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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000243-MR

BILLY C. SCOTT and REBECCA S. SCOTT — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 07-CI-05617

DAN F. HEDRICK, RILEY C. HEDRICK,
FIFTH THIRD BANK, INC. and
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND WINE, JUDGES.

MOORE, JUDGE: Billy C. Scott and Rebecca S. Scott bring this appeal from a judgment of the Jefferson Circuit Court following a bench trial whereupon the trial court adjudicated a property boundary dispute in favor of Dan F. Hedrick and Riley C. Hedrick with damages awarded to Appellants. The Scotts argue that the

trial court erred in granting the Hedricks' partial summary judgment motion as to the title of the disputed property and that the trial court erred in the determination of the Scotts' remedies. Having carefully considered the issues and applicable law, we affirm in part because the trial court did not err in rejecting the Scotts' claim of adverse possession nor in its determination of damages and reverse in part because the trial court did not evaluate the request for injunctive relief under the correct standard.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Scotts and the Hedricks are next-door neighbors. They dispute ownership of a small piece of property, approximately one-hundredth of an acre, located between the Hedricks' driveway and the circular drive in front of the Scotts' home. The Scotts claim title through adverse possession, by agreement and/or estoppel. Additionally, the Scotts allege that the Hedricks' failure to maintain a catch basin resulted in damage to the Scotts' property. The Scotts seek damages and injunctive relief.

The deeds to the parties' properties reference only lot numbers and do not contain metes and bounds descriptions. Before a 2007 land survey, there were no pins marking the front corner of the properties.

When the Scotts bought their property in 1987, the disputed property had some trees and shrubbery, but little landscaping. They began installing various plants in the disputed area. They continued to purchase, plant, and remove various plants over the course of the next twenty years. They also placed a birdbath,

benches, trellises and other items on the disputed property. When the house was built in 1976, the Scotts' mailbox was placed in front of the disputed property approximately four or five feet from their driveway.

The Lumsdens, who owned the property prior to the Hedricks, mowed the grass up to what was believed to be the property boundary line. The Hedricks subsequently did so.

In August 2005, the Scotts removed a honeysuckle bush located on the disputed property. Mr. Hedrick requested an explanation for the action, and Mrs. Scott apologized for removing the honeysuckle bush. Mr. Hedrick maintains that the bush was located on his property. Despite having apologized for cutting down the bush, Mrs. Scott testified that she believed the bush was on her property.

Regarding the catch basin, the parties' homes are positioned on fall-away lots. These lots run steeply downhill from the front line of the properties at the street and down to the backs of the properties. Along the mutual property line there are retaining walls which elevate the front part of each property including the Hedricks' driveway and side yard. The Hedricks' retaining wall is elevated several feet above the surface of their driveway while the Scotts' retaining wall is located close to ground level.

In the back corner of the Hedricks' driveway is a catch basin, which addresses water runoff and redirects it towards the back of the retaining wall. The catch basin is basically a hole in the driveway several feet deep filled with rock and plastic pipes leading to outlets along the retaining wall. When the catch basin fills

with dirt and debris, it stops fully functioning and water pools at its surface, filling the corner of the Hedricks' driveway and overflowing the Scotts' lower retaining wall. The Scotts have a small, landscaped courtyard behind the wall, and the entrance to their walkout basement is nearby.

The initial owners of the properties (not the Scotts or Hedricks) jointly paid for the installation and maintenance of the catch basin. When the Scotts moved to their property, they obtained permission from the Lumsdens, the prior owners of the Hedricks' property, to clean the catch basin about every six to eight months.

In 2003, the Hedricks had their driveway resurfaced, and the catch basin was paved over with asphalt. The Scotts contacted the Hedricks, informing them of the catch basin's purpose. The Hedricks had the asphalt removed from the catch basin, and it functioned again. However, it was not properly maintained. As time passed and no maintenance was performed, the catch basin filled with dirt and debris and no longer functioned properly. When it rained, the water remained pooled in the catch basin and at times overflowed over the retaining wall onto the Scotts' courtyard below. As a means of mitigating the water, the Scotts placed plastic bags of rock and mulch on the retaining wall with portions of the items on the Hedricks' property. At this time the dispute between the parties escalated, and Mr. Hedrick began removing the bags. In April 2007, Mr. Hedrick sent a letter to the Scotts, asking that they not place the bags and plastic sheeting on his property. The Scotts ignored this request.

