

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000940-MR

JOHNNY GOODWIN, AND THE UNKNOWN
SPOUSE OF JOHNNY GOODWIN; RANDY
GOODWIN AND SHAWNA GOODWIN,
HIS WIFE; BILLY GOODWIN AND GAIL
GOODWIN, HIS WIFE; WILMA HURLEY AND
NORMAN HURLEY, HER HUSBAND; LOUISE
HALL AND WAYNE HALL, HER HUSBAND;
WANDA MCINTOSH AND THE UNKNOWN
SPOUSE OF WANDA MCINTOSH; ANTHONY
GOODWIN, JR. AND THE UNKNOWN SPOUSE
OF ANTHONY GOODWIN, JR.; CHRISTIE
PETROSKY AND NATE PETROSKY, HER
HUSBAND; AMBER GOODWIN AND THE
UNKNOWN SPOUSE OF AMBER GOODWIN;
TINA GOODWIN AND THE UNKNOWN
SPOUSE OF TINA GOODWIN; CHELSIE COLE
AND THE UNKNOWN SPOUSE OF CHELSIE
COLE; AND UNKNOWN HEIRS OF FAYE
GOODWIN

APPELLANTS

v. APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 10-CI-00258

DALLAS CLARK AND VICKIE CLARK,
HIS WIFE; AND GLENDA
ROUNDTREE

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MAZE, AND THOMPSON, JUDGES.

MAZE, JUDGE: Johnny Goodwin and other heirs of Faye Goodwin (collectively, “the Goodwins”) appeal from a judgment by the Powell Circuit Court resolving a boundary dispute in favor of Dallas Clark, his wife Vickie Clark, and Glenda Roundtree (collectively, “the Clarks”). The Goodwins argue that the trial court failed to give sufficient weight to the conclusions of their surveyor over the other evidence. Finding no error, we affirm.

The Goodwins and the Clarks each own adjoining tracts of land in the vicinity of Sprout Springs Road in Powell County, Kentucky. The Clarks trace their title to an 1870 deed from Levy Wheeler to Matthew McKinney. The next deed of record in their chain of title is an 1895 Master Commissioner’s deed which conveyed the interest of the Matthew McKinney heirs to John McKinney. The deed describes a conveyance of 747 acres, less an exception of 265 acres. The parties agree that the 265 acre exception covers the same property described in a 1945 Master Commissioner’s deed which conveyed the interest of the Matthew McKinney heirs to A.C. Pettit. The Goodwins trace their chain of title to the excepted property from the 1895 deed via the 1945 Commissioner’s deed.

The disputed property is a 31.145 acre tract located on the south side of Sprout Springs Road. In 2010, the Goodwins and the Clarks each brought

declaratory judgment actions seeking a determination of the ownership of this tract. The Goodwins claim that this tract is part of the 265 acre exception included in their chain of title. The Clarks argue that this tract was not part of the property excepted from the 1895 conveyance and is not part of the Goodwin's tract. The Clarks also sought an award of damages for the loss of potential profits from a timber sale on the disputed property.

The trial court conducted a bench trial on these issues on March 5 and March 30, 2012. The Clarks presented historical and reputation evidence locating the boundary along a series of fence lines south of Sprout Springs Road. In addition, the Clarks presented the testimony of Shelby "Russ" Powell, a licensed land surveyor, concerning the location of the boundary. Powell testified that the descriptions in the Clarks' deed and those of the adjoining land owners were consistent with this fence line. Likewise, Powell testified that the maps on file with the Property Valuation Administrator were also consistent with this boundary. Finally, Powell noted that none of the Goodwin's deeds referenced Sprout Springs Road as a boundary.

Blake Adams, an engineer and registered land surveyor, testified for the Goodwins regarding the survey which he performed. He testified the description in the deed for the 265 acres was consistent with that in the Goodwins' deed. Adams also looked to the descriptions in the 1945 Master Commissioner's deed, as well as the litigation which preceded the issuance of that deed. Based

upon those descriptions, Adams concluded that the disputed area was encompassed in the property owned by the Goodwins.

In its conclusions of law, the trial court placed the greatest emphasis on the evidence of the rusted fence line identified by Powell which was consistent with the boundary line claimed by the Clarks. The trial court observed that, where deeds of adjoining lands from a common grantor both mentioned a line established by a fence, the fence line will take precedence over distance and directional calls in the deed. In the absence of any more definitive monuments, the trial court found that the Clarks had title to the disputed tract. The Goodwins now appeal to this Court.

The Goodwins primarily argue that the trial court erred in failing to give primary weight to the testimony and conclusions of their surveyor, Blake Adams. They focus heavily on Adams's interpretation of the 1945 Master Commissioner's deed to A.C. Pettit, their predecessor in title. In addition to the property conveyed from the Matthew McKinney heirs, Adams testified that the deed conveyed property which was the subject of litigation between Pettit and Dallas Rupard. The Commissioner's Deed conveyed to Pettit all of the interest which W.L. Jackson had in the disputed property, including the Jackson house. Since the Jackson house stood on the south side of Sprout Springs Road, Adams concluded that the road marked the northern boundary of the tract which is disputed in this action and consequently, the disputed tract is within the Goodwins' chain of title.

As this matter was tried before the circuit court without a jury, our review of factual determinations is under the clearly erroneous rule. Kentucky Rules of Civil Procedure (CR) 52.01. This rule applies with equal force on an appeal from a judgment in an action involving a boundary dispute. *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980).

Although the testimony by Surveyor Adams would have supported the boundary claimed by the Goodwins, we cannot find that the trial court was compelled to accept it over the other evidence. None of the deeds, including the 1945 Master Commissioner's deed, refer to Sprout Springs Road as the boundary. Consequently, both surveyors had to look to extrinsic and historical evidence in order to reach a conclusion regarding the boundaries. "A fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors." *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky. App. 2002), quoting *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184-85 (Ky. App. 1987). The Goodwins have not shown that the trial court made any such error.

The Goodwins also argue that any issues regarding the boundary of the properties are precluded under the doctrines of *res judicata* and collateral estoppel based upon the 1945 judgment and Master Commissioner's deed. But as we noted above, the Goodwins have not shown how the prior litigation was conclusive as to the boundary. Moreover, the Goodwins have not shown that they preserved this issue by raising it before the trial court. *See* CR 76.12(4)(c)(iv) &

(v). We are under no obligation to scour the record on appeal to ensure that an issue has been preserved. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). Similarly, we are not required to consider portions of the Appellant's brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409, 413 (Ky. App. 1985). Therefore, we decline to address this issue further.

Accordingly, the judgment of the Powell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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Mt. Sterling, Kentucky

BRIEF FOR APPELLEES:

Leah Hawkins
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