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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000321-MR

EDWARD VANHORN, CLIFFORD FRAZIER AND BEULAH FRAZIER — APPELLANTS

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE DANIEL R. SPARKS, JUDGE
ACTION NO. 98-CI-00161

THOMAS JORDON, MARTHA JO JORDON AND NELSON SPARKS — APPELLEES

OPINION AFFIRMING IN PART,
VACATING IN PART
AND REMANDING

** ** ** ** **

BEFORE: HOWARD AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

HOWARD, JUDGE: This is an appeal from a judgment of the Lawrence Circuit Court resolving a boundary line dispute which also involved a claim for damages for timber cut on the disputed property. The circuit court determined that the appellees, Thomas Jordan

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

and Martha Jordan (hereinafter the Jordans) were the owners of the disputed property and awarded them damages against the appellants, Edward Vanhorn (hereinafter Vanhorn), and Clifford Frazier and Beulah Frazier (hereinafter the Fraziers) in the sum of $13,800.00 for the loss of their timber. We affirm as to the boundary line, but for the reasons set out herein, vacate the award of damages and remand.

The Jordans and the Fraziers own adjoining tracts of real estate in rural Lawrence County, Kentucky. According to their deeds, the Jordans own approximately 72.37 acres and the Fraziers approximately 230 acres. The two tracts were apparently once part of the same larger tract, which was divided in 1870, when the common grantor, John Allison, deeded what is now the Frazier property to E. F. Chapman and on the same day deeded another tract, including what is now the Jordan property, to George McClure. The McClure property was divided again in 1923, this time by a judicial partition, into several tracts, with what is now the Jordan property deeded at that time to J. P. McClure. The Jordon tract lies primarily on the west side of a ridge and the Frazier property on the east side, although it is disputed whether or not the ridge itself is the boundary line.

While both properties have changed hands several times, the Frazier property still carries its 1870 description and the Jordon tract its 1923 description. Both descriptions contain specific bearings and distances and references to natural monuments, although few of these monuments can still be located. It appears that both descriptions were based on surveys done contemporaneously with the deeds, in 1870 and 1923, respectively. It is also noteworthy that the 1870 deed to George McClure, out of which

tract the Jordan property was later divided, contains the same description, as to the common boundary, as the Frazier deed and its predecessors, all the way back to 1870.

This dispute arose in 1998, when the Fraziers hired Vanhorn to cut timber on their property. All of the timber actually cut appears to have come from the portion of the property disputed between these parties. The Jordans then filed suit against Vanhorn, seeking damages for the timber that was taken. The Fraziers were allowed to intervene in the suit, setting up their claim to ownership of the disputed property. The Jordans ultimately amended their complaint to assert their damage claim against the Fraziers as well as against Vanhorn.

The Lawrence Circuit Court assigned the case to the master commissioner to hear evidence, and ultimately entered a judgment adopting his recommended findings, holding that the Jordans owned the disputed property, both by deed and by adverse possession, and awarding them damages in the sum of $41,400.00 plus attorney fees and costs. The damages were based on a finding that the timber taken had a value of $13,800.00, which was trebled pursuant to KRS 364.130.

The Fraziers and Vanhorn appealed and this court reversed,[2] holding that the findings that the Jordans owned the property both by deed and by adverse possession were inconsistent findings, and that the damages for loss of the timber should not be trebled under KRS 364.130 unless the parties responsible lacked even "color of title" to the property. On remand, the circuit court did not hear any additional evidence, but amended its judgment in accordance with our ruling to hold that the Jordans owned the

[2] 2003-CA-002665-MR.

property by virtue of their deed, omitting the earlier finding of adverse possession, and awarding damages in the sum of $13,800.00 for the timber, consistent with its earlier findings, without being trebled. The court also omitted its earlier award of attorney fees.

The Fraziers and Vanhorn once again appeal, asserting that the circuit court erred in finding that their 1870 description was "too imprecise and uncertain to be relied on in determining the correct location of the boundary line . . ." They point out that the 1923 description in the Jordan's deed is similar to theirs, as to bearings, distances and monuments, and argue that it cannot be sufficiently definite if theirs is not. They also argue that their claimed boundary, along the ridge, is supported by the calls and natural monuments in the common 1870 deeds, and that the ridge is the natural boundary between the two tracts.

