RENDERED: April 2, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001557-MR

CHARLES JOHNSON
AND ROWENA JOHNSON — APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 97-CI-00860

DONALD R. MAYNE
AND ANDREA R. MAYNE;
ROBERT HELTON,
D/B/A HELTON LOGGING;
WAYNE "SHAG" HELTON,
D/B/A HELTON LOGGING;
AND RAYMOND HELTON,
D/B/A HELTON LOGGING — APPELLEES

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: COMBS AND KNOPF, JUDGES; AND MILLER, SENIOR JUDGE[1].

KNOPF, JUDGE: The appellants, Charles and Rowena Johnson (the Johnsons), appeal from judgments of the Laurel Circuit Court quieting title to a disputed boundary area and awarding damages to the appellees, Donald and Andrea Mayne (the Maynes) for

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

trespass in the disputed area. Because we agree with the Johnsons that they presented sufficient unrebutted evidence to establish title to the disputed area by adverse possession, we vacate the judgments for the Maynes and remand for entry of a judgment in favor of the Johnsons.

The Johnsons and the Maynes own adjacent tracts of real property in Laurel County, Kentucky. The dispute in this case concerns the location of the boundary between their tracts. By all accounts, the area in dispute is no more than six to eight feet wide and some seventy to eighty feet long, comprising approximately 391 square feet. The Johnsons acquired their tract by a deed from the Master Commissioner of the Laurel Circuit Court on June 2, 1970. The Maynes purchased their tract in 1995.

In November of 1997, the Maynes filed an action against the Johnsons to quiet title to the disputed area. The Maynes also filed a trespass claim against the Johnsons for the value of timber taken from the disputed area. In addition to the Johnsons, the Maynes named Shag Helton, Robert Helton, and Raymond Helton, d/b/a Helton Logging, with whom the Johnsons had contracted to conduct logging in the disputed area.

The trial court bifurcated the claims, considering the boundary dispute issue first. Following a bench trial, the trial court entered a judgment on July 12, 1999, finding for the

boundary as claimed by the Maynes. The Johnsons filed a notice of appeal from this judgment. However, this Court dismissed the appeal, finding that it was taken from a non-final order.[2] Thereafter, a jury trial was conducted on the remaining issues. The jury returned a verdict for the Maynes against the Johnsons and Helton Logging in the amount of $500.00 for the value of the timber removed, and $4,000.00, representing the Maynes' legal expenses. The jury apportioned the award equally between the Johnsons and Helton Logging. The trial court entered a judgment confirming the jury's verdict, and this appeal followed.

The Johnsons indirectly challenge the sufficiency of the evidence supporting the trial court's location of the boundary as described in the deed. The commissioner's deed contains a metes-and-bounds description which is based on a survey that the parties agree is of very good quality. The language at issue in the Johnson deed describes the disputed boundary as follows:

> to a stone at a fence, R.B. Trosper's N. corner; thence with the Trosper's fence line in reverse, N 79 E 116 ft. to a stone and persimmon; thence S 25 E 446 ft. to a stone at the end of the fence; . . .

To interpret the deed description, the Johnsons presented the testimony of surveyors Richard Reece and John

[2] Johnson v. Mayne, No. 99-CA-002628 (Not-to-be-published opinion and order rendered June 15, 2001).

Ledington, and the Maynes introduced the testimony of surveyor Harrison Smith. All the surveyors agreed to the location of the corner at "a stone at the end of the fence." However, Reece and Ledington surmised that a second corner stone had been moved during earlier timber operations. They also noted that the deed makes reference to the fence at several points. Based on the evidence, they concluded that the line ran with the fence and the plow ridge.

On the other hand, Smith did not believe that the second set stone had been moved. Moreover, he noted that the distance calls in the Johnson deed match up more closely with the boundary claimed by the Maynes than with a boundary along the fence line. He also noted that, while the deed referenced the fence, it did not state that the boundary ran with the fence. Rather, he concluded that the boundary ran along a straight line between the two stones.

