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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001220-MR

RUTH FARMER WELLS, ALBERT WELLS,
AND TERRY FARMER

APPELLANTS

v. APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 12-CI-00203

C.W. HOSKINS HEIRS, A GENERAL
PARTNERSHIP COMPRISED OF GREGORY S.
HOSKINS, CONSTANCE WELLS, WALTER S.
HOSKINS, AND GARY C. HOSKINS; AND AS
INDIVIDUAL PLAINTIFFS, PHILLIP LEWIS
AND ROBIN LEWIS

APPELLEES

AND

NO. 2014-CA-001511-MR

ICG HAZARD, LLC

APPELLANT

v. APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 12-CI-00203

C.W. HOSKINS HEIRS, A GENERAL
PARTNERSHIP COMPRISED OF GREGORY S.
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AND ROBIN LEWIS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, D. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Ruth Farmer Wells, Albert Wells and Terry Farmer (collectively the "Wellses") and ICG Hazard, LLC ("ICG") appeal from the Findings of Fact, Conclusions of Law and Judgment of the Leslie Circuit Court entered July 15, 2014, after conducting a bench trial on November 25, 2013. This case began as an action to recover coal royalties from ICG for mined coal and evolved into disputed boundary litigation between the Wellses and Phillip Lewis, Robin Lewis and a general partnership known as the C.W. Hoskins Heirs (collectively "Lewis-Hoskins"). The court ruled in favor of Lewis-Hoskins. For the reasons stated, we reverse and remand.

BACKGROUND

The Wellses and Lewis-Hoskins own two adjoining properties on a hill adjacent to Greasy Creek in Leslie County, Kentucky.¹ In 2005, the Wellses leased their property (mineral and surface) to ICG to mine coal therefrom. The mineral and surface estates of Lewis-Hoskins property were divided with Phillip Lewis and his wife owning the surface estate and the C.W. Hoskins Heirs partnership owning the mineral estate. Lewis-Hoskins leased their property to ICG by leases entered into in 2006 and in 2008.

The common boundary between the Wellses and Lewis-Hoskins property is the Raven Cliff Hollow. During its mining operations, ICG removed a high knob (the "Knob") from the top or crest of the hill along with six acres above the elevation referred to as the No. 7 coal seam. Below the No. 7 coal seam, the hill's topography was unaffected. The hill has four faces that are a part of three separate watersheds: Lower Bad Creek, Round Hole Creek and Greasy Creek. Specifically, rainfall on the northeast face flows into the Lower Bad Creek; rainfall on the south face flows into Round Hole Creek; and rainfall on both the southwest face, which is the Raven Cliff Hollow, and the west face flows into Greasy Creek. Well-defined ridges separate the watersheds.

¹ Greasy Creek is a tributary of the Middle Fork of the Kentucky River in Leslie County, Kentucky. The disputed mining area occurred in and around a drain known as Raven Cliff Hollow, which is a tributary to Greasy Creek when water is present.

When ICG completed mining at the top of the hill, a dispute arose over who was due the royalties from mining operations thereon, again immediately adjacent to and in the Raven Cliff Hollow. The disputed area was approximately six acres. After the top of the hill was mined, Lewis-Hoskins sued ICG in Leslie Circuit Court for unpaid coal royalties under their leases. Lewis-Hoskins' complaint described their property and specifically stated that ICG extracted coal from Lewis-Hoskins property without payment of royalties.² Acknowledging that the Wellses might also have a claim to these royalties, ICG brought the Wellses into the action via interpleader. ICG then deposited the disputed royalties of approximately \$298,000 with the court.³

The trial court conducted a bench trial on November 25, 2013. At trial, the parties sought to establish their respective boundaries. The central issue in this boundary dispute looks to the common boundary between the properties known as Raven Cliff Hollow. The Wellses introduced a deed that provided the following description (both mineral and surface):

Beginning on the North bank of Greasy Creek on the Middle Fork of the Kentucky River at the mouth of the Raven Cliff Hollow; thence running up same as it meanders, being a conditional line between H.W.

