

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001323-MR

GARY LEWIS; SARAH BETH LEWIS;
MARY ALICE ISHAM; DONALD B. ISHAM;
ROGER LEWIS; AND DEVERE LEWIS

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NOS. 11-CI-01752 & 11-CI-01778

RONNIE G. JOHNSON; WANDA JOHNSON;
JOSEPH THOMAS SKEES; BRENDA SKEES;
CHARLES E. THOMPSON; AND
GERALDINE THOMPSON

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Gary Lewis, Sarah Beth Lewis, Mary Alice Isham, Donald B. Isham, Roger Lewis, and Devere Lewis—the children of the late Stewart and Eunice Lewis, and their spouses (collectively “Lewis heirs”)—have appealed from

the Hardin Circuit Court's July 2, 2012, entry of an order in favor of Ronnie G. Johnson, and his wife, Wanda Johnson (collectively "Johnson"), Joseph Thomas Skees, and his wife, Brenda Skees (collectively "Skees"), and Charles E. Thompson, and his wife, Geraldine Thompson (collectively "Thompson"), following a bench trial on two consolidated boundary line dispute lawsuits. The trial court determined the Appellees had carried their burden of proving title to the land areas in dispute by adverse possession. Following a careful review of the record, the law, and the arguments of the parties, we affirm.

After hearing testimony during the two-day trial from over twenty witnesses, receiving in excess of one hundred exhibits, and subsequently reviewing post-trial briefs from the parties, the trial court entered an order in which it carefully and fully set forth the facts surrounding this boundary dispute between the Lewis heirs and their northern and southern neighbors. Rather than attempting to restate what has already been stated so well, we recite the facts as set out by the trial court.

The Skees/ Johnson Boundary

1. Since 1963, Stewart and Eunice Lewis owned the property directly to the north of the lots owned by Skees and Johnson. The Lewis's (sic) purchased the northernmost section of their property from H.H. and Mona Carpenter in 1951, but it did not include the tract touching the Woodring property. Subsequently, in 1963, the Lewis's (sic) purchased a tract of land situated directly south of their property at a Master Commissioner's sale. Reno and Elizabeth Williams owned the southern tract of land prior to the sale by the Master Commissioner and this tract of land will be

referred to as the “Blair Property”. Frances Blair purchased the 1½ acre tract on November 8, 1946[,] which was eventually purchased by the Lewis’s (sic) at the 1963 Master Commissioner Sale. Stewart Lewis passed away in 1967 and Eunice Lewis derived sole title to the property by virtue of a survivorship deed. When Eunice Lewis died in 2008, the property was transferred by her will to her three children, Roger Lewis, Mary Isham and Gary Lewis.

2. Following Eunice Lewis’ death, the Lewis heirs contracted with Pence Surveys to perform a boundary line survey of the property. When C.E. Pence determined the boundaries of the property were not located where the Lewis heirs believed they should be located, his services were terminated. The Lewis heirs then hired James G. Banks to perform a “retracement survey” of their property. Banks considered title lines, and deed calls to determine the boundaries of the Lewis property. He did not consider possession lines such as fences.

3. Banks retracement survey began with a deed from J C Kurtz to Haynes and recorded in Deed Book 71, page 511. The source of title on this deed was Deed Book 12, Page 210 containing 291 acres originally owned by Kurtz and Bethel. Bethel, shortly after the purchase, deeded his ½ interest to the 291 acres to Kurtz in Deed Book 13, Page 376. According to Banks the Haynes property was carved out of the original 291 acres on November 14, 1912[,] and was the first tract of land sold from the original farm. This deed was recorded in the clerk’s office on February 25, 1919. Langley purchased the property on February 27, 1919. The Langley purchase, according to Banks, is significant because the next property carved out of the original 291 acres was the property identified as the Woodring property. The source of title for the Woodring property begins with the original 291 acres purchased by J M Kurtz and Bethel. J M Kurtz sold 39½ acres to C J Kurtz on May 29, 1919, Deed Book 72, Page 559 and recorded on June 15, 1919. The property description refers to the “Langley corner”, and according to Banks, because of the

reference to the Langley corner; the Lewis property has superior title to the Woodring property.

