

RENDERED: OCTOBER 30, 2009; 10:00 A.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001346-MR

FREDDIE C. WALLACE
and LOIS WALLACE, his wife

APPELLANTS

v.
APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 04-CI-01434

LORETTA JUDE, single;
ROY R. RATLIFF and BRENDA L. RATLIFF, his wife;
DEIDRE M. BROWN; DONYA WHITE;
DAREN RATLIFF; DANA HANES;
PAULETTA RATLIFF; and
BLUE FLAME ENERGY CORPORATION

APPELLEES

OPINION
AFFIRMING

*** * * * *

BEFORE: KELLER, MOORE AND TAYLOR, JUDGES.

MOORE, JUDGE: This is an appeal by Freddie C. Wallace and Lois Wallace from the Findings of Fact, Conclusions of Law and Judgment of the Pike Circuit Court adjudicating a boundary dispute. Upon review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Appellees, with the exception of Blue Flame Energy Corporation, (“Ratliffs”) filed a Complaint in the Pike Circuit Court claiming, as heirs of Eugene Vincent Ratliff, that they are the owners of the real property in dispute. The Ratliffs assert that the Wallaces are wrongfully claiming a portion of their property. As a result of the dispute, Blue Flame Energy Corporation withheld royalties on gas being developed through the gas well drilled pursuant to an Oil and Gas Lease executed by the Ratliffs with Blue Flame Energy Corporation.

The Wallaces filed a Counterclaim asserting that they are the owners of the disputed tract of land, asking the circuit court to declare the correct boundary lines and to order Blue Flame to pay the withheld royalties. The Wallaces also filed a Third Party Complaint against Blue Flame Energy Corporation for all of their alleged damages, including damages to their surface estate as well as damages to their oil and gas estate.

At the non-jury trial, all the parties presented evidence. The Ratliffs presented evidence in the form of testimony from Roy R. Ratliff. Blue Flame presented its evidence through Donna Thompson, a licensed land surveyor; Patrick Cleary of Highland Forestry, Inc.; Terry Connors of the University of Kentucky Forestry Department; and Ken Hall, the General Manager of Blue Flame Energy Corporation. The Wallaces established their evidence through the testimony of Rick P. Keene, a registered and licensed engineer and land surveyor; Jay Wallace, the brother of Freddie C. Wallace; Freddie C. Wallace; and Luke Hatfield, a

licensed land surveyor. On rebuttal, Blue Flame Energy Corporation presented testimony by Loretta Jude and Donna Thompson. In addition to the aforementioned evidence, the court made an on-site visit to the property in dispute.

Through the circuit court's Findings of Fact, Conclusions of Law and Judgment, this matter was resolved in favor of the Ratliffs and Blue Flame Energy Corporation. The Ratliffs were held to be the owners of the disputed tract of land. The Wallaces appealed.

On appeal, the Wallaces argue that the circuit court erroneously located one of the boundary lines. Presenting the issue on appeal, they ask:

Can the Trial Court ignore evidence produced by the Wallaces/Appellants' two (2) licensed land surveyors, who each independently performed and certified a survey of the subject property, and base his decision on the evidence produced by the Blue Flame/Appellee's land surveyor, who did not perform or certify a survey, and the evidence of Blue Flame/Appellee's tree expert who is not an expert on property lines or land surveying?

The Ratliffs and Blue Flame Energy Corporation argue that substantial evidence was submitted to the trier of fact through expert and lay testimony; therefore, the trial court's findings of fact were not clearly erroneous.

II. STANDARD OF REVIEW

“With respect to property title issues, the appropriate standard of review is whether or not the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for that of the trial court absent clear error.” *Phillips v. Akers*, 103 S.W.3d 705, 709 (Ky. App. 2002) (citing *Church and Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 323 (Ky. 1992)). CR¹ 52.01 states, in part, “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”

The test of whether a finding of fact is clearly erroneous is whether it is supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954 (Ky. 1964); *D.H. Overmyer Warehouse Co. v. Smith*, 451 S.W.2d 668 (Ky. 1970). Substantial evidence does not mean undisputed evidence, but where both parties introduce adequate evidence, if believed, to support their respective positions, the findings of the trial judge are not clearly erroneous. *Hensley v. Stinson*, 287 S.W.2d 593, 594 (Ky. 1956). The clearly erroneous standard has been applied specifically to boundary disputes. *West v. Keckley*, 474 S.W.2d 87 (Ky. 1971); *Croley v. Alsip*, 602 S.W.2d 418 (Ky. 1980). The fact-finder may choose between the conflicting opinions of surveyors so long as the opinion relied on is not based upon erroneous assumptions or fails to take into account established factors. *Webb*

¹ Kentucky Rules of Civil Procedure.

v. Compton, 98 S.W.3d 513, 517 (Ky. App. 2002) (citing *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183 (Ky. App. 1987)).

III. ANALYSIS

The location of the disputed boundary line is established by a call in the Commissioner's Deed to the Wallaces. The call reads, "thence with a marked line to beech and spruce pine in hollow." The Ratliffs and the Wallaces disagree as to the location of the "marked line." Essentially, the Ratliffs assert that the marked line is below the hill while the Wallaces assert that the marked line is around the hill.

In support of their argument, the Wallaces trace ownership of the disputed property back to B.L.C. Francisco. In the late 1800s and early 1900s, the Commonwealth of Kentucky issued two patents to Francisco. Francisco acted as a "marker" on the survey crews for these patents. Therefore, the Wallaces argue that Francisco was familiar with the boundaries of the disputed property and the courses and distances of the calls in the deed descriptions.

