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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001337-MR

BRADLEY ESTEP AND
EVELYN ESTEP — APPELLANTS

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR GAYLE HOUSE, JUDGE
ACTION NO. 08-CI-00382

OLA RUTH REINKING;
ALLEN REINKING; AND
ROBERTA ASHER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

JONES, JUDGE: The Appellants, Bradley and Evelyn Estep, and the Appellees, Ola Ruth Reinking, Allen Reinking, and Roberta Asher (collectively "Reinkings"), own adjoining tracts of land in Clay County, Kentucky. The Reinkings sued the

Esteps in 2008 asking the trial court to declare them the rightful owners of a parcel of land situated between the Esteps' residence and land owned by the Reinkings. The Reinkings asserted they owned the parcel by deed based on the boundary as established by the calls[1] in the parties' deeds. Alternatively, they claimed they owned the parcel through adverse possession. For the foregoing reasons, we affirm the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Bradley and Evelyn Estep are husband and wife who allege they were deeded approximately 3.5 acres of land in the Lost Fork community in Clay County on November 22, 1985. The land in their deed is described as follows:

> TRACT NO. 2. Being on the waters of Lost Fork of Elk Creek of Red Bird River and bounded as follows: BEGINNING at a Beech tree on the bank of Lost Fork of Elk Creek at the mouth of a drain; thence up the drain and with the same to a Red Oak stump under the top of the hill at the rail fence; thence with said rail fence southwardly to Bart Collins line fence; thence with the said Collins line to the creek of Lost Fork and thence with said Lost Fork creek as it meanders down the same to the beginning corner. Containing approximately two acres more or less.

[1] A "call" is a landmark, used in a deed or chosen by a surveyor, to designate real property boundaries.

The Esteps introduced this deed,[2] as well as the previous four deeds[3] for the property, into evidence at trial.

Ola Ruth and Allen Reinking are wife and husband, and Roberta Asher is Ms. Reinking's daughter. The Reinkings[4] own approximately 31.5 acres of land in the Lost Fork community. They also claim to own approximately 2.75

[2] This deed conveyed land from Rube and Sophia Estep to Bradley and Evelyn Estep, for $13,000.

[3] On September 28, 1981, Larry and Lola Smith conveyed the land to Rube and Sophia Estep, for $7,000. (Defendants' Ex. 3, DB 171, p. 131.) On September 27, 1974, Jessie and George W. Napier conveyed the land to Larry and Lola Smith, for $3,000. (Defendants' Ex. 4, DB 147, p. 604.) On June 19, 1969, George W. Napier conveyed the land to Jessie Napier, for "$1.00 and the love and affection he has for his wife." (Defendants' Ex. 5 and 6, DB 134, p. 471.) This deed conveyed both Tract No. 1 and Tract No. 2. Tract No. 2 is the property at issue in this case and has the exact same description of the land described in the 1974, 1981, and 1985 deeds. On March 21, 1954, Rachel Napier, Susie and Caleb Collins, Sherman and Nannie Napier, Irvin and Delores Napier, Tommie Napier, Theo and Edith Napier, Shafter and Cleo Napier, and Martha and Alfred Wagers conveyed the land to George and Jessie Napier, for "consideration of exchange of deeds heirship in their father's estate." (Defendants' Ex. 8, DB 107, p. 293.)

[4] We refer to the Reinkings collectively in this opinion, although none of the deeds reflect all three Appellees owning the land collectively. The most recent deed, dated May 30, 2003, conveyed the land from Ola Ruth Reinking to herself or Roberta Asher, for $5,000. (Plaintiffs' Ex. 3, DB 269, p. 214.) This same property, in addition to another tract of land, was conveyed to Allen and Ola Ruth Reinking by A.T. and Dora Collins, on May 17, 1983, for $10,000. (Plaintiffs' Ex. 1, DB 176, p. 340.) This deed notes the same property was recorded in Deed Book 142, page 21 (conveyed to A.T. and Dora Collins by several individuals) and in Deed Book 138, page 161 (conveyed to A.T. and Dora Collins by several individuals, including Ola Ruth Asher and Frank Asher, her husband). This same property, with the additional tract of land, was conveyed to Ola Ruth Reinking by Dewey and Mae Collins, A.T. and Dora Collins, Marion C. and Addie Collins, Leona and Curtis Nantze, Margaret and Albert Mills, and Bart Jr. and Joyce Collins, on July 28, 1983, for $10,000 "having already been paid to A.T. Collins for all heirs parts." (Plaintiffs' Ex. 2, DB 177, p. 41.) This deed claims the source of title was acquired by Bart Collins, Sr. and Stella Collins from Arra Caudill by a November 17, 1930 deed.