Two surveyors testified in this case, one for each side.[3] Joe Curd, Jr., upon whom the trial court appears to have primarily relied, testified for the Jordans. He had not surveyed the property himself, but had visited the site and reviewed the deeds and other previous surveys. He testified that the 1870 deeds, while they contained a common boundary description, contained such major errors that he could not determine from them where that boundary lay. He pointed out that the description of the Frazier tract failed to close by some 1500 feet, and the description of the McClure tract, from which the Jordan property came, failed to close by approximately 2700 feet. He also noted that the 1870 deeds include certain points on the ridge but never say that the line runs "with the ridge,"

[3] Both sides were also allowed to introduce various plats and reports from other surveys, both recent and old, but none of these other surveyors actually testified.

or contain any similar language. He testified that the 1923 deed, however, did close to within approximately 160 feet, expressly described the line as "leaving the ridge" and clearly placed the boundary down the hill on the Frazier's side, in "a cove in the head of Long Branch." He also stated that he found the remnants of a barbed wire fence in the cove, near where the 1923 deed would place the line.[4] He therefore concluded that the 1923 surveyors probably were able to find monuments not present today and were able to determine that the 1870 deeds also placed the line in the cove, although those 1870 deeds did not contain any language referring to the cove.

Randall Thompson, who testified for the Fraziers, had surveyed the property himself, at their request. He prepared a plat showing the lines claimed by both parties and thus the disputed property, with which plat Mr. Curd agreed. He testified that the descriptions in both 1870 deeds clearly identified two monuments on the ridge, "a chestnut oak on the knob," and "a chestnut oak on top of a point at some large rocks." This latter point is described in all of the relevant deeds, including the Jordan's. Although Mr. Thompson could not find either chestnut oak 130 years later, he did believe he found the "knob" and the "point at some large rocks."[5] While he could not find any of the other monuments described in between those two, he stated that the calls between those two points roughly follow the ridge line. He therefore believed that the ridge was the

[4] The Jordans also introduced photos purporting to show the remnants of this fence.

[5] The trial judge, in his Amended Findings of Fact, Conclusions of Law and Judgment, states that "Mr. Thompson found none of the monuments called for in those deeds." The appellants claim this to be "clearly erroneous." Although we do not believe it is material, for the reasons set out below, we agree that this statement, as a summary of Mr. Thompson's testimony, is erroneous. Mr. Thompson clearly did claim to have found these two monuments.

common boundary, and that the 1923 survey and resulting deed description, which he conceded placed the line well down the hill to the east, was in error. He pointed out that the 1923 survey contains some of the same calls as the 1870 description, but changes the monuments at the ends of those calls. He testified that the 1923 description also added two new calls not in the 1870 deeds, the result of which was to place the disputed boundary down in the cove in that description, rather than on the ridge. Mr. Thompson conceded that the 1870 descriptions both failed to close by substantial distances, but stated that this was not unusual in old deeds and that he did not believe the errors leading to this were "all in that area [of the disputed boundary]." Mr. Thompson also acknowledged that if the Frazier property went to the ridge, it would actually contain 301 acres, substantially more than the 230 acres called for in their deed.[6]

After considering all of the evidence, the circuit court found that the 1870 description in the Fraziers' deed was "too imprecise and uncertain" and that the description set out in the Jordans' deed, based on the 1923 survey, which clearly described a line below the ridge, in the cove, represented the true line between the two properties.

We review findings of fact made by the trial court only to determine if they are clearly erroneous. CR 52.01 states, in part,

> Findings 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.

[6] There is no evidence in the record as to the total acreage of the Jordon property, with or without the disputed land.

The test of whether a finding of fact is clearly erroneous is whether it is supported by substantial evidence. *Black Motor Co. v. Greene,* 385 S.W.2d 954 (Ky. 1964); *D. H. Overmyer Warehouse Co. v. Smith,* 451 S.W.2d 668 (Ky. 1970). Substantial evidence does not mean undisputed evidence, but where both parties introduce adequate evidence, if believed, to support their respective positions, the findings of the trial judge are not clearly erroneous. *Hensley v. Stinson,* 287 S.W.2d 593 (Ky. 1956).

The clearly erroneous standard has been applied specifically to boundary disputes. *West v. Keckley,* 474 S.W.2d 87 (Ky. 1971) and *Croley v. Alsip,* 602 S.W.2d 418 (Ky. 1980). In this case, there was substantial evidence to support a finding for either party as to the correct boundary line. Two surveyors testified; one believed the line to be on the ridge and the other in the cove. There was other evidence for both sides. The circuit court was persuaded by Mr. Curd and the evidence offered by the Jordans. While we might have reached a different conclusion, the trial court's finding in this regard was supported by substantial evidence and was not clearly erroneous.

