

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002621-MR

IMOGENE HULING AND
GAYLON HULING, HUSBAND

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 98-CI-00066

CHARLES L. WILLIAMSON AND
MILDRED WILLIAMSON, WIFE

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * **

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE. This appeal involves a boundary dispute between two neighbors: the appellees, Charles and Mildred Williamson (the "Williamsons"), and the appellants, Imogene and Gaylon Huling (the "Hulings"). The Williamsons sought to enforce a boundary line agreement previously executed by the two parties. The Knox Circuit Court, after a bench trial, determined that the Hulings were in violation of the agreement, and ordered the Hulings to remove a fence built along the

disputed property line. Furthermore, the Knox Circuit Court awarded the Williamsons their costs, including the cost of a surveyor's fee and attorney fees. We believe that the evidence was sufficient to support the lower court's ruling, that summary judgment was properly denied in this case, and that the lower court did not err in awarding the Williamsons their costs. However, because attorney fees may not be included as costs absent statutory authorization, we hold that the award of attorney fees was improper in this case. Thus, we reverse in part and remand.

The Hulings are owners of property in the Heidrick Community of Knox County. The Williamsons are the owners of the adjacent property. A dispute as to the location of the boundary line dividing the two pieces of property arose in the 1960s, between both parties' predecessors-in-title. In April of 1997, the Williamsons filed suit against the Hulings to establish the common boundary line and, after negotiations, the parties entered into an agreement concerning that boundary (hereinafter, the "boundary line agreement"). The boundary line agreement was adopted by the Knox Circuit Court pursuant to an agreed order. Under the boundary line agreement, the parties agreed that the property line would exist along a red line on a plat prepared by Edvard Grande in April of 1997. The boundary line agreement also identified the line by steel stakes set along an old fence

line that had been erected by the Williamsons' predecessor-in-title. By the agreement, the Hulings were to replace the wire fence where it had previously stood, and this fence would serve as the agreed boundary line. If the Hulings failed to replace the wire fence or failed to place the fence along the proper line, the Williamsons reserved the right to replace the fence themselves at the Hulings' expense.

The Hulings did, in fact, re-erect the fence. However, in this action, the Williamsons claim that the Hulings did not replace and restore the fence along the line indicated by the boundary line agreement. After the institution of these proceedings, Mr. Grande was asked to revisit the property line by the Hulings. Mr. Grande's affidavit states that, in his opinion, the fence remained in the same location and that it was along the boundary line. The Williamsons hired another surveyor, Richard Frederick, to determine if the fence was in fact along the line established by the boundary line agreement. Mr. Frederick determined that the fence was on the Williamsons' side for about fourteen feet of the line. Mr. Frederick also replaced several survey markers that had been removed, and re-marked the division line pursuant to Mr. Grande's plat.

A bench trial was held to determine if the Hulings were in compliance with the boundary line agreement in erecting the fence. A central issue was whether Mr. Huling had removed

the survey markers that indicated the boundary line as determined by Mr. Grande, a fact which would, if true, explain why the fence was not along the agreed boundary line. The Knox Circuit Court determined that the fence, as erected by the Hulings, was not built according to the boundary line agreement. Furthermore, citing the determination that Mr. Huling had moved the survey markers, the Court ordered the existing fence to be removed at the Hulings' expense and awarded the Williamsons their costs and attorney fees. The Hulings now appeal that order, citing three errors.

The Hulings first claim that the evidence was insufficient to support the lower court's ruling. The findings of the lower court will 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." Kentucky Rule of Civil Procedure (CR) 52.01. A factual finding is not clearly erroneous if supported by substantial evidence. Substantial evidence is evidence of "substance and relevant consequence sufficient to induce conviction in the minds of reasonable men." Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998).

It is undisputed that the Hulings replaced the wire fence dividing the properties, as was their duty under the boundary line agreement. The issue before the court was simply

whether the fence, as it currently stands, actually follows the proper boundary line. Mr. Grande testified that the fence follows the boundary line; Mr. Frederick testified that the fence follows the boundary line at the front of the property but eventually veers off into the Williamsons' property. In its order, the trial court concluded that the agreed boundary between the two properties, as contemplated by the boundary line agreement, is "most accurately reflected by the Richard Frederick survey." This conclusion is supported by substantial evidence. Mr. Frederick, a surveyor licensed in the Commonwealth of Kentucky, went to the property, conducted an investigation, and concluded that the wire fence did not follow the boundary line as demarcated on Mr. Grande's plat. While Mr. Frederick's testimony as to the location of the proper boundary line differed from the testimony of Mr. Grande, "it is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 118 (1991). Therefore, the conclusion of the lower court that Mr. Frederick's survey most accurately reflects the proper boundary line will not be disturbed. Having determined that Mr. Frederick's survey accurately reflects the boundary line, and that the current location of the fence is in violation of the

agreement, it was proper for the trial court to enter judgment in favor of the Williamsons.

The Hulings next claim that the lower court erred in denying their motion for summary judgment. Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991). On appeal, the standard of review of a summary judgment is whether "the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law". Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

Here, summary judgment was not available to the Hulings because a genuine issue of material fact existed as to whether the fence, as it stood, followed the agreed boundary line. The court was presented with affidavits from two qualified surveyors, who disagreed as to whether the fence followed the boundary line. Clearly, a genuine issue of material fact remained and summary judgment was properly denied.

Finally, the Hulings claim that the court erred in awarding the Williamsons their costs, and the expenses of reasonable attorney fees and surveyor's fees. We find that the

trial court did not err in awarding costs in this case; however, the award of attorney fees was improper. KRS 453.040 (1)(b) provides, in pertinent part: "The successful party in any action shall recover his costs, unless otherwise provided by law." Thus, the Williamsons, being the successful party, were entitled to reimbursement for their costs and the cost of the surveyor's fees. Attorney's fees, though, "are not allowable as costs in absence of statute or contract expressly providing therefore." Batson v. Clark, Ky. App., 980 S.W.2d 566, 577 (1998). Neither party to this appeal has pointed to a statute or contract provision expressly providing for the payment of attorney fees. Absent statutory or contractual authority, the trial court was limited by KRS 453.060 in awarding attorney fees. KRS 453.060 (1) provides that "if the successful party is represented by a licensed attorney and no jury is impaneled, the following attorney's fees shall be allowed: (a) in the Court of Appeals, \$10.00; (b) in the Circuit Court, \$5.00; (c) in the District Court, \$2.50." Therefore, the trial court erred in awarding the Williamsons their "reasonable" attorney's fees and the award should have been limited to five (5) dollars, as this action was before the Circuit Court.

For the foregoing reasons, the judgment of the Knox Circuit Court is affirmed in part and reversed in part, and this

case is remanded for further proceedings consistent with this opinion.

TACKETT, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur on all issues except the affirming of the trial court's order allowing for the recovery of the surveyor's fee as cost. I respectfully dissent on this issue. Unless specifically authorized by statute, a fee paid by a party to an expert witness is not recoverable as part of the cost of the action. Brookshire v. Lavigne, Ky.App., 713 S.W.2d 481 (1986). The appellees have failed to cite to any statutory authority supporting the allowance of a surveyor's fee as cost.

BRIEF FOR APPELLANT:

Kenneth M. Boggs
Barbourville, Kentucky

BRIEF FOR APPELLEE:

Robert E. Cato
London, Kentucky