² Phillip Lewis, Robin Lewis and a general partnership known as the C.W. Hoskins Heirs set out deed descriptions in their complaint. The same deed descriptions are set forth *infra*.

³ After the judgment was entered on July 16, 2014, additional royalties were ordered to be paid into court by ICG Hazard, LLC, and Ruth Farmer Wells, Albert Wells and Terry Farmer which now total approximately \$440,000.

Hoskins and Burley Hoskins to the top of the ridge between Lower Bad Creek and Round Hole Creek to the lands of the Kentucky River Coal Corporation; thence with same, being a line of the Ed Morgan Patent crossing Round Hole Creek to the top ridge between Round Hole Creek and Upper Bad Creek; thence with the meanders of the ridge to the top of the point between Bad Creek and Round Hole Creek to a line of the DeGrott Patent claimed by Gertrude Elliott; thence with the line of same to Greasy Creek; thence with Greasy Creek as it meanders to the beginning.

Lewis-Hoskins claimed their boundary under two deeds. The first described the mineral estate and provided:

On the East side of Greasy of the Kentucky River, known as the "Deadening" tract or farm, and beginning at the mouth of a small drain on the East side of said Greasy Fork in line of Ford Motor Company; thence up said drain as it meanders with line of Ford Motor Co. to the top of the mountain the divide between Greasy Fork and Lower Bad Creek of the Middle Fork; thence with the top of said mountain and as it meanders, nearly South, to the Raven Cliff Hollow on the divide between Greasy and Round Hole Creek; thence down Greasy Fork as it meanders to a point in the center of same opposite the beginning; thence a straight line to the beginning.

The second deed described the surface estate, and it recited the following:

Beginning at a point in the center of Greasy Creek on the line between First Party and the US Forestry Service, thence up the hill on the East side of Greasy Creek to the top of the hill between Bad Creek and Greasy Creek, thence with the crest of said divide as it meanders to the head of the Raven Cliff Branch; thence down said as it

meanders to the center of Greasy Creek; thence down same as it meanders to the beginning.

Based on the deed descriptions, the trial court found that the two properties shared a common boundary line along the Raven Cliff Hollow. It is undisputed that upon mining the No. 7 coal seam in the disputed area, the meanders of the Raven Cliff Hollow had been obliterated and all meanders that formed the boundary in the mined area between the properties were gone.

At trial, both parties relied upon surveyors to testify as to the boundary locations. The Wellses called Curtis Felts ("Felts") and Rick Keene ("Keene") as witnesses, and Lewis-Hoskins called Lonnie Fields ("Fields") and Anthony Bowling ("Bowling") to testify.⁴ Their respective surveys were introduced into evidence. The Wellses had hired Felts to survey the location of their property in the vicinity of Raven Cliff Hollow in 2009 before ICG began mining. Lewis-Hoskins, on the other hand, retained Fields to retrace their boundary after ICG had mined the hill and altered the landscape in 2013.

Felts testified at trial that he had surveyed the Wellses' property and located the head of the Raven Cliff Hollow at the top or crest of the divide between Lower Bad Creek and Round Hole Creek. He explained the topography

⁴ Rick Keene testified as an expert at trial and did not perform any work in the field. Anthony Bowling is Lonnie Fields' supervisor at the firm CBC Engineers. These individuals are all licensed land surveyors in Kentucky.

of the hill above the No. 7 coal seam and gave his opinion as to the Wellses' property line. According to Felts, the Wellses' property cornered on the top of the Knob and extended on to a point on the adjoining Kentucky River Coal Company ("KRCC") line.⁵ Felts based his conclusions on the language of the Wellses' deed, his personal observations of the property, an earlier survey prepared by Ekenko Inc., and parol evidence of Ruth and Albert Wells. In a plat prepared for the Wellses, Felts had also noted that a tree was painted blue on top of the Knob.

