

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002281-MR

LEROY WILLIAMS AND
BRENDA WILLIAMS

APPELLANTS

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-01003

MARLENE STURGEON

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Leroy Williams and Brenda Williams (collectively referred to as the Williams) appeal from a judgment entered by the Boone Circuit Court on September 24, 2003, in favor of Marlene Sturgeon, adjudicating a boundary dispute between the parties. We affirm.

This case involves a dispute concerning the exact location of a boundary between properties owned by the Williams and Sturgeon. Sturgeon initiated this action in the Boone

Circuit Court in July of 2002, to determine the location of the boundary on the northern side of Sturgeon's property that adjoins the Williams. The action went before the master commissioner for an evidentiary hearing on August 22, 2003, and the commissioner filed his report with the Boone Circuit Court on September 2, 2003. The commissioner submitted specific findings of fact and a recommended judgment for entry by the circuit court. The Williams subsequently filed exceptions to the master commissioner's report to which Sturgeon responded. By judgment entered September 24, 2003, the circuit court approved and confirmed the master commissioner's report, overruled all exceptions to the report and adopted the master commissioner's findings as part of its judgment entered in favor of Sturgeon. This appeal follows.

Before analyzing the issues raised on appeal, a brief discussion of the parties' respective properties is warranted.

STURGEON PROPERTY

Sturgeon owns the real property located at 15084 Glencoe-Verona Road, in Verona, Kentucky. The description for her property is as follows:

Lying and being in the town of Verona, Kentucky and bounded and described as follows: on the north by the lot of Adah Waller, on the east by the L & N Railroad, on the south by the lot of Leonard Caldwell

and on the west by the Boone and Gallatin Turnpike.

Marlene Sturgeon is the widow of Bobby Sturgeon. They were married from December 29, 1967, until Bobby's death on December 19, 2000. Bobby had inherited the property from his parents Harvey and Eleanora Sturgeon. Bobby's parents had acquired the property by deed in 1949 and lived on the property during their respective lives. Marlene Sturgeon inherited the property from Bobby upon his death in 2000. Marlene Sturgeon testified that she had been familiar with the property, including its boundaries, since 1963.

WILLIAMS PROPERTY

The Williams property is located at 15046 Glencoe-Verona Road, in Verona, Kentucky, and its legal description is as follows:

Bounded and described as follows: On the South by the Louisville, Cincinnati and Lexington Railroad, on the West by Highway No. 16, on the North and East by T.J. Peek's and A. Arrosmith's (now A.J. Stone's) lot and on the Southwest by Marion Fulliloves (now Nannie Sturgeon's) lot. The line along the railroad from Fulliloves corner East is Five Hundred and Forty (540) feet long and the line from the railroad to Peek's Corner is One Hundred and Forty (140) feet long supposed to contain three (3) acres be the same, more or less.

Leroy Williams obtained title to the property in 1990 by a deed from the estate of his father, Boyd Williams. Leroy Williams had lived on the property for fifty-six years. His parents lived on the property before him.

BOUNDARY HISTORY

The record reflects that the legal descriptions for both properties have remained the same since the late 1800's. However, with the exception of two calls in the Williams' description, all of the calls are bounds descriptions only and are vague at best. The two metes calls in the Williams' description are meager at best and do not relate directly to the boundary line in dispute, although Sturgeon's surveyor utilized these calls in his survey. Testimony at the master commissioner hearing indicated that a fence line once served as the boundary between these two properties. However, the fence had long been removed prior to trial and the parties remained at an impasse as to the exact location of the fence and the boundary between their properties.

In October of 2001, the parties met at the Sturgeon property to attempt to amicably resolve the boundary dispute. Surveyor Joe Justice was present at this meeting. Purportedly, the parties had reached a tentative agreement as to the location of the old fence line which served as the boundary between the two properties. Justice subsequently prepared a proposed plat

based upon the parties' discussions. The Williams alleged that no agreement was reached as to the location of the boundary. Justice passed away in 2002 and the Williams dispute the location of the boundary on the Justice plat. This lawsuit followed.

MASTER COMMISSIONER HEARING

The master commissioner conducted an evidentiary hearing on August 22, 2003. Sturgeon testified on her own behalf and further called Daniel V. Leach, a licensed professional land surveyor as an expert witness. She further called several other witnesses who were familiar with the property and its boundary history. The Williams called various family members and a local neighbor. Leroy Williams also testified. The Williams did not submit any expert testimony at the evidentiary hearing. After hearing the evidence, the master commissioner made the following finding of fact regarding the establishment of the boundary that was subsequently adopted by the circuit court as part of its judgment:

12. The Master Commissioner finds that the following three points establish the common boundary line between the parties' property and a straight line shall connect the following three points:
 1. The corner of the parties' line with the Railroad property is established at the northern corner of the existing gate.

