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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000230-MR

CHAMP AND MELANIE CHANEY

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 11-CI-01468

RALPH AND DEBRA JUSTICE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Champ Chaney and his wife, Melanie Chaney, appeal from a judgment of the Pike Circuit Court which found that the boundary line proffered by Ralph Justice and his wife, Debra Justice, was the proper one between the parties' two tracts of land. After careful consideration, we affirm the trial court.

FACTUAL AND PROCEDURAL HISTORY

This case arises out of a boundary dispute between owners of two adjoining tracts of land. The dispute was the subject of a previous action, which was partially tried but dismissed when the Chaney's, who had initiated that action, failed to establish title to a common source.

On November 14, 2011, the Justices filed this complaint because, since the dismissal of the first action, the Chaney's continued to claim and attempted to take possession of the disputed property. In their complaint, the Justices asked the trial court to adjudge them as the owners of the disputed property. The Chaney's filed an answer and counterclaim. Thereafter, a bench trial was held on September 13, 2012.

At trial, evidence established that the Chaney's and the Justices own adjoining properties, which are located on Chimney Fork of Jonican Creek in Pike County, Kentucky. The disputed area is a strip of land approximately 130 feet wide. The disputed property extends in length from the creek to the top of the hill. Both parties' titles are derived from a common grantor, Nathaniel Thacker, who at one time owned all the property under discussion. Particularly significant here is that shortly after Thacker acquired the property, he had a mineral deed prepared for the property. Any challenge to this mineral deed is precluded by the prior action.

The initial deeds divide the property into two tracts running from a beech tree near Chimney Fork and near the roadway and from there up the point, referred to as a center of the point. The relevant deeds have called the property

either from a beech tree up the hill with the center of the point or coming down the point to the beech tree. In fact, virtually all the deeds in the chain of title acknowledge the center of the point and the beech tree. (Later deeds called down the “center of the point” to a stake witnessed by the beech tree.)

Prior to Champ Jr.’s occupying the property, his father, Champion Chaney Sr., who is in privity of title with the Chaney’s, lived on the property. According to testimony at trial, in 1989, Champ Chaney Sr. put a mobile home on a small part of the disputed property. Following his marriage in 1991, Champ Chaney Jr. lived in this trailer for several years. In addition, Champ Jr. testified that around this time period, he and his wife planted pine trees on the property to commemorate the birth of their son, who was born in 1992. In addition, a basketball goal was put up at that time to commemorate the child’s birth.

In 2004, Champ Sr. died and after his death, Champ Jr. started to clear the property extensively. In 2010, the clash over the property heated up when the Chaney’s, among other things, attempted to put a second mobile home on the property; blocked the roadway with pipes; began cutting trees down, including some peach trees; removed the agreed boundary; and hired an excavator to clear out tree stumps from the disputed area. Debra Justice testified that the Justices protested these actions.

Luke Hatfield, who was a professional engineer and land surveyor, provided expert testimony at trial on behalf of the Justices. He explained that the mineral deeds for the property that Thacker had prepared, while not controlling as

to the division of the surface property, could still be used to pinpoint the location of the beech tree. Hatfield noted that an old mineral deed of record found in Deed Book R, page 445, and Deed Book R, page 477, allowed for a surveyor to determine the placement of the beech tree. In contrast, John Justice, a professional engineer and land surveyor, who provided expert testimony for the Chaney's, depicted the line down the center of the point as anywhere along the land separating the two drainages. After considering the testimony of the parties, the title and possession of the property, the arguments of counsel, and the trial exhibits, the trial court entered findings of fact, conclusions of law, and judgment on November 30, 2012.

The trial court found that once the surface property was separated, relevant deeds have either called from a beech tree up the hill with the center of the point or coming down the point to the beech tree. Further, the trial court also determined that Thacker had a mineral deed prepared for the property. Using the mineral deed, the trial court noted that Hatfield was able to locate the position of the beech tree. Indeed, when determining boundaries, the general rule is that natural and permanent monuments are the most satisfactory evidence and control all other means of description. *Metropolitan Life Ins. Co. v. Hoskins*, 273 Ky. 563, 117 S.W.2d 180, 182 (Ky. App. 1937).

Once its position was determined, Hatfield was able to establish the proper boundary line by going up the point with the center of the point as shown

on Plaintiffs' (the Justices) Exhibit 1. The trial court adopted the language therein as depicting the correct boundary:

BEGINNING at the former location of a beech tree now marked by a rebar/cap set by Luke Hatfield; thence running S 65° 22' 40" West 348.25 feet to a set rebar on the center of the point; thence on with the center of the point as depicted on the Hatfield Map.