4. Banks used a stone discovered at the northern edge of a closed road to the north of the Lewis property as the beginning point of his retracement survey as indicated on the 1912 deed stating, "beginning at a stone on the north side of the Cecilian and Howesvalley road...". The 1912 Deed had four calls, but would not close. In order to force the boundary lines to close, Banks determined the southern boundary of the property encroached approximately 50 some feet on Lots 12 and 1, the property now owned by Johnson and Skees.

5. The Deed from Kurtz to Haynes contained the same four (4) calls throughout the chain of title until April 27, 1935. When Emmett Morrison purchased the property, the property description contained three (3) calls, leaving out the call for the direction and distance for the property line running along Bethlehem Academy Road. The Lewis, (sic) Deed Book 135, Page 370, contains the same three (3) calls with the fourth call missing and identified by Banks as the direction and distance call for the boundary line parallel to the Bethlehem Academy Road or now Highway 253.

6. On November 8, 1946, the Hargans, who owned the Lewis property at the time, sold 1½ acres of the property to Frances Blair. This tract was carved out of the Lewis property with the following description:

Beginning at a stone on the north side of the Cecilia and Howealvey road, now Cecilian and Bethlehem road; thence N 49 E 22 100 feet to a stake; thence S 45 E 34 2/3 poles to a stake; thence S 45 W 100 feet to a stone; thence N 45 W 38 2/3 poles to the beginning, containing 1.5 acres

According to Banks, the above description does not, and cannot, describe the second tract carved out of Lewis property. Taking the description literally would place the property at the northern most end of the Lewis property where the Lewis's home was located.

7. The Woodring property was carved out of the original 291 acres owned by J M Kurtz and Bethel on May 29, 1919, Deed Book 72, Page 559, and purchased by C J Kurtz. C J Kurtz sold the property on February 21, 1955[,] to Eugene and Lettie Thomas, Deed Book 151, [Page] 233. The 39½ acres was surveyed by George G. Smith on July 16, 1954. A new description appears in the deed and refers to existing title lines of Frances Blair, Joe Thompson, and Argus Allen. The new survey reduced the acreage to 37 1/3 acres. According to Banks, the calls remained the same and described the same property as indicated in the May 29, 1919[,] Deed from J M Kurtz to C J Kurtz. There are no references to markers such as “stones” in the Woodring property before or after the 1954 Smith survey.

8. The Lewis’s (sic) purchased the Blair property at a Master Commissioner’s Sale on September 7, 1963, Deed Book 180, Page 256. The previous owners were Reno and Elizabeth Williams who purchased the property from Frances Blair on February 14, 1959, Deed Book 164, Page 463. The description is the same faulty description described in paragraph 6 above.

9. Banks testified he reviewed all pertinent deeds to retrace the Lewis boundaries. The deed from VanMeter to Woodring (DB 234, PG 353), stated the northern boundary of the VanMeter property was 1500 feet north of the intersection of Highways 86 and 231. Banks testified he did not measure 1500 feet north of said intersection, but did verify that 1500 feet from the intersection stops precisely where the line, referring to the northern boundary line between the Skees/Johnson and Lewis property, is indicated on the Harrison Evans survey of Lot 1 and Lot 12. Banks agreed a stone such as the one he used as his reference point for the beginning of the tracts could be moved much more easily than a road intersection. The road intersection is the artificial monument used in the VanMeter to Woodring Deed for the boundary line running along Bethlehem Academy Road. The Woodring deed states “thence with the East side of said Highway N 44¾ W 1500 feet to a post,

corner to Mrs. Frances Blair, thence with her line N 47 E 251 feet to a post and continuing with the Blair line and line of Stewart Lewis N 44¾ W 467 feet.”

10. Banks, pursuant to his survey, provided an opinion that the Lewis property overlaps Lot 1 and Lot 12 of Enchanted Acres. According to Banks, Lot 1, owned by the Skees, encroaches on the Lewis property 59.94 feet on the West side of Lot 1 and 55.86 feet on the east side of Lot 1. According to Banks, Lot 12, owned by Johnson, encroaches on the Lewis property 55.86 feet on the West side and extends 108.19 feet into the Johnson’s property with the East side of the encroachment being 53.98 feet. Mr. Banks’ survey determined the southern boundary of the Lewis property extended some 50-60 feet past the fence line which was historically accepted as the boundary of the property and encroached upon the Johnson’s and Skees’ property in that approximate amount.

