

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001836-MR

WESLIE M. KING; and  
BRANDON SWAFFORD

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 02-CI-00374

HARRISON GLEN CAMPBELL;  
and ALMA CAMPBELL

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DYCHE, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: This appeal is from a judgment of the Knox Circuit Court in favor of Harrison Glen Campbell and Alma Campbell<sup>1</sup> holding that they had established title by adverse possession to property in Knox County. Finding no error, we affirm the circuit court's judgment.

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<sup>1</sup> The Campbells will hereinafter be referred to collectively as "Campbell."

Campbell, Weslie King, and Brandon Swafford own adjoining tracts in Knox County. King and Swafford each own lots which front on Kentucky Highway 459. The rear, or easterly, boundary of the lots is a larger tract owned by Campbell. In addition, King owns a larger tract on the south of Campbell's property. These two larger tracts share a common property line which runs from the rear of one of King's lots to the Cumberland River. The complicating factor is that in 1967, the Knox Fiscal Court abandoned and conveyed to Campbell a county road which ran roughly parallel to Kentucky Highway 459. A portion of the roadbed encroached on and severed the easterly portion of Swafford's and King's lots. In either 1967 or 1968, Campbell fenced along the westerly side of the roadbed, and mowed and used those portions of the King and Swafford lots and roadbed which were enclosed by the fence.

King brought this action to quiet title to his property, to establish the common boundary lines, and to recover the value of timber allegedly taken by Campbell from King's property. Campbell answered and filed a third-party complaint joining Swafford. The case was submitted to the trial court upon depositions. The trial judge entered findings of fact, conclusions of law and a judgment generally in favor of Campbell. King and Swafford appeal from this judgment.

As an initial matter, we note that this case was tried by the trial court sitting without a jury. In such a case, the findings of the trial judge may not be set aside unless clearly erroneous, with due regard being given to the opportunity of the trial judge to consider the credibility of the witnesses.<sup>2</sup> Findings of fact are not clearly erroneous if supported by substantial evidence.<sup>3</sup> The test for substantiality of evidence is whether the evidence, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons.<sup>4</sup> This court has applied this rule in boundary disputes. "It is the rule that, where this Court cannot say on an appeal from the decree in an action involving a boundary dispute that the Chancellor's adjudication is against the weight of the evidence, the decree will not be disturbed."<sup>5</sup>

In this case, the surveyors separately retained by King and Campbell both agreed as to the location of the property lines and fences. Thus, the case hinged on the extent to which Campbell enclosed the portion of the King and Swafford lots by

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<sup>2</sup> CR 52.01; *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995).

<sup>3</sup> *Black Motor Company v. Greene*, 385 S.W.2d 954 (Ky. 1964).

<sup>4</sup> *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky.App. 1999).

<sup>5</sup> *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980) (quoting *Rowe v. Blackburn*, 253 S.W.2d 25, 27 (Ky. 1952)); *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky.App. 2002).

the fence along the old county roadbed, and then exercised such actual, exclusive, continuous, open and hostile possession to the property as to establish a claim by adverse possession.<sup>6</sup> Apparently some of the deposition testimony conflicted; however, none of the depositions of the parties or other witnesses have been filed in the record on appeal. An appellate court is "required to assume that any evidence in the record not before [it] supports the findings of the lower court."<sup>7</sup> In this instance, we therefore must assume that the evidence before the trial court supported the court's findings and conclusions that Campbell established ownership to the portion of the King and Swafford lots to the east of the west side of the old county roadbed by adverse possession, and that King failed to prove the value of the timber allegedly cut by Campbell from King's property.

The judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

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<sup>6</sup> See *Tarter v. Tucker*, 280 S.W.2d 150, 152 (Ky. 1955).

<sup>7</sup> *Colonial Life & Acc. Ins. Co. v. Weartz*, 636 S.W.2d 891, 893 (Ky.App. 1982) (citing *Burberry v. Bridges*, 427 S.W.2d 583 (Ky. 1968); *Hamblin v. Johnson*, 254 S.W.2d 76 (Ky. 1953)).