Fields' survey differed from that of Felts. Fields concluded that the Raven Cliff Hollow, as a defined drain, ended at the No. 7 coal seam level and did not continue up to the Knob to the top of the hill, notwithstanding the legal description in the respective deeds and his acknowledgement that he had not surveyed the property before being mined. He based this conclusion on his review of Lewis-Hoskins' deeds, review of the Wellses' deed and his field observations of the mined property. He admitted at trial that the Raven Cliff Hollow had been obliterated from the No. 7 seam of coal to the top of the Knob. Fields further testified that he did not believe the parties' boundary cornered on

⁵ The Kentucky River Coal Company line runs in a northwestern direction along the eastern face of the hill. It also runs perpendicular to the Raven Cliff Hollow. Curtis Felts testified his survey was limited to locating the crest of the Raven Cliff Hollow and he did not survey the location where the Ruth Farmer Wells, Albert Wells, and Terry Farmer line intersected the KRCC boundary.

top of the Knob. He had instead discovered a lone “monument” on a ridge⁶ between Round Hole Creek and Lower Bad Creek while retracing KRCC's boundary line.⁷ Fields concluded that the respective properties cornered at that location.

After determining that the Raven Cliff Hollow ended at the No. 7 coal seam and that the properties cornered at the “monument” in KRCC’s line, Fields literally connected the dots to define his conclusions as to the parties’ respective boundaries. Fields prepared a plat whereupon he drew a straight line from what he believed to be the end of the Raven Cliff Hollow to the “monument” on KRCC line, which placed the disputed area that was mined within his clients’ boundary and which the trial court relied upon in granting judgment to Lewis-Hoskins. It is important to note that neither the monument nor the KRCC line is referenced in Lewis-Hoskins’ deeds.

Also relevant to our review is ICG’s position that the judgment is manifestly in error in that it ignores the legal descriptions of the respective coal leases entered into with ICG. ICG argues that the legal descriptions match the plats utilized by ICG in its mining activity, noting that Lewis-Hoskins’

⁶ Fields testified that he examined the language of the Wellses’ deed and noticed that their boundary extended to KRCC’s boundary. This led Fields to consult with KRCC personnel and obtain their field notes with respect to the boundary. The “monument” he identified was based upon KRCC field notes.

⁷ The trial court found that the ridge between Lower Bad Creek and Round Hole Creek is the same as the divide between Greasy Creek and Round Hole Creek.

boundary is contained within the Raven Cliff Hollow watershed, with the dividing line between the parties' property being the meanders of Raven Cliff Hollow.

On July 16, 2014, the trial court entered judgment for Lewis-Hoskins. Both the Wellses and ICG have filed appeals, which we have consolidated for judicial economy.

STANDARD OF REVIEW

As noted, the trial court conducted a bench trial in this action. Accordingly, our review is based upon the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure (CR) 52.01. CR 52.01 states that “[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 witness.” A reversible error arises when there is no substantial evidence in the record to support the findings of the trial court. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114 (Ky. App. 1998). Evidence is substantial, when taken alone or in light of all the evidence, if it has sufficient probative value to induce conviction in the mind of a reasonable person. *Stanford Health & Rehab. Ctr. v. Brock*, 334 S.W.3d 883 (Ky. App. 2010).

Of course, we review issues of law *de novo* as discussed in *Gosney v.*

Glenn, 163 S.W.3d 894 (Ky. App. 2005):

[A]ppellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. A factual finding is not clearly erroneous if it is supported by substantial evidence. 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. The trial court's conclusions of law, however, are subject to independent *de novo* appellate determination.

Id. at 898 (citations omitted). Our review proceeds accordingly.

