

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002435-MR

PHYLLIS SELLARDS AND
CARL SELLARDS

APPELLANTS

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 00-CI-00736

JERRY LOWE AND
WANDA LOWE

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

SCHRODER, JUDGE: This appeal involves a boundary line dispute between two properties located on the Bart Garrett Branch of Calf Creek in Floyd County, Kentucky, and the extent of a roadway reservation in a deed on the left hand side of Bart Garrett Branch. The trial court viewed the property, read the depositions, reviewed the maps and photographs in evidence, and made a decision in favor of Jerry and Wanda Lowe (the Lowes).

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Our review of the record leads us to conclude that the trial court's findings were not clearly erroneous. Hence, we affirm.

That part of the common boundary line in dispute revolves around a call in the deeds from a rock with an "X" on it to a locust tree with three hacks on it. The rock is huge and still visible today, but the locust tree is long gone. In its place, or near where the locust tree used to be, is a steel pole which turned out to be an old bumper jack. The bumper jack is in line with the calls in the deed and lines up with the old property boundary fence, which supports the appellees' location of the boundary line and was convincing to the trial judge.

To assist the trial court in its decision, both sides engaged a surveyor to map out the calls in the deeds. The surveyors came to different conclusions because their survey techniques were different. Randall Stewart, the Lowes' surveyor, viewed the property and looked for monuments to correspond to the deed calls. He located the rock with the "X" on it and the old fence line where the locust tree was supposed to be. The fence line had a number of older trees grown into the wire which showed it had been there awhile. He could not locate a locust tree with three hacks, but he did find the bumper jack in the same line about where he expected to find the locust tree. From the bumper jack to the "X" rock he drew the

call as a straight line. Other lay witnesses, including a prior owner, testified the bumper jack replaced the locust tree.

The Sellards' surveyor, Phillip Potter, took a different approach in drawing a map. He viewed the property and the deeds with the call in question. He also located the rock with the "X" on it and failed to locate the locust tree with the three hacks on it. At this point he platted a line according to where Phyllis Sellard remembered the property line going, which did not follow any monuments, other than the rock with the "X".

The appellants' first argument on appeal is that the trial court's finding as to the location of the boundary line is against the clear preponderance of the evidence. We disagree. In reviewing the trial court's decision, we cannot disturb the findings of fact unless clearly erroneous. CR 52.01; Croley v. Alsip, 602 S.W.2d 418 (Ky. 1980). When the trial court has conflicting surveys, as here, the fact finder may choose between the conflicting opinions of the surveyors, or even accept some evidence and not other, as the trier of fact determines the credibility and the weight that is to be given the evidence. Lewis v. Bledsoe Surface Min. Co., 798 S.W.2d 459, 461 (Ky. 1990); Calloway v. Calloway, 832 S.W.2d 890, 893 (Ky.App. 1992). A few rules of construction also come into play where there is a conflict or ambiguity in the description. Monuments in a survey prevail over any course and distance. Kenmont Coal Co. v.

Combs, 243 Ky. 328, 48 S.W.2d 9 (1932). Other natural or artificial monuments take priority over maps, plats, and field notes. Oliver v. Muncy, 262 Ky. 164, 89 S.W.2d 617 (1935). When a monument has been obliterated or lost (i.e. the locust tree), the position of the monument must be determined by resort to the other calls or by the aid of lines or corners marked at the time when the original monument was presumably in existence (i.e. the old fence line). III American Law Of Property, § 12.111 (A.J. Casner ed. 1952). In this case, the trial court viewed all the evidence and came to different conclusions than the appellants. Its findings are supported by substantial evidence and we will not disturb them as to the boundary line issue. Basham v. Wilkins, 851 S.W.2d 491 (Ky.App. 1993).

Appellants' second argument is that the trial court erred in limiting the use of the easement. A reservation in a 1983 deed reserved "the access road to their remaining property and home on the right hand side of said branch" In 1983, the county road dead-ended near the intersection of the Birch Branch with the Bart Garrett Branch. In 1998 and 1999, the appellants had bulldozer work done to extend the easement or roadway to other property they owned up the hollow. The dozer work was on the left side of the Bart Garrett Branch, which now belongs to appellees, but the trial court found the appellants could build an access road over their land on the right side of

the Bart Garrett Branch. The appellants contend the trial court's interpretation gives them no easement, but we disagree. As the trial court pointed out, the property line goes to the Bart Garrett Branch, not to the county road. Also, the driveway serves the house that existed in 1983. The subsequent extension is for serving future houses. We agree with the trial court that appellants cannot enlarge or extend the original reservation. Plunkett v. Weddington, 318 S.W.2d 885, 888 (Ky. 1958).

Appellants' final argument is that they and their predecessors adversely held the disputed area and the trial court erred in not finding so. The trial court did not make findings as to adverse possession, and was not requested to do so in a CR 52.02 motion. Such omission precludes our review of that issue. CR 52.04; Bennett v. Horton, 592 S.W.2d 460, 464 (Ky. 1979).

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

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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