acres of the Esteps' 3.5 acres of land. The Reinkings introduced several deeds into evidence at trial with the following description of their land:

> TRACT NO. 1 BEGINNING upon the Lost Fork of Elk Creek at two (2) white oaks poplar and a beech tree, the beech marked E.W.M. February 11, 1840 the 5th corner of a survey made for Walker and Murphy for four hundred (400) acres; thence with same west 50 poles to a corner of same; thence S. 5 E. 130 poles to a stake in a line of the 400 acres survey, E. 50 poles to a stake in a line of the 400 acres thence with another line of same S. 5 E. 60 poles to a stake in said line and also a corner in a 200 acre survey made for Hi Marcum; thence with a line of same N 10 E 190 poles to a stake in said line W. 50 poles to the beginning, containing sixty-one (61) acres (more or less).
> The oil and gas was reserved in a deed from Arra Caudill to Bart Collins.
> There is excepted and not conveyed and or all of the following described boundary of land deeded to Ola Ruth Asher by Bart Collins and Stella Collins by deed dated 20th day of August 1963 and recorded in Deed Book 130 at page 369 and bounded as follows: BEGINNING at the lower end of the garden where said second party now lives; Beginning on a small poplar bush in the edge of the creek; thence a north direction running with the road, the lower side thereof to the sugar camp branch; thence a western direction to main Lost Fork Branch; thence running with the meanders of Lost Fork Branch to the beginning so as to include two (2) acres more or less.

(Plaintiffs' Ex. 3, DB 269, p. 214.)

The dispute over the 2.75 acres of land began in the early 2000s. The Esteps were building a garage when Ms. Reinking told them they were building on her part of the land. The Esteps disagreed but stopped building the garage. In

2008, the Reinkings filed a quiet title action as related to the disputed parcel. The Esteps answered claiming ownership through their deed.

In August 2010, the trial court held a bench trial. Both parties presented expert and lay witness testimony. Surveyor James Blanton testified for the Reinkings, while Surveyor Ralph Peters testified for the Esteps. Surveyor Blanton traced the Reinkings' property through several deeds and United States Forest Service documentation. He also used the deed to the Esteps' adjoining property, but testified it was "hard to put on the ground" because it called for a "red oak stump," which was not located. Also, the Esteps' deed called for a "rail fence,"[5] but only a barbed wire fence was found. For the Esteps, Surveyor Peters explained his own survey of the land and how he traced the Esteps' property through several deeds. He further testified that he found no physical evidence of a boundary line where Ms. Reinking claimed the two properties met. Ms. Reinking testified for the plaintiffs, while the Esteps testified for the defendants, and all described their histories with the land.

One year after trial, on August 23, 2011, the trial court entered its findings of fact and conclusions of law. The trial court found the Reinkings to be

[5] A rail fence is generally considered to be a wooden fence of some type.

the legal owners of the disputed tract by virtue of both their deed[6] and through adverse possession.[7]

The Esteps filed a motion to alter, amend, or vacate arguing that the trial court ignored Surveyor Peters' testimony. The Esteps claimed their deed described the old fence which runs around their property "on all but one small side." The Esteps also argued Ms. Reinking did not occupy the disputed land, as claimed in the complaint, because she lives in Indiana, while the Esteps had used and built upon the disputed land. The trial court denied the Esteps' motion, and the Esteps appealed, for the first time, on December 2, 2011.

