirty (30) days from April 24, 2008 to seek, obtain and file in the record proof of employment of a suitable qualified surveyor, as agreed upon by the [Jesseys], to conduct the survey on this boundary line and by which time each party shall remit ½ the fee and costs associated with the survey to be performed payable into Court through the Letcher Circuit Court Clerk's office to be held in escrow pending further order of this Court.

IT IS HEREBY ORDERED that if such arrangements have not been made and filed of record, together with remittance of payment, then the Court does accept the survey of Douglas J. Blakely filed of record as Plaintiff's Exhibit 1 to his deposition in this action as depicting the boundary line between the parties['] properties and judgment shall so issue.

On December 1, 2008, the Jesseys again moved the trial court to accept Blakely's mortgage inspection as depicting their common boundary line with the Flemings. In their motion, they contended that the Jesseys had yet to present any survey, and that the surveying company that the Flemings had purported to hire, Aarco, had not responded to any request from the Jesseys regarding the status of that survey.

In an order entered December 22, 2008, the trial court put the Flemings on notice that if they did not file Aarco's survey with the record by January 5, 2009, it would try the boundary dispute. The order also provided that (1) the trial court would try the quiet title action upon the depositions and other evidence of record and (2) it would enter judgment in favor of the Jesseys by relying upon Blakely's survey.

On January 7, 2009, the Flemings moved for an extension of time in which to obtain the survey pursuant to the trial court's December 22, 2008 order. Thereafter, the trial court entered a January 21, 2009 order allowing the Flemings to provide the Aarco survey to the Jesseys no later than February 4, 2009. But, this order did not adjust or extend the January 5, 2009 deadline for actually entering that survey into the record.³ The record indicates that the Flemings did not actually file Aarco's survey into the record until March 26, 2009.

Along with their February 6, 2009 motion to strike, the Jesseys also requested the trial court to render a judgment in this matter based upon Blakely's mortgage inspection and the other evidence of record, including Blakely's deposition and the depositions of Gary Jessey and Paul Fleming. On February 12, 2009, the trial court entered its final judgment in this matter. The trial court prefaced its final judgment by stating, "As of January 6, 2009 the [Flemings] had not filed the survey with the Letcher Circuit Court Clerk." The judgment then recited that the Flemings and Jesseys each owned their respective tracts, described

³ Oddly, the Jesseys moved to strike the Aarco survey from the record on February 6, 2009, but no such survey existed in the record at that time, either.

those tracts per their respective deeds, and added “The Court finds that the Douglas J. Blakely survey of August 16, 1985 depicts the adjoining boundary line between the [Jesseys’] lands and the lands belonging to the [Flemings].”

On February 20, 2009, the Flemings moved the trial court to alter, amend, or vacate its judgment. Then, on March 26, 2009, the Flemings filed Aarco’s survey into the record. The trial court overruled the Flemings’ motion on November 3, 2009, and, in that same order, held that the Jesseys’ prior motion to strike the Aarco survey from the record was moot in light of the prior February 12, 2009 judgment. The trial court’s February 12, 2009 judgment, as well as its November 3, 2009 order overruling the Flemings’ motion to alter, amend, or vacate, are the subjects of the Flemings’ appeal.

II. STANDARD OF REVIEW

This action was tried by depositions, with the trial court sitting as the finder of fact. When a trial court decides a matter without a jury, the findings of the trial judge shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial judge to consider the credibility of the witnesses. Kentucky Rule(s) of Civil Procedure (CR) 52.01; *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995). In *Webb v. Compton*, 98 S.W.3d 513 (Ky. App. 2002), this rule was held to apply to boundary disputes. Findings of fact are not clearly erroneous if supported by substantial evidence. *Black Motor Company v. Greene*, 385 S.W.2d 954 (Ky. 1964). The test for substantiality of evidence is whether the evidence, when taken alone, or in the light of all the evidence, has sufficient probative value

to induce conviction in the minds of reasonable persons. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999). Moreover, on an appeal from the decree in an action involving a boundary dispute, it is also the rule that where this Court cannot say that the trial court's adjudication is against the weight of the evidence, the trial court's decree will not be disturbed. *See Rowe v. Blackburn*, 253 S.W.2d 25, 27 (Ky. 1952).

III. ANALYSIS

A. The February 12, 2009 Judgment

The sum total of the Flemings' arguments on appeal of the trial court's February 12, 2009 judgment are an attack upon the qualifications of, and mortgage inspection performed by, the Jesseys' witness, Douglas Blakely. We address each of these issues in turn.

1. Blakely's qualifications as a professional land surveyor

Without citation to the record, the Flemings simply contend that "Mr. Blakely testified that he was not a qualified land surveyor under the definition in KRS 322, and therefore, the court, based its decision on unreliable testimony."

We assume that the Flemings are referring to KRS 322.010(8) and (9).

