

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000393-MR

JOSEPH R. SPALDING;  
MARY SPALDING; AND  
BILLY SHERRILL

APPELLANTS

v. APPEAL FROM MARION CIRCUIT COURT  
HONORABLE DOUGHLAS M. GEORGE, JUDGE  
ACTION NO. 03-CI-00051

CHARLES SAPP

APPELLEE

OPINION  
AFFIRMING IN PART AND  
REVERSING AND REMANDING IN PART

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BEFORE: BARBER, MINTON, AND TACKETT, JUDGES.

BARBER, JUDGE: This appeal stems from an adverse possession action originating in Marion Circuit Court. Appellants, Joseph R. Spalding (Spalding), Mary S. Spalding,<sup>1</sup> and Billy Sherrill (Sherrill)<sup>2</sup> filed suit against Appellee, Charles Sapp (Sapp) February 19, 2003 claiming ownership of property totaling

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<sup>1</sup> Joseph R. Spalding's wife. She was not a witness at the bench trial nor gave a deposition in this matter.

<sup>2</sup> Spalding sold a portion of his property to Sherrill in January 2003. Sherrill is relying upon the Spaldings' use of the disputed property in his adverse possession claim.

approximately one-quarter of an acre<sup>3</sup> that was situated between the parties' parcels. The section in dispute is located between fields primarily used for various agricultural purposes<sup>4</sup> by the parties. Sherrill's parcel is referred to as Tract 3 on the plat map.<sup>5</sup> The Spaldings' parcel is referred to as Tract 2 on the plat map.<sup>6</sup> We first examine Sapp's adjoining parcel.<sup>7</sup>

Sapp purchased his parcel of property April 26, 1974. At that time, he was a resident of Indiana and remained as such until his retirement in 1987.<sup>8</sup> At that time, Sapp relocated to Marion County. At various periods of time, Sapp would lease the parcels to third parties for their agricultural use. Sapp, nor his lessees, used the disputed property until early 2003. We now turn to the Spaldings' parcels, including the parcel later purchased by Sherrill.

Spalding purchased his parcels at a Commissioner's sale in 1986 following a foreclosure action against the prior owner and Spalding immediately began living on the property.<sup>9</sup>

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<sup>3</sup> The section in dispute is approximately 10 feet wide and 881 feet long.

<sup>4</sup> The parcels have been used for pasturing horses, growing crops or hay, and raising livestock.

<sup>5</sup> Sherrill's property is located on the inside lower left of the plat map.

<sup>6</sup> The Spalding's property is located on the upper left of the plat map.

<sup>7</sup> Sapp's property is located on the right side of the plat map adjoining Tracts 2 and 3.

<sup>8</sup> During this time, Sapp did frequently visit his property in Marion County.

<sup>9</sup> A house was present on the property at the time of purchase.

Five wooden posts had been placed in the field<sup>10</sup> in the adjoining section between Spalding and Sapp.<sup>11</sup> Spalding presumed the posts were his boundary line. Shortly after moving in, Spalding placed iron stakes in between the wooden posts and put a single strand of electric fence wire<sup>12</sup> on the stakes and posts.

Joe Robert Buckman (Buckman) began leasing Sapp's property adjoining the Spaldings' Tract 2 in 1987<sup>13</sup> to grow corn and soybeans. In the 1990's Spalding subleased the adjoining portion of Sapp's property to his Tract 2 from Buckman for a few years. Spalding used the subleased property for additional land for his horses to graze. During this time, Spalding removed a portion of the single strand of electric fence wire to allow his horses to pass through to the subleased property. Spalding never removed any of the iron or wooden posts. When the Buckman lease terminated as to the Sapp property, the electric fence wire was put back up along the iron and wooden posts.

Spalding had a survey performed by Scott Hardin on December 1, 2002, because he was considering selling his property. Mr. Hardin placed surveyor stakes into the ground to represent the actual boundary line described in Spalding's deed

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<sup>10</sup> None of the parties were aware who originally placed these posts into the ground.

<sup>11</sup> This section was adjacent to Tracts 2 and 3.

<sup>12</sup> The electric fence was used by Spalding to keep his horses on his property.

