

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000617-MR

JAMES C. BROWN AND  
MARTHA BROWN

APPELLANTS

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 02-CI-00216

CARLOS SMITH AND  
CAROL SMITH

APPELLEES

OPINION

AFFIRMING

\*\* \*\* \* \* \*

BEFORE: BARBER, BUCKINGHAM AND MINTON, JUDGES.

BUCKINGHAM, JUDGE: James C. (Jimmy) and Martha Brown appeal from the findings of fact, conclusions of law, and order of the Muhlenberg Circuit Court, which rejected their claim to certain disputed realty located in Muhlenberg County, Kentucky. The trial court quieted title to the disputed realty in Carlos and Carol Smith after finding that the Smiths had obtained title through adverse possession. We affirm.

The parties herein dispute the ownership of a tract of land located in the Bremen area of Muhlenberg County, Kentucky. This disputed parcel consists of approximately 14.05 acres.<sup>1</sup> On April 30, 2002, the Browns filed their civil complaint with the trial court to quiet title to the property. The Browns' claim of ownership to the disputed parcel arises from a February 7, 2002 quitclaim deed from Donald and Betty Bowles and Bentley and Linda Badgett II which conveyed the surface rights of this realty to the Browns. In response, the Smiths filed an answer and counterclaim asserting ownership to the property by adverse possession.

The evidence contained within the record is largely uncontroverted. Prior to 1966, Oscar Jones cultivated the disputed parcel. In 1966, Jones turned this tract of land over to Carlos Smith.<sup>2</sup> From 1966 until 1980, Carlos cultivated the property every year, raising and harvesting beans, peas, and corn. He also improved the property by constructing drainage ditches. After 1980, Carlos exclusively raised and harvested hay from this property. He cut, raked, baled, and removed the hay from this realty in the spring and autumn of each calendar

---

<sup>1</sup> While the deeds of record indicate that the disputed property consists of 13.87 acres, the parties herein accept the findings of a survey conducted by Floyd R. Ashby on June 21, 2000, in which Ashby found that the disputed parcel actually consists of 14.05 acres.

<sup>2</sup> There is nothing in the record that indicates Jones claimed ownership to this disputed parcel of property. Also, it is clear that Jones did not convey this realty to the Smiths by deed.

year. Between hay harvestings, Carlos permitted area residents to hunt and ride horses on the property. He also removed timber from the property in 1967 and 1999. Finally, every three or four years, Carlos removed excess brush and limbs from the boundaries of this disputed parcel.

Jimmy and Martha Brown first became aware of this tract of land in 1969 after Jimmy's parents purchased farmland that adjoins the disputed parcel on the south and east. Even though the deed conveying the adjoining land to Jimmy's parents specifically excluded the disputed parcel, Jimmy believed that his parents had purchased the property. Despite Jimmy's mistaken belief that his parents owned the property, Jimmy was fully aware that Carlos had cultivated, maintained, and possessed the disputed acreage since 1966.

In 1982 or 1983, following the death of Jimmy's father, Jimmy began managing the adjoining farmland for his mother. At this time, Jimmy constructed a fence upon the disputed property for the purpose of creating a 200-acre field for pasturing his cattle. Carlos discovered that Jimmy had constructed the fence and immediately advised him that the fence was not a proper boundary and threatened to remove the fence from the property. Jimmy acknowledged that he did not intend for the fence to be a boundary line. Carlos, however, did not remove the fence because he did not possess the equipment to do

so and because he considered the Brown family to be his friends. Instead, he conducted his operations around the fence. Ultimately, Carlos removed Jimmy's fence in 2000.

In 1994, Carlos discovered that Jimmy had removed timber from the disputed property near the east property line. He caught Jimmy cutting firewood from the tops of trees that had been left by Jimmy's timber cutter. At this point, Carlos expressed anger that timber from his property had been cut. After this confrontation, Jimmy examined the 1967 deed and discovered that his parents did not purchase or otherwise own the disputed parcel. Accordingly, Jimmy and Martha claimed ownership to the disputed property by adverse possession, executed a deed to themselves, and began paying property taxes on the property. Later, Jimmy admitted that his 1995 deed was incorrect and that he never adversely possessed the property.

In late 1999, Carlos learned from a third person that Jimmy had gotten a deed to the subject property. He confronted Jimmy with this information and discovered that Jimmy had, in fact, claimed the disputed property in a 1995 deed. Carlos advised Jimmy that he would obtain counsel and recover the property. On January 10, 2000, the Smiths executed a deed which conveyed the disputed property to themselves. They claimed ownership of the property by adverse possession.