As a result of the additional disputes between the parties, the Hedricks had a survey conducted to locate the boundary line. The surveyor placed a pin, marking the front corner of the boundary line. The pin was placed several feet to the side where the Scotts' mailbox was located, showing that the disputed property was on the Hedricks' side of the boundary line. In May 2007, Mr. Hedrick sent a letter to the Scotts explaining the survey and asking that they remove from the property all "non-permanent decorative items" and that they relocate their mailbox onto their property.

The Scotts did not remove the items from the disputed property. Instead, they responded with a letter from their counsel, claiming adverse possession and/or the doctrine of estoppel. The Scotts then filed a lawsuit claiming title to the disputed property had vested in them by an agreement, adverse possession, and/or estoppel.

Subsequently, the Scotts and the Hedricks filed motions for partial summary judgment with respect to title of the disputed property. The trial court dismissed the Scotts' claims of adverse possession and estoppel against the Hedricks. The Scotts' claims of trespass, conversion and property damage proceeded to a bench trial.

At trial, the court dismissed all of the Hedricks' counterclaims and found the Hedricks liable to the Scotts for damages sustained due to their failure to maintain the catch basin. The trial court found insufficient evidence of the amount of damages claimed by the Scotts and limited the award to $179.42 (the cost for

materials to barricade the water on the retaining wall). The trial court also found that the Scotts were not entitled to punitive damages or injunctive relief. The Scotts now appeal, asserting that the trial court erred by granting title to the disputed property to the Hedricks and that the trial court erred in the determination of their damages.

III. STANDARD OF REVIEW

When a trial court grants a motion for summary judgment, the standard of review on appeal is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). As such, when considering a motion for summary judgment, the court is to view the record in the light most favorable to the party opposing the motion, and all doubts are to be resolved in that party's favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue of material fact exists. *Id*.

As to the Scotts' claims to damages and requests for injunctive relief, "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." Kentucky Rule of Civil Procedure (CR) 52.01. Because this case was tried before the court without a jury, its factual findings shall not be set aside unless they are clearly erroneous, *i.e.*, not supported by substantial evidence. *Cole*

v. Gilvin, 59 S.W.3d 468, 472 (Ky.App. 2001). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Union Underwear Co., Inc. v. Scearce*, 896 S.W.2d 7, 9 (Ky. 1995). With these standards in mind, we will review the issues before us.

IV. ANALYSIS

A. Adverse Possession

The requirements to establish title through adverse possession are well known:

> A claimant must show possession of disputed property under a claim of right that is hostile to the title owner's interest. Further, the possession must be shown to be actual, open and notorious, exclusive, and continuous for a period of fifteen years.

Phillips v. Akers, 103 S.W.3d 705, 708 (Ky. App. 2002) (citing *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky. 1955)); s*ee also Creech v. Miniard*, 408 S.W.2d 432, 436 (Ky. 1965). In order to succeed on a claim of adverse possession, all elements must be met at all times through the fifteen-year statutory period.

For possession to be open and notorious, a possessor must openly evince a purpose to hold dominion over the property with such hostility that will give the non-possessory owner notice of the adverse claim. *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Company, Inc.*, 824 S.W.2d 878, 880 (Ky. 1992). "An intent to exercise dominion over land may be evidenced by the erection of physical improvements on the property." *Id.* Where the disputed

property does not have a fence or other erected structures, there must be proof of substantial, and not sporadic, activity by the possessor. *Phillips*, 103 S.W.3d at 708. "[T]he character of the property, its physical nature and the use to which it has been put, determines the character of acts necessary to put the true owner on notice that a hostile claim is being asserted." *Ely v. Fuson*, 297 Ky. 325, 180 S.W.2d 90, 92 (Ky. 1944) (citations omitted). Further, a well-established aspect of a successful claim for adverse possession is a well-marked boundary line. *See id.*; *see also Watts v. Bryant*, 144 Ky. 14, 137 S.W. 780 (1911).

