

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001554-MR

THE MASON FAMILY LIMITED PARTNERSHIP

APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE STANLEY BILLINGSLEY, SENIOR JUDGE
ACTION NO. 04-CI-00195

ROBERT W. FLAIG AND
MARY K. FLAIG

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI¹ AND JOHNSON,² JUDGES.

JOHNSON, JUDGE: The Mason Family Limited Partnership has appealed an order entered by the Boone Circuit Court on July 14, 2005, which quieted title in the disputed property to the appellees, Robert and Mary Flaig. Having concluded that the adverse possession element of hostile possession was properly

¹ Judge Daniel T. Guidugli concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

established, we affirm.

In 1955 the Flaigs purchased an approximate 52-acre farm in Boone County, Kentucky, from Claude and Loretta Wilson. At that time, a section of the Wilson's property abutting a farm of approximately 127 acres owned by Cliff Rittinger was bounded by a fence. Over the years, by agreement with Rittinger, the fence was maintained and repaired by, and at the expense of, the Flaigs. The Flaigs raised crops and grazed cattle on the fenced acreage. During this time, all the parties operated under the assumption that the entire fenced area belonged to the Flaigs.

The Mason Family Limited Partnership purchased Rittinger's farm in 2002. However, no dispute over title to the subject property arose until the Flaigs sold their farm in 2004. A survey at that time revealed that 2.843 acres of the area within the Flaigs's fenced property was actually within the Partnership's deed.

The Flaigs filed suit against the Partnership claiming that they had acquired title to the disputed property by virtue of adverse possession and sought a quitclaim deed for the 2.843 acres. The parties stipulated that the Flaigs's possession of the disputed property was actual, exclusive, continuous, open, and notorious for well beyond the statutory period of 15 years.³

³ See Kentucky Revised Statutes (KRS) 413.010.

However, the question of whether that possession had been hostile was disputed.

A hearing was held before the Deputy Master Commissioner on March 24, 2005. At the conclusion of all the evidence, the Commissioner found in favor of the Flaigs. The Commissioner's report was entered on June 16, 2005, and thereafter the Partnership filed its objection to the report on July 11, 2005. On July 14, 2005, the Boone Circuit Court entered an order confirming the Commissioner's report in its entirety. This appeal followed.

On appeal the Partnership simply asks us to revisit the issue of hostile possession.

With respect to property title issues, the appropriate standard of review is whether or not the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for that of the trial court absent clear error. Furthermore, in an action tried without a jury, the factual findings of the trial court shall not be set aside unless they are clearly erroneous, that is[,] not supported by substantial evidence [citations omitted].⁴

Five elements must be established "before adverse possession will bar record title: 1) possession must be hostile and under a claim of right, 2) it must be actual, 3) it must be exclusive, 4) it must be continuous, and 5) it must be open and

⁴ Phillips v. Akers, 103 S.W.3d 705, 709 (Ky.App. 2002).

notorious.”⁵ In the case before us, there is no question that the last four elements have been satisfied by the Flaigs. The issue is whether their possession of the Partnership property has been hostile.

The Partnership argues that the Flaigs were in possession of the disputed property on the basis of a mistake and that Mr. Flaig’s testimony shows that he did not possess the property with the intent to claim it adversely. The Partnership cites Wilson v. Shepherd⁶ in support of its contention that the Flaigs did not hold the disputed property with the requisite hostility to establish a claim of adverse possession. In Wilson, our former Court of Appeals held that where a party mistakenly takes possession of land owned by an adjacent owner, but intends only to claim to the true property boundary, the possession is not adverse.⁷

We conclude, however, that the authorities relied upon by the trial court are more similar to the present case and sufficiently support the decision that the Flaigs’s possession was hostile. Under Kentucky law, a person “may obtain a perfect title to real property by adverse possession for the statutory

⁵ Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Company, Inc., 824 S.W.2d 878, 880 (Ky. 1992).

⁶ 50 S.W.2d 540 (Ky. 1932); See also Kinder v. Ramey, 102 S.W.2d 32 (Ky. 1937), Traylor v. West, 255 S.W.2d 612 (Ky. 1953).

⁷ Id. at 542.

period of time of fifteen years even when there is no intention by the adverse possessor to claim land not belonging to him.”⁸

In Tartar, the former Court of Appeals was presented with a case very similar factually to the present case. The only issue was whether the claimant’s possession was hostile as all the other elements of adverse possession clearly existed.⁹ The Court held that because the claimant used and improved the property, as owners were accustomed to, by building upon and improving the property, the possession was deemed to be hostile to the title of the real owner “although their claim of title originated in a mistaken belief that the land lay within the calls of their deeds.”¹⁰

In the case before us, the Flaigs openly treated the property as their own and utilized it continuously for the purposes for which the land was best suited. The Flaigs maintained a fence around the disputed acreage and raised crops and grazed cattle on the fenced acreage. The finding of the trial court that the Flaigs’s possession of the property was hostile was supported by substantial evidence and thus not clearly erroneous. Further, because all of the remaining

⁸ Appalachian Regional, 824 S.W.2d at 879-80 (Ky. 1992) (citing KRS 413.010; Tartar v. Tucker, 280 S.W.2d 150, 152 (Ky. 1955)).

⁹ Tartar, 280 S.W.2d at 152.

¹⁰ Id. See also Marcum v. Noble, 242 S.W.2d 866, 867 (Ky. 1951); and Mudwilder v. Claxton, 301 S.W.2d 3, 4 (Ky. 1957).

elements of adverse possession were present, the trial court properly awarded the disputed property to the Flaigs.

Based upon the foregoing, the judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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