11. Denver Woodring and his wife, Faye (now deceased), purchased a tract of land containing approximately 37-1/3 acres from Mattie & Jessie VanMeter on July 2, 1971. This tract of land remained undivided since its original separation from the farm owned by J.C.Kurtz in 1870. Mr. Woodring developed Enchanted Acres subdivision on this tract of land. Harrison Evans, a licensed surveyor, surveyed the 37-1/3 acres, divided the land into lots and filed the appropriate documents with the Hardin County Clerk establishing Enchanted Acres subdivision on June 20, 1974, as amended.

12. Johnson purchased Lot 11 of Enchanted Acres from Denver Woodring on April 7, 1977. Following their purchase of this lot, Johnson built their home on Lot 11. On April 10, 1984, Johnson purchased the adjoining lot, being Lot 12 of Enchanted Acres from Denver Woodring. This lot was adjacent to the property owned by Eunice Lewis on the north side and bounded by a fence line containing portions of a former fence. Johnson purchased this lot for the purpose of a buffer, in order to

prevent anyone else from purchasing the lot and building directly beside their home.

13. Johnson maintained Lot 12 from the date of purchase by fertilizing, mowing, trimming and using it as part of their yard. He walks the dog on Lot 12. He considers Lot 12 his yard. He attempted to raise a garden on Lot 12 for a couple of seasons but determined it was not a good garden spot because the ground was too wet. The disputed area (or overlap) on lot 12 has been used and has every appearance of being Johnson's yard since the 1980's. Pictures verify this claim.

14. Skees purchased Lot 1 of Enchanted Acres from Eddie Peters on July 25, 1978. Following their purchase of this lot, Skees built their home on Lot 1. This lot was adjacent to the property owned by Eunice Lewis on the north side and bounded by a fence line containing portions of a former fence. The Skees planted flowers along said fence line, maintained said fence, established a grape vineyard, planted fruit trees, mowed and otherwise maintained the disputed area (or overlap) as their yard since the late 1970's. Pictures verify this claim.

15. Various witnesses testified as to their memory of whether there was an "outer fence" 50 to 60 feet south in addition to the fence that was just a few feet south of the "rental house". As expected, the testimony was contradictory due to passage of time and memories. Regardless, it (sic) not necessary to resolve this "outer fence" issue in order to legally resolve the boundary.

16. In August, 2011 Gary Lewis and Mary Isham entered upon the disputed area (or overlap) of Johnson and Skees. They dug postholes, set fence posts in concrete, painted the fence posts bright orange and then piled large concrete slabs around the posts. Shortly thereafter, this lawsuit was filed.

The Thompson Boundary

17. The Thompson property adjoins the Lewis property on the northern boundary. This boundary dispute involves an abandoned roadway and whether the property line is at the centerline (as claimed by Thompson) or the northern edge of the roadbed (as claimed by Lewis).

18. The Lewis deed description does not refer to this roadway, but begins "...at a stone on the north side of Cecilia-Howealley Road (now State Highway No.253) ...". Some surveyors believe they found said stone on the northern edge of the roadbed, while others have not located such stone. Again, the mystery of the stone is not necessary to the legal resolution of this case. The Thompson deed description refers to "... being in the middle of abandoned old Hardinsburg Road..." (Deed Book 222, Page 236 dated November 18, 1969). This old roadway, whether a private, public or county road, was abandoned in the 1930's and not used since. There remain today remnants of an old fence line meandering through the old roadway.

19. Thompson removed the old fence line on their side of the centerline of the old roadway shortly after acquiring the property and building their home. They have since cleared the old roadway to the approximate centerline (and helped Eunice Lewis clear her side) and have mowed and otherwise maintained this area as part of their yard since the 1970's. Pictures verify this claim.

