

RENDERED: AUGUST 3, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2011-CA-001267-MR

AUDREY JUNE HESS BELCHER; AND  
ELSTER BELCHER, HER HUSBAND

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 10-CI-01204

WALTER W. HESS; AND  
JOANN HESS, HIS WIFE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, COMBS, AND NICKELL, JUDGES.

CAPERTON, JUDGE: Audrey June Hess Belcher and Elster Belcher appeal from the Pike Circuit Court's judgment in which the court adjudicated the parties' property dispute in favor of Walter W. Hess and Joann Hess. On appeal the Belchers assert that the property in question is located in Virginia and not

Kentucky, depriving the Pike Circuit Court of jurisdiction. After a thorough review of the parties' arguments, the record, and the applicable law, we find no error in the trial court's determination that the property is located in Kentucky and not Virginia and accordingly, affirm.

The Hesses filed a complaint with the Pike Circuit Court claiming to have legal title and possession to a certain tract of property in Pike County, Kentucky. The land in question is Tract 9 as set out on a 1973 survey of Charles Hess's property, which is a part of a six-acre survey. The Belchers disagreed and claimed the disputed property by claims of title or adverse possession.<sup>1</sup> The Belchers also challenged the jurisdiction of the Pike Circuit Court, claiming that the property in question actually was located in Virginia.

The parties presented their evidence to the trial court. Hess obtained Tract 9 from his father, Charles Hess, by deed in 1975. The survey of this property was duly recorded in the Pike County Clerk's Office in 1977. The survey established the Kentucky-Virginia border from a 1973 Virginia Department of Highways map.<sup>2</sup> The state border was one of the calls in the Hess's deed.

The Hesses presented their surveyor, Philip Potter, who was able to reconstruct the 1973 survey by locating original monuments; additionally, Potter

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<sup>1</sup> The court ultimately ruled against the Belchers in regard to the claim of adverse possession. This argument was not presented in Appellants' brief to this Court and, thus, the matter has been waived. *See Cherry v. Augustus*, 245 S.W.3d 766, 780 (Ky. App. 2006) ("As a general rule, assignments of error not argued in an appellant's brief are waived.").

<sup>2</sup> While the parties argue over whether the 1973 survey had to be certified at the time, we do not find such evidence to be solely dispositive *sub judice*.

was able to reestablish the Kentucky-Virginia border as found in 1973 from the Virginia Department of Highway map.<sup>3</sup>

The Belchers received a piece of property by deed on June 23, 1980, and that deed reads in part:

“All that certain tract or parcel of land containing **one-half acre**, more or less, situated on the Levisa River, **near** the Virginia State line in Buchanan County, Virginia.” [Emphasis added].

The Belchers presented surveyor J. Todd Vanmeter, who did not conduct a survey but instead attempted to establish the Kentucky-Virginia state line through aerial maps. Both surveyors acknowledged that aerial maps may distort the exact location of property lines.

In regard to the Belchers’ deed, Potter testified that the Belchers’ deed description calls for approximately one-half acre and that if the property line was drawn where the Belchers believed the Kentucky-Virginia border was, then they would instead possess approximately two acres of property and not one-half acre. Moreover, the Belchers’ deed does not call for the state line; instead, it simply references the state line.

After hearing the evidence presented by the parties, the Pike Circuit Court found that the Kentucky-Virginia line was established by the 1973 survey of the Hesses’ property by utilizing maps from the Virginia Department of

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<sup>3</sup> The Hesses also presented evidence that the building on Tract 9 originally operated as a liquor store until Pike County became dry. The Hesses argued that if said store was located in Virginia, it would have been profitable to continue operating the liquor store.

Highways.<sup>4</sup> The court recognized that the Hesses' property is taxed by the Commonwealth of Kentucky and not the Commonwealth of Virginia. A map from the local Virginia property tax office showed that the Hess property was not taxed by Virginia and that the Belcher property did not go to the Virginia line.

The court found that it had jurisdiction because the property in question was located in Pike County, Kentucky. The court also found that the property line as depicted in the 1973 survey recorded in the Pike County Clerk's Office accurately reflects the location of the Hesses' property and the Kentucky-Virginia border as set out therein. Thus, the court ruled in favor of the Hesses. It is from this judgment that the Belchers now appeal.

On appeal the Belchers assert that the property in question is located in Virginia and not Kentucky, depriving the Pike Circuit Court of jurisdiction. We disagree for the reasons set forth *infra*.

Because this matter was tried without a jury, the “[f]indings of fact 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 is applicable to boundary disputes. *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky.App. 2002). *See also Cole v. Gilvin*, 59 S.W.3d 468, 473 (Ky.App. 2001)(“With respect to property title issues, the appropriate standard of review is whether the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for

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<sup>4</sup> The court noted the actual Kentucky-Virginia line has never been officially surveyed.

that of the trial court absent clear error.”). A finding supported by substantial evidence is not clearly erroneous. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 955 (Ky. 1965). Substantial evidence is “that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky.App. 1994). In assessing whether the findings of fact are supported by substantial evidence, we will not substitute our judgment for that of the trial court. *Bickel v. Bickel*, 95 S.W.3d 925, 928 (Ky.App. 2002). *See also Cole* at 473 (It has long been the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence).

Jurisdiction is a prerequisite to any judicial action. *Fehr v. Fehr*, 284 S.W.3d 149, 152 (Ky.App. 2008). “It is well established law that Kentucky courts are without jurisdiction to settle title or possessory rights to land outside the Commonwealth.” *Fehr* at 152, citing *Kaplon v. Chase*, 690 S.W.2d 761 (Ky.App. 1985). Thus, the trial court correctly considered the Belchers’ assertion that the land in question was located in Virginia. The court was presented substantial evidence that the property was located in Kentucky through surveys, taxation, maps from governmental departments of Virginia, and testimony from Potter, the Hesses’ surveyor. In the case *sub judice*, the trial court as fact-finder was free to choose between “conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions” or does not ignore established

factors. *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky.App. 2002)(quoting *Howard v. Kingmont Oil Co.*, 729 S.W.2d 184-85 (Ky.App. 1987)). Thus, the trial court did not err in finding that the property was located in Kentucky, establishing the court's jurisdiction. Accordingly, we affirm.

Finding no error, we hereby affirm the judgment entered by the Pike Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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