ANALYSIS

We note at the outset that our initial review is focused upon the trial court's reliance upon adoption of the Lonnie Fields' survey in establishing the boundary for the disputed area in favor of Lewis-Hoskins. This is the primary error argued by both ICG and the Wellses in their appeals. It is well-established in our jurisprudence that a circuit court, as fact-finder, may choose between "conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions" or does not ignore established factors. *Webb v. Compton*,

98 S.W.3d 513, 517 (Ky. App. 2002) (quoting *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184-85 (Ky. App. 1987)).

The trial court relied upon Fields' survey almost exclusively in entering its judgment for Lewis-Hoskins. Based upon our review of the record on appeal, the Fields' survey fails to meet the *Webb v. Compton* criteria stated above for several reasons. *See Webb*, 98 S.W.3d 513. First, the survey on its face does not comport with the legal descriptions set out in each of the three deeds. Fields' survey, on its face, is based upon an erroneous assumption that Lewis-Hoskins' property reaches to the line of the Kentucky River Coal Company, which is clearly not referenced in either the Lewises' or Hoskins' deeds. The only deed which clearly establishes that the property line runs to the KRCC property is set out in the Wellses' deed. In order to enclose the disputed property within the boundary of the Lewises, the Fields' survey identifies a "monument" on the KRCC line which does not appear in any of the three legal descriptions. This "monument" was found in a review of KRCC field notes by Fields. The Fields' survey then creates a legal fiction by drawing a straight line from the corner at an undisturbed point of the Raven Cliff Hollow, where the mining of the No. 7 coal seam began, to the "monument" identified by Fields in the KRCC line. The Fields' survey thus concludes that the two tracts of land corner on the KRCC line at this "monument" and the entire disputed property falls within the boundary of the Lewis-Hoskins'

property. Again, on its face, this survey completely ignores the legal descriptions in all three deeds that reference the property lines running along the meanders of the Raven Cliff Hollow.

Second, none of the deeds in this case references that the Raven Cliff Hollow ends prior to reaching the top of the hill at some flat location where essentially the mining was commenced by ICG. The Hollow meanders to its head, or beginning, at the top or crest of the hill. The Felts' survey, conducted on behalf of the Wellses, prior to the commencement of mining, reflects that the meanders of the Raven Cliff Hollow did exist to the top of the hill. This was further supported by the ICG based upon its review of the leased property prior to mining. At trial, Fields acknowledged that the meanders of the Raven Cliff Hollow area would have been obliterated by the mining activity, yet he nonetheless concluded that the Hollow ended at the beginning of the disputed area that was mined. The trial court agreed with this conclusion, presumably on the basis that the Raven Cliff Hollow did not have water in it and thus would have logically ended at the No. 7 seam of coal. This finding by the court was clearly erroneous in that it was not supported by evidence in the record. Raven Cliff Hollow is a drain for the hillside it is located on that flows to Greasy Creek, and logically would only have water in it during periods of rain. There is no dispute that the Hollow is the common boundary for the properties. As argued by the Wellses, it has long been the law in

this Commonwealth that where a stream or channel is changed by sudden, violent, or artificial change, the boundaries of such lands where such a change occurs remain in their original position and are otherwise not affected by the obliteration thereof. *See Spurrier v. Hodges*, 90 S.W. 559 (Ky. 1906); *see also Ball Creek Coal Co. v. Napier*, 202 S.W.2d 728 (Ky. 1947) (holding that courses and distances in deed descriptions must yield to the meanders where there is a conflict in the deed description). It is undisputed in this case that the meanders of Raven Cliff Hollow were obliterated by ICG's mining activity. Nonetheless, the boundary between the parties' property, as clearly set out in all three deeds, is the meanders of the Hollow. Fields' survey completely ignores these descriptions.