Based on these facts, the trial court determined Johnson and Skees had proved the five elements of adverse possession necessary to obtain title to the disputed portions of their lots. It concluded, "[f]rom at least 1959 until 2009, the generally recognized northern boundary between Lots 1 and 12 and the Lewis property was the fence line which coincided with the northern boundary line of Lots 1 and 12 as platted on the Enchanted Acres Subdivision." Finding the paper titles conflicted with this long-recognized border, the trial court determined, on the

strength of *Wallace v. Lackey*, 199 Ky. 190, 250 S.W. 843, 844 (1923), the record line was unimportant and the recognized line would control.

The trial court likewise concluded Thompson had carried the burden of proving adverse possession sufficient to establish title to the disputed area along the common border with the Lewis tract. Because the boundary traversed the path of an abandoned roadway and no evidence was introduced as to the roadway from which the tract was originally carved, the trial court determined as a matter of law “the adjoining property owners each own to the centerline of such abandoned roadway. *Hensley v. Lewis*, 278 Ky. 510, 128 S.W.2d 917 (1939).” After describing in detail the appropriate boundary lines with reference to Banks’ “Plat of Retracement Survey,” the trial court ordered the Lewis heirs to remove any iron pins, concrete slabs or other debris they had placed in the disputed area.

In this ensuing appeal, the Lewis heirs contend insufficient proof was adduced at trial to support the trial court’s finding that the Appellees had proven their adverse possession claims. More specifically, as to the Johnson and Skees claims, the Lewis heirs contend the evidence was insufficient to show Eunice Lewis was ever put on notice of an adverse claim to her property and that Johnson and Skees further failed to prove an “open and notorious” possession by their activities conducted in the disputed area. The Lewis heirs further contest the trial court’s determination that the fence line along the northern border of Lots 1 and 12 was a boundary fence or that the fence constituted a “well-defined boundary” for adverse possession purposes.

Regarding the Thompson claim, the Lewis heirs contend—as with the Johnson and Skees claims—the activities undertaken by Thompson on the disputed area were insufficient to support a finding of adverse possession. Finally, the Lewis heirs argue the evidence clearly showed the old abandoned road was entirely on their property and the trial court erred in not so concluding.

A party claiming title through adverse possession bears the burden of proving each element by clear and convincing evidence. *Commonwealth, Dep't of Parks v. Stephens*, Ky., 407 S.W.2d 711, 713 (1966); *Flinn v. Blakeman*, *supra* at 970. With respect to property title issues, the appropriate standard of review is governed by CR¹ 52.01. As stated in *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980),

[t]he law is clear that “findings of fact (of the trial judge) shall not be set aside unless clearly erroneous.” CR 52.01; 7 Clay, Kentucky Practice, Rule 52.01, comment 8. This court has applied this rule in boundary disputes. “It is the rule that, where this Court cannot say on an appeal from the decree in an action involving a boundary dispute that the Chancellor’s adjudication is against the weight of the evidence, the decree will not be disturbed.” *Rowe v. Blackburn*, 253 S.W.2d 25, 27 (Ky. 1952). *See also Story v. Brumley*, 253 S.W.2d 24 (Ky. 1952).

Substantial evidence is defined as “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). Moreover, due regard

¹ Kentucky Rules of Civil Procedure.

must be given to the opportunity of the trial court to judge the credibility of witnesses. CR 52.01. With this standard in mind, we now turn to the case before us.

The detailed order entered following the bench trial clearly reveals the trial court fully and carefully considered all the evidence and testimony put before it in deciding legal title to the disputed areas vested in Johnson and Skees to the south and Thompson to the north. A careful review of the record reveals substantial evidence to support the trial court's decision, and we discern no abuse of discretion. It is not for us to determine whether we would have reached a different conclusion if faced with the same evidence. *See Church & Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321 (Ky. 1992). It is axiomatic that even where the evidence presented is conflicting, as it was in this case, we may not substitute our judgment for that of the trial court. *Truman v. Lillard*, 404 S.W.3d 863, 868-69 (Ky. App. 2012). Mere doubt as to the correctness of a trial court's finding is insufficient to justify reversal. *Moore v. Asente*, 110 S.W.3d 336, 355 (Ky. 2003).

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

ALL CONCUR.

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