

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000220-MR

PETER KRAUSS

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 10-CI-00335

LLOYD SHEPPERD AND
HIS WIFE, RHONDA SHEPPERD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

ACREE, CHIEF JUDGE: This boundary dispute case requires us to determine if the Wayne Circuit Court erred in its placement of the boundary line between the parties' respective properties. We perceive no error. Accordingly, we affirm.

I. Facts and Procedure

Appellant Peter Krauss and appellees Lloyd and Rhonda Shepperd own adjoining properties in the Meadow Creek community of Wayne County,

Kentucky. Krauss's property is situated to the north of the Shepperds's property. The parties share one common boundary: part of the south boundary line of Krauss's land and all of the north boundary line of the Shepperds's land. The dispute in this case centers on the proper location of this line.

In the early 1990s, all the land at issue was part of one 26-acre tract. Slowly, the owners of that tract began parceling it out. The original 26-acre tract is today eight individual, smaller parcels. The Shepperds acquired their parcel in 1993. The deed describes the land as follows:

BEGINNING at a stake a corner to Maggard and [another tract also owned by the Shepperds, known as Shepperd Tract 1], thence running with Maggard's line a northeasterly direction approximately **478 feet to a stake near a ditch** thence running a [sic] easterly direction 200 feet to a stake, thence running a southwesterly direction 478 feet to a stake, thence running a westerly course 200 feet to the beginning. Containing two acres more or less.

(Emphasis added). The property is rectangular, with the longer sides running north and south and the shorter sides running east and west.

Krauss purchased his land at auction in May 2010. The deed to his property described the parcel, in relevant part, as follows:

BEGINNING on a fence in the line of John D. Wilhite, a corner to a 9.55 acre tract. Thence, running with said line S 21-57 W 579.53 ft. to a fence post. Thence, leaving the fence and running S 71-00 E 410.71 ft. to a steel post, a new corner. Thence, S 23-22 W 383.50 ft. to a steel post a new corner. Thence S 68-17 E 240.17 ft. running so as to exclude the shed to a steel post, a new corner in the original outside line. Thence with said line and fence N 24-11 E 928.04 ft. to a steel post in said line, a corner to the 9.55 acre tract. Thence, leaving the fence

and running with the 9.55 acre tract N 66-55 W 677.16 ft. to the beginning, containing 10.68 acres.

This property is square-shaped.

Shortly after the auction, Lloyd Shepperd informed Krauss that the Krauss property overlapped the Shepperd property. Krauss disagreed. The area of dispute consists of a square-shaped .6 acre of land. Lloyd believes the northern line of his parcel lies further north and, therefore, the disputed .6-acre parcel belongs to him. Krauss believes the southern boundary line of his land lies further south, and therefore, the disputed .6-acre parcel is part of his property.

Unable to agree, the Shepperds filed suit against Krauss in August 2010, asking the circuit court to quiet title to their property. Krauss counterclaimed, seeking a declaratory determination as to the boundary line pursuant to Kentucky Revised Statute (KRS) 418.040. A bench trial was held in September 2013.

Land surveyor James West testified that he had previously surveyed the properties at issue and discovered there was an overlap between the two tracts, one each now owned by Shepperd and Krauss. Specifically, he stated that both deeds included the .6 acre area of land in dispute. In 2006, at Lloyd's request, James conducted a new survey. Upon inspection of the property, James was unable to locate a "stake near a ditch" which was identified as the terminus of the western boundary line which would, in turn, mark the beginning of the northern boundary line of the Shepperds' property. James explained there was simply no

ditch that corresponded with the line distance stated in the deed. James testified there were no other monuments identified in the deed to gauge the end-point for this line, and no courses. Accordingly, absent monuments and courses, James relied upon the distance identified in the deed to terminate the western boundary line and to commence the northern boundary line. James testified his plat is accurate.

