

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000223-MR

BENJAMIN H. BERNARD
AND MARY E. BERNARD

APPELLANTS

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 80-CI-00111

MICHAEL S. IRVIN

APPELLEE

OPINION VACATING AND REMANDING

** ** *

BEFORE: ABRAMSON AND TAYLOR, JUDGES, AND KNOPF,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: Benjamin and Mary Bernard, husband and wife, appeal from a November 14, 2005 order of the Russell Circuit Court finding them in contempt of that court's 1986 judgment establishing the boundary between the Bernards' approximately two-and-a-half acre tract outside Russell Springs and an access way running from Kentucky Highway 619 to a tract owned by Michael Irvin, the appellee. Relying on surveyor Gary Girdler's May 2003 survey, which attempted to reestablish the line

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

established by the 1986 judgment, the court found that the Bernards' fence and a garage encroached upon the access way and ordered their removal. The Bernards contend that a survey they commissioned by surveyor Michael Flanagan is more accurate than the Girdler survey and that the trial court erred by relying on the latter. This action was originally filed in 1980, and since then there appears to have been little respite in the parties' dispute over this boundary line. Even the 1986 judgment did not bring the matter to a close, and neither, we regret to say, has the court's November 2005 order, for it appears that Girdler's survey may have been based upon an incorrect assumption and thus did not reliably reflect the 1986 judgment. Accordingly, we must vacate the trial court's 2005 order and remand for additional proceedings.

As the parties correctly note, the general rule under CR 52.01 is that the trial court's "findings of fact shall not be set aside [on appeal] unless clearly erroneous." Applying this rule to boundary dispute cases such as this one, this Court has held that

[the] fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied on 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) (citing *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183 (Ky.App. 1987), internal quotation marks omitted). As noted, the surveyor's opinion upon which the trial court relied in this case appears to have been based upon an erroneous assumption.

The 1986 judgment enjoined the Bernards from interfering with an access way, referred to in the record as the Walker-Bernard road, which runs westerly from

Kentucky Highway 619 to Irvin's tract. The judgment incorporates an undated plat by surveyor Charles Campbell as follows:

The plaintiff [Irvin] is entitled to an easement leading from Ky. Highway 619 to the plaintiff's property. . . . [T]he easement shall extend from the corner post as shown by the plat of Charles Campbell herein in a straight line on a course of S 79 degrees 30 minutes E to the corner post in the line of plaintiff as testified to in the evidence.

In 2002, alleging that the Bernards had encroached on his right of way, Irvin moved to have them held in contempt of the 1986 judgment. In May 2003, apparently at the behest if not the actual order of the court, the parties and counsel met with surveyor Girdler at the site, and using Campbell's plat Girdler attempted to locate the boundary line established by the 1986 judgment.

Unfortunately, Campbell's plat, the plat incorporated in the 1986 judgment, is not a masterpiece of clarity. Although it is customary for plats to be oriented with north at the top and east at the right, and though Campbell's plat is marked with an arrow according to that convention, the plat nevertheless appears to reverse that orientation. The parties agree that the Bernards' tract lies to the south of the Walker-Bernard road and that to the north of the road is a tract referred to as the Gene Conner property. They also agree that from where it passes the Bernards' tract the Walker-Bernard road runs easterly, *i.e.* to the right on a conventional plat, to Highway 619. On Campbell's plat, however, the Gene Conner property is shown at the bottom, below the road, and the highway (the "blacktop") is shown to the left. Campbell's plat also shows an embankment above the roadway and toward the right hand side, whereas Girdler testified that the most obvious

embankment at the site is on the south side of the roadway, the Bernards' side, and toward the western side of the Bernards' tract.

Campbell's reversed orientation appears to have interfered with the present attempt to relocate the boundary line. Campbell's plat indicates that the boundary between the Walker-Bernard road and the Gene Conner property, what would be the northern boundary of the road but which is shown at the bottom of Campbell's plat, was marked by an "old fence row." Apparently assuming that the bottom of Campbell's plat was the south, however, Girdler testified that he looked for an old fence row along the southern (*i.e.* the Bernards') side of the road. He found two old posts that seemed to indicate an old fence row and so used those posts to establish the southern, not the northern, boundary of the road. The Bernards' newer fence and a portion of their garage encroach on the line so established.

