

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001213-MR

BALIS BARGER; RONNIE BARGER;
RICKY BARGER; AND FRANK WILLIAMS

APPELLANTS

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 11-CI-00520

FLOYD COUCH, JR. AND
RACHEL COUCH

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Balis Barger, Ronnie Barger, Ricky Barger and Frank Williams (collectively “the Bargers”) appeal from a judgment by the Perry Circuit Court resolving a boundary dispute in favor of Floyd Couch, Jr. and Rachel Couch (collectively, “the Couches”). We conclude that the trial court’s determinations

concerning the weight of the evidence and the credibility of witnesses were supported by substantial evidence. Hence, we affirm.

The Bargers and the Couches own adjacent tracts of real property in Perry County, Kentucky. Both tracts are primarily on the north side of Kentucky Highway 484, but a small portion of both properties is located on the south side of the road. Furthermore, both tracts trace back to a common owner, Ira J. Barger, and were divided by his heirs.

The Bargers trace their title to a deed from Alpha Omega Barger, dated June 18, 2003, recorded in the Perry County Clerk's Office in Deed Book 300, Page 647, and particularly described as follows:

Beginning on a pine on the bank of Leatherwood Creek, corner to Sterling Barger; thence up the hill to a cliff; thence up the right hand hollows of the sweeten Hollow to the top of the hill to a chestnut oak; thence around and with the ridge to Pearl Arnett's line and an oak tree; thence down to the point with Pearl Arnett's line to a twin pine and a sulphur spring near the creek; thence down the creek to the BEGINNING, containing 15 acres, more or less.

The Couches trace ownership of their tract by way of a deed from Rachel Smallwood, dated February 6, 1979, and recorded in the Perry County Clerk's Office in Deed Book 177, Page 649, and particularly described as follows:

Lying and Being in Perry County, Kentucky, on the waters of Leatherwood Creek of the Middle Fork of the Kentucky River and more particularly described as follows:

Beginning on a twin pine on the creek bank; thence up said creek to a pine; thence up the hill to a cliff; thence up the right hand hollow of Sweetin Hollow to an oak on

to the top of the hill; thence down to the point and with Cranville Rice's line to the beginning contained 15 acres more or less.

There is excepted from this conveyance a roadway leading up to Polly Barger's house.

The dispute in this case concerns the location of the boundary between the tracts, and specifically, the location of the pine tree that is used as a reference point in both deed descriptions. The Bargers identify a pine tree on the south side of Highway 484 and adjacent to a mobile home owned by the Couches. The Couches identify a pine tree on the north side of Highway 484, adjacent to a roadway leading from the Bargers' house to Highway 484. The survey map based upon the Couches' line shows a cider block building used by the Bargers and a mobile home owned by the Couches within the disputed property. The house owned by the Bargers also partially encroaches onto the disputed area.

The Bargers brought this action seeking to quiet title to the Couches' claim to the disputed property. The matter proceeded to a bench trial in March 2014. The trial court personally viewed the property and considered the testimony and evidence in support of each claim. Thereafter, on June 24, 2014, the trial court entered its findings of fact, conclusions of law and a judgment in favor of the Couches. In particular, the trial court relied on the testimony of the Couches' surveyor, Ralph Peters, as definitively establishing the location of the pine tree and the boundary claimed by the Couches. However, the court also concluded that the Bargers had established the elements of adverse possession with respect to the portion of the house which encroached onto the disputed property.

The Bargers now appeal from the portion of the judgment establishing the boundary between the properties.

As this matter was tried before the circuit court without a jury, our review of factual determinations is under the clearly erroneous rule. CR¹ 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence, which is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). It is within the trial court’s province as the fact-finder to determine the credibility of the witnesses and the weight given to the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). 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). We review the trial court’s conclusions of law *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

As previously noted, the trial court primarily relied upon the testimony of and survey map by Ralph Peters. The Bargers argue that this reliance was inappropriate because Peters based his conclusions upon the pine tree identified by the Couches. The Bargers contend that Peters’s conclusions regarding the boundary are only as credible as the information which the Couches provided. The Bargers maintain that their lay testimony identifying the pine tree

¹ Kentucky Rules of Civil Procedure.

on the south side of Highway 484 was more credible than the testimony offered by the Couches.

However, the trial court was entitled to weigh the credibility of the Bargas' testimony against that of the Couches. Furthermore, the trial court pointed to other evidence supporting Peters's conclusions:

Mr. Peters stated that the reference points that the Petitioners [Bargas] are using as reference points are not called for in any deed of conveyance and are inaccurate. Mr. Peters further testified that the deed that the Defendants [Couches] claim as their source of title contains an exception in the conveyance stating ... "There is excepted from this conveyance a road-way leading up to Polly Barger's house." Such is consistent as both properties were owned by a common source, prior to the heirs dividing the property into four (4) parts, which was consistent with ensuring that Polly Barger had an access from highway 484 to her house (now Plaintiffs' house). Mr. Peters stated that if the Plaintiffs' boundary line is correct, then there would [be] no need for the Plaintiffs to put an exception onto an adjacent property description. In addition, the Commonwealth of Kentucky received a right-a-way [*sic*] to build highway 484, by way of a deed of conveyance from Taylor and Billy Barger, dated August 03, 1959 and of record at deed book 117, page 143. Taylor Barger and Billy Barger are previous owners of the property now owned by the Defendants. Mr. Peters testified that none of the deeds that the Plaintiffs claim in their source of title call for any grants to the Commonwealth for a right-a-way [*sic*] to construct Highway 484. These facts are consistent with the Defendants' claim of ownership of the property in dispute.

Although the lay testimony identifying the pine tree on the south side of Highway 484 would have supported the boundary claimed by the Bargas, we cannot find that the trial court was compelled to accept it over the other evidence.

The trial court gave sufficient reasons for accepting the pine tree and boundary identified by Peters as substantial evidence, and the Bargins make no showing that the trial court's determinations were clearly erroneous. Therefore, we find no basis to disturb the trial court's judgment on these matters.

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

ALL CONCUR.

BRIEF FOR APPELLANTS:

Frank C. Medaris, Jr.
Hazard, Kentucky

BRIEF FOR APPELLEES:

Michael E. Roper
Hazard, Kentucky