Lloyd Shepperd testified that the “ditch” referenced in his deed is no longer in existence. He explained that he grew up in the Meadow Creek community and was long acquainted with all the land at issue in this case. Indeed, the property now owned by him once belonged to his sister. Regarding the Krauss property, Lloyd stated that its prior owners – Mike and Andrea Armstrong – operated a construction business and, as part of that business, Mike regularly removed and sold dirt from the property. Frequent digging by Mike altered the contours of the land such that the original ditch in question is no longer discernible. According to Lloyd, the ditch disappeared prior to his acquisition of the land. Lloyd reiterated that, at one time, numerous ditches were visible on the property now belonging to Krauss, but those ditches frequently changed as a consequence of dirt removal by Mike.

Andrea Armstrong confirmed Lloyd’s testimony. Just as Lloyd had said, Andrea testified that the ditch referenced in the Shepperds’s deed fell out of existence some time ago. She explained that her husband (Mike) bulldozed in,

near, and around the ditch, making the land in that area bigger, deeper, and wider so that it was not possible now to point to an identifiable ditch.

Lloyd further testified that disputes concerning the location of the boundary line at issue long pre-dated Krauss's purchase of his property. Lloyd had issues with Mike Armstrong and the interim owner of the Krauss property, Jackie Keith, concerning the proper boundary line. At various times both Mike and Keith occupied the .6 area in dispute. However, subsequent to James West's 2006 survey, Lloyd placed steel post markers over West's survey pins to readily identify what he believed was the proper boundary.

Peter Krauss testified that there is no ditch at the point identified by James West. He explained there are other ditches on his property that, though not well-defined, are distinct. At Krauss's request, land surveyor Greg West conducted a survey in 2011. Greg testified that he pulled all the relevant deeds and found seven of the eight parcels fit together perfectly, the exception being the Shepperds's tract. Greg found two distinct ditches on the property. Greg located the disputed boundary line using the bearings and courses stated in Krauss's deed; by his calculations, the line was 14.4 feet from a ditch, and the .6-acre disputed parcel belonged to Krauss. Notably, Greg's placement of the north-south boundary line shortened the eastern and western boundaries of the Shepperds's property by approximately 150.56 feet and 135.99 feet, respectively. Greg further opined that James West's survey had to be incorrect because James's line did not terminate at *any* ditch; it was 82 feet from a ditch which, in his view, certainly cannot be

considered “near a ditch.” Greg testified that, in his opinion, if the deed calls for a monument, a surveyor is required to go to that monument regardless of the distance stated in the deed.

The circuit court entered its findings of fact, conclusions of law and judgment on January 13, 2014. The circuit court found that the survey of James West properly located the boundary line, and title to the property claimed by the Shepperds should be quieted in their favor. Krauss appealed.

II. Standard of Review

Our review of a circuit court’s findings of fact following a bench trial is to determine whether those findings are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. This rule applies with equal force to matters involving boundary disputes. *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980). Factual findings are clearly erroneous if unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is “some evidence of substance and relevant consequence, having fitness to induce conviction in the minds of reasonable people.” *Abel Verdon Const. v. Riveria*, 348 S.W.3d 749, 753 (Ky. 2011). Our role as a reviewing court prohibits us from disturbing the circuit court’s factual findings that are supported by substantial evidence, despite whether we would have reached a contrary conclusion. *Moore*, 110 S.W.3d at 354. We defer to a significant degree to the circuit court, for it had the opportunity to observe, scrutinize and assess the credibility of witnesses. CR

52.01; *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

Notwithstanding the deference due the circuit court's factual findings, its conclusions of law, reached after making its findings, are reviewed *de novo*.

Hoskins v. Beatty, 343 S.W.3d 639, 641 (Ky. App. 2011).

III. Analysis

Krauss argues that the circuit court erred in its placement of the boundary line at issue and, in so doing, improperly relied upon James West's survey. He argues the survey prepared by his expert, Greg West, should have prevailed because Greg's survey took into account all relevant factors and adhered to the surveyor's hierarchy of evidence, which states that distance and other inferior calls must give way to monuments.

