

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001777-MR

CHESTER CARNES

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 96-CI-00256

HERALD CARNES,
AND MELISSA CARNES

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: BAKER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Chester Carnes appeals from a judgment of the Knox Circuit Court which resolved a boundary dispute claim brought by Herald and Melissa Carnes. Chester argues that the trial court's determination of the boundary was not supported by substantial evidence. Finding no error, we affirm.

The underlying facts of this action are not in dispute. Chester and Herald Carnes are brothers who, along with their wives, own adjoining tracts of real property in Knox County, Kentucky. Herald and Melissa Carnes purchased their

property in September of 1963. In June of 1990, Chester and Bernice Carnes bought two adjacent tracts which are to the north of Herald and Melissa's property. The boundary separating the two properties is heavily wooded and not marked.

Eventually, a dispute arose among the parties concerning the location of the boundary. In 1996, Herald and Melissa filed this action claiming that Chester was trespassing on their property and unlawfully removing timber from the disputed area.¹ Chester brought a counterclaim claiming that the boundary description in his deed encompasses the disputed area.

The deed to Herald and Melissa's property does not specifically describe their tract. The deed contains no calls or measurements, but bases its description on the location of the surrounding property owners. The boundary description in Chester and Bernice's deed traces back to a 1933 deed from Walter Valentine to R. B. Mays, and describes the disputed boundary as follows:

BEGINNING on a line southward a straight line to a rock; thence with the branch to the lower edge of a rock; thence to a sassafras; thence to a poplar stump; thence to a rock; thence to a chestnut stump on a

¹ Although both Chester and Bernice Carnes are named as grantees in the 1990 deed, Bernice was not named as a party to the action below or in this appeal. However, Chester has not asserted that she was an indispensable party to this action.

point between R. B. Mays and Walter Valentine house and with the meanders at the point to the fence and with the fence to the road and with the road to Oscar Moore's line, line up the point to R.B. Mays' line to Percifull line at a fence with the fence to a line at the Beginning Corner.

Herald and Chester each hired a qualified surveyor to determine the boundary based upon the deed description and the extrinsic evidence. Edward Grande testified for Herald, and Charles Felts testified for Chester. Both surveyors admitted that the precise location of the boundary could not be located because the monuments described in Chester's deed no longer exist or cannot be identified with any degree of certainty, and because the boundary description does not include any direction or distance calls. The surveyors also agreed that the boundary descriptions in older deeds tend to be less accurate than those in more recent deeds.

The surveyors also generally agreed on the western corner of the disputed boundary. From there, however, their opinions diverged. Grande stated that he believed he could identify several of the rocks mentioned in the deed description. Although Grande could not identify where the chestnut stump referenced in the deed had been located, he discovered remnants of an old fence embedded in the trees. There was evidence that Ronnie Smith, the prior owner of Chester's property, had built this fence around his yard. Grande surmised that the chestnut

stump had been around the turn of the fence. He also interpreted the phrase "with the meanders at the point" to mean going up the spur of a hill.² Based upon these features and the other extrinsic evidence, Grande felt he could locate the boundary line with some degree of certainty in the area claimed by Herald.

Felts expressed doubts whether Grande actually located the rocks mentioned in the deed description. He also questioned whether any surveyor could locate the boundary line with the degree of certainty that Grande had claimed. However, Felts testified that he found evidence of a different fence line which diverged significantly from the line determined by Grande. Furthermore, Felts stated that a depression found on the spur was of the type which would be left by a chestnut stump that has rotted. Felts also opined that the spur point which he located was more likely the one referred to in the deed than the one identified by Grande. In addition, Felts identified a timbered line, which indicated to him that someone had stopped logging because they were approaching the boundary line. Although Felts stated that the exact boundary line could not be located with any degree of certainty, he believed that he could approximate

² To meander means to follow a winding or flexuous course. The term is usually, although not always, used to refer to boundary lines following the sinuosities of a river, stream or body of water. Blacks Law Dictionary (5th ed., 1979), p. 884.

the boundary line as being somewhat to the south of the line claimed by Herald.³

Both parties also presented lay testimony regarding the location of the boundary between the properties. Several individuals identified features, such as the second fence and timbered lines, which would support the location of the boundary advocated by Chester. However, Ronnie Smith, the prior owner of Chester's property, testified that he had never claimed ownership of the disputed property, and that he had always believed that the boundary was in the location advocated by Herald.

The parties submitted the case to the commissioner on the depositions and exhibits of record. After considering the evidence, the commissioner filed a report finding that the boundary was in the location advocated by Herald. In response, Chester filed exceptions to the commissioner's report. After considering the evidence, the trial court did not adopt the commissioner's report, but entered its own findings in favor of Herald's claim. The trial court was particularly convinced by Grande's discovery of the yard fence, the old photographs showing a continuation of the fence line between the parties,

³ Felts identified the eastern corner of the disputed boundary as being approximately 700 feet south of the corner identified by Grande.

and the fact that Herald and Melissa had maintained a garden in a portion of the disputed area, using that fence as a boundary for the garden. Accordingly, the trial court entered a judgment in favor of Herald and Melissa, and directed that they draw a conditional line deed based upon the survey plat prepared by Grande. This appeal followed.

Chester correctly points out that, as the plaintiffs in the action below, Herald and Melissa bore the burden of establishing with reasonable certainty the location of the boundary they claim. Where there is confusion, as here, the doubt should be resolved against them.⁴ Chester argues that Herald and Melissa failed to meet their burden of proof. Rather, Chester maintains that the evidence clearly supported the boundary line established by Felts, and that the trial court's findings to the contrary were clearly erroneous.

Nevertheless, "[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."⁵ This rule also applies to boundary disputes.⁶ Furthermore, "[a] fact finder may choose between the conflicting

⁴ Rowe v. Blackburn, Ky., 253 S.W.2d 25, 27 (1952)(citing Green v. Witten, 200 Ky. 725, 255 S.W. 519 (1923)).

⁵ CR 52.01.

⁶ Croley v. Alsip, Ky., 602 S.W.2d 418, 419 (1980).

opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors." ⁷

As has been noted, neither surveyor could determine the boundary between the properties based only on the deed descriptions. Both surveyors had to rely on extrinsic and historical evidence to reach any conclusions. Even this evidence was conflicting and would have supported the boundary claimed by either Grande or by Felts. Yet while Chester takes issue with Grande's conclusions from that evidence, he does not point out any clearly erroneous assumptions or improper factors underlying Grande's conclusions. After reviewing the record, we cannot say that the trial court's findings were clearly erroneous.

Chester also asserts that Herald and Melissa have failed to demonstrate their adverse possession of the disputed property for the required fifteen years. However, the trial court's reference to the garden maintained by Herald and Melissa was not a finding that they had adversely possessed the disputed property. Rather, the trial court was simply focusing on the historical evidence showing that Ronnie Smith, Chester and

⁷ Webb v. Compton, Ky. App., 98 S.W.3d 513, 517 (2002) (*quoting* Howard v. Kingmont Oil Co., Ky. App., 729 S.W.2d 183, 184-85 (1987)).

Bernice's predecessor in title, had never claimed the disputed area. Consequently, the issue of adverse possession is not properly raised in this appeal.

Accordingly, the judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

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