

RENDERED: NOVEMBER 1, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001912-MR

LINDA E. HOUSE AND
GLENDON HOUSE

APPELLANTS

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE MICHAEL L. MCKOWN, JUDGE
ACTION NO. 15-CI-00008

BARBARA D. HODGES

APPELLEE

AND

NO. 2016-CA-001947-MR

BRETT LOVELL AND MARY ELIZABETH
LOVELL

APPELLANTS

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE MICHAEL L. MCKOWN, JUDGE
ACTION NO. 15-CI-00008

BARBARA D. HODGES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, LAMBERT AND SPALDING, JUDGES.

COMBS, JUDGE: Linda House and Glendon House, her husband, appeal the judgment of the Ohio Circuit Court after a bench trial resolving a boundary line dispute in favor of Barbara Hodges. In a separate appeal, Brett Lovell and Mary Elizabeth Lovell, his wife, appeal that portion of the same judgment pertaining to a different tract of land. Our Court has elected to consider the separate appeals together and to resolve them in a single opinion. After our review of the record, we affirm as to both appeals.

Hodges owns property on the north side of Halls Creek Road in rural Ohio County. She initiated an action to quiet title in Ohio Circuit Court in order to resolve a boundary line dispute with the Houses, who own adjacent property. The disputed property is a roughly rectangular, extremely steep woodland of about fourteen (14) acres. The Houses' property lies to the west of Hodges. The disputed property lies to the north of Hodges.

Hodges also owns a hilly, wooded, roughly triangular tract on the south side of Halls Creek Road. In the same lawsuit, Hodges also sought to resolve a boundary line dispute with the Lovells. Both the Lovells' property and that of Hodges front on Halls Creek Road. The Lovells' property surrounds

Hodges's property on the remaining two sides. The disputed property includes between thirteen (13) and fifteen (15) acres.

In January 1957, Brinton Young and Bertha Young, his wife, deeded to their nephew, Alfred Midkiff, and his wife, Sara Midkiff, two parcels of real property lying on both the north and south sides of Halls Creek Road. The property is referred to as the "North Tract," which borders the Houses' property, and the "South Tract," which borders the Lovells' property, respectively. The Youngs carved these tracts out of their farmland. They did not hire a surveyor; instead, both sets of boundary lines were marked with stones and were inartfully described in a deed. The North Tract was described as follows:

Beginning at a stone in the New Highway (Old Hartford-Leitchfield Road) northeast, with Wendell Young's lines 338 steps to a stone; thence west with Wakeland's line to a stone; thence S.W. with Brinton Young's line 340 steps to a stone in right of way of Harford-Leitchfield road (sic); thence Eastward with said road to the beginning, containing 13 acres, more or less.

The triangular South Tract was described as follows:

Beginning at a stone in right of way of the Old Hartford-Leitchfield road (sic); southeast to a stone a distance of 538 steps, Brinton Young's line; thence North 330 yards to a stone in the right of way of said road; thence eastward to the starting corner, containing 13 acres, more or less.

In 1964, the Midkiffs sold both tracts to Dewey Nabours, another nephew of the Youngs (and Alfred Midkiff's cousin). Dewey Nabours sold the

property to John Gay in 1972. Gay sold the property to Jimmy Harris in December 1973. Harris sold the tracts on each side of the road to the Hodgeses in June 1975. Barbara Hodges lived with her family in a house on the South Tract from 1975 until late 2013, when, shortly after her husband's death, she moved out of the county.

The Youngs continued to own what is now the Houses' property on the north side of the road until they sold it to more relatives, the Filbacks. The deed excepted from the conveyance to the Filbacks "a tract of 13 acres, more or less." The Filbacks eventually deeded the property to James Faulkner, another of the Youngs' relatives. Faulkner sold the property to Linda House (and her former husband) in 1994. The deed excepted "a tract of 13 acres, more or less" -- the North Tract eventually deeded to the Hodgeses.