Additionally, in Kentucky when there is a conflict between a survey plat and a deed description, the deed description is controlling absent an ambiguity in the legal description in the deed. *Bevins v. West*, 242 S.W.2d 868 (Ky. 1951). Again, the Fields' survey fails because it does not address the meanders of the Raven Cliff Hollow which are a common boundary in all three deeds introduced into evidence in this case. The fact that the meanders of the Raven Cliff Hollow were mined by ICG after the Felts' survey was conducted does not create a sufficient legal basis to ignore the legal descriptions as set out in the respective deeds, which is the effective result of the Fields' survey.

What is even more disturbing in the Fields' survey is the establishment by Fields of a straight line at the beginning of the area in dispute where the mining began to a "monument" in the line of KRCC that does not appear in any of the deeds. This arbitrary decision by Fields to close his boundary descriptions to encompass the disputed area is again refuted on its face by the description in the respective deeds as there is no reference to a straight line in this area but rather the meandering line of the Raven Cliff Hollow, which Fields effectively declares does not exist. This survey must fail for ignoring the established factor that substantial mining had occurred in this area, which clearly obliterated the land from the Raven Cliff Hollow to the top of the hill. Stretching this straight line in Fields' survey from the parties' common boundary at the beginning of the No. 7 seam of coal to a "monument" in the KRCC line is clearly erroneous on its face. As a matter of law, the Fields' survey ignores the express language and limitation of the legal description in the respective deeds, including the unambiguous description in the Wellses' deed, being the only deed that references as a boundary the KRCC line.

Lewis-Hoskins, as plaintiffs in this action, had the burden of establishing with reasonable certainty the location of their boundary line in this boundary dispute. Where there exists confusion or doubt as to the location of said boundary, it has long been the law in Kentucky that such doubt must be resolved against the party with the burden of proof. *Rowe v. Blackburn*, 253 S.W.2d 25 (Ky.

1952). In this case, Lewis-Hoskins failed to meet their burden of proof in that their reliance upon the Fields' survey was totally misplaced and otherwise, as a matter of law, insufficient to establish their boundary based upon the legal descriptions set forth in the respective deeds in this case. The Fields' survey is based upon numerous erroneous assumptions, including that the boundary between the parties' respective properties did not follow the meanders of the Raven Cliff Hollow to the top or crest of the hill and that Lewis-Hoskins' deed descriptions reached the line of KRCC, which was over the ridge in the Round Hole watershed, all of which is clearly refuted on its face by the legal descriptions in the deeds, which we have previously noted are controlling in this case.

In *G.E.Y. v. Cabinet for Human Resources*, 701 S.W.2d 713 (Ky. App. 1985), this Court, in quoting the United States Supreme Court, stated that:

[J]udicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient *quality* and *substantiality* to support the rationality of the judgment.

Id. at 715; *Woodby v. INS*, 385 U.S. 276, 282, 87 S. Ct. 483, 486, 17 L. Ed. 2d 362 (1966).

In this case the evidence relied upon by the trial court, primarily being the Fields' survey, is lacking in both quality and substantiality to support the judgment entered by the court in this action. The Felts' survey, having been conducted prior to the mining of the subject property and being reflective of the

actual legal descriptions as set forth in the respective deeds of the parties, clearly reflects the controlling boundaries for which the mining was conducted by ICG in this case.

For the foregoing reasons, we reverse and remand the judgment entered by the Leslie Circuit Court in favor of Lewis-Hoskins, and direct the court to enter judgment for the Wellses and ICG. Given that the judgment is being reversed and the issues raised by ICG on appeal are deemed moot, upon remand, ICG shall not be obligated to pay any additional royalties other than those required under the terms of the respective coal leases.

COMBS, JUDGE, CONCURS.

D. LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

D. LAMBERT, JUDGE, DISSENTING: It is with the utmost respect for my fellow judges that I author this dissent. In awarding judgment for the Wellses and ICG, the majority effectively usurped the role of the trial court and weighed the credibility of the evidence presented to the trial court. This was impermissible under the very standard of review provided in the majority's opinion.

