

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000974-MR

RAY MAST, SARA MAST, EDDIE JOE HERRIN,
SANDRA HERRIN, DONALD OTTO BROWN,
DEBBIE BROWN, and ANNA DELL TOLLEY APPELLANTS

v. APPEAL FROM CRITTENDEN CIRCUIT COURT,
HONORABLE RENE WILLIAMS, JUDGE
ACTION NO. 16-CI-00040

KENNY HILLYARD and APPELLEES
ANNA HILLYARD

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, NICKELL, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: Appellants appeal a jury verdict that awarded a disputed parcel of land to the Hillyards. After careful review, we affirm.

The parties own adjoining tracts of property along Wilson Farm Road in Crittenden County, Kentucky. The westernmost parcel is the Herrin tract, which is bordered to the east by the Hillyard tract. The Brown tract borders Hillyard to

the east, and the Mast tract borders Brown to the north. The dispute centers around the boundaries between the Hillyard and Herrin tracts at the westernmost portion of the Hillyard tract; and between the Hillyard, Brown, and Mast tracts at the easternmost portion of the Hillyard tract.

The question before the jury was whether the Hillyard tract has twenty-five or 125 feet of frontage on Wilson Farm Road at its northeast border¹ and extending in a southerly direction along the easternmost portion of the Hillyard tract. The jury heard testimony from the parties and two professional land surveyors and returned a verdict in favor of the Hillyards (*i.e.*, the jury found that the Hillyards own 125 feet of frontage on Wilson Farm Road).² This appeal followed.

Appellants argue insufficiency of evidence to this Court, but they present their argument in two ways. Appellants assert that 1) the trial court improperly denied their motion for directed verdict; and 2) the jury verdict was “flagrantly against the evidence.”

¹ The boundaries of the Mast, Brown, and Hillyard tracts meet at the northeast corner of the Hillyard tract.

² The jury found that the Hillyards had deed ownership as shown in the Sprague Engineering survey. Per the instructions given, the jury did not answer whether the Hillyards held the disputed property by adverse possession.

We cannot reach the merits of Appellants’ appeal because they have failed to properly preserve the sufficiency of the evidence issues before the trial court. Appellants reference their motion for directed verdict made at the close of the Hillyards’ case, but they did not provide a reference in the record before us demonstrating that they renewed the motion at the close of all evidence. After careful review of the entire record before us, we discern that Appellants did not renew their motion for directed verdict. Kentucky law is clear: A “motion for a directed verdict made at the close of the plaintiff’s . . . case is not sufficient to preserve error unless renewed at the close of all the evidence[.]” *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977). “A defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the issue in light of all the evidence, in order to be preserved for our review.” *Steel Technology, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007)³ (quoting *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998)). Therefore, Appellants’ argument that the trial court improperly denied their motion for directed verdict is not properly preserved for appeal, and we cannot review it.

Appellants’ second argument that the jury verdict was “flagrantly against the evidence” is simply a repackaging of their assertion that there was insufficient evidence for the jury to find for Appellees. This sufficiency of the

³ *Abrogated on other grounds in Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012).

evidence issue is also not properly before us because it was not preserved in a motion for judgment notwithstanding the verdict (and which would have been improper in any regard due to the failure to renew the motion for directed verdict at the close of all evidence. *See Id.*).

We will pause to note, however, that the resolution of the boundary dispute ultimately came down to credibility of the surveyors and the weight the jury gave to the testimony of each. Surveyor George “Andy” Sprague testified on behalf of Appellees.⁴ Surveyor Jacob Selph testified on behalf of Appellants. Witness credibility is a question for the jury. *Cochran v. Downing*, 247 S.W.2d 228, 229-30 (Ky. 1952). A reviewing Court does not make determinations regarding credibility or weight of the evidence. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). “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). The surveys performed by Sprague and Selph are contradictory because they place the easternmost boundary line of the Hillyard tract in different places. However, both are professional surveyors who had active licenses in

⁴ We note that Appellees did not motion the trial court to have Sprague qualified as an expert witness. However, Sprague testified as to his qualifications (*e.g.*, his education, years of experience, professional license, and his survey business). Appellants did not object to Sprague’s testimony; however, they now assert that Sprague did not qualify as an expert witness. Not only is Appellants’ argument unpreserved, but it was the jury’s prerogative to determine how much weight to afford Sprague’s testimony in light of all the evidence.

Kentucky at the time the surveys were performed.⁵ Both of the surveyors consulted relevant deeds, prior surveys, and parole evidence prior to making their respective determinations regarding where the correct boundary line is located. Both testified on what points they disagreed with the other's survey and why. Sprague testified that he believed the boundary discrepancies were attributable to the dividing or "deconstruction" of various tracts of land in 1948 by a single prior owner and that the boundary in question changed at that time. He also testified that he believed one or more of the calls present in the original deed dated in 1911 were erroneous and that the error was simply copied from deed to subsequent deed over the years. Selph also had an opportunity to testify regarding the surveys he performed, the methods employed, and why, in his professional opinion, he believed Appellees own only twenty-five feet of frontage on Wilson Farm Road. However, Selph also testified, on direct examination, that he is a convicted felon. He provided details regarding his convictions, and also testified that he had a prior complaint with the Board of Licensure. The jury had the opportunity to assess the credibility of the witnesses and weigh all the evidence. Therefore, the determination that Sprague's survey was correct was not "flagrantly against the evidence."

⁵ Selph testified that his license was no longer active in Kentucky at the time of the trial as he was working solely in Indiana.

Accordingly, we affirm the judgment of the Crittenden Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Marvin Lee Wilson
Allen O. Wilson
Eddyville, Kentucky

BRIEF FOR APPELLEES:

William Clint Prow
Providence, Kentucky