In March 2012, the Lovells purchased property from the Rouses. The deed described a tract containing seventy-five (75) acres -- excepted from which was the thirteen (13)-acre tract conveyed by the Youngs to the Midkiffs in 1957 and ultimately acquired by the Hodgeses on the south side of the road in 1975 (the South Tract). Burl Rouse told the Lovells that he did not know the exact location of the property boundary, but a survey was not undertaken.

After the boundary disputes arose, Hodges enlisted the services of a licensed professional surveyor, Joe Simmons. The Houses and Lovells also hired a

licensed professional surveyor, Gerald Ward. Each of the surveyors testified and submitted plats depicting the parties' properties. Hodges testified -- as did the Lovells and the Houses. Several of the parties' predecessors in interest testified as well as some family members.

In its findings of fact, conclusions of law, and judgment, the trial court found Simmons's testimony and survey work to be the more credible with respect to the North Tract. While acknowledging that the drafters of the property description made numerous mistakes, the trial court interpreted the call "with Wakeland's line" included in the description of the North Tract to be consistent with its use as a term of art referring to a distance monument. The trial court interpreted the call not to designate a course or direction in which the north line was to run but as a monument to which the east and west lines of the tract extended. This interpretation of the deed meant that the Hodgeses owned the disputed fourteen (14)-acre woodland for a total of more than twenty-nine (29) acres on the north side of the road. In the alternative, the trial court found that the Hodgeses had openly, continuously, exclusively, adversely, and notoriously possessed the disputed acreage for a period of more than fifteen (15) years, thus entitling them to title by prescription or adverse possession.

With respect to the South Tract, the trial court found that Ward's survey was the more accurate representation of the deed description. However, the

court found that over the years, the Hodgeses and their predecessors in interest had agreed with neighbors to boundary lines that widely exceeded thirteen (13) acres or that they had adversely possessed the disputed acreage for a period longer than fifteen (15) years. The court concluded that Barbara Hodges owned the disputed property, and title was quieted in her favor as to nearly twenty-six (26) acres on the south side of the road. These separate appeals followed.

The North Tract.

The Houses argue that the trial court erred by relying on a survey founded upon erroneous assumptions and that it failed to interpret the deed correctly as a matter of law. They also contend that the trial court made a finding of adverse possession for which there was no legal basis. Hodges disputes both of these assertions.

The Houses contend that the Simmons survey upon which the trial court relied with respect to the North Tract was flawed because it is based on two erroneous assumptions. First, they argue that Simmons incorrectly used the reference in the original deed to the “Wakeland line” as a distance monument for the northern boundary of the North Tract rather than as a reference monument. Second, they argue that Simmons used an erroneous measurement of three (3) feet for a “step” as opposed to the correct measurement of two and one-half (2 ½) feet in establishing the length of the east and west boundaries.

Again, the North Tract was described in the Midkiffs' deed as

follows:

Beginning at a stone in the New Highway (Old Hartford-Leitchfield Road) northeast, with Wendell Young's lines 338 steps to a stone; thence west with Wakeland's line to a stone; thence S.W. with Brinton Young's line 340 steps to a stone in right of way of Hartford-Leitchfield road (sic); thence Eastward with said road to the beginning, containing 13 acres, more or less.

The stones marking the four corners cannot be found, and their former location cannot be established with reasonable certainty. However, the parties agree that one terminus of both the east and west boundaries of the tract is each defined with reference to the Hartford-Leitchfield Road. There is no dispute with respect to those three boundaries. It is the location of the opposite terminus of the east and west boundaries – the northern boundary – that is at issue.

Relying on the interpretation implemented in the Simmons survey, the trial court concluded that the description “thence west with Wakeland's line” meant that the northern boundary adjoined Wakeland's line – a clearly established, easily identifiable monument lying to the north of the north boundary line. The Houses contend that the trial court erred by failing to conclude that the northern boundary should be established with reference to the distance calls included in the deed rather than to the Wakeland property line as a distance monument. We disagree.