The Campbell plat does not appear to establish the southern boundary of the road in that manner, however. Assuming that the orientation of the Campbell plat is reversed, the plat seems to show two ways of determining the southern boundary. First, the plat shows the southern boundary as a straight line apparently parallel to and 20.2 feet apart from the line established by the old fence row on the northern boundary. That parallel line begins at an old corner post at the eastern edge of the Bernards' tract and extends, according to the description in the 1986 judgment, to another post on the western edge. Second, the plat also indicates that the southern boundary is the line beginning at that south-eastern corner post and following a course of S 79 degrees 30 minutes E to the

western edge of the Bernards' tract. Girdler testified, however, that this second description could not be used to establish the southern boundary because even if one found the corner post, magnetic north has shifted since Campbell made his survey, and so the boundary line would no longer yield a course of S 79 degrees 30 minutes E. That would seem to leave the parallel line method, which was not the method Girdler employed.

Adding to the confusion in this case, Girdler testified that he did not find the corner post the Campbell plat refers to, but he apparently looked for the post on the north(west) side of the road, not the south(east). The plat that he prepared indicates, though, that he did find a corner post on the south(east) side, which may have been the corner post referred to on the Campbell plat. The record thus suggests that the trial court erred by relying on Girdler's survey.

Even if the trial court should not have relied on Girdler's reading of the Campbell plat, however, it did not err by rejecting the Flanagan survey the Bernards commissioned. Flanagan testified that he did not work directly from the trial court's 1986 judgment. Working rather from deeds supplied to him by the Bernards, including one that had never been recorded, he attempted to resurvey the Bernards' entire lot. He assumed that the Bernards' northern boundary, as determined by those deeds, corresponded to the northern boundary of the Walker-Bernard road. He then determined the southern boundary of the roadway, the boundary in question, by measuring over 20.2 feet from the northern boundary he arrived at on the basis of the deeds. If Flanagan's

assumption about the correspondence between the Bernards' purported northern boundary and the north side of the roadway was correct, then, as discussed above, his striking off a parallel southern boundary of the roadway 20.2 feet apart would have been a suitable means of determining that southern boundary. Flanagan's assumption, however, appears to have been unwarranted. The evidence presented during the 1986 trial of this matter has not been included in the record before us, but apparently the location of the Bernards' northern boundary was one of the issues at that trial, the upshot of which was the judgment referred to above and Campbell's plat. If possible, therefore, both the southern and the northern boundaries of the roadway should be determined on the basis of that judgment and plat, not by reference to what was apparently a disputed property line. Because Flanagan's survey thus appears to be an attempt to relitigate a matter already decided, the trial court did not err by rejecting it.

The bottom line is that the Campbell plat appears to employ an unorthodox orientation that misled Girdler. We do not pretend to expertise in surveying methods, however, and there may be another explanation for the Campbell plat's apparent anomalies. It may be that the Campbell plat is not unorthodox and that Girdler correctly read it as marking the southern boundary of the roadway with an old fence row. If that is the case, however, the record should include evidence to reflect why the Campbell plat shows the Gene Conner property toward the bottom and adjacent to the old fence row, and why it shows the highway toward the left. Accordingly, we must vacate the trial court's November 14, 2005 order and remand for additional proceedings—a new hearing

at least—to clarify the record. If it is established that Girdler correctly read the Campbell plat, then the trial court should reinstate its November 14, 2005 order. If Girdler mistakenly looked for an “old fence row” on the south side of the roadway when the Campbell plat calls for it on the north side, however, then the order finding the Bernards in contempt cannot stand, and their alleged contempt must be retried. In either event, it is incumbent upon the trial court to make factual findings addressing the Campbell plat's apparently reversed orientation and otherwise permitting informed review of this persistent controversy. Accordingly, we vacate the November 14, 2005 order of the Russell Circuit Court and remand for additional proceedings consistent with this opinion.

KNOPF, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. I would affirm the trial court's judgment entered November 14, 2005.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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