The trial court also observed that John Justice depicted the line down the center of the point by saying that it could be anywhere along the land that separates the two drainages. In Paragraph Five of the Findings, the trial judge articulated that John Justice's testimony was a variance with the traditional mountain interpretation of "down a point," or "center of a point." This terminology, according to the findings, refers to the highest ground and a watershed as that watershed descends. Therefore, the trial court decided that his conclusion was incorrect and did not comport with the calls in the deeds.

Ultimately, the trial court found and adopted Plaintiffs' Exhibit 1, prepared by Hatfield, as depicting the correct boundary line.

In addition, the trial court found that the Chaney's proffered insufficient evidence of possession on the disputed property to establish adverse possession since their actions have not been actual, open, or hostile enough to ripen into possession. Specifically, the trial court found that prior to 2006, the actions on the property were intermittent, sporadic, and insufficient to warn the Justices of the Chaney's claim.

The Chaney's then filed a motion to alter, amend, or vacate the trial court's decision, which the trial court denied. They now appeal the trial court's decisions.

On appeal, the Chaney's claim that the trial court erred when it found that the common boundary line was accurately depicted by the Justices' surveyor; that the trial court erred when it determined that insufficient evidence existed to establish adverse possession; and, that it erred when it held that the conversation between Champ Chaney Sr. and Debra Justice was admissible. The Justices respond that findings of fact are supported by substantial evidence and, hence, should not be set aside and that the statements of Champ Chaney Sr. are admissible under Kentucky Rules of Evidence (KRE) 803(20).

STANDARD OF REVIEW

Our standard of review is governed by Kentucky Rules of Civil Procedure (CR) 52.01. As stated in *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980), the law is clear that "findings of fact (of the trial judge) shall not be set aside unless clearly erroneous. CR 52.01; 7 Clay, Kentucky Practice, Rule 52.01, comment 8. This court has applied this rule in boundary disputes. It is the rule that, where this Court cannot say on an appeal from the decree in an action involving a boundary dispute that the Chancellor's adjudication is against the weight of the evidence, the decree will not be disturbed." *Rowe v. Blackburn*, 253 S.W.2d 25, 27 (Ky. 1952). See also *Story v. Brumley*, 253 S.W.2d 24 (Ky. 1952).

Substantial evidence is defined as “that 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.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994). Moreover, due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. With this standard in mind, we now turn to the case before us.

ANALYSIS

The Chaney’s first two arguments are based on a claim that the trial court erred when it found that the common boundary line was accurately depicted by the Justices’ surveyor and that insufficient evidence existed to establish adverse possession. As explained above, if substantial evidence supports the trial court’s findings of fact, we may not reverse its findings of fact unless they were clearly erroneous.

Regarding the determination of the boundary line, as is typical in most trials concerning boundary disputes, the trial court was provided conflicting engineering and survey testimony. Nonetheless, the trial court, after listening to the witnesses and considering the trial exhibits, determined that the testimony provided by the Justices’ surveyor was not only accurate but also the most compelling.

On appeal, the Chaney’s have merely reiterated their trial testimony and provided no argument or evidence that demonstrates that the trial court was

clearly erroneous; that is, that it did not have substantial evidence supporting its findings, conclusions, and judgment. Therefore, because substantial evidence supports the findings, conclusions, and judgment of the trial court about the location of the boundary line, we conclude that the trial court's decision regarding the boundary line was not erroneous.

Having not prevailed on the boundary line argument, the Chaney's next argue that, by virtue of adverse possession, they have established a claim to the disputed property. For adverse possession to bar record title, it must be shown that possession was hostile and under a claim of right, actual, exclusive, continuous, and open and notorious. *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878, 880 (Ky. 1992). Additionally, these common law elements of adverse possession must all be maintained for the statutory period of fifteen years, and it is the claimant's burden to prove them by clear and convincing evidence. *Moore v. Stills*, 307 S.W.3d 71, 78 (Ky. 2010).

Here, the trial court concluded that the Chaney's had not offered clear and convincing evidence to prove their claim of adverse possession. The trial court observed that although the Chaney's cut down trees, excavated the property, and put a new trailer on the property, these actions were not actual, open, hostile, or adverse long enough to ripen into possession. Specifically, the trial court found that the acts prior to 2006 were intermittent, sporadic, and not sufficient to support a claim of adverse possession. It is indisputable that fifteen years have not passed since Champ Jr. blatantly acted to claim the property. Significantly, the most

obvious actions occurred in 2010, and testimony established that the Justices protested the actions. Again, the Chaney's have not established any evidence or rationale to show that the trial court committed clear error in rendering this finding. Accordingly, the trial court's decision regarding adverse possession was not erroneous.