Kentucky jurisprudence and surveying standards adhere to the longstanding rule that “natural and permanent monuments are the most satisfactory evidence [in determining the location of a boundary] and control all other means of description. Artificial marks, courses, distances, and area follow in the order named, area being the weakest of all the means of description.” *Metropolitan Life Ins. Co., v. Hoskins*, 273 Ky. 563, 117 S.W.2d 180, 182 (1937). However, “natural 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, 182 S.W.2d 955, 957 (1944) (quoting 8 Am. Jur. § 54, pg. 785).

When interpreting a deed, the court must “look to the intentions of the parties, [which are] ‘gathered from the four corners of the instrument[.]’” *Smith v. Vest*, 265 S.W.3d 246, 249 (Ky. App. 2007) (quoting *Phelps v. Sledd*, 479 S.W.2d 894, 896 (Ky. 1972)). However, in *Bain v. Tye*, 160 Ky. 408, 169 S.W. 843, 845 (1914), the court cautioned that where the words used in an inartfully drawn deed are uncertain or ambiguous, “and the parties have by their acts given a practical construction thereto, the construction so put upon the deed by them may be resorted to, to aid in ascertaining their intention.”

The trial court did not err by interpreting the deed description for the North Tract calling for the northern boundary to run “with” Wakeland’s line to

mean that the northern boundary ran along with and adjoined Wakeland's property line rather than merely being parallel to it. To support its decision (and as noted by Simmons), the trial court cited the property description's inclusion of the word "with" in the calls for the other three boundary lines of the North Tract. "With Wendell Young's lines" defining the east boundary line meant that the boundary line adjoined Wendell Young's line; "with Brinton Young's line" defining the west boundary meant that the boundary line adjoined Brinton Young's line; and "with said road" defining the southern boundary meant that the boundary line adjoined the road. It was wholly consistent with the drafter's intent to interpret "with Wakeland's line" to mean along with and adjoining that property line. We are persuaded that if Brinton Young had retained property north of the tract that he conveyed to the Midkiffs, the description for the northern boundary line would have read "with Brinton Young's line." Instead, it reads "with Wakeland's line."

The Houses also argue that the trial court erred by relying upon Simmons's survey because he used an erroneous measurement of three (3) feet for a "step" as opposed to the correct measurement of two and one-half (2½) feet when he established the length of the east and west boundaries. The trial court did not make a specific ruling on this issue because it properly concluded that the monument, "Wakeland's line," took priority over the distance calls for the east and west boundaries. Moreover, Simmons testified that in his experience, farmers in

Ohio County and Daviess County always used the term “step” to mean three (3) feet. We are persuaded that there was no error.

Having concluded that the trial court did not err in its interpretation of the deed, we need not address its conclusion, in the alternative, that Hodges established her claim to the property by adverse possession.

Consequently, we affirm the judgment of the Ohio Circuit Court in Appeal No. 2016-CA-001912-MR.

The South Tract.

In their separate appeal, the Lovells contend that the trial court’s findings of fact with respect to the South Tract are clearly erroneous. They argue that there is no evidence either of an agreement between the parties as to the boundary line or of an exercise of possession by the Hodgeses for the statutory period. Having reviewed the testimony, we disagree.

To recapitulate, in 1957, the Youngs deeded to their nephew, Alfred Midkiff, and his wife, Sara Midkiff, property that the Youngs carved out of their farmland on both sides of Halls Creek Road. The South Tract was described as thirteen (13) acres. In 1964, the Midkiffs sold the tracts to Dewey Nabours, another nephew of the Youngs (and Alfred Midkiff’s cousin). Dewey Nabours sold the property to John Gay in 1972. Gay sold the property to Jimmy Harris in

December 1973. Harris sold the tracts on each side of the road to the Hodgeses in June 1975.