2. A point shall be set at the corner of the existing Sturgeon House, which point shall be 10 feet from its closest corner with the common boundary line.
3. The boundary line at the intersection with the right of way line for Ky Hwy 16 shall be at the Justice iron pin from his survey.

Recommended Judgment

WHEREFORE, Your Master Commissioner recommends that a Judgment be entered as follows:

- A. That a Judgment be entered establishing the boundary line between the Plaintiff and the Defendant as set forth in paragraph 12 of the Master Commissioner's Findings of Fact.

As noted, the circuit court entered a judgment adopting the findings of fact by the master commissioner in establishing the boundary between the properties in accordance with the commissioner's recommendation. This appeal followed.

THE APPEAL

The Williams assert numerous errors on appeal. First, the Williams assert that the circuit court's findings as to the actual location of the property line ten feet from the Sturgeon home are clearly erroneous and that further, reliance upon the testimony of Sturgeon's expert is also clearly erroneous. In conjunction with these arguments, the Williams argue that

Sturgeon failed to meet her burden of proof in establishing the location of the boundary line.

The Williams next argue that the circuit court erred in allowing evidence from the Justice survey to be admitted to establish any aspect of the boundary line. Additionally, as regarding any evidence pertaining to the Justice survey that was admitted at the evidentiary hearing, the Williams argue that this violated the statute of frauds.

Finally, the Williams argue that the establishment of the boundary line by the circuit court constituted an unlawful taking of the Williams property without just compensation. We will address each of these allegations separately.

We begin our analysis by noting that the findings of fact made by the trial court at a bench trial shall not be set aside unless clearly erroneous. Ky. R. Civ. P. (CR) 52.01. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. Id. This "clearly erroneous" rule is applied in boundary disputes. Webb v. Compton, 98 S.W.3d 513 (Ky.App. 2002).

The Williams first argue the circuit court's finding that the actual property line was ten feet from the Sturgeon home is clearly erroneous. We disagree. The master commissioner, after hearing substantial evidence, identified three points from which the boundary line was to be drawn in a

straight line. The corner point adjacent to the railroad property and the corner point adjacent to Kentucky Highway 16 appear to have been adopted by the court based upon the survey of Daniel V. Leach, the land surveyor retained by Sturgeon. The center point of the boundary line between the properties, at a point ten feet from the closest corner of the Sturgeon house to the boundary, was determined by the court based upon the testimony of various witnesses. As the Williams point out, a finder-of-fact may choose between conflicting opinions of surveyors as long as the opinion relied upon is not based upon erroneous assumptions and where the opinion does not ignore established factors. See Webb v. Compton, 98 S.W.3d 513 (Ky.App. 2002)(citing Howard v. Kingmont Oil Co., 729 S.W.2d 183 (Ky.App. 1987)). Given that the Williams did not present any expert testimony for the court to consider, the Williams have failed to demonstrate that the circuit court's findings based upon Leach's testimony and others are clearly erroneous.

To determine whether findings of fact by a trial court are clearly erroneous, a reviewing court must focus on whether those findings are supported by substantial evidence. Moore v. Asente, 110 S.W.3d 336 (Ky. 2003). In Moore, the Supreme Court defined substantial evidence as follows:

"[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that,

when "taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (citations omitted). Based upon our review of the record presented on appeal, we believe there was substantial evidence presented to the circuit court that supported the findings of fact regarding the establishment of the boundary line in this case.

The Williams next argument is that the circuit court erred in relying on the Justice survey. As noted, Justice had been retained to prepare a plat that would reflect an agreement by the parties as to the location of the boundary line. Justice prepared a boundary plat based upon a purported agreement. However, the parties did not reach an agreement and Justice subsequently passed away. The findings of Justice were considered by Sturgeon's expert, Daniel Leach. Leach's report cites Justice's survey as one piece of evidence considered by

Leach in preparing his survey. The circuit court established the boundary line based upon the totality of the evidence heard at the evidentiary hearing and not simply based upon the Justice survey that was introduced into evidence. Even if consideration of the Justice survey was improper by the circuit court, we note that the Williams failed to object to the introduction of the Justice plat into evidence or any reference to Justice's survey by Leach. Having failed to properly object to the introduction of this evidence, the Williams waived any error that may have existed in its admission. Osborne v. Pepsi-Cola, 816 S.W.2d 643 (Ky. 1991), *superseded by statute on other grounds as stated in Smith v. Dixie Fuel Co.*, 900 S.W.2d 609, 612 (Ky. 1995).

Finally, the Williams argue that the establishment of the boundary line by the circuit court resulted in a taking of the Williams property without just compensation. We find no merit in this argument whatsoever. This case involves a classic boundary line dispute, not a case where someone's property is being taken without payment of just compensation. One is not entitled to compensation for that he does not own. Resolution of the boundary dispute was clearly within the jurisdiction of the circuit court and would not warrant an award of compensation under any of the facts or circumstances presented in this appeal.

For the foregoing reasons, the judgment of the Boone
Circuit Court is affirmed.

ALL CONCUR.

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