Lastly, we address the Chaney's contention that the trial court erred when it used Debra Justice's testimonial rendition of the conversation between Champ Chaney Sr. and her regarding the boundary line for the property. The standard of review for evidentiary issues is not that of clear error but whether the trial court's decision was an abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

The Chaney's argue that this alleged agreement between Champ Sr. and Debra Justice was inadmissible because of the repeal of the "deadman's statute;" it was not a historical statement regarding the boundary; and, it was a violation of the Statute of Frauds. The Justices respond that Debra's testimony as to Champ Sr.'s statements as to the boundary line was admissible as an exception to the hearsay rule under KRE 803(20).

First, the Chaney's characterization as the conversation representing an agreement between Champ Sr. and the Justices is a stretch. Rather, Debra

explained the interchange as a conversation wherein Champ Sr. pointed out his understanding of the location of the boundary line. Debra conceded that the Chaney's' manufactured home, at that time, was placed slightly on the Justices' property. However, she did not indicate any agreement between the two conversants.

Given that the conversation did not constitute an agreement, it is not necessary to address the statute of frauds or "deadman's statute" arguments. But still remaining for deliberation is whether her statement represented a historical statement regarding the boundary line, which might be admissible under KRE 803(20).

Actually, during the trial several witnesses besides Debra referred to statements spoken by Champ Sr. about the location of the boundary line. The only objection to Champ Sr.'s purported statements, however, were made by the Chaney's to the aforementioned testimony between Debra and Champ. The Justices maintain that this testimony was admissible based on KRE 803(20), which states:

Reputation concerning boundaries or general history.
Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

Our research of this rule reveals no recent Kentucky cases interpreting the rule. In fact, only two cases in Kentucky make reference to this hearsay

exception. The first reference is in a footnote in *Wells v. Sanor*, 151 S.W.3d 819 (Ky. App. 2004). It goes without saying that a dictum does not have precedential value since such statements are not part of the reasoning process. Therefore, because a footnote is dicta, it has no persuasive authority. The second reference to KRE 803(20) is in an unpublished case, *Dotson v. Debord*, 2007 WL 1378487 (Ky. App. 2007)(2006-CA-000047-MR). Therein, we made no ruling because the evidentiary issue had not been preserved.

So, we are left with a determination of whether KRE 803(20) permits Debra Justice's testimony regarding the conversation with Champ Sr. to be admitted. Because no Kentucky court has analyzed this rule, we look to other jurisdictions for interpretive guidance. The federal rule, which is quite similar, provides:

Reputation Concerning Boundaries or General History. A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

Federal Rules of Evidence (FRE) 803(20).

The implications of this rule of evidence are discussed in 2 *McCormick on Evid.* § 322 (7th Ed.)(2013). Therein, it is explained that when the location of boundaries of land is an issue, reputation is admitted to prove that location. A key concept in the exception is "reputation." Further, the treatise states:

In addition, the matter must be one of general interest, so that it can accurately be said that there is a high probability that the matter underwent general scrutiny as the community reputation was formed.

In essence, two elements – reputation and community – are necessary for this hearsay exception to apply. In this case, Champ Chaney Sr.’s statement is based neither on reputation or community knowledge but merely on his understanding of the boundary.

In a situation quite similar to the one at hand, the Indiana Court found that it was erroneous for the trial court to permit the hearsay testimony “regarding the statements made by Silvers’ late father with respect to the location of the boundary line.” *Roser v. Silvers*, 698 N.E.2d 860, 864 (Ind. App. 1998). The Indiana court determined that the exception embodied in KRE 803(20) “applies only to reputation or general consensus evidence and does not permit the admission of specific statements or assertions made by the predecessor in interest regarding a boundary.” *Id.*

We conclude that because Champ Sr.’s statement was an admission by a predecessor in interest regarding a boundary without reputational or general consensus support, it is not admissible hearsay under KRE 803(20), and consequently, the trial court’s use of it in the findings was unsupported by sound legal principles.

However, that does not end our analysis. Rather, we must now review this erroneous admission of evidence for harmless error. See *Caudill v. Commonwealth*, 120 S.W.3d 635, 660 (Ky. 2003). “The test for harmless error is whether there is any reasonable possibility that, absent the error, the verdict would have been different.” *Douglas v. Commonwealth*, 374 S.W.3d 345, 352 (Ky. App. 2012.) (citations omitted). Here, we conclude that substantial evidence otherwise existed to support the findings, conclusions, and judgment and, hence, the inclusion of the hearsay evidence was harmless error.

CONCLUSION

Notwithstanding the conflicting evidence in this case, it was the trial court’s task as fact-finder to weigh the evidence and witness testimony. CR 52.01. Based upon our review of the record, we conclude that the trial court made its decision by relying on the expert testimony of Hatfield, who, by using mineral deeds, determined the location of the monument, the beech tree. He then reviewed numerous other deeds that included a call that began with a beech tree that goes up the point with the center of the point. This testimony, as well as other evidence and testimony, constituted substantial evidence supporting the trial court’s decision.

Consequently, we affirm the decision of the Pike Circuit Court.

ALL CONCUR.

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