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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000345-MR

LARRY VINSON MCCLEESE AND  
KATHY MCCLEESE

APPELLANTS

v. APPEAL FROM LEWIS CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 00-CI-00071

DAVID JEFFERSON AND  
OLETA CAROL JEFFERSON, HIS WIFE

APPELLEES

OPINION  
AFFIRMING IN PART, VACATING AND REMANDING IN PART

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BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: Larry Vinson McCleese, and his wife, Kathy McCleese, brought this action to reform the deed of David Jefferson and his wife, Oleta Carol Jefferson. The McCleeses believed that the Jeffersons' deed to property in Lewis County, Kentucky should be reformed due to a mutual mistake between the original grantor and the original grantee in a conveyance involving approximately 200 acres of farm property. On this

issue, the trial court concluded after a bifurcated bench trial that the McCleeses had not proven that there was a mutual mistake by clear and convincing evidence.

After holding that there was not a mutual mistake in the Jeffersons' deed, the trial court conducted a second bench trial to establish the boundary line between the McCleese property and the Jefferson property. At the conclusion of the second phase of the bifurcated bench trial, the trial court found that the survey plotted by the Jeffersons' surveyor established the correct boundary. The McCleeses contend that the trial court erred in not reforming the Jeffersons' deed and in setting the boundaries in reliance upon the survey submitted by the Jeffersons. Because we conclude the trial court's findings of fact on the issues of reform and boundary lines are supported by substantial evidence, we affirm in part. We vacate and remand in part, however, so that the trial court may correct an erroneous call in the survey description it adopted.

The McCleese and Jefferson properties are adjacent properties. Larry Vinson McCleese (Vinson) and Oleta Carol Jefferson (Carol) are brother and sister, and are two of 10 children. The properties were both owned at one time by either their parents, Flora McCleese Henry and Jesse McCleese, or by Jesse McCleese individually. Jesse McCleese died in a farming accident in June of 1984.

The Jefferson property is the smaller piece of property. It is comprised of two tracts which consist of about 200 acres total. One tract is about 130 to 135 acres (the 130 acre tract), and the other tract is about 66 acres. The McCleese property is the larger, original piece of property acquired by Flora and Jesse, and it also encompasses two tracts. One tract is about 330 acres, and the other tract is about 40 acres. Flora conveyed the McCleese property to Vinson and Kathy McCleese in 1989 after Jesse died. The tracts that comprise the Jefferson property are surveyed out exceptions in Vinson and Kathy McCleese's deed.

The Jeffersons acquired their property in 1976 from Dean McCleese, another brother, and his wife, Jackie. Jesse and Flora had conveyed the property to Dean and Jackie in 1974, but they had trouble keeping up with the payments. This failure to pay the mortgage indebtedness jeopardized not only the land conveyed to the Jeffersons but also other lands mortgaged by Jesse and Flora McCleese as security for the loan.

So Jesse and Flora called the Jeffersons and asked them to assume the mortgage so the property could stay in the family. At the time, the Jeffersons lived in Michigan. But they discussed it and ultimately agreed to assume the mortgage. Although, Dean and Jackie were the record owners, Flora and Jesse took responsibility for disposing of the property because

they did not want their family to lose any property, and the Jeffersons were willing to help.

Under the arrangement between Flora and Jesse, Dean and Jackie McCleese conveyed the property consisting of two tracts of land to David and Carol Jefferson by deed dated June 16, 1976, for the purchase price of \$24,724.65. The Jeffersons continued to reside in Michigan and made payments on the farm until the early '80s when they moved back to Lewis County to live.

Eventually, Jesse McCleese took steps to formally correct a mistake in the boundary line description in the Jefferson deed. On April 10, 1984, he attempted to reform the deed description by drafting a handwritten revision, which he, Flora, Dean and Jackie signed, and presenting that signed document to the Jeffersons for their signatures. But the Jeffersons refused to sign it, planting the seed for the current dispute.

At issue in the first phase of these proceedings was whether David and Carol Jefferson knew that there was a mistake in Dean and Jackie McCleeses' deed before the McCleeses conveyed the property to them. Flora McCleese testified that Jesse pointed out the actual boundary line, which all parties in the trial referred to as the reform line, to Dean and Jackie before he conveyed it to them in 1974. According to Vinson McCleese,

the reform line accounted for a home site on the McCleeses' 40 acre tract by taking a portion of the Jeffersons' 130 acre tract. Without the reform line, the McCleeses believe that the Jeffersons' home is on their 40 acre tract. Flora testified that Jesse pointed out the reform line to David Jefferson before he and Carol purchased the property in 1976. Flora admitted, however, that she did not actually see Jesse show David the reform line.

The Jeffersons testified that they did not know about the reform line until April of 1984 when Jesse came to them with the handwritten revision, which they refused to sign. Moreover, when they purchased the property, they did not know where the boundary line was that separated their property from the McCleese property. They built their house on the home site where Dean McCleese had had a trailer.

