

RENDERED: APRIL 14, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002224-MR

CHARLES DEBERRY
AND JOAN DEBERRY

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, SPECIAL JUDGE
CIVIL ACTION NO. 00-CI-00568

TOY FERGUSON
AND CHAD FERGUSON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

MINTON, JUDGE: Charles and Joan Deberry appeal from a judgment that decided a real estate boundary dispute in favor of Toy Ferguson (Ferguson). They also appeal from the failure to award damages against Ferguson and his son, Chad, for unreasonably burdening an easement across the Deberry property. Finding no error, we affirm.

This case centers primarily on the dispute between the Deberrys and Ferguson over the location of a boundary line between the lands they own in Knox County along Kentucky Highway

11 south of Barbourville. A secondary issue is the Deberrys' claims arising out of Ferguson and Chad's use of an existing roadway crossing a very small portion of the Deberrys' property and providing access to Kentucky Highway 11 from Chad's home. Chad owns a tract that adjoins the Deberrys' property. This narrow roadway lies in a right-of-way easement that was expressly granted to him by deed. According to the Deberrys, Ferguson and Chad expanded the use of this right-of-way beyond its originally intended purpose by running heavy haying equipment and hauling hay over it and by using it to access other properties.

The Deberrys sued Ferguson and Chad in the Knox Circuit Court. By agreed pretrial order, the case was tried by deposition and submitted to the master commissioner. The master commissioner's report recommended findings in favor of Ferguson and Chad on all of the Deberrys' claims. The Deberrys filed written exceptions that were heard by the circuit court. In its final judgment, the circuit court overruled the Deberrys' exceptions and adopted the master commissioner's report in all respects except the one concerning the right-of-way easement.

The circuit court sustained the Deberrys' exception to the master commissioner's recommendation regarding use of the easement ruling that Ferguson and Chad's use of the roadway easement unduly increased the burden on the Deberrys' lands by

using it to access other tracts. The circuit court's judgment enjoined the Fergusons' use of the easement for anything more than ingress and egress to the tract where Chad lived. But the circuit court adopted the commissioner's recommendation that "[t]here is no clear testimony or evidence of record that demonstrates that the roadway has been damaged or altered. Therefore, [the Deberrys] must take nothing on their claim for damages to the roadway."

Dissatisfied, the Deberrys filed this appeal.

The Deberrys argue on appeal that the trial court erred by choosing to believe the testimony of Ferguson's expert, Edvard Grande, over the testimony of their expert, Bill Ed Cannon. They also assert error by the trial court by failing to award them damages commensurate with the finding that the Fergusons' use of the easement created an unreasonable burden on the Deberrys' land.

The scope of our review of this case is limited by Kentucky Rules of Civil Procedure (CR) 52.01, which recognizes the trial court's superior opportunity to observe witnesses. The rule provides that findings of fact made by a trial court at a bench trial shall not be set aside unless clearly erroneous. And CR 52.01 further provides that the findings of a commissioner, to the extent that the court adopts them, are reviewed

on a par with those of the court. This “clearly erroneous” rule applies specifically to bench trials in boundary disputes.¹

We find no error in the fact-finder’s reliance on the testimony of Grande over the testimony of Cannon. In Howard v. Kingmont Oil Co.,² this court held that “[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.”

The Deberrys contend that the trial court erred by accepting Grande’s flawed opinion as to the location of the disputed boundary—flawed by Grande’s reliance on the 1949 Cole survey. The Deberrys argue that the authenticity and accuracy of the Cole survey was never adequately established by the evidence. While it is true that little or no foundation was laid for the admission of the Cole survey, it came into evidence without objection during Grande’s testimony, where he explained his reliance on its content to corroborate the facts underneath his own opinion. Significantly, the Deberrys never objected or moved to strike any part of this evidence. So error cannot be

¹ Webb v. Compton, 98 S.W.3d 513, 517 (Ky.App. 2002) (citing Croley v. Alsip, 602 S.W. 2d 418, 419 (Ky. 1980)).

² 729 S.W.2d 183, 184-185 (Ky.App. 1987).

predicated upon the references to this old plat unless manifest injustice would result.³

Grande's testimony cites the Cole survey as one piece of evidence that he considered in preparing his survey. The trial court stated that it established the boundary line based upon the totality of the record and not simply on the strength of the Cole survey. The trial court specifically referenced other facts that supported reliance on Grande's survey, meaning that there is evidence in the record apart from the Cole survey to support the trial court's findings.

This and the other objections raised by the Deberrys to the fact-finder's acceptance of Grande's opinion go to the weight, rather than the admissibility of the evidence. Thus, we hold that the trial court did not err in accepting Grande's opinion.

The Deberrys also argue that this case should be remanded to the trial court for a separate trial on damages in accordance with the trial court's finding of unreasonable use of the right-of-way easement. The agreed order that submitted this case on depositions to the master commissioner made no provision for a separate trial on the issue of damages. The master commissioner's report recommended a finding that the Deberrys had failed to offer any evidence of damages, and the trial court

³ Kentucky Rules of Evidence (KRE) 103(a) and (e).

adopted that finding. The Deberrys have not pointed to any such evidence in the record, nor have we independently located any. Therefore, we find no merit in the Deberrys' argument that they should be allowed another chance to present damages.

For the reasons stated above, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Scott M. Webster
London, Kentucky

BRIEF FOR APPELLEES:

W. Patrick Hauser
Barbourville, Kentucky