In considering this evidence, the trial court correctly stated that a lost or unmarked corner between two known corners is properly located at an intersection of lines from known corners according to courses and distances called for in the description of the land.[3] Because Smith used this process in locating the boundary but Ledington and Reece did not, the

[3] Queen v. Gover, 308 Ky. 649, 215 S.W.2d 107, 108 (1948).

trial court found Smith's testimony to be more convincing. Therefore, the trial court found the boundary described in the deed to be a straight line between the two stones.

As this matter was tried before the circuit court without jury, our review of factual determinations is under the clearly erroneous rule.[4] This rule applies with equal force on an appeal from a judgment in an action involving a boundary dispute.[5] Furthermore, "[a] fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors."[6] We cannot conclude that the trial court clearly erred in relying on Smith's testimony.

The Johnsons primarily argue that they presented sufficient evidence to establish their title to the disputed area by adverse possession, and that the trial court erred in finding to the contrary. To prove the elements of adverse possession, the Johnsons' possession must have been hostile, under a claim of right, actual, exclusive, continuous, open, and

[4] CR 52.01.

[5] Croley v. Alsip, Ky., 602 S.W.2d 418, 419 (1980).

[6] Webb v. Compton, Ky. App., 98 S.W.3d 513, 517 (2002) (*quoting* Howard v. Kingmont Oil Co., Ky. App., 729 S.W.2d 183, 184-85 (1987)).

notorious for a period of at least fifteen years.[7] These elements must be demonstrated by clear and convincing evidence.[8] Adverse possession of land may be said to be founded in trespass; it must be a trespass constantly continued by acts on the premises. It must challenge the right of all the world; the claimant must keep his flag flying, and present a hostile front to all adverse claims.[9]

Charles Johnson testified that when he acquired the property it was enclosed by a three-strand barbed wire fence. He estimated that the fence was at least fifty years old. Johnson admitted that he never repaired or replaced the fence, and the fence has deteriorated in many places. Johnson further testified that he had cut some timber in the area of the contested boundary line in 1975 or 1976. He also said that he had a walking path on this property that ran near the fence, but he stated that he had not used it in some time and it has become overgrown.

The Maynes' tract was previously owned by the heirs of Lizzie Walden. Johnson testified that the land near the disputed boundary had been plowed on Walden's side of the fence,

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[7] *See* Appalachian Regional Healthcare v. Royal Crown, Ky., 824 S.W.2d 878, 879-80 (1992).

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

[9] Combs v. Ezell, 232 Ky. 602, 24 S.W.2d 301, 305 (1930).

leaving a plow ridge which extended just beyond the fence. While the plow ridge is still visible, Walden's tract had not been plowed for at least fifteen years. Several witnesses confirmed the existence of the old fence line, the walking path on the Johnsons' side of the fence and the plow ridge. Johnson also testified that Walden had built chicken coops right up to her side of the fence. In addition, there was evidence that an outhouse had been built by a prior owner of Walden's tract up to the fence and plow ridge claimed by the Johnsons.

In finding that the Johnsons had failed to establish their adverse possession claim, the trial court focused on the Johnsons' failure to actively assert an adverse claim to the disputed area. The court noted that the fence had been built by the Johnsons' predecessor, and that they had never maintained or improved the fence. In fact, much of the fence had been allowed to deteriorate during the ten years prior to the Maynes' purchase of their tract. Similarly, the trial court pointed out that the plow ridge had been created by Walden, and there was no evidence that any plowing had taken place in at least the past fifteen years. The court also questioned whether the Johnsons' use of the disputed area had been sufficiently open and obvious. The court acknowledged Charles Johnson's testimony that he had used a walking path along the fence. However, the court noted that the path had not been used in some time and can no longer

be located with specificity. Consequently, the trial court found that the Johnsons had "failed to show that their possession of the property in dispute has been exclusive, continuous, open and hostile for any fifteen year period."

The central question in this case is whether the Johnsons' activities were sufficient to establish an adverse claim to the disputed area. Although we owe deference to the trial court's factual findings on this question, we review *de novo* the court's application of law to those findings.[10] Sporadic activity is not sufficient to give notice to the record title owner of a continuing hostile claim, and absent the erection of physical improvements to the land, the activity must be substantial.[11] However, a person who settles within a large body of wild, uncultivated, unenclosed, vacant land may claim adverse possession to boundaries which are kept marked for such time period and in such a way as to give the owner of the land notice that it was a marked boundary.[12]

The Johnsons assert that they exclusively possessed the disputed area up to the fence from 1970 until the Maynes

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[10] *See* Cinelli v. Ward, Ky. App., 997 S.W.2d 474, 476 (1998).