On February 7, 2002, the Browns acquired their record title to the surface of the subject property by a quitclaim deed from Donald and Betty Bowles and Bentley and Linda Badgett II. As a condition of this conveyance, the grantors and the Browns entered into an indemnification agreement wherein they acknowledged that the grantors may hold record title to the property, but that others also claimed ownership. The Browns agreed to fully indemnify and hold the grantors harmless from any loss, claim, damage, liability, or expense by reason of the quitclaim deed. When this quitclaim deed was executed, the Smiths were in possession of the disputed parcel.

Following a bench trial, the trial court entered its Findings of Fact, Conclusions of Law and Order on February 18, 2003. In this judgment, the trial court found that the Smiths acquired title to the disputed property by adverse possession. Moreover, the court found that the Browns did not prove their legal title to the subject property and could not extend their ownership of the property back to the Commonwealth. As a result, the court held that the Smiths owned the disputed property and invalidated the February 7, 2002 quitclaim deed that conveyed this acreage to the Browns. This appeal followed.

Since the case was tried without a jury and the trial court made specific findings of fact and conclusions of law, we must briefly address the standard by which we review this

matter. "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." CR<sup>3</sup> 52.01. A factual finding is not clearly erroneous if it is supported by substantial evidence. Owens Corning Fiberglass Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998).

Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. Janakakis-Kostun v. Janakakis, Ky. App., 6 S.W.3d 843, 852 (1999), citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972). "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." Uninsured Employers Fund v. Garland, Ky., 805 S.W.2d 116, 118 (1991).

Guided by these principles, we now address the arguments presented by the Browns in this appeal.

First, the Browns assert that the trial court erred in holding that they failed to establish legal title to the disputed property. In support of this assertion, the Browns contend that they were not required to prove their title back to the Commonwealth. We find this argument to be without merit.

In an action to quiet title, the claimant can prevail only on the strength of his own title, not on the weaknesses in

---

<sup>3</sup> Kentucky Rules of Civil Procedure.

his adversary's title. Rose v. Griffith, Ky., 337 S.W.2d 15, 17 (1960). To conclusively prove the strength of his own title, the claimant must either assert his claim by adverse possession or show paper title back to the Commonwealth. Id., citing Ratliff v. Coleman, 241 Ky. 791, 45 S.W.2d 493, 494 (1931).

Here, the Browns do not assert title to the disputed property by adverse possession; rather, they rely on paper title. In attempting to demonstrate their paper title, the Browns can only trace title to the mineral rights of this disputed parcel from 1907. The deeds of record indicate that the record title to the surface rights of this disputed parcel ends in 1950.<sup>4</sup> Under Kentucky law, the conveyance of a fractional interest in the mineral rights of real estate creates a severance of the surface rights from the mineral rights. East Kentucky Energy Corporation v. Niece, Ky. App., 774 S.W.2d 458 (1989). Our review of the record reveals that, not only have the Browns failed to trace their title to this disputed parcel back to the Commonwealth as required by Rose, but they have not produced any deeds or otherwise demonstrated any valid chain of

---

<sup>4</sup> The record reveals that, on October 16, 1950, D.B. Dozier obtained title to the entire disputed parcel from Swatiska Coal Company by a deed recorded in Deed Book 173, Page 325. On October 21, 1950, Dozier conveyed only the mineral rights to this property to Kentucky Bank and Trust Company, as recorded in Deed Book 173, Page 413. Kentucky Bank, in a deed recorded in Deed Book 204, Page 433, conveyed the mineral rights to the disputed property to West Kentucky Coal on December 9, 1950. West Kentucky Coal's predecessor, Island Creek Coal Company, deeded the surface rights to this disputed parcel to the Bowles on August 11, 1995, as recorded in Deed Book 133, Page 313.

title to the surface rights of this disputed property since 1950. Thus, we believe that the trial court correctly found that the Browns failed to establish any legal title to this disputed realty.<sup>5</sup>

Next, the Browns assert that the trial court's finding that the Smiths acquired title to the disputed acreage by adverse possession is not supported by substantial evidence. We disagree.

The basic elements of adverse possession are well-established. In order to establish title through adverse possession, 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. Tartar v. Tucker, Ky., 280 S.W.2d 150, 152 (1955); Creech v. Miniard, Ky., 408 S.W.2d 432, 436 (1965); KRS<sup>6</sup> 413.010.

