

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001491-MR

DONALD MCCOY AND
KATHY MCCOY, his wife

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 09-CI-01111

JESSE JAMES BOWENS AND
ANNA MARIE BOWENS, his wife

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: DIXON, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: This case involves a real property dispute between (i) Donald and Kathy McCoy and (ii) Jesse and Anna Marie Bowens, which has had two prior trips to this Court. For the reasons hereafter stated, we hold that the Pike Circuit Court erred in entering its most recent Order. We therefore vacate that Order and remand to the circuit court for further proceedings.

I. Factual and Procedural Background.

In 2007, this court confirmed the Pike Circuit Court's judgment resolving the property line dispute between the McCoys and Douglas and Linda Hatfield, the Bowens' predecessor-in-title. *McCoy v. Hatfield*, 2006-CR-000308-MR, 2007 WL 2562840 (Ky. App., Sep. 7, 2007). Following that decision, the Hatfields sold their property to the Bowens, and a new dispute arose over ingress to and egress from the McCoys' tract, since they claimed an easement across a portion of the Bowens' tract as the only access to the state highway.¹ The Bowens filed a motion to dismiss the McCoys' complaint based on their understanding that the prior case held that no easement existed, and also filed an answer generally denying the factual allegations in the complaint. The trial court denied the motion to dismiss. Following a hearing, the trial court agreed with the McCoys and granted their motion for summary judgment. The court determined that they were entitled to an easement fifteen feet in width:

It appearing that there are no genuine issues of fact in this case, **IT IS HEREBY ORDERED AND ADJUDGED** that the [McCoys] are entitled to a fifteen (15) foot easement as located on Luke Hatfield's^[2] file plat in Action no. 04-CI-01662 and the [Bowens] shall not interfere with, impede or obstruct the use of same. To the extent that the [Bowens] may have obliterated or

¹ The McCoys' complaint described the easement, as follows: "The right-of-way . . . goes from Kentucky Highway 1056, crosses county property, crosses railroad property and enters property adjudged to the [Bowens] and curves to the right and should then cross the [Bowens'] property until it reaches the property of the [McCoys]." Complaint, ¶ 6.

² Luke Hatfield was the surveyor whose survey was used as the basis to establish the boundary line in the initial lawsuit.

impaired the road which is the right-of-way herein the [Bowens] shall restore the same to its former condition.

Following entry of the judgment and the Bowens' appeal, the McCoys filed a motion for supersedeas bond or an order that the Bowens open the roadway pending appeal on the ground that the Bowens were continuing to block access to the McCoys' property. The trial court granted the motion, and the Bowens and a surety posted a \$10,000 supersedeas bond.

As to the Bowens' appeal, this Court affirmed the trial court's summary judgment. *Bowens v. McCoy*, 2010-CA-001653-MR, 2012 WL 1231938 (Ky. App., Apr. 13, 2012). The Kentucky Supreme Court denied the Bowens' motion for discretionary review,³ and the matter became final on February 25, 2013.

After remand of the record to the trial court, the McCoys filed a motion for judgment on Bowens' supersedeas bond. The basis for the motion was to restore the driveway which was on the easement. The McCoys claimed that the reasonable cost to repair the driveway was \$12,600. In response, the Bowens filed a motion to "enforce the judgment"⁴ and to enjoin the McCoys from trespassing on the Bowens' property, claiming that the McCoys had torn down a fence placed along the boundary established by the trial court, removed boundary markers and placed a portable trailer on property blocking access to the easement. From our

³ *Bowens v. McCoy*, 2012-SC-000293-D (Ky., Feb. 13, 2013).

⁴ The record is not clear as to what judgment the Bowens were seeking to enforce. The only judgment in this case was the trial court's summary judgment which operated in favor of the McCoys against the Bowens.

review of the record, these allegations concerned the location of the easement across properties the Bowens and the McCoys, respectively, had leased from the railroad. Following a hearing, the trial court entered the following order on July 10, 2013:

The [Bowens'] Motion to Enforce Judgment and an Order prohibiting the [McCoys] from interfering with the easement established by the Court's Judgment is hereby SUSTAINED.