[11] Kentucky Women's Christian Temperance v. Thomas, Ky., 412 S.W.2d 869, 870 (1967).

[12] Gillis v. Curd, 117 F.2d 705, 708 (E.D. Ky., 1941) (*applying Kentucky law*).

purchased the adjoining tract in 1995. They further maintain that they actively used the area along the fence from 1970 until at least 1985. Because no other party challenged the fence line as the boundary for the requisite fifteen-year period, the Johnsons argue that they are entitled to title to the disputed area by adverse possession. We agree.

In Cornelius v. Stephens,[13] there was evidence that, over a fifty-year period, the claimant regularly cut timber on the property for his personal use, and that he twice cut and sold merchantable timber from the property. In addition, the claimant sold or gave a small strip of the property to a neighbor, and twice he permitted the erection of a temporary house on the land. The former Court of Appeals found that the claimant's consistent, but irregular use and control over real property was sufficient to establish adverse possession where the claimant was the only person who attempted to exercise dominion over the property.[14]

In this case, there was uncontested evidence that the fence had been built by the Johnsons' predecessor nearly fifty years ago, and that it was still standing into the 1980's. The fact that the Johnsons failed to maintain it after 1985 is not

[13] Cornelius v. Stephens, 312 Ky. 499, 228 S.W.2d 28 (1950).

[14] Id. at 29.

relevant because the fence had served as a clearly marked boundary for at least fifteen years earlier. Similarly, while Walden ceased plowing her fields sometime prior to 1985, the existence of the plow ridge along her side of the fence demonstrates that the Maynes' predecessor had recognized the fence as the boundary. Likewise, Johnson testified, without contradiction, that he had maintained a walking path along his side of the fence, that he had cut timber in the disputed area during 1975 or 1976, and that he had cleared the area of brush on several occasions.

As was the case in Cornelius, the Johnsons' use of the disputed area was sporadic. Nevertheless, it was actual, exclusive, open and obvious for at least a fifteen-year period. Moreover, the fence served as a clearly marked boundary enclosing the disputed area within the Johnsons' tract at least until the mid-1980's.[15] Such evidence meets the clear and convincing standard necessary to prove adverse possession. Therefore, we conclude that the trial court clearly erred in

[15] In contrast, the claimants in Philips v. Akers, *supra*, took somewhat more affirmative steps than the Johnsons to exercise control over their disputed area (periodically planting a vegetable garden, clearing vegetation and renting lots to third parties). But in the absence of evidence of any clearly marked boundary, this Court concluded that these sporadic activities were not sufficiently continuous or notorious to ripen into adverse possession. Id. 103 S.W.3d at 710.

finding that the Johnsons had failed to prove their title to the disputed area by adverse possession.

The Johnsons also argue that, if they prevail on their adverse possession claim, they are entitled to relief from the judgment awarding damages to the Maynes. The Maynes question whether the Johnsons adequately raised this issue in their notice of appeal and in their pre-hearing statement. However, the Johnsons' notice of appeal is specifically taken from the trial court's 1999 orders regarding the boundary dispute and from the June 27, 2002, judgment awarding damages to the Maynes. Furthermore, the Johnsons named Helton Logging as a party to this appeal, and the Johnsons' pre-hearing statement asks for relief from the damages judgment. Because we find that the Johnsons have proven their title to the disputed area by adverse possession, the damages judgment to the Maynes must also be set aside. However, since the Heltons and Helton Logging have not asked for relief separately, that portion of the trial court's June 27, 2002, judgment must remain undisturbed.

Accordingly, the July 12, 1999, judgment of the Laurel Circuit Court is vacated and this matter is remanded for entry of a judgment in favor of the Johnsons and quieting the Maynes' title in the disputed area. The June 27, 2002, judgment awarding damages to the Maynes from the Johnsons is likewise set aside.

COMBS, JUDGE, CONCURS.

MILLER, SENIOR JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

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