

RENDERED: JANUARY 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001771-MR

JIMMY BRUMBACK AND WIFE
ALFREDA BRUMBACK

APPELLANTS

v.

APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 07-CI-00142

EVERETT POTTER AND WIFE
LORAIN POTTER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

MOORE, JUDGE: Jimmy and Alfreda Brumback appeal the judgment of the Jackson Circuit Court after a bench trial resolving a boundary line dispute in favor of Everett and Loraine Potter. After careful review of the record, we affirm.

I. FACTUAL BACKGROUND

Everett and Loraine Potter initiated a quiet title action in Jackson Circuit Court to resolve a boundary line dispute with Jimmy and Alfreda Brumback. At the outset of the bench trial, the parties entered into two joint stipulations regarding each of their chains of title and deeds to their respective properties. The stipulations revealed that the parties' ownership interests trace back to a common owner, Mr. Boyd Mays. The Potters acquired ownership of their property in 1967 and the Brumbacks in 2005. The boundary line in dispute is the northern property line of the Potters and the southern property line of the Brumbacks.

Each of the parties enlisted the services of a licensed professional surveyor. The Potters hired Ralph Peters of Peters Land Surveying, and the Brumbacks hired Lewis Mills of A&L Surveying and Engineering, LLC. Both of the surveyors testified and submitted plats depicting the parties' properties. Mr. Potter and Mr. Brumback also testified.

In its Findings of Fact, Conclusions of Law and Judgment, the trial court stated that it found Peters' testimony and survey work to be the most credible, and it found the boundary line claimed by the Potters depicted by a bold red dash line in Peters' plat as the boundary between the properties. The trial court found Peters' plat to be a recordable and credible document. The Brumbacks now appeal. Other facts will be discussed throughout the opinion as they become relevant.

II. STANDARD OF REVIEW

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 Rules of Civil Procedure (CR) 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). “[S]ubstantial evidence” is “[e]vidence that a reasonable mind would accept as adequate to support a conclusion” and evidence that, when “taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men.” *Id.* This rule has been held to apply to boundary disputes. *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky. App. 2002); *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980).

III. ANALYSIS

The Brumbacks argue on appeal that the trial court’s finding of the boundary line is not supported by substantial evidence. Their contention relies on the purported significance of a conveyance of .78 acres of the Potters’ land from the Potters to Wayne and Anne Mullins in 1982. The description of the .78 acres in the Mullins’ deed is as follows:

Beginning at a 1st black [oak] in the right-of-way line of Jacks Ridge road this being a corner common to the Boyd Mays property and going with his line down the hill S 73 degrees: 45 E 189 to a steel stake this being a newly established corner between Wayne Mullins and Everett Potter; thence a new line established between said Potter & Mullins S 04 degrees: 40 E 103 to a 2nd

maple; thence going up the hill a new line S 64 degrees: 30 W 200 to a large corner post in the right-of-line of Jacks Ridge road; thence following said road N 17 W 102 to the beginning, containing 34,014 sq. fr. Or .78 acres by survey. [Emphasis added].

The Brumbacks argue that the language in the deed of this conveyance established the location of the northern boundary line of the Potters' property because of the reference to "the Boyd Mays property and going with his line down the hill." There is a fence running along part of this line as shown on the plats, which continues beyond the Mullins' property. The Brumbacks claim the line that runs along the Mullins' property and the fence extending from it as the boundary between themselves and the Potters. The Potters contend the boundary line is 143.43 feet north of the corner and line of the Mullins' property and the fence.

The Brumbacks' surveyor, Lewis Mills, found the black oak listed in the conveyance from the Potters to the Mullins as a common corner with Boyd Mays. Mills also testified as to the other boundaries mentioned in the deed from the Potters to Mullins. Mills further testified that to locate the boundary line between the Brumbacks and the Potters at a location other than that claimed by the Brumbacks requires a complete disregard of the conveyance by the Potters to the Mullins. He based his survey of the boundary line fundamentally on the language contained in the deed from the Potters to the Mullins. Mills testified that he used the fence line in determining his survey due to the language in the deed of the Potters' conveyance to Mullins. Mills' survey describes the area up to the fence, the area in dispute, as a part of Tract 1 of the property listed in the Brumbacks'

deed. However, Mills stated that the Brumbacks' deed did not describe a southern property line, but the line was described in the Potters' deed. Mills did not explain in his testimony how the Brumbacks' deed was contained within the plat he produced and was presented to the court.

The Brumbacks assert that the language in the deed of the conveyance is decisive as to the boundary line question. Mr. Brumback testified that the boundary line claimed by him is marked by a three-generation fence which was established before Potter ever owned his property. Also, Mr. Brumback testified that the property in dispute was logged by Boyd Mays in 1994 up to the fence line he claims is the boundary line and no objection by the Potters was made at that time.

The Potters presented evidence to support their contention that the correct boundary line was 143.43 feet north of that where the Brumbacks alleged. The Potters noted that the description of Tract 1 in the Brumbacks' deed makes no reference to the "black oak near the road" contained in the Mullins' deed. The Potters also emphasized that the reference to the Boyd Mays line in the Mullins' deed was incorrect.

The Potters' surveyor, Ralph Peters, testified to his method of surveying and his preparatory work for the survey. Peters explained in his testimony that because each of the parties' properties were originally one property, there are no calls in the Brumbacks' deed demonstrating a southern boundary line. Peters also noted that because the conveyance to the Potters was prior to the conveyance of the

Brumbacks, the only indicator of a dividing line would have to come from the Potters' deed. Peters explained that because the Potters' property originated from the Boyd Mays property, the "Boyd Mays line" argued to be the boundary line by the Brumbacks could not be established without first determining the Potters' property lines as outlined in their deed. Peters stated that he surveyed the Potters' property as described in the Potters' deed. Peters further testified that none of the relevant deeds had calls running with any fence lines. Peters also stated that based on the evidence on the ground after surveying the Potters' property according to their deed and comparing it with Tract 1 described in the Brumbacks' deed, it appeared that the area of property in dispute was encompassed within the Potters' deed.

Additionally, Mr. Potter testified that he had lived on the property for 47 years and constructed a fence on the property during that time. He further acknowledged that the fence was not intended to be a boundary line. Mr. Potter testified that he knew he owned the property beyond the fence, but that he only enclosed a small parcel to accommodate his needs at the time. Mr. Potter's former son-in-law also testified that he had lived on the property for nearly 20 years with the Potters, and he knew Mr. Potter owned the land beyond the fence and used it as well.

Contrary to the Brumbacks' argument, we are convinced that the trial court's judgment was supported by substantial evidence. The trial court found Peters' testimony to be more credible than Mills', given Peters specificity in his

explanation of his survey and plat. Additionally, the court found the testimony of Mr. Potter to be credible regarding the fence and the awareness of owning the property beyond the fence. The trial court found the boundary line to be the bold red dash line as indicated on Peters' plat. We are not persuaded that the trial court's reliance on Mr. Potter's testimony and Peters' testimony and survey was clearly erroneous. A trial court 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*, 98 S.W.3d at 517 (citing *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184-85 (Ky. App. 1987)). Peters' testimony reflected that his survey was based upon the information contained in the relevant deeds. It is within the province of the trial court to determine the credibility of testimony in making its conclusions. Kentucky Rules of Civil Procedure 52.01. Accordingly, we cannot find that court erred in finding Peters' survey more credible as it was supported by substantial evidence in the record.

IV. CONCLUSION

For these reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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McKee, Kentucky

BRIEF FOR APPELLEES:

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