

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001421-MR

GARY GAY; PAULINE GAY;
AND MARTHA GAY

APPELLANTS

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR GAYLE HOUSE, JUDGE
ACTION NO. 04-CI-00188

HARRY WILSON
AND JUDITH WILSON

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CAPERTON, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Gary and Pauline Gay, husband and wife, and Martha Gay appeal from a judgment of the Jackson Circuit Court dismissing their action that they were adverse possessors of the disputed property. For the reasons stated herein, we affirm.

On May 9, 1953, Lewis and Martha Gay obtained title to a tract of land in Jackson County. Shortly thereafter, they conveyed a portion of the property to Vee Gay and, in 1971, they conveyed the remainder to Vee Gay. Following these conveyances, it is undisputed that the families of each of the parties used the disputed property at various times.

This litigation commenced as a partition action wherein the Gays alleged that they were the joint owners with the Wilsons of the disputed real estate. The complaint was later amended to assert a claim of adverse possession to ownership of the property. At the beginning of trial, the parties stipulated to the chain of title, to deeds and to a survey by Donald Ray Nolan wherein the portion of the property in dispute was above the red line on a map which was presented as an exhibit to the court.

At the beginning of trial, the Gays stipulated that the only issue before the court was whether or not they had gained title to the disputed area by adverse possession to the detriment of the Wilsons. Several witnesses testified before the court, including Judith Wilson who stated that she knew that she owned the property and that she permitted the Gays to use the property as they “saw fit” because they were all cousins. Judith also testified that Uncle Lewis had asked her shortly before his death if she would deed the property back to him, thereby indicating that Lewis knew that he did not own the property.

The court ruled that there was no indication that the alleged adverse possessor Gary Gay or his father, Lewis Gay, or his family made any physical

improvements to the property during the period of their claim of adverse possession. There was some testimony of repairs made to buildings or fences that were already in place. Further, there was no proof of substantial activity and only testimony of sporadic activity on the disputed property.

After a bench trial, the trial court dismissed the Gays's action and wrote the following:

In the present case[,] given the sporadic nature of the occupancy of the plaintiffs and their predecessors in title and the non-exclusive [nature] of the use of the property, taken along with the court's impression from the proof that there was very little hostility in any possession by the [Gays], it is clear that the elements of adverse possession have not been met.

From this judgment, this appeal followed.

The Gays contend that the trial court erred by failing to find that they had adversely possessed the property which was the subject of their lawsuit. They contend that the evidence established that they and their predecessors in title adversely possessed the barn and hillside in an adverse, actual, open and notorious, exclusive, and continuous manner. We disagree.

“The findings of a trial court sitting without a jury will not be set aside unless clearly erroneous.” *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government*, 265 S.W.3d 190, 195 (Ky. 2008). Findings of facts are not clearly erroneous if supported by substantial evidence which constitutes evidence having the fitness to induce a belief in the minds of reasonable men.

Rivers v. Howell, 276 S.W.3d 279, 281 (Ky.App. 2008). The application of law is reviewed *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App. 1998).

To establish title through adverse possession, a person must show possession of the disputed property under a claim of right that is hostile to the title owner's interest, and it "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). "Mere intentions or verbal expressions of a claim to property is not sufficient absent physical acts appearing on the land evidencing a purpose to hold the property hostile to the rights of and giving notice to the title holder." *Id.* The party asserting title to property by adverse possession must prove their claim by establishing each element by clear and convincing evidence. *Id.* at 709.

In this case, the trial court heard testimony that Gary left the property around 1980 and was only aware of sporadic activity on the property, including his brother's placement of dogs on the property during the 1990s. However, Gary testified that Lewis and Vee were extremely close, were continuously in business together, and used each other's properties as needed. According to William Gay's testimony, he once had horses on the property and that the two families both used the disputed property as needed from time to time.

While the Gays conducted activities and paid taxes and insurance on the property which were indicative of ownership, adverse possession requires the exercise of exclusive and continuous possession of the disputed property. *Allen v. Thomas*, 209 S.W.3d 475, 478 (Ky.App. 2006). The adverse possession claimant

must exercise dominion over the disputed property with such hostility that the title owner would have notice of the adverse claim. *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878, 880 (Ky. 1992). From the record, we conclude that the trial court's finding that the Gays have not established exclusivity and continuous possession over the disputed property is not clearly erroneous.

Further, “[s]tronger evidence of hostile possession with a clear, positive assertion of an adverse right is required where there is a family relationship between the parties than where there is no such relationship.” *Phillips v. Akers*, 103 S.W.3d at 710. It is clear that the Gays and Wilsons were extremely close going back to the two brothers, Lewis and Vee. Each family used the property as needed and there was scant evidence of exclusivity or continuous control.

Accordingly, we conclude that the trial court did not err by finding that the Gays did not establish all of the elements required to establish their claim for adverse possession under the clear and convincing evidentiary standard.

For the foregoing reasons, the judgment of the Jackson Circuit Court dismissing the Gays's property action is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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