RENDERED: April 1, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002599-MR

DAVID R. HARROD — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 99-CI-01182

VERSAILLES PROPERTIES, INC.;
ELISSA MAY PLATTNER; AND
MARGARET MAY PATTERSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

HENRY, JUDGE: For the second time David Harrod[1] appeals from a judgment of the Franklin Circuit Court concerning an easement for access to his Frankfort property. Again, we affirm.

In 1972 Bruce and June Irvine sold W.H. and June May 0.55 acres of land so that the Mays could build a private

[1] When the first appeal was prosecuted David was married to Connie Harrod. David is now the sole owner of the property pursuant to a decree of dissolution of marriage and subsequent deed.

roadway extending Country Lane to provide access to what is now Two Creeks Subdivision. At the same time the Irvines received an easement across the 0.55 acre tract for ingress and egress. Sometime in 1972 the Irvines built a driveway from their property to the road built by the Mays.

In 1999 David and Connie Harrod bought 3.534 acres of land from the Irvines and built a home on it. They got permission from the Appellees (Versailles Properties, Inc., Elissa May Plattner and Margaret May Patterson, hereinafter collectively "Versailles") who are successors in interest of the Mays, to use the Irvines' easement. A dispute soon arose over the location and size of the easement. The Harrods wanted to build another driveway in a different location and contended that the easement gave them that right. Versailles argued that the easement was contiguous with the Irvines' existing driveway, as it has been used since 1972. Versailles sued to enjoin the Harrods from using any access other than the Irvine driveway. The Franklin Circuit Court found for Versailles, and this court affirmed in Harrod v. Versailles Properties, Inc., et al, 2000-CA-002350-MR, rendered February 22, 2002. David Harrod then filed a new defense to the same action, alleging that the 0.55 acre tract the Irvines sold the Mays in 1972 wasn't properly located when the tract was marked off at the time of the original transaction. He obtained a survey that locates the

boundaries of the conveyance from the Irvines to the Mays in such a way that it overlaps part of Country Lane. If Harrod's survey is correct, as the trial court stated, "there is no need for an easement". Versailles obtained a survey that supports its position that the boundaries observed since 1972 are correct.

Harrod makes three arguments on appeal, which are paraphrased here in an effort to clarify and simplify the discussion. The first argument is that Versailles failed to meet its burden of proof. The second and third, which will be discussed together, are that the trial court's decision is not based on substantial evidence.

Harrod's first argument grows out of the trial court's Finding of Fact Number Seven, which states:

> There is adequate evidence to support either conclusion based upon deed descriptions and which 'starting point' one chooses to use.

From that finding it is argued that Versailles failed to carry its burden of proof and, since the plaintiff bears the risk of non-persuasion, the case should have been dismissed.

Under CR[2] 52.01, the findings of fact of a trial court are not to be disturbed by appellate courts unless they are "clearly erroneous." These findings are not clearly erroneous if they are supported by "substantial evidence." Owens-Corning

[2] Kentucky Rules of Civil Procedure.

Fiberglass Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998). The "clearly erroneous" standard applies to boundary line disputes. Croley v. Alsip, 602 S.W.2d 418 (Ky. 1980). Substantial evidence in turn is "evidence that, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." Wells v. Sanor, 151 S.W.3d 819, 823 (Ky. 2005).

Harrod cites Galloway Motor Co. v. Huffman's Adm'r, 281 Ky. 841, 137 S.W.2d 379 (Ky. 1939), for the rule that the risk of non-persuasion rests with the party that brought the action. He then argues that the only proof the trial court could have properly considered was the survey evidence from each side which, he says, the trial court found equally persuasive. The argument proceeds from the premise that by the statement "there is adequate evidence to support either conclusion" the trial court meant that the evidence for each side was precisely equal, resulting in a failure by Versailles to carry its burden of proof. We reject the premise.

The clear meaning of Finding of Fact Number Seven is that there is evidence to support a judgment for either the plaintiff or the defendant. It is the judge's job to decide between the two. "A fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take

into account established factors." Webb v. Compton, 98 S.W.3d 513, 517 (Ky.App. 2002), quoting Howard v. Kingmont Oil, 729 S.W.2d 183, 184-85 (Ky.App. 1987). Furthermore, the argument overlooks the fact that the trial court was persuaded by the totality of the evidence, not merely the surveys. In Finding of Fact Number One the court noted the fact that the purpose of the original conveyance was to provide an entrance to Two Creeks Subdivision thirty years ago. Since that time, as the court points out in Finding of Fact Number Eight, everyone in the chain of title except Harrod has treated the property in accordance with the position urged by Versailles. "Any competent evidence, whether documentary or parol, which is admissible to establish other facts and which will tend to identify the location of a disputed boundary is admissible and may be received in evidence." 12 Am.Jur.2d Boundaries, §106.

In his second and third arguments Harrod contends that the trial court relied on irrelevant evidence regarding occasional maintenance of the property by Versailles, and that Versailles did not prove that it is entitled to claim the property by adverse possession. Although both parties discuss adverse possession in the briefs, the doctrine is not even mentioned in the trial court's judgment and it is not at issue in this appeal. The court considered the maintenance proof to

help resolve the principal issue in the case, not for purposes of adverse possession.

The judgment of the trial court was based on substantial relevant evidence in the record. The court's findings of fact were not clearly erroneous. We affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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