While the first appeal was pending, the Esteps filed a CR[8] 60.02 motion to set aside the judgment claiming the Reinkings concealed a Master Commissioner's deed relating to the property. Furthermore, the Esteps presented

[6] With respect to ownership by deed, the trial court explained that it found the Reinkings' expert, Surveyor Blanton, was more persuasive as he followed the calls within the Reinkings' deed to include the disputed area. The calls in the Esteps' deed, on the other hand, were dependent upon the location of the "Bart Collins line." Bart Collins is Ms. Reinking's father and a predecessor in the Reinkings' title to the land. Because the Esteps' boundary was "totally dependent" upon the "Bart Collins line," the trial court concluded the proper location of the line could only be located by running the calls of the Reinkings' deeds, which Surveyor Blanton did in his survey.

[7] As to adverse possession, the trial court concluded that the Reinkings and their predecessors in title "sufficiently utilized the property in dispute for a period in excess of fifteen (15) years prior to the dispute between the parties, and that the [Reinkings] and their predecessors in title have been in the actual, peaceable, exclusive, open, notorious, visible, hostile, continuous and uninterrupted adverse possession of same under a claim of right and right of ownership adversely to the [Esteps]."

[8] Kentucky Rules of Civil Procedure.

three affidavits claiming that Surveyor Blanton told them, while in the waiting room during trial, that Ms. Reinking directed him to put a false "claimed line" on his survey under the threat that she would not pay him if he refused. In response, the Reinkings argued the "concealed" deed shed no new light on the case, as that Master Commissioner's deed only removed a cloud on the title to the property.[9] The Reinkings also submitted the affidavit of Surveyor Blanton, which stated he was not forced to put an incorrect boundary line on his survey. Pending a ruling on the CR 60.02 motion, this Court held the first appeal in abeyance.

On August 9, 2012, the trial court held a hearing on the CR 60.02 motion. During that hearing, the Esteps called Ms. Reinking and asked if she had lived in Lost Fork for the past several decades. She answered: "I was letting Lost Fork sit there and take care of itself" in the 1970s, 1980s, and 1990s. The Esteps then called Surveyor Blanton who denied telling the Esteps that he placed the boundary line where Ms. Reinking told him, and that his fee was not contingent on testifying one way or another. The Esteps also called Lola and Larry Smith, the previous owners of the Esteps' property, who testified the property was supposed to go up the mountain and join the government (U.S. Forest) land. Ms. Smith

[9] In 1963, Ms. Reinking's parents, Bart and Stella Collins, executed a deed to Morris Homes Corporation for 61 acres of land. In 1985, Mr. and Ms. Reinking sued Morris Homes Corporation and three other defendants to clear the title. As a result, the Master Commissioner re-conveyed the land to Mr. and Ms. Reinking by deed in 1986. According to the Reinkings, the reconveyance did not change or alter the boundaries set out in the previous deeds; it merely served as reconfirmation that those boundaries remained intact.

testified that, while in the waiting room at trial with Ms. Estep, Surveyor Blanton told them Ms. Reinking was "crazy" and told him where to draw the boundary line, but they had nothing to worry about because their surveyor was good. Ms. Estep testified the same as Ms. Smith regarding the remarks Surveyor Blanton made in the waiting room. Mr. Estep testified he would have nothing left of his backyard if Ms. Reinking's "claimed line" were to be believed.

Three weeks after the hearing, the trial court granted the CR 60.02 motion and set aside its prior order. In doing so, the trial court found the "newly discovered Master Commissioner's Deed" was never mentioned and "mistakes . . . may have arisen without consideration of that deed." The trial court's decision to grant the CR 60.02 motion mooted the pending appeal in our Court, and we dismissed it as such.

The trial court scheduled a new trial, but subsequently ordered the parties to present additional proof by depositions instead of conducting another trial. The Esteps took the depositions of Ms. Reinking and their own surveyor, Mr. Peters. In Ms. Reinking's deposition, she admitted she deceived the court into believing she owned all the property identified in her complaint, but she had actually sold part of it to her brother, Bart Collins, Jr., in 2002:

> Q: In other words, you deceived the Court and you deceived Mr. Estep into thinking that you owned this property when you filed this Complaint because you included it in your Complaint, didn't you?