<sup>13</sup> Date taken from copy of lease submitted by Sapp as Defendant's Exhibit 2.

and he also prepared a plat representing the same. At this point, Spalding became aware that his fence actually intruded onto the property of Sapp by approximately ten feet. The sequence of events which occurred after this discovery is disputed by the parties. Ultimately, in early 2003, Sapp removed Spalding's entire fence<sup>14</sup> and tried to straighten the wire with the surveyor stakes in order to represent the proper boundary line as described in the parties' deeds.

Suit was filed, and a bench trial was held February 9, 2004. The trial court rendered its decision August 30, 2004, holding that the Spaldings failed to meet their burden of proof relating to Tract 2, but found the burden of proof satisfied as to Tract 3. Sapp filed a motion to alter, amend, or vacate September 10, 2004.<sup>15</sup> On February 3, 2005, the trial court rendered its Order on Post-Judgment Motions which vacated its prior conclusions of law and judgment related to Tract 3 and entered judgment for Sapp. The Spaldings and Sherrill now appeal to our court.

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

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<sup>14</sup> Bordering Tracts 2 and 3.

<sup>15</sup> The trial court's order references competing motions to alter, amend or vacate; however, Spalding's motion was not included in the record.

absent clear error. Phillips v Akers, 103 S.W.3d 705, 709 (Ky.App. 2003). 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. Id.; see also Ky. CR 52.01. Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134 (Ky. 2000). Additionally, the test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

There are five elements, all of which must be satisfied, 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 notorious. Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., 824 S.W.2d 878, 880 (Ky. 1992). One may obtain a perfect title to real property by adverse possession for the statutory period of time of fifteen years even when there is no intention by the adverse possessor to claim land not belonging to him. Id. at

879-880. The party claiming title through adverse possession bears the burden of proving each element by clear and convincing evidence. Phillips, supra 103 S.W.3d at 709. We next examine each element in more detail.

The first element of adverse possession is that the possession must be hostile and under a claim of right. Property used as owners are accustomed to do shows a hostile entry which amounts to a public pronouncement of hostility to the title of the real owner. Tartar v. Tucker, 280 S.W.2d 150, 152 (Ky. 1955). Further, the character of the property, its physical nature and the use to which it has been put, determine the character of the acts necessary to put the true owner on notice of the hostile claim. Appalachian Regional Healthcare, Inc. supra 824 S.W.2d at 880, (citing Ely v. Fuson, 180 S.W.2d 90 (Ky. 1944)).

We believe the second and third elements of adverse possession that the possession must be actual and exclusive are self-explanatory. The fourth element of adverse possession is that the possession must be continuous. The one claiming adverse possession need not be present on the premises at all times. Thompson v. Ratcliff, 245 S.W.2d 592, 593 (Ky. 1952). The important consideration is whether or not the physical use of the property by the adverse possessor or his representative, the erection of structures, or the keeping of chattels thereon

demonstrates that he is asserting dominion over the property.

Id.

The final element of adverse possession is that the possession must be open and notorious. 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., supra 824 S.W.2d at 880. Mere intentions or verbal expressions of a claim to the 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. Phillips supra 103 S.W.3d at 708. An intent to exercise dominion over land may be evidenced by the erection of physical improvements on the property. Appalachian Regional Healthcare, Inc. supra 824 S.W.2d at 880, (citing Kentucky Women's Christian Temperance Union v. Thomas, 412 S.W.2d 869 (Ky. 1967)). It is not necessary that a well-defined boundary be a fence or any enclosure, but there must be some evidence of a boundary, made so by a continuous cultivation to a certain point, or in some other manner, that the claim of ownership and possession will give notice to the adjoining owner. Greenway v. Watson, 105 S.W.2d 848, 850 (Ky. 1937). We now turn to the judgments of the trial court.