---

<sup>5</sup> The Browns also argue that they were not required to prove legal title to the property back to the Commonwealth because the Smiths agreed to the admission into evidence the Ashby survey which referenced the property as being the same property conveyed in a 1950 deed from Kentucky Bank & Trust Company to West Kentucky Coal Company. We disagree. The survey was admitted into evidence as a joint exhibit for the purpose of identifying the property and assisting the witnesses in their testimony. The fact that the survey referenced a deed did not amount to an admission by the Smiths that the chain of title in favor of the Browns was proven back to the Commonwealth and did not relieve the Browns of their burden to prove such.

<sup>6</sup> Kentucky Revised Statutes.



"The 'open and notorious' element requires that the possessor 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 Co., Ky., 824 S.W.2d 878, 880 (1992), citing Sweeten v. Sartin, Ky., 256 S.W.2d 524, 526 (1953). Mere intentions or verbal expressions of a claim to property are 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. See Gatliff Coal Co. v. Lawson, Ky., 247 S.W.2d 375, 377 (1952); Warfield Natural Gas Co. v. Ward, 286 Ky. 73, 149 S.W.2d 705 (1940); D.B. Frampton & Co. v. Saulsberry, Ky., 268 S.W.2d 25 (1954). Absent proof that the possessor made physical improvements to the property, such as fences or buildings, there must be proof of substantial, and not sporadic, activity by the possessor. See Kentucky Women's Christian Temperance Union v. Thomas, Ky., 412 S.W.2d 869, 870 (1967); Price v. Ferrera, Ky., 258 S.W.2d 460, 461 (1953); Marsee v. Colson, 307 Ky. 328, 210 S.W.2d 952, 953 (1948).

The Browns argue that Carlos's activity did not sufficiently satisfy the elements of adverse possession because his activities on the property were primarily seasonal. Contrary to the Browns' arguments, however, seasonal and

substantial cultivation of the land every year could be found to be sufficiently notorious to create something in the nature of constructive continuity. Thomas, 412 S.W.2d at 870. In Thomas, the former Court of Appeals found that Thomas's actions in harvesting hay every other year, placing the property in a soil bank for four years, and raising only one occasional crop did not support his adverse possession claim because his actions were not sufficiently notorious, exclusive, or continuous. Id.

In the matter before us, however, the record is clear that, from 1966 until 1980, Carlos cultivated the property each year and raised beans, peas, and corn on this land. Since 1980, Carlos cut, raked, baled, and removed hay from this realty in the spring and autumn of each calendar year. Further, he testified that he occasionally left his equipment on the property and improved the property by installing drainage ditches in an effort to better cultivate the land, thereby increasing his hay and crop production. Carlos has also permitted his friends and neighbors, some of whom believe that Carlos owns the property, to hunt upon it.

The Smiths' activities on this disputed land were well-known to the Browns, who permitted the Smiths to remain on the property even though Jimmy believed his family owned it. Thus, for a continuous period of approximately 36 years, the Smiths have openly and freely undertaken some form of

agricultural activity on this disputed property. Hence, we believe the evidence of record supports the trial court's conclusion that the Smiths acquired title to the property by adverse possession.

The Browns next assert that the trial court erred in finding that the February 7, 2002 quitclaim deed was void pursuant to Kentucky's champerty statute. The champerty statute, KRS 372.070(1), provides as follows:

Any sale or conveyance, including those made under execution, of any land, or the pretended right or title thereto, of which any other person has adverse possession at the time of the sale or conveyance, is void; but this section does not render void any devise of land in adverse possession.

The main purpose of this statute is to prevent one with notice that land is being adversely possessed from attempting to convey that property. In other words, it attempts to avoid the selling of a lawsuit. J. Walter Wright Lumber Co. v. Baker, Ky., 395 S.W.2d 365 (1965); Johnson v. Kirk, Ky. App., 648 S.W.2d 878 (1983).

Since we have already determined that the trial court correctly determined that the Smiths acquired title to this disputed property by adverse possession, it is clear that the plain language of KRS 372.070(1) invalidates the February 7, 2002 conveyance of it from the Bowles and the Badgetts to the Browns. Therefore, the trial court correctly held that the

Browns' February 7, 2002 deed was champertous within the meaning of KRS 372.070.

Finally, the Browns argue that the trial court erred in finding that the Smiths acquired title to the entire 14.05-acre tract by adverse possession. However, given our holdings that the trial court correctly found that the Browns have failed to prove their title to any portion of this disputed property and that the Smiths acquired title to the surface rights to disputed property by adverse possession, we need not address this final issue because it is rendered moot.

The judgment of the Muhlenburg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

B.R. Paxton  
Jonathan S. King  
PAXTON & KING, PLC  
Central City, Kentucky

BRIEF FOR APPELLEES:

Ralph D. Vick  
DONAN & VICK  
Greenville, Kentucky