KRS 322.010(8) provides:

"Land surveyor" means a person who is qualified to engage in the practice of land surveying by reason of special knowledge and use of mathematics, the physical and applied sciences, and the principles and methods of

land surveying, acquired by education and practical experience in land surveying[.]

Similarly, KRS 322.010(9) provides:

“Professional land surveyor” means a person who is licensed as a professional land surveyor by the board[.]

Contrary to the Flemings’ assertion, however, Blakely made no such admission in his deposition. In his 2003 deposition, Blakely actually testified that he was a licensed surveyor at the time he performed the 1985 mortgage inspection; that he remained a licensed surveyor at the time of his deposition; and that his professional surveyor’s license number is 2783. Incidentally, this is the same professional surveyor’s license number that appears next to where Blakely signed his name in his certification of his 1985 mortgage inspection. Blakely also discussed his qualifications and experience at length in his deposition. There is nothing in the record demonstrating that Blakely was anything but an experienced, licensed surveyor at the time he conducted his mortgage inspection and at the time he was deposed. As such, Blakely’s qualifications as a professional land surveyor and the trial court’s decision to rely upon those qualifications in reaching its decision in this matter do not supply a basis for reversible error.

2. Blakely’s mortgage inspection as evidence of the common boundary

Next, the Flemings argue that Blakely’s mortgage inspection does not constitute a “qualified land survey” under the purview of KRS 322 *et seq.* As such, they contend that it was error for the trial court to rely upon it as evidence of their common boundary with the Jesseys.

Blakely admitted that the purpose of his mortgage inspection was to enable the Jesseys to secure a loan from a bank, not to determine the boundaries of their property. Blakely testified to the effect that his mortgage inspection would not qualify as a professional land survey that could be recorded in any courthouse. He also testified that when he conducted his mortgage survey in 1985, he did not speak with adjoining owners,⁴ monument the corners, review the adjoining property owners' deeds at the recorders' office,⁵ and that he only approved the drawings contained in the mortgage inspection, and that he did not actually complete the drawing himself.

Nevertheless, Blakely also testified that the measurements and depictions of boundaries contained in his mortgage inspection are "as accurate as can be established using surveying techniques." He testified that when he was conducting his mortgage inspection, he found two of the original pins, described on the subdivision plat map, that Consolidation Coal Company placed into the road in front of the Flemings' and Jesseys' properties in order to monument the property boundaries. He described in depth how he focused upon these pins in matching the boundaries on his map with the plat map; he described at length how his mathematical equations and the equipment he used for establishing those

⁴ The mortgage inspection notes: "All adjoining property owners accept the existing fences as the boundary." But, Blakely testified that he did not write this note on the mortgage inspection, speak to any adjoining property owners, or know if any other person involved with this mortgage inspection did, either.

⁵ Blakely testified that Bethlehem Steele Company, who purchased this property from Consolidation Coal Company, had the deeds of the adjoining property owners in their office and that he researched these deeds there, instead.

boundaries met or exceeded professional surveying standards; and, he testified that his calculations were capable of reproduction or duplication within minimum surveying standards, *i.e.*, “one part in five thousand for distance.”

In this light, we disagree that the trial court was precluded from considering Blakely’s mortgage inspection as substantial evidence of the Flemings’ and Jesseys’ common boundary. Generally speaking, “[a] boundary may be proved by every kind of evidence which is admissible for the establishment of any other fact.” *Hail v. Haynes*, 312 Ky. 357, 227 S.W.2d 918, 921 (1950). Further, unofficial surveys, charts, and maps are admissible if, as here, the surveyor who made the proffered document testifies to their accuracy. *See Gannon v. Pearl*, 311 S.W.2d 184 (Ky. 1958). The Kentucky Administrative Regulations (KAR) specifically contemplate that a surveyor’s working drawing or unfinished plat may be used as an evidentiary exhibit. *See* 201 KAR 18:150(10)(b). The Flemings cite no authority to the contrary. And, in any event, we believe that the several flaws of Blakely’s survey go to the weight of the evidence and thus fell within the purview of the trial court’s authority to resolve. As such, we find no error.

B. Motion to alter, amend, or vacate

As stated, on February 20, 2009, the Flemings moved the trial court to alter, amend, or vacate its February 12, 2009 judgment, and on November 3, 2009, the trial court overruled that motion. In their notice of appeal, the Flemings designated the trial court’s overruling of their motion to alter, amend, or vacate as a subject of their appeal. Yet, in their brief, the Flemings offer no argument

relating to that denial, and instead limit their arguments of error to the admissibility of Blakely's survey and the reliability of Blakely's opinion, as stated above.

Kentucky Rule(s) of Civil Procedure (CR) 76.12(4)(c)(v) states, in part, that an appellant's brief shall contain “[a]n ‘ARGUMENT’ conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law” Because the Flemings offer no argument relating to the trial court's denial of their motion to alter, amend, or vacate, we need not address the merits of the trial court's denial of the Flemings' motion. *See Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006).

IV. CONCLUSION

For these reasons, the decision of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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