Nabours's deposition testimony was read into evidence at trial.

Nabours indicated that his uncle, Brinton Young, showed him the property lines at the time he purchased the property from his cousin, Alfred. Nabours testified that the west boundary line of the South Tract ran from the road "straight back to the [creek] branch where the tree was." Nabours explained that he (Nabours) had shown the west property line to James Burl Rouse (the Lovells' predecessor in interest) and to Hodges's late husband on two separate occasions. He said he walked the line with them and that Hodges agreed that Rouse could build a fence on the line as indicated by Nabours. The west boundary line ended at the creek branch, and the tract's east boundary line followed the creek branch in a northerly direction back to Halls Creek Road.

When Nabours was shown the survey outlining a tract of nearly twenty-six (26) acres, he confirmed that it depicted the boundary lines as shown to him by Brinton Young – the same boundary that Nabours showed to both Rouse and Hodges. When asked about the discrepancy in acreage, Nabours explained that "Uncle Brinton didn't care about that hill of ground . . . he didn't care if it was 5 acres or 25 acres. . . . He [Brinton Young] wanted the bottoms. He had a lot of cattle, you know, and that's what he [Brinton Young] wound up with."

Jimmy Harris consulted with Nabours before he and his wife purchased the property in 1973. Nabours identified the creek branch as the eastern boundary line. Harris inspected the property shortly before trial and confirmed that the existing fence built along the west boundary line was very close to the line as he remembered it.

Harris testified that the creek branch on the east boundary line was crooked when he owned the property and that Rouse, the Lovells' predecessor in interest, straightened it without consulting him. To resolve the ensuing dispute about the location of the property line, Rouse had offered to extend the Harrises' western boundary onto his tract, but Harris declined. Instead, Rouse gave the Harrises a cow and a calf in exchange for the property that allegedly had been taken, and they agreed that a fence erected by Rouse (in 1976 or 1977) on the Harrises' side of the creek branch's new course would mark the eastern boundary between them. The western boundary remained unchanged.

In his testimony, Rouse confirmed that he considered the fence line along the creek branch on the east side of the South Tract and the fence along the tree line on the west side of the South Tract to mark the boundary line between his property and that of the Hodgeses.

Steve Wiggins, Barbara Hodges's son-in-law, testified that Brett Lovell told him that the boundary lines of the South Tract were accurately marked

by the fence lines. Frank Hodges III, Barbara Hodges's son, testified that he walked the fence lines on a regular basis and mended them.

Based upon this testimony, the trial court found that Rouse's fences had existed, without opposition, for several decades before the quiet title action was filed. It found that the Hodgeses had held the disputed area of the South Tract under fence for more than thirty-five (35) years. They emptied sewage, ran cattle, harvested timber, and rode a tractor upon various parts of the disputed area. The court concluded that the Hodgeses and their predecessors in interest had adversely possessed the disputed portion of the South Tract. In the alternative, the trial court concluded that the property owners had acquiesced to the location of the boundary lines by the 1970s, thus establishing its location forevermore under the doctrine of agreed boundaries. The Lovells contend that the judgment should be reversed because there was no agreement concerning the property boundaries and there was no evidence to support a finding that the Hodgeses possessed the property to the fence lines.

Where a trial court decides a matter without a jury, due regard must be given to the opportunity of the trial judge to consider the credibility of the witnesses. The findings of the trial judge shall not be set aside unless they are clearly erroneous. CR¹ 52.01. Findings of fact are not clearly erroneous if

¹ Kentucky Rules of Civil Procedure.

supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). “[S]ubstantial evidence” is “[e]vidence that a reasonable mind would accept as adequate to support a conclusion[.]” *Id.* at 354 (quoting BLACK’S LAW DICTIONARY 580 (7th ed. 1999)). Further, “[a] fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions. . . .” *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184-85 (Ky. App. 1987). After the trial court makes its findings of fact, its conclusions of law are reviewed *de novo*. *Hoskins v. Beatty*, 343 S.W.3d 639, 641 (Ky. App. 2011).