Although a claim for adverse possession does not require a fence, it does require a well-marked boundary that would put a rightful owner on notice of the adverse claim. Here, the common boundary line in the disputed area is not clearly marked. Over time, plants have grown and altered the appearance of the line between grass in the lawns of the Scotts and Hedricks and the rough sod in the disputed area.

In their depositions, the prior owners of the Hedricks' property stated that the dividing line is not in the same location as when they lived there. Considerable testimony from both the Hedricks and the previous owners of their property was that the groundcover has grown and expanded over time, changing the location of where grass meets sod and making it difficult to know the boundary line of the disputed property over time. We agree with the trial court that the record does not establish a well-marked boundary line that would put the Hedricks or the prior owners of the property on notice of the hostile claim.

Putting aside the need for a well-marked boundary line, the Scotts must also show substantial activity on the disputed property to give rise to a hostile claim through adverse possession. Cutting down of timber over the course of forty years has been held as insufficient. *Price v. Ferra*, 258 S.W.2d 460 (Ky. 1953). Seeding and fertilizing land and later bulldozing the land, cutting hay every other year, and growing one corn crop was also found insufficient for adverse possession. *Kentucky Women's Christian Temperance Union v. Thomas*, 412 S.W.2d 869 (Ky. 1967). Where there was no visible boundary, an adverse possession claim also failed when grass was cut over a number of years and plaintiff's father paid property taxes. *Vaughan v. Holderer*, 531 S.W. 2d 520 (Ky. 1976).

Here, over the course of twenty years, the Scotts planted, removed and maintained plants, and placed a birdbath and a trellis on the disputed property. The Scotts testified that they spent two or three hours per week working in their entire yard, not just the property in dispute. However, given the character of the property as appearing natural and not particularly manicured, the maintenance performed by the Scotts would not necessarily give notice of an adverse claim. And, in comparison with the other cases where the activities on the land were deemed insufficient for title by adverse possession, we agree with the trial court that these activities are not sufficient to amount to substantial activity to suggest a claim of ownership.

It is also worth noting that if the actual owner has granted the claimant permission to use the property, the claim of adverse possession cannot be deemed hostile and thus fails. *See generally United Hebrew Congregation of Newport v. Bolser*, 244 Ky. 102, 50 S.W.2d 45 (1932). "Possession by permission cannot ripen into title no matter how long it continues." *Phillips*, 103 S.W.3d 705 at 708. The previous owners of the Hedricks' property both testified that they gave Mrs. Scott permission for her plants to grow onto their property.

We now turn to the exclusive use requirement. An adverse possession claim requires the hostile party's possession to be exclusive. *Phillips*, 103 S.W.3d at 708. The Hedricks claim to have removed weeds and maintained aspects of the property. The Scotts also claim to have planted, removed, and maintained plants on the property. Additionally, when Mrs. Scott cut down a honeysuckle bush on the disputed property, Mr. Hedrick confronted her over the issue, asserting that the bush belonged to him. Even though Mrs. Scott apologized for the removal of the bush, she testified that she believed the bush to be on her property. The record shows that the Scotts and the Hedricks both engaged in activities on the property, and both parties were treating the land in the manner consistent with that of a landowner. Thus, the Scotts' use of the property was not exclusive.

Because the Scotts are unable to establish both exclusive use and the open and notorious element, their claim of adverse possession fails; we need not analyze the remaining elements. Accordingly, the Scotts cannot gain title as a

matter of law. The trial court appropriately granted the Hedricks' partial summary judgment as to title of the disputed property.

B. Agreed Boundary

The Scotts claim that title vested in them as a result of an oral agreement with the Lumsdens, the previous owners of the Hedricks' property. This claim also fails.

It is true that the "agreed boundary" doctrine allows for parol agreements establishing boundary lines to be enforceable, despite the statute of frauds. *Faulkner v. Lloyd*, 253 S.W.2d 972 (Ky. 1952). However, this doctrine applies "only in the event the true dividing line between two tracts is in doubt, and there is a dispute between the adjoining owners as to the exact location of the line, which depends on variable circumstances not susceptible of certain determination." *Id.* at 974.