A: Yes, I did.
Q: And you didn't own it, did you?
A: I –
Q: You had sold it to your brother.
A: That was the cemetery side.
Q: It doesn't matter. But, you had sold it to your brother; is that correct?
A: Well, I sold it to my brother, but I did come – I did complain about it.

In addition to including property in the lawsuit that was not hers, Ms. Reinking admitted that the Master Commissioner's deed covered the property described in her complaint but claimed she did not "conceal" it as that deed was in the public record. In Surveyor Peters' deposition, he testified "there's no way that (Ms. Reinking) can have a deed of the area in dispute, totally impossible – totally impossible." He explained that the Reinkings' surveyor did not identify a source deed for the disputed area of land. Instead, the Reinkings' survey is marked with dotted lines and labeled: "AREA CLAIMED BY OLA RUTH REINKING 2.75 ACRES." Surveyor Peters contended that if Surveyor Blanton had a source deed for the disputed area he would not have labeled it as "claimed by":

Q: Okay. So, when – when Mr. Blanton indicates that this is the area claimed by her, she doesn't have a deed to claim it by?
A: When he puts on here "area claimed by Ola Ruth Reinking" . . .
Q: Uh-huh (affirmative response).
A: . . . he is saying in effect without saying it that she has no deed for it. She is one hundred percent (100%) responsible for her claim on this plat. She is responsible for that. That's why he signed off and said "area claimed

> by." He doesn't want to be responsible for that because he knows positively she doesn't have a deed for it.
> Q: Okay.
> A: So, he has to put it on her as her claim area. That's an old surveyor trick to get off – get the monkey off your back. You're not responsible for this because you don't have a deed for it.

Surveyor Peters also testified no fence, wall, tree line, or other monument follows Ms. Reinking's "claimed line," which runs in a north-south direction behind the Esteps' house, which is marked by a vertical rectangle labeled "HOUSE" on the surveys.

The Reinkings took no depositions. Instead, they moved for reinstatement of the 2011 judgment claiming the additional testimony did not change the trial court's original findings. The Esteps responded that both parties' surveyors could find no well-defined boundary for Ms. Reinking's "claimed line," and Ms. Reinking's misrepresentations damaged her credibility as a witness.

On August 9, 2018, the trial court reinstated its August 23, 2011 judgment. In its order, the trial court held the Master Commissioner's deed contained nothing to call into question the findings of fact on which it based its original judgment. This appeal followed.

II. STANDARD OF REVIEW

When reviewing a bench trial, we may not reverse the trial court's findings of fact unless they were clearly erroneous. CR 52.01; *Elsea v. Day*, 448

S.W.3d 259, 263 (Ky. App. 2014). This rule applies to matters involving boundary disputes. *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980). Findings of fact are not clearly erroneous if supported by substantial evidence. *Weinberg v. Gharai*, 338 S.W.3d 307, 312 (Ky. App. 2011). Substantial evidence is evidence 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. *Id.* (citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)). Notwithstanding the deference to the trial court's findings of fact, we review its conclusions of law *de novo*. *Id.*

III. ANALYSIS

The Esteps argue the trial court's findings of fact were not supported by substantial evidence because the Reinkings produced no evidence that the disputed area was within the calls of the Reinkings' deed. They also argue Ms. Reinking's "claimed line" runs through their backyard, within thirty feet of their home, and was given to Surveyor Blanton by Ms. Reinking with no deed support. The Reinkings argue the trial court found the survey of their expert, Surveyor Blanton, to include the disputed area and this finding was supported by the evidence.

The trial court has the exclusive task of judging the credibility of witnesses and "due regard shall be given to the opportunity of the trial court" to

accomplish this task. *C.W. Hoskins Heirs v. Wells*, 560 S.W.3d 852, 856 (Ky. 2018) (quoting CR 52.01). "It is not for us to determine whether or not we would have reached a different conclusion, faced with the same evidence confronting the trial court." *Id.* (quoting *Church and Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 323 (Ky. 1992)). Because the trial court is given the task of assessing witness credibility, "'[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal,' and appellate courts should not disturb trial court findings that are supported by substantial evidence." *Id.* (quoting *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)).