The trial court found that for more than thirty (30) years before the Lovells acquired their property, the property owners adjoining Hodges’s South Tract recognized the fences as her boundary lines. That finding is not clearly erroneous. Nor did the court clearly err by finding that the fences had been erected as a means of dispute resolution between adjoining land owners. These findings are amply supported by the evidence. Based upon these findings, the trial court concluded that the location of the South Tract’s boundaries had been established long ago under the doctrine of agreed boundaries.

The doctrine of agreed boundaries provides that oral agreements establishing boundary lines are enforceable where the true dividing line between two tracts is in doubt and where there is a dispute between the adjoining owners as

to the exact location of the line, which depends on variable circumstances not susceptible of certain determination. *Faulkner v. Lloyd*, 253 S.W.2d 972 (Ky. 1952). If these elements are present, the agreement is not considered an exchange of land and is not within the statute of frauds. *Id.* In such a case, it is immaterial whether there has been any possession as to the agreed line. *Id.* (citing *Howard v. Howard*, 271 Ky. 773, 113 S.W.2d 434 (1938)).

Where two tracts of land owned by adjoining owners interfere, the boundary called for by the title papers of one overlapping that of the other, there being a dispute and controversy as to the superiority of the titles, and consequently as to the true dividing line, an agreement between the owners to establish a dividing line between them in pursuance of which such line is established and plainly marked, and thereafter recognized by both parties for a considerable time as the true line, is not within the statute of frauds, and will be upheld.

Howard, 113 S.W.2d at 436 (citing *Amburgy v. Burt & Brabb Lumber Co.*, 121 Ky. 580, 89 S.W. 680, 681 (1905)).

Under the facts of this case, the trial court did not err by concluding that the boundary lines claimed by Hodges were established pursuant to the doctrine of agreed boundaries. Hodges's evidence showed that: (1) there was a *bona fide* controversy between the owners at the time the fences were erected respecting the true location of the boundary; (2) the line claimed to have been agreed upon was marked; (3) actual possession was taken in accordance with such agreement; and (4) there was continuing acquiescence or mutual recognition by the

adjoining landowners for a considerable length of time. *See Bringardner Lumber Co. v. Bingham*, 251 S.W.2d 273 (Ky. 1952). There is no requirement that the Hodgeses possessed the property to the fence lines.

Furthermore, and in the alternative, the evidence shows that Hodges acquired title to the disputed property through adverse possession. Where a fence has been recognized by the parties as a division line between their lands, each holding, claiming, cultivating, and controlling the land up to the fence on his side for more than fifteen (15) years, the fence becomes the true division line -- even though the line may have been originally located at a point on one side or the other of the fence. *Brock v. Muse*, 232 Ky. 293, 22 S.W.2d 1034, 1035 (1929). The recognition and acquiescence of one preceding owner may be tacked on to the recognition and acquiescence of another to establish that the fence has been recognized for fifteen (15) years or more. *Id.*

KRS² 413.010 is Kentucky's statute setting the fifteen (15)-year period as the statute of limitations for an action in adverse possession. Pertinent to the case before us, that statute has been construed as follows:

One may obtain a perfect title to real property by adverse possession for the statutory period of time of fifteen years even when there is no intention by the adverse possessor to claim land not belonging to him.

² Kentucky Revised Statutes.

Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Company, Inc.,
824 S.W.2d 878, 879-80 (Ky. 1992).

The trial court did not err by concluding that under either of these theories, Barbara Hodges was the owner of the disputed area enclosed by the fences erected on the South Tract. The opinion of the trial court was thorough and well reasoned, and we find no error.

We AFFIRM the judgment of the Ohio Circuit Court as to Appeal No. 2016-CA-001947-MR.

ALL CONCUR.

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