Francisco eventually deeded some of his property to his daughter, Roxie Spradlin, and her husband. The deed to Spradlin included the property now in dispute. One of the boundary lines set in the Spradlin deed is essentially the same as the disputed boundary line in the case before us. The only difference in the boundary line in the Spradlin deed from the boundary line in the Wallace deed is the addition of the word "a." In the Spradlin deed, the call reads, "thence with a marked line to beech and a spruce pine in a hollow." The Wallaces note that

Francisco did not use a course or distance to the beech tree in his deed to Spradlin.

Nor did he use the word “down” in describing the location to the hollow.

The Wallaces take the position that the beech tree, claimed by the Ratliffs as part of the “marked line,” is not actually part of the “marked line” referred to in the deed. Because Francisco’s patent surveys included directions to that particular beech tree such as “down hill” and “N 64 W 48 poles,” the Wallaces argue that Francisco not only knew the location of the beech tree but also the exact course and distance to that beech tree. However, in his deed to Spradlin, which is essentially the same as the Wallaces’ deed, Francisco did not describe the beech tree using courses or distances.

The Wallaces conclude that because the call does not include a course or distance to the beech tree, although a course and distance description was available and known to Francisco, he did not intend the call to identify that particular beech tree. “If B.L.C. Francisco meant to use the Appellee’s beech tree in deeding part of his land to his daughter, he would have referred to [sic] same course and distance to that beech tree in the line of his [patents].”

To establish their proposed location of the “marked line,” the Wallaces rely on the surveys performed by their land surveyors. The Wallaces claim that the court ignored the testimony and surveys of their two land surveyors, basing its judgment instead on the site visit and the testimony of Blue Flame’s experts.

Additionally, the Wallaces take issue with the fact that the Ratliffs produced no expert witness, relying instead “upon the hearsay testimony of Roy Ratliff.” The Wallaces also point out that Blue Flame’s land surveyor did not perform a boundary survey and was potentially biased. They also note that Blue Flame’s tree expert is not a surveying expert. Therefore, the Wallaces conclude that the trial court’s decision was clearly against the weight of the evidence.

The Ratliffs argue that the findings of the trial court “were practically compelled and were certainly not clearly erroneous.” They assert that an entire boundary survey was not required, citing Section 11(1) of 201 KAR² 18:150 which reads, “[a] partial boundary survey may be conducted by a professional land surveyor if: (a) The portion of the property being surveyed can be clearly isolated from the remainder of the property; and (b) The interest of an adjoining owner is not affected.”

Blue Flame Energy Corporation, in analyzing each finding of the trial court, points out evidence presented at trial that supports the court’s findings of fact. Blue Flame ultimately argues that the trial court’s judgment was supported by substantial evidence and was not clearly erroneous.

We find the circuit court’s judgment holding the boundary line to be located at the position advocated by the Ratliffs to be supported by substantial evidence. In its Findings of Fact, Conclusions of Law and Judgment, the trial court laid out very specific and detailed evidence presented by the parties. It was the

² Kentucky Administrative Regulations.

trial court's role to weigh the credibility of the witnesses, and the fact-finder may choose between the conflicting opinions of surveyors.

Patrick Cleary, described by the court as a qualified forester and tree expert, prepared Exhibit 11 presented by Blue Flame at trial. Exhibit 11 depicts the positions and descriptions of each of the trees the parties assert comprise the "marked line." Trees identified as 1-6 are those which establish the boundary line according to the Wallaces. Trees 7-13 establish the boundary line advocated by the Ratliffs.

Finding that the Spradlin deed used a boundary line established by Francisco's two separate patents, rather than creating a new call, the court determined that the boundary line claimed by the Wallaces did not correspond to either the boundary line established in Francisco's patents or Spradlin's deed. Rather the boundary shown by trees 7-13 was held to be the correct boundary line, coinciding with the location of the trees referenced in the patents and the Spradlin deed.

The court determined that, although the patents issued to Francisco used courses and distances to describe the boundary line, the boundary claimed by the Ratliffs is in the approximate location of the calls of the patents. The court was not persuaded by the Wallaces' argument that Francisco would have used courses and distances to describe the "marked line" if he intended the boundary in the Spradlin deed to correspond to the boundary established in the patents.

During the on-site visit, the court examined the trees that the Wallaces claim stand as the boundary line markers. After viewing those trees, the court did not believe that they were boundary trees nor were they the trees described in the Wallace or Spradlin deed. The court noted that trees 7-13 had “very clear hacks in them which the Court believes are the trees which mark the boundary line . . .”

The court found that tree 1, advanced by the Wallaces as a boundary marker, was not in existence at the time of the deed. Therefore, tree 1 could not have been a marker of the boundary line. “The Report of Patrick Cleary and his testimony prove that the trees being claimed by the Wallaces as boundary markers are not old enough to be boundary trees at the time the Deed to the Spradlins was made in 1941.”

The court concluded that the boundary line set forth in the Spradlin deed and the Wallace deed was correctly shown by Blue Flame’s Exhibit 11. The common boundary line was set in favor of the Ratliffs.

The fact that the Ratliffs did not offer expert testimony, that Blue Flame’s surveyor did not perform a boundary survey, or that Blue Flame’s surveyor might have been biased are all credibility and weight issues. It was within the purview of the court to judge the credibility of the witnesses and weigh the evidence. The circuit court was not clearly erroneous in its placement of the boundary line because all of the circuit court’s findings were supported by substantial evidence.

IV. CONCLUSION

This Court being otherwise duly advised, the trial court's Findings of Fact, Conclusions of Law and Judgment is hereby AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Donald H. Combs
Pikeville, Kentucky

BRIEF FOR APPELLEES:

Ratliffs:
Lawrence R. Webster
Pikeville, Kentucky

Blue Flame Energy Corporation:
Charles J. Baird
Pikeville, Kentucky