First, we note that the trial court's abandonment of its initial finding as to Tract 3 does not affect the weight of the trial court's amended judgment. A trial court has unlimited power to amend its own judgments. Gullion v. Gullion, 163 S.W.3d 888, 891-892 (Ky. 2005). In rendering its decisions, the trial court stated the following in determining the Appellants failed to prove their adverse possession claim:

Tract 2<sup>16</sup>

Spalding's use of the land in dispute as to Tract 2 was not open and notorious, hostile, exclusive and continuous for a period of 15 years. Spalding fenced part of Tract 2 sometime around 1987 but removed the fence in 1990. He then subleased a portion of Sapp's property which bordered him. Also, Sapp put a temporary fence on the disputed property in 2001 which means that Spalding did not have the exclusive use of the land in dispute as to Tract 2 for a period of 15 years. In any event, the use was interrupted when Spalding subleased Sapp's property from 1990 to 1996.

Tract 3<sup>17</sup>

Spalding's use of the land in dispute as to Tract 3 was not open and notorious, hostile, exclusive and continuous for a period of 15 years. Spalding's use of Tract 3 was not open, notorious, hostile and exclusive as he quit running horses on Tract 3 approximately six years ago. Spalding's use of Tract 3 was not open and notorious, hostile,

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<sup>16</sup> Taken from the August 30, 2004, Order and Judgment.

<sup>17</sup> Taken from the February 3, 2005, Order on Post-Judgment Motions.

exclusive and continuous for a period of 15 years as Sapp would occasionally use a sickle bar mower to cut the weeds on the disputed property. Spalding's use of Tract 3 was not open and notorious, hostile, exclusive and continuous for a period of 15 years as the fence erected by Spalding laid on the ground a majority of the time and was not visible, open or notorious. As a result, this court vacates its conclusions of law and judgment granting the [Appellants'] claim for the land in the disputed section of Tract 3.

Before we more closely examine the trial court's judgment as to Tract 2, we would like to take notice that an important portion of Sapp's testimony at the February 9, 2004, bench trial was contradictory with prior testimony at a January 19, 2004, deposition.<sup>18</sup> We believe this discrepancy seriously harmed the credibility of Sapp.<sup>19</sup>

The trial court found that Spalding's sublease with Buckman as well as the sublease itself caused Spalding's use of the disputed property to be interrupted. We agree. We believe Spalding's sublease constituted permissive use of the disputed property. Possession by permission cannot ripen into title no matter how long it continues. Phillips supra 103 S.W.3d at 708. The sublease defeated any adverse possession claim the Spaldings

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<sup>18</sup> We also note that on the trial video, while on the witness stand, Sapp mouths a question then makes hand gestures (thumbs up and thumbs down) to an individual out of the camera's range to Sapp's left. This occurred during cross-examination by opposing counsel while opposing counsel had his back turned.

<sup>19</sup> Sapp offered no other witnesses at the bench trial or the depositions to support his case.

had as to Tract 2. As such, it is not necessary to examine the remainder of the trial court's judgment related to Tract 2.<sup>20</sup> We turn now to the trial court's judgment regarding Tract 3.

In its February 3, 2005, Order on Post-Judgment Motions, the trial court vacated its original judgment in relation to Tract 3 and found that the Spaldings and Sherrill failed to prove their adverse possession claim. The trial court first found that "Spalding's use of Tract 3 was not open, notorious, hostile and exclusive as he quit running horses on Tract 3 approximately six years ago." We disagree. The one claiming adverse possession need not be present on the premises at all times. Thompson supra 245 S.W.2d at 593. The important consideration is whether or not the physical use of the property by the adverse possessor or his representative, the erection of structures, or the keeping of chattels thereon demonstrates that he is asserting dominion over the property. Id. Any court, though required to follow precedent established by a higher court, can set forth the reasons why, in its judgment, the

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<sup>20</sup> However, we would like to note that we disagree with the trial court's finding when Sapp put a temporary fence up in the disputed property for his cattle in 2001. Sapp testified at the bench trial that he placed a temporary electric fence six to eight feet from the old fence on his side of the property because he did not want his cows going where they did not belong. Sapp testified to this at the bench trial while looking at the plat map which contained a notation for only one fence, the Spaldings'. Further, on the trial video, Sapp clearly pointed to the right of the Spaldings' fence away from the disputed property on the plat map when asked where his temporary fence was located. For the court to find that Sapp's temporary fence was located on the disputed property was clearly erroneous in that it was not supported by substantial evidence.

established precedent should be overruled but cannot, on its own, overrule the established precedent set by a higher court. Special Fund v. Francis, 708 S.W.2d 641, 642 (Ky. 1986).