1. The [McCoys] shall remove the black trailer on or near the easement[.]

2. The Court FINDS the assertion of a purported railroad easement by the [McCoys] obtained in 2010 is champertous and is not enforceable.

The [McCoys] shall not interfere with any engineering markers in any fashion subject to [fines] or penalties of this Court as sanctions.

The trial court subsequently denied the McCoys' CR⁵ 59.05 motion to alter, amend or vacate, and designated the July 2013 Order as final and appealable.

This appeal follows.

II. Standard of Review.

Our standard of review in real property disputes is governed by CR 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. 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

⁵ Kentucky Rules of Civil Procedure.

[trial judge's] adjudication is against the weight of the evidence, the decree will not be disturbed.

(citations and internal quotations omitted). A factual finding is not erroneous if supported by substantial evidence. *Cole v. Gilvin*, 59 S.W.3d 468, 472-73 (Ky. App. 2001). 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 Res. & Env'tl. Prot. Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994). Moreover, due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01.

III. Analysis.

The difficulty in applying our normal standard of review to this case is that the trial court did not, from our review of the sparse appellate record, make any findings of fact. As suggested by the McCoys, the trial court appeared to be confused about the posture of the case, stating several times that the McCoys have “lost this case twice,” when the contrary is true: the McCoys prevailed in the trial court and in the appellate courts in the most recent appeal to establish an easement over the Bowens’ property to access the McCoys’ property. The prior judgment of the trial court only established an easement in favor of the McCoys over the Bowens’ property, not the converse.

The other confusion in the case, from our review, is that both the McCoys and the Bowens sidetracked the trial court with respect to easements across and leases of the right of way of the Norfolk Southern Railway. The

railroad right of way is apparently no longer in use as a railroad since the track no longer exists, but the Norfolk Southern Corporation, not a party to this action, appears to still own the right of way.⁶ Both the McCoys and the Bowens appear to require a passageway on an easement across the railroad to access their respective properties, and they appear to use the same passageway/easement to pass over the railroad property to get to the Bowens' property⁷ from the state highway. The passageway then continues on an easement across the Bowens' property to the point of entry to the McCoys' property. Prior to the July 10, 2013, hearing, this matter concerned only the existence and location of this latter easement, *i.e.*, the McCoys' right to cross the Bowens' property to access the McCoys' property.

We certainly understand the trial court's desire to dispose of this matter as expeditiously as possible, given the conflict between the parties, but the only matter properly before the trial court was the Bowens' and their surety's liability, if any, on the supersedeas bond. No pleading was before the trial court placing any other matter in controversy. See CR 8 (claims for relief are to be set forth; as "an original claim [complaint], counterclaim, cross claim or third party claim[)"). The Bowens never made any such claim for relief. CR 15 permits

⁶ The railroad right of way runs in a north-south direction, parallel to the state highway and lies between the McCoys' and Bowens' properties on the west side of the railroad and the state highway on the east side of the railroad.

⁷ We do not purport to adjudicate the rights, duties and obligations of any party to the right of way over the railroad property, especially since the Norfolk Southern Corporation is not a party to this action. From the sparse record before us, any such right of way across the railroad property would certainly seem to predate the railroad's leasing of any property to either party.

amendment of pleadings, but the record discloses no such amendment, motion for amendment, or order granting same.

IV. Conclusion.

The Pike Circuit Court's July 10, 2013, order is hereby vacated. We remand this matter with direction to hear and fairly decide the McCoys' motion seeking judgment on the supersedeas bond regarding damages and liability. Such determination is to be limited to the easement across the Bowens' property.⁸

ALL CONCUR.

BRIEF FOR APPELLANT:

Lawrence R. Webster
Pikeville, Kentucky

BRIEF FOR APPELLEE:

W. Sidney Trivette
Pikeville, Kentucky

⁸ We strenuously encourage the parties and their counsel to resolve amicably and expeditiously any dispute with respect to the parties' claims of easements across the railroad property, their respective leases of railroad property, and rights, such as they may be, over the property from the state highway to the railroad property. As an aside, we would think that any further litigation regarding the railroad property or the property between the state highway and the railroad property would need to include as necessary parties the fee owners of those properties.