On the issue of mutual mistake requiring reformation, the trial court held that each party presented equally credible witnesses, which testified to just the opposite set of facts with respect to when the Jeffersons received notice of the mistake in the deed. The trial court did not believe that the McCleeses met their burden of proving by clear and convincing evidence that the Jeffersons knew of the mistake in the deed before the Jeffersons purchased the property.

Because the trial court did not reform the deed in the first phase of the bifurcated proceedings, the trial court conducted a second phase to establish the boundaries with a survey plat. The McCleeses claimed ownership of the property in dispute through the boundary of the 40 acre tract. Alternatively, they claimed title to the property in dispute by adverse possession as defined by the reform line.

In the second phase, the McCleeses and the Jeffersons each submitted a survey plotted by a licensed surveyor. The McCleeses' surveyor was Joe Curd. The Jeffersons' surveyor was James Pollitte. Both surveyors testified in the second phase.

According to the McCleeses, the location of the boundary line between the McCleeses' 40 acre tract and the Jeffersons' 130 acre tract depended on the location of a stone and a crab apple tree in a small bottom field called for in the respective deeds. At some point, Emmet Blanton, who is now deceased, cleared the crab apple tree with a bulldozer. So the McCleeses called a number of witnesses to testify where they remember the crab apple tree being -- Vinson McCleese, Randy McCleese (another brother), Dean McCleese, Flora McCleese, and Roger McCleese (another brother).

Joe Curd, a licensed surveyor, testified for the McCleeses and gave his opinion on the location of the boundary line between the 40 acre McCleese tract and the 130 acre

Jefferson tract. In plotting the boundary line, he relied on Flora McCleese's identification of where she remembered the crab apple tree.

James Howard Pollitte, a licensed surveyor, testified for the Jeffersons and gave his opinion on the boundary line between the 40 acre McCleese tract and the 130 acre Jefferson tract. He developed a survey plat and a legal land description which encompassed the Jeffersons' current home and which did not rely on where the McCleeses placed the crab apple tree as he saw no ambiguity with the controlling deed for the boundary line. In walking the property, Pollitte located an oak tree with two hack marks on it that he believed was evidence of an agreement as to the boundary line. Although he admitted on cross-examination that this tree was not named in any of the deeds, he believed the oak tree was significant in establishing the boundary line because it was only five to six feet from a bearing called for in the deed.

Pollitte explained that he did not believe Curd's line matched the deeds because Curd's line broke to the south and the old deed showed it breaking to the north. On cross-examination, Pollitte agreed that the land description in the Jefferson deed was "a mess as far as surveying goes and trying to figure out where the line is." He further agreed that if Curd correctly

located the corner where he placed the crab apple tree then his survey would be wrong and Curd's survey would be right.

In addition to Pollitte, Carol Jefferson testified in her case. She stated that she was never aware of a crab apple tree in the area identified by her mother and brothers, but was familiar with a crab apple tree further down the creek past her driveway in a small bottom. The Jeffersons also called two of Jesse McCleese's brothers to testify regarding what they knew about Jesse's land and the boundary lines.

At the conclusion of the second phase of the proceedings, the trial court found that the description as surveyed by Pollitte correctly established the boundary lines between the two parties for four reasons. First, the survey was a complete survey and not a partial one, as Curd's survey was. Thus it gave a truer picture of the boundaries as intended by the grantors from 1898. Second, the hack marks on the oak tree were the only physical evidence of the boundary along the bearing between the two properties. Third, Pollitte's boundary did not depend on the disputed location of a tree -- the crab apple -- that was no longer there. Fourth, the trial court found that Jesse McCleese believed in good faith that the crab apple tree was the same tree called for in the deed; but his understanding of the location of the boundary did not comport with the description of the deeds.

On the issue of adverse possession, the Court was not convinced that the McCleeses established sufficient evidence of adverse possession for three reasons. First, the McCleeses believed that the reform line was the legal line therefore they could not adversely possess the Jeffersons' land when there was no recognition by either party as to the real boundary. Second, the Jeffersons could not acquiesce in that matter either since they were never aware of where their survey was located and believed that they granted the McCleeses and their predecessors' permission to the use the upper part of the long bottom. Third, the evidence indicated a break in the McCleeses' adverse possession when the Jeffersons used the upper end of the long bottom to grow green beans.

In this appeal, as to whether Jesse McCleese showed David Jefferson the reform line before the Jeffersons purchased the property, the McCleeses argue that David and Carol Jefferson both lied when they denied that David had been convicted of a felony. They contend that after the first phase of the proceedings, they presented the trial court with proof that David pled guilty to carrying a concealed weapon in Washtenaw County, Michigan on March 13, 1980. Having conclusively proven that David and Carol Jefferson both lied about David's conviction, the McCleeses argue that the trial court erred when

it concluded that both sides presented equally credible witnesses.