Spalding testified that even after he quit pasturing his horses on Tract 3, he still maintained the fence and mowed up to the posts until early 2003.<sup>21</sup> The trial court's finding that Spalding's cessation of pasturing his horses on Tract 3 defeated his adverse possession claim is contrary to precedent.

Therefore, the trial court erred in relation to this matter.

The trial court next found that "Spalding's use of Tract 3 was not open and notorious, hostile, exclusive and continuous for a period of 15 years as Sapp would occasionally use a sickle bar mower to cut the weeds on the disputed property." We disagree. Sapp blatantly contradicted prior testimony from his January 19, 2004, deposition at the bench trial in relation to this matter. At his deposition, Sapp testified that he cleared out **underneath** Spalding's fence line and that he did not cross the fence. He stated, "I didn't believe in getting on somebody else's property." This was quite a contrast to his testimony at the bench trial in which he testified he crossed the fence and bushhogged the disputed portion, as well as, used the sickle bar mower under the fence as he felt the disputed portion needed it. When this

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<sup>21</sup> Testimony from bench trial and January 19, 2004, deposition.

discrepancy was pointed out to Sapp, he finally admitted that he never crossed the fence line. As stated earlier, we believe this discrepancy seriously harmed the credibility of Sapp's testimony. Further, Spalding testified at his January 19, 2004, deposition and at the bench trial that Sapp did occasionally mow under his fence, but Sapp never crossed said fence. Therefore, we believe it was error and an abuse of discretion for the trial court to find that Sapp used a sickle bar mower to cut weeds on the disputed property, because it was not supported by substantial evidence.

The trial court lastly found that "Spalding's use of Tract 3 was not open and notorious, hostile, exclusive and continuous for a period of 15 years as the fence erected by Spalding laid on the ground a majority of the time and was not visible, open or notorious." We again disagree. Spalding testified at the bench trial that even though honeysuckle did break down part of the wire on the fence it was always at least one foot off the ground and the iron and wooden posts always remained. Also, Sherrill testified at the hearing that the Spaldings' fence was clear, definite, and visible at all times.<sup>22</sup> Sapp testified at the bench trial that the Spaldings' wire laid

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<sup>22</sup> Sherrill had been familiar with the properties since Spalding's purchase in 1986. Also, Sherrill made a video of the Spaldings' fence before it was moved by Sapp and then after. Unfortunately, it was not included in the record.

on the ground probably ninety percent of the time during the last four or five years. Sapp then testified that he raised the Spaldings' wire for a reference point in a video made by Sherrill even though he was not asked about the video. Given Sapp's other contradictory testimony, we believe his testimony in relation to this issue cannot rise to the level of substantial evidence. Therefore, the trial court erred and abused its discretion in relation to this matter.

Following a review of the record, we agree with the trial court's original judgment related to Tract 3.<sup>23</sup> We believe that the Appellants satisfied each element of their adverse possession claim as to this tract. The Spaldings' possession of the disputed property adjacent to Tract 3 was hostile and under a claim of right, actual, exclusive, continuous, and open and notorious for more than the required statutory period of time.

Based on the foregoing, we agree with the trial court that the Spaldings failed to establish their adverse possession claim as to Tract 2. However, we believe the trial court erred in its amended judgment related to Tract 3. Therefore, we affirm as to Tract 2 and reverse and remand as to Tract 3 to the

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<sup>23</sup> In its August 30, 2004, Order and Judgment the trial court stated, "the Spaldings' use of the land in dispute as to Tract 3 (now owned by Sherrill) was open and notorious, hostile, exclusive and continuous for a period of 15 years. A fence was erected in 1987 on the property. This fence was never removed. The Spaldings used this tract to pasture horses and Sapp never crossed over onto Tract 3 from 1987 until 2003. Sherrill through his predecessors, the Spaldings, would own the disputed 10 foot tract by adverse possession."

Marion Circuit Court for a judgment consistent with this  
opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel Todd Spalding  
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BRIEF FOR APPELLEE:

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