The Fraziers and Vanhorn also appeal from the circuit court's award on monetary damages, based on a finding as to the value of the timber taken from the disputed property. Our review of this issue is complicated by a procedural mishap. Again, the parties each relied on the testimony of one expert witness, Clyde Howard for the Jordans and the appellant, Edward “Pete” Vanhorn for himself and the Fraziers. Unfortunately, the tape apparently malfunctioned and the entire testimony of Mr. Howard

and part of the testimony of Mr. Vanhorn was unavailable for transcription. The parties therefore prepared a joint narrative statement of the missing testimony, pursuant to CR 75.13. That joint narrative, filed of record herein, states that Mr. Howard testified that he went to the property, counted 87 stumps and estimated that there were approximately 100 trees cut. He could not give an exact figure, but could only use his best judgment as to the value of the timber. The parties disagreed as to Mr. Howard's testimony regarding the measure he used to value the timber. Appellants' counsel recalled that Mr. Howard "testified that the market value of the timber would be $13,500.00 to $15,000.00 and that a sale price of $3921.00 seemed low to him." Appellees' counsel recalled "that he asked Mr. Howard what the stump value of the trees was," inferring but not stating directly that Mr. Howard answered in those terms. The parties attached to the narrative statement notes taken by the master commissioner during the hearing, which read, "Market value - $13,500 - $15,000. $3,921 - actual sale price seems low to him." This would appear to support the appellants' recollection. The narrative statement also indicates that Mr. Howard testified that he had to speculate about the grade and condition of the timber, and the person who actually cut the trees would be better able to determine those facts.

Vanhorn testified that he is the party who actually cut the timber in question, and that he carried off of this disputed property five loads of logs. He could not say from his records with absolute certainty what that timber brought, because he took it to the market together with timber from another property, but he had gone back through his records and sorted out, as best he could, the sales bills for the timber which he

believed came from this property, based on the dates and the types of trees. These sales bills showed that he sold this timber, consisting of 142 logs,[7] for a total of $3921.00. He also testified that his agreement with the Fraziers, as was typical in that market, was that he paid them one-third of this sum, and kept two-thirds for his labor. Thus, he testified that the Fraziers received a total of $1307.00 for the timber in question, and that this was, in his opinion, the stump value of the timber.

The measure of damage for innocent taking of timber is, as we stated in our opinion on the first appeal of this case, "the reasonable market value of the timber on the stump." *D. B. Frampton & Co. v. Saulsberry,* 268 S.W.2d 25, 27 (Ky. 1954).

It is clear from this that, whether or not his figures were accurate, Vanhorn used the correct measure. If he paid fair value, the amount he paid the Fraziers for their timber, "on the stump," would be the best evidence of its value. However, the circuit court relied on the opinion of Mr. Howard for its award of $13,800.00, within his range of $13,500.00 to $15,000.00. But it is unclear from the joint narrative statement what measure Mr. Howard used, the value of the timber at the market, or on the stump. Even assuming the commissioner's notes to be correct, that he testified to "market value," nothing in the narrative statement allows us to say with any certainty what Mr. Howard meant by "market value." If he meant the value of the timber at the market, after it is cut, he used the wrong measure, and his testimony cannot support a verdict. On the other hand, if he meant "market value . . . on the stump," as that language is used in the *D. B.*

[7] This appears generally consistent with either Mr. Howard's count of 87 trees or his estimate of 100 trees. Vanhorn testified that, depending on the size, he would usually get either one or two logs, occasionally three, from each tree.

Frampton opinion, his testimony would properly support a verdict, and we could not say that an award of $13,800.00, based on his testimony, would be clearly erroneous.

Ordinarily, it is the obligation of the appellant to assure that the complete record is provided to us on appeal, *Fanelli v. Commonwealth,* 423 S.W.2d 255 (Ky. 1968). In the absence of some necessary portion of the record, we will assume that the record supports the findings of the trial court. *Porter v. Harper,* 477 S.W.2d 778 (Ky. 1972).

However, in this case, the Fraziers filed a motion with the circuit court, pursuant to CR 52.02, pointing out the confusion in the record and specifically requesting findings of fact concerning this issue. In this motion, they pointed out the requirement that the damages be based on stump value and their contention that Mr. Howard's testimony only referred to "market value." The court overruled that motion without comment. Accordingly, we cannot tell from the record whether or not the evidence supported the verdict, as to damages. Neither can we say that the deficiency in the record is the responsibility of the appellants.[8]

Therefore, we vacate the award of damages and remand this matter to the Lawrence Circuit Court on the issue of damages alone. The circuit court should make specific findings of fact concerning the value of the timber on the stump, noting the evidence of record supporting such findings. If it is necessary to hear additional evidence

[8] The appellants also raised this issue on their first appeal to this court. However, we did not find it necessary to consider this issue at that time, as we reversed on other grounds, as set out above.

in this regard, that would be appropriate, within the sound discretion of the circuit court.

In all other respects, the judgment of the Lawrence Circuit Court is affirmed.

ALL CONCUR.

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