In her deposition, Mrs. Scott described a conversation that she had with Mr. Lumsden, where they discussed the location of the property boundary line. Based on this discussion, she believed the line to be about 6 to 12 inches from the mailbox. However, in his deposition, Mr. Lumsden did not recall a conversation regarding boundary lines nor did he recall this specific statement. Mr. Lumsden did state that he had assumed that the line was somewhere near the Scotts' mailbox. Based on this, we are not persuaded that the parties had a mutual

understanding regarding an identifiable boundary because an actual agreement is a required element to establish an agreed boundary. *Embry v. Turner*, 185 S.W.3d 209 (Ky. 2006). Absent such an agreement, the Scotts' claim fails.

C. Estoppel

The Scotts also claim title by estoppel. *Faulkner* holds that the doctrine of estoppel can come into play in a disputed boundary case where there is absence of an agreed boundary or adverse possession. 253 S.W.2d at 974. A landowner who knows the true line and silently permits an adjoining owner to make substantial improvements unknowingly past the line is estopped to claim to the true boundary. *Id.* To establish an equitable estoppel, the party attempting to raise it must show an actual fraudulent representation, concealment or such negligence as will amount to a fraud in law, and that the party setting up such estoppel was actually misled thereby to his injury. A "clear strong case of estoppel must be made" to pass title. *Jones v. Travis*, 302 Ky. 367, 194 S.W.2d 841, 842 (1946).

The Scotts' only support for their claim of estoppel is their belief that Mr. Lumsden's conduct in indicating the boundary line induced them to believe the disputed property was a part of their lot and to maintain it as their own. However, nothing in the record suggests any sort of false representation, concealment of material fact, detrimental reliance, or any of the other facts required to prove estoppel. We therefore conclude that the trial court did not err on this issue.

D. Damages

We next turn to the claims for damages. The Scotts were required to show their damages with reasonable certainty. *See Pauline's Chicken Villa, Inc. v. KFC Corporation*, 701 S.W.2d 399, 401-02 (Ky. 1985). While there is not a single definition of "reasonable certainty," damages may be established with reasonable certainty with such tools as expert testimony, economic and financial data, analyses, and the like. *Id.*

The Scotts sought more than $31,000 in compensatory damages for the plants, mailbox, and other miscellaneous items placed on the disputed property. The trial court found:

> The plants are improvements (akin to fixtures), which are items that were once a chattel that have become physically attached to real property such that the real property would be damaged upon their removal. The evidence reflects that the removal of the plants would cause damage to the property that would have to be repaired through additional landscaping.

The trial court correctly found the Scotts were only entitled to the amount by which the plants increased the value of the Hedrick property. *See Kentucky River Coal Corp. v. Combs*, 269 Ky. 365, 107 S.W.2d 241 (1937); *Frazier v. Frazier*, 264 S.W.2d 665 (Ky. 1954). However, the Scotts failed to present competent evidence to show any increase in the value of the Hedricks' property that resulted from the plants. Further, the Scotts failed to establish with competent evidence the amount of damages to which they are entitled for the personalty, *i.e.,* the trellises, mailbox, etc. Their only evidence was self-prepared documents stating replacement costs. These documents did not include receipts,

testimony from a horticulturist or other specialist, evidence of replacement costs, or any other competent evidence that would prove the value of what was damaged. It was the Scotts' burden to prove damages, and they put forth only their own testimony, which was subject to credibility determinations by the trial court. The Scotts had to put forth some proof on damages to a reasonable certainty which the trial court would find credible. Without this evidence, we cannot say the trial court erred in its calculation of damages.

Even if the court considered the plants chattel instead of improvements, the Scotts have not met their burden of proving damages. Mrs. Scott asserted that she could remember the purchase price of each plant (numbering in the hundreds) that she purchased over the twenty years. Mrs. Scott testified that she possessed the original receipts for the plants but did not produce the receipts into evidence. The trial court was not persuaded. In addition to their own testimony, the Scotts provided as evidence, a multiple page document prepared by them that contained a list of plants and purported costs of the plants installed on the disputed property. However, this list does not show any increase in the value of the Hedricks' property derived from the installation of the plants and is therefore insufficient to prove damages.