In determining the location of property boundary lines, natural and permanent monuments (such as roads, rivers, or trees) take precedence, for they "are the most satisfactory evidence and control all other means of description." *Metropolitan Life Ins. Co. v. Hoskins*, 273 Ky. 563, 117 S.W.2d 180, 182 (1937). "We have frequently held that courses and distances must give way to natural objects in a deed, but the natural objects must be definitely located." *Staton v. Lyons*, 280 Ky. 531, 133 S.W.2d 707, 708 (1939). Absent natural and permanent monuments, artificial marks or monuments (such as iron pins or fences), courses and directions (in degrees and seconds), "distances, and area follow in the order named, area being the weakest of all the means of description." *Id.*; *Wagers v.*

Wagers, 238 S.W.2d 125, 126 (Ky. 1951). Furthermore, “[a] fact-finder may choose between the conflicting opinions of surveyors as 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)(citation omitted).

It is conceivable that a monument, whether natural or artificial, may be lost, destroyed, or appreciably altered such that it cannot be accurately located.

“[N]atural objects cannot prevail when they are doubtful, and in that case recourse is had to artificial marks or monuments or other calls of an inferior degree of accuracy.” *Duff v. Fordson Coal Co.*, 298 Ky. 411, 416, 182 S.W.2d 955, 957 (1944); *Mullins v. Commonwealth, Dept. of Highways*, 487 S.W.2d 937, 938 (Ky. 1972) (reasonable to disregard monuments identified in a deed when “the objects on which appellants rely no longer exist and the evidence as to their former locale is conflicting”).

Krauss contends the circuit court was in error when it concluded that the ditch referenced in the Shepperds’s deed had ceased to exist. As our recitation of the facts suggest, the circuit court received extensive testimony at trial regarding the location and survival of this ditch. However, two witnesses – Lloyd Shepperd and Andrea Armstrong – testified, unequivocally, that the “ditch” referenced in the Shepperds’s deed perished some time ago. It was within the circuit court’s discretion, as finder of fact, to believe this testimony and accept it as true.

“Questions as to the weight and credibility of a witness are purely within the

province of the court acting as fact-finder and due regard shall be given to the court's opportunity to judge the witness's credibility.” *Ensor v. Ensor*, 431 S.W.3d 462, 474 (Ky. App. 2013). While Greg West might have offered opposing testimony, this does not render the circuit court's finding erroneous. *Truman v. Lillard*, 404 S.W.3d 863, 868-69 (Ky. App. 2012) (“If the testimony before the trial court is conflicting, as in this case, we may not substitute our decision in place of the judgment made by the trial court.”).

Further, we see no issue with the circuit court's reliance upon the survey prepared by James West. James testified that he was certainly aware of the hierarchy of survey markers: natural and permanent monuments; artificial marks; courses; distances; and area. *Hoskins*, 117 S.W.2d at 182. Absent the ditch, there were simply no monuments or courses in the Shepperds's deed to guide his survey. Accordingly, James turned to the next available indicator – distance. James's surveying tactics comport with Kentucky law. As stated by this Court long ago: “In locating land, natural objects called for in [a deed or patent] must govern; but if they are destroyed and cannot be found, then the courses and distances given must be resorted to to ascertain the true location.” *Poplar Mountain Coal Co. v. Dick*, 7 Ky. Op. 420, 423-24 (Ky. 1874). The circuit court agreed with James that the ditch described in the Shepperds's deed had been destroyed. It was entirely proper then for James to turn to the distances stated in the Shepperds's deed to locate the various boundary lines. *Duff*, 182 S.W.2d at 957.

A different trier of fact, on this same evidence, might have found differently. But “[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal.” *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citation omitted). In the end, we are not prepared to say the circuit court’s findings are clearly erroneous.

IV. Conclusion

We affirm the Wayne Circuit Court's January 13, 2014 Findings of fact, Conclusions of law and Judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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