In this case, the trial court had to assess the testimony of the surveyors and witnesses, as well as the exhibits presented, regarding where the boundary is located. Based on the record, the trial court considered the evidence and placed more weight on the evidence it found more credible, which was the testimony of Surveyor Blanton. Surveyor Blanton's survey was based on source deeds, adjoining deeds, and U.S. Forest Service documents, while the Esteps' deed was poorly written and hard to place on the ground. When construing a deed, the descriptive elements, such as natural monuments, are relied upon to determine boundaries. The surveyor tries to track the footsteps of the original surveyor to locate the survey as it was intended to be located on the ground by him or her. *Lainhart v. Shepherd*, 246 S.W.2d 460, 461 (Ky. 1952). Here, the descriptive

elements in the Esteps' deed, like the "red oak stump" and "rail fence," were not located by either Surveyor Blanton or Surveyor Peters. *See Mullins v. Commonwealth, Dep't of Highways*, 487 S.W.2d 937, 938 (Ky. 1972) (affirming unreliability of deed calling for an oak tree and creek, which had long ago been removed and their former location was in controversy).

If Ms. Reinking told her surveyor where to place the boundary line, as the Esteps previously alleged, this would be problematic. However, Surveyor Blanton explained his methodology and presented the evidence he used in his survey, which the trial court found persuasive. Surveyor Blanton also denied, under oath during the CR 60.02 hearing, that he had been instructed where to put the line. If a surveyor with a deed can locate the land and establish its boundaries accurately, with or without the aid of extrinsic evidence, his method is proper and the description in such deed is legally sufficient. *Ken-Tex Exploration Co. v. Conner*, 251 S.W.2d 280, 281 (Ky. 1952). The trial court as a fact-finder may choose between conflicting opinions of surveyors as long as the opinion relied upon is not based upon erroneous assumptions or the opinion does not ignore established factors. *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky. App. 2002).

Furthermore, although the trial court had a moment of pause when it granted the Esteps' CR 60.02 motion and vacated its original judgment, it properly reinstated its judgment after finding the "concealed" Master Commissioner's deed

had the identical property description listed in the Reinkings' quiet title complaint. As the property description had not changed, the Master Commissioner's deed did not alter the trial court's original judgment. The purpose of the Master Commissioner's deed was to clear the title of the property after a mortgage on a home was paid off.

Finally, the Esteps' deed references the "Bart Collins line." Applying *Williams v. Waddle*, 148 S.W.2d 298 (Ky. 1941), the trial court properly found the Esteps' property boundary at the "Bart Collins line" could only be located by running the calls of the Reinkings' deed. Because Surveyor Blanton surveyed the Reinkings' property and placed the "Bart Collins line" correctly, the trial court held this sufficient evidence to prove the Reinkings' property encompassed the disputed area.

As the evidence in the record is sufficient to sustain the trial court's findings that the Reinkings own the disputed area of land, we affirm the trial court's judgment as not clearly erroneous. *Croley*, 602 S.W.2d at 419.

Our determination that the Reinkings owned the property by deed renders the remaining issue regarding adverse possession moot. "In order to establish title through adverse possession, a claimant must show possession of disputed property under a claim of right that is *hostile to the title owners interest*."

Phillips v. Akers, 103 S.W.3d 705, 708 (Ky. App. 2002) (emphasis added). One who owns property by deed cannot acquire the same property through adverse possession because a person cannot make a claim of right hostile to his own legal interest. We pause only to note that since the testimony showed that disputed property was used by the Esteps as their backyard, we cannot fathom how the trial court could possibly conclude that the Reinkings, who did not live in the area for several years, could have exercised continuous and exclusive use of the property.[10]

CONCLUSION

For the foregoing reasons, we affirm the Clay Circuit Court's judgment.

ALL CONCUR.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEES:
David Jorjani Corbin, Kentucky	Tommie L. Weatherly London, Kentucky

[10] The Esteps' appellant brief asserts that the trial court erred in concluding that the Reinkings acquired the property by adverse possession; they do not argue or otherwise suggest that the trial court should have determined them to be the rightful owners through adverse possession.