As to the second adverse ruling pertaining to the boundary dispute area, the McCleeses argue that the trial court erred when it concluded that the description as surveyed by Pollitte correctly established the boundary lines between the two parties. The McCleeses contend that the trial court made an erroneous finding that the McCleeses' 40 acre tract came out of the 130 acre tract of the Jesse McCleese property. They further contend that Pollitte created an entirely new description for the Jefferson property, which resulted in them receiving 15 additional acres than called for in the deed. Although David Jefferson did not testify in the second phase, Carol Jefferson did, and the McCleeses assert that the trial court's reliance on her testimony as to the crab apple tree was misplaced. Finally, the McCleeses identify an apparently erroneous call in Pollitte's survey, that call being South 64 Degrees 59 Minutes 37 Seconds West (S 64°59'37"W), a distance of 7783.51 feet to a metal pipe found with 3" cap marked 714-1979 corner to Tammy Plank (D.B. 185, P. 38 in Rowan County records).

We begin with a review of the first phase of the proceedings, which was the action to reform the deed on the ground of mutual mistake. "[R]eformation of a deed may be granted only if the mistake is mutual . . . the evidence is

clear, convincing and beyond reasonable controversy, and it is shown that the parties had actually agreed upon terms different from those appearing in the written instrument." Pressley v. Morton, 325 S.W.2d 81, 83 (Ky. 1959).

In this case, the original grantors, Jesse and Flora McCleese, subdivided their property, and this dispute is between subsequent purchasers for value over the boundary lines of the subdivided tracts. Vinson and Kathy McCleese were in the difficult position of proving -- by clear and convincing evidence -- that Jesse McCleese, now deceased, had a conversation with David Jefferson during which he informed David of the reform line and David and Carol Jefferson agreed to it. According to the McCleeses' witnesses, no one else was present or heard the conversation, and David Jefferson denied that it ever took place.

The McCleeses argue that David and Carol Jefferson were not worthy of belief because they both denied in the first phase of the proceedings that David Jefferson had been convicted of a felony in Michigan. The problem was that the McCleeses never provided the trial court with a certified copy of the criminal conviction. They did produce documents that alluded to a felony conviction, but they did not produce a copy of the judgment of conviction. In response, the trial court did not consider the documents as a basis for setting aside its earlier

ruling. Notwithstanding its ruling on the earlier conviction, the trial court noted that the alleged conviction fell outside the 10 year time limit for admissibility in KRE Rule 609(b) and further determined that the prejudicial effect of the admittance of the conviction (that was never tendered to the court) outweighed its probative value.

We understand that David and Carol Jefferson's credibility was at issue. But "[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." CR 52.01. A finding of fact supported by substantial evidence is not clearly erroneous. See Black Motor Co. v. Greene, 385 S.W.2d 954, 956 (Ky. 1965).

In light of the evidence suggestive of a criminal conviction, the trial court was still entitled to believe the Jeffersons' account of the circumstances surrounding their acquisition of the property and find that there was not a mutual mistake requiring reformation of the deed. And this Court will not disturb the trial court's decision as it is supported by the testimony of the Jeffersons and the circumstances of the conveyance as testified to by Dean McCleese and Flora McCleese Henry.

We move to the second phase of the proceedings -- the determination of the boundary between the McCleese property and

the Jefferson property. When presented with two surveys and after hearing the two expert witnesses testify, the trial court found that the Pollitte survey was the accurate survey. This finding is supported by substantial evidence. Thus, it is not clearly erroneous and will not be disturbed by this Court. As best stated by the McCleeses' surveyor, Joe Curd, "[y]ou could probably take ten different surveyors and take this deed and come up with ten different ideas about where it might be from this deed description. Different people have difference of opinion. And that's what this basically is; it's -- A survey like this is an opinion of the boundary lines."

The McCleeses point to one finding that they believe is erroneous and demonstrates that the trial court was confused about the property survey. That finding, as paraphrased by the McCleeses, is that the trial court found that the 40 acre tract came out of the 130 acre tract of the Jesse McCleese property. But we do not interpret the trial court's finding in the same way that the McCleeses do, and we do not conclude that it is clearly erroneous.

However we do agree with the McCleeses that there is an erroneous call on page 3 of the survey description. After reviewing the plat, it appears to this Court that there is a typographical error in the distance. It seems that it should be 783.51 feet, not 7783.51 feet. Accordingly, we vacate and

remand for a hearing on the matter and a revision to the survey description.

For the foregoing reasons, the judgment of the Lewis Circuit Court on the issue of reformation is affirmed. And on the issue of the survey, the judgment of the Lewis Circuit Court is affirmed in part and vacated and remanded in part in accordance with this opinion.

ALL CONCUR.

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