Contrary to the majority's repeated assertions, Fields **did** base his survey on the descriptions contained in the deeds. The Wellses' deed specifically

referred to a “ridge” between Lower Bad Creek and Round Hole Creek, and this “ridge” was the same permanent natural physical feature referred to as the “divide” between Greasy Fork and Lower Bad Creek in the Lewis-Hoskins’ deed. Under Kentucky property law, permanent natural physical features such as “ridge” or “divide” are known as “natural monuments,”⁸ and these control all other means of describing a boundary, including, in descending order of control, artificial monuments, courses, distances, and land areas. *Metropolitan Life Ins. Co. v. Hoskins*, 273 Ky. 563, 117 S.W.2d 180, 182 (1937). Fields went to the “ridge”/“divide,” which was still discernible despite the mining activity, and on that natural monument he discovered an artificial monument. The artificial monument he found represented a point on the KRCC boundary line. Thus, he logically concluded—based on the language of the parties’ deeds and boundary descriptions of the adjoining property owner—that he had located the property corner at the intersection of the “ridge”/“divide” and the KRCC line.

After locating the corner, Fields examined the landscape of the Raven Cliff Hollow and observed the meander was actually a straight line down the hill from the “ridge”/“divide” to the No. 7 coal seam. The trial court confirmed this

⁸ “Natural monuments include such natural objects as mountains, streams, rivers, creeks, springs, and trees.” 12 Am. Jur. 2d *Boundaries* § 6 (citing *Holmes v. Trout*, 32 U.S. 171, 8 L. Ed. 647, 1833 WL 4201 (1833)(applying the well-settled Kentucky property rule that natural monuments trump all other means of describing a boundary).

observation after personally visiting the mining site. The trial court also found that this straight line (1) adapted a call in a deed to close an open boundary at a natural monument, which is permissible under *Sackett v. Burt & Brabb Lumber Co.*, 150 S.W. 997, 998 (1912), and (2) explained the reference to the “conditional line” in the Wellses’ deed. These conclusions were both legally and factually sufficient—they were based on the judge’s own observations and the opinion of a registered professional land surveyor. Moreover, the *Spurrier* rule relied upon by the majority is inapposite in light of the trial court’s personal observations that no water sources were located above the No. 7 coal seam. *Spurrier* only applies when avulsion or artificial changes to land occur in riparian zones; the case has no effect where the altered boundary line never featured a continuous flow of water.

A cursory comparison of the Fields’ survey to Felts’ survey would seem to support the majority, especially since Felts conducted his survey before mining commenced. On the surface, Felts based his decision on the language of the Wellses’ deed, his personal observations of the property, an earlier survey by Ekenko Inc., parol evidence of Ruth and Albert Wells, and a plat prepared by Felts that refers to a certain tree marked with blue paint on top of the Knob. However, upon a closer examination, none of these bases were acceptable under Kentucky law.

First, Felts did not consider any adjoining deeds. This was a direct violation of 201 Kentucky Administrative Regulations 18:150 §5(1)(b), which requires a professional land surveyor to obtain and evaluate the historical record descriptions of each adjoining parcel. Had he done so, Felts presumably would have noticed the common reference to the “ridge”/“divide” natural monument. Second, the Ekenko “survey” upon which Felts relied was nothing more than a random bulldozer trail that ran up the hill; it had no connection whatsoever to any calls in any deed. Third, Felts accepted parol evidence from his clients Ruth and Albert Wells, both of whom were judged not to be credible by the trial court because they claimed they had walked and ridden four-wheelers up the hill. The trial court personally observed this was impossible. Finally, and most importantly, the blue tree on top of the hill was actually painted blue by Felts after Albert told him to paint it. In other words, Felts did not conclude the property cornered at the top of the Knob independently. He instead accepted the self-serving representation of the person paying him, who was neither a licensed surveyor nor a credible witness, and twisted his ultimate opinion as to the location of the boundary corner accordingly.

I would affirm the trial court.

BRIEFS AND ORAL ARGUMENT
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