Additionally, the Scotts' calculations of damages were contradicted by the testimony of landscaper, Peggy Heustis. Specifically, Heustis testified that many of the plants listed by the Scotts were not present on the property. She also

disagreed with the number of plants the Scotts allege were removed from the property.

After hearing all the testimony, the trial court did not find the Scotts' claims credible. We are bound to give due deference to a trial court's opportunity to judge the credibility of witnesses. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003); CR. 52.01. Consequently, having reviewed the evidence of damages and given the deference due to the trial court, we find the trial court did not err in its calculation of damages.

The Scotts argue that the trial court contradicted itself when finding that the plants were improvements for purposes of damages after finding that the Scotts' activities on the disputed property did not support their claim for adverse possession. We do not find this argument persuasive. The plantings are improvements, but they are not "substantial improvements" as required by *Phillips,* 103 S.W.3d at 708. So, while the plantings do not rise to the substantial improvement threshold, they are, nevertheless, improvements for which the Scotts (with proper evidence) could have recovered the amount by which the plants increased the value of the Hedrick property. Having failed to produce evidence to support their claim of damages, we cannot find error with the trial court's conclusion.

Next, we examine the Scotts' claims regarding punitive damages. KRS 411.184(2) provides:

> A plaintiff shall recover punitive damages only upon providing, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud, or malice.

The Scotts point to Mr. Hedrick's act of cutting and removing the bags on the retaining wall as evidence supporting an award of punitive damages. The trial court found that the Scotts did not meet the clear and convincing standard and failed to establish that the Hedricks' conduct was outrageous because of evil motive or reckless indifference to the Scotts' rights. We give deference to the trial court's fact finding on this issue and do not find error based on the evidence in the record.

E. Injunctive Relief

The Scotts seek injunctive relief regarding the catch basin. They contend the Hedricks have a continuing duty to exercise reasonable care in maintaining the catch basin to allow the free flow of water, and they are liable for damages which are sufficiently shown to be caused by their failure to maintain the catch basin. Case law supports their argument in theory. *See Mason v. City of Mt. Sterling*, 122 S.W.3d 500 (Ky. 2003); *Chesapkeake & O. Ry. Co. v. Saulsberry*, 262 Ky. 31, 88 S.W.2d 949 (1932).

Both parties testified that even if properly functioning, the catch basin will overflow with heavy rain. Notwithstanding this, the trial court ruled that

> Plaintiffs have proven by a preponderance of the evidence that Defendants' failure to maintain the catch basin has caused damage on their property. Plaintiffs each testified that the catch basin was maintained by

> them every few months during the first 10 years that they owned the property, and again in 2006. Plaintiffs testified that the catch basin functioned prior to Defendants having it paved over, and that, subsequently, the catch basin failed to properly function, water flooded over their retaining wall, and caused damage to their property. Although Mr. Hedrick testified that he did not think that the clearing of the catch basin alone would rectify the flooding problem, he acknowledged that the catch basin will work if it is maintained and that he did not maintain it, other than clearing leaves every now and then.

Given the trial court's finding that the Hedricks' failure to maintain the catch basin caused damage to the Scotts' property and the probability of continuing flooding, damages are likely inadequate. *See Louisville & N.R. Co. v. Franklin*, 170 Ky. 645, 186 S.W. 643, 647 (1916).

The trial court expressed concern, however, that it lacked the authority to direct the Hedricks to maintain their catch basin in good operating condition. Regarding the rights and obligations of an upper landowner clearing surface water onto lands below, Kentucky has adopted the "reasonable use" rule. The rule balances "the reasonableness of the use by the upper owner against the severity of damage to the lower owner." *Walker v. Duba*, 161 S.W.3d 348, 350 (Ky. App. 2005) (citing *Klutey v. Commonwealth, Department of Highways*, 428 S.W.2d 766, 769 (Ky. 1967)).

The circuit court did not review the Scotts' request for injunctive relief under the correct legal standard set forth in *Walker*, 161 S.W.3d at 350.

Therefore, we reverse the circuit court's decision regarding this issue and remand for analysis under *Walker*.

V. CONCLUSION

Accordingly, the judgment of the Jefferson Circuit Court is affirmed in part with respect to the adverse possession and damage claims, and the judgment is reversed in part with regard to injunctive relief. The case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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