

RENDERED: OCTOBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000909-MR
AND
NO. 2007-CA-000947-MR

ROBERT BRUNER; AND
GEORGETTE BRUNER, HIS WIFE APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 01-CI-00544

DOUGLAS SIZEMORE; AND
PAMELA MUSTER SIZEMORE,
HIS WIFE
APPELLEES/CROSS-APPELLANTS

OPINION AFFIRMING

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Robert Bruner and Georgette Bruner appeal from a determination of the correct location of and proper title to a disputed tract of real

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

property. Douglas Sizemore and Pamela Muster Sizemore filed a cross-appeal arguing that champerty bars the Bruners from claiming a portion of the disputed property. We affirm.

The Bruners and Sizemores are owners of adjoining property in Laurel County, Kentucky. The disputed property is a 1.85-acre tract which derived from a common grantor. The parties agreed that the Bruners have superior paper title to the 1.85-acre tract. The dispute concerns the correct location of the tract and the validity of the Sizemores' adverse possession claim. The Bruners filed suit in Laurel Circuit Court. The trial court entered a partial summary judgment. This Court vacated the partial summary judgment and remanded the matter to the trial court. *Sizemore v. Bruner*, 2004-CA-000912-MR, (rendered May 27, 2005). Upon remand, the court held a bench trial and found that the correct location of the property was the placement made by the Sizemore's surveyor, Ralph Peters. The court also found that the Sizemores owned a portion of the disputed property west of a removed fence line by adverse possession. However, the Sizemores did not present sufficient evidence of adverse possession to the east of the fence line. Both parties filed post-judgment motions and the trial court entered amended findings of fact and judgment. These appeals followed.

The Bruners argue that the trial court erred in its determination of the correct location of the disputed property in three respects: (1) by placing only two of the three corners delineated by common calls at the same location; (2) by ignoring a statutory preference for evidence provided by county surveyors over

surveyors retained for litigation purposes; and (3) that surveyor Peters relied on a separate tract owned by the Bruners rather than the parent tract in locating the property.

The standard of review in cases tried before the court without a jury is well established. “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 Rules of Civil Procedure (CR) 52.01. This rule applies to boundary disputes. *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky.App.2002). Further, “[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.” *Id.* (quoting *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184-5 (Ky.App.1987)).

In its original findings, the trial court found that three of the calls demarking a corner of the 24.84-acre tract were identical to three of the calls demarking a corner of the 1.85-acre disputed property. The deeds stated these calls as follows:

N. 85.15 E. 260 feet to a stone; thence N. 53.45 E. 314 feet to a stone; thence N. 53.45 E. 314 feet to a stone; thence N. 20.30 W. 196 feet to a pine.

The Bruners argue that there is a discrepancy in the amended findings of the trial court which places only two of the three common calls in the same location on the ground. The court also found that “[t]he surveyor for the defendants [Peters] performed a more appropriate survey and field work in locating the appropriate

calls set forth in the plaintiff's deed; and the Court accepts as correct the location of plaintiff's tract as determined by surveyor Ralph Peters on the behalf of defendant and as marked as Defendant's Plat #3." The Bruners argue that the trial court placed the common corner 130 feet south of the location determined in the original findings. However, in the amended findings, the trial court reiterated its reliance on the location as determined by Peters. The court further explained the basis of the more southerly placement as follows:

Mr. Peters, the Defendant's surveyor, has positioned the Plaintiff's tract of land about one hundred and thirty or forty (130-140) feet south of the site in which Mr. Alitzer, the Plaintiffs' surveyor, has positioned the Plaintiffs' tract of land. The Defendant's surveyor attributes the discrepancy to a mistake in the descriptive language on the face of the Plaintiffs' deed which he has substantiated by tracing the deed back in the chain of title. In addition, the Defendant's surveyor has identified errors in distance as it relates to the language set forth on the face of the Defendant's deed.

We have reviewed both the original and amended findings of the trial court as well as the testimony of surveyor Peters. The findings of the trial court are not inconsistent and are supported by substantial evidence in the record.

The Bruners next argue that the trial court improperly accepted the Peters survey because it failed to acknowledge a statutory preference contained in Kentucky Revised Statutes (KRS) 73.120 for evidence provided by county surveyors. The Bruners provided evidence from Ace Hensley, a former Laurel County surveyor. Kentucky Revised Statutes 73.120 does not create a statutory preference for evidence.

The apparent purpose of the provision of KRS 73.120 upon which the appellants rely, is to make it clear that only official surveys (charts, maps, etc.), or copies thereof, may be admitted in evidence merely upon authentication as a public record, presumptively regular and accurate, and that unofficial surveys, unless made by order of court, require preliminary proof of accuracy by the surveyor or engineer who made the proffered documents.

Gannon v. Pearl, 311 S.W.2d 184 (Ky. 1958).

Thirdly, the Bruners argue that Peters improperly determined the location of the boundary by relying on the location of a separate tract of land rather than the parent tract. Peters's testimony indicates that this was not the sole basis of his determination. Peters also explained the basis of his reliance on the separate tract. He stated that this separate tract adjoined the Bruner's first tract. The deeds in this case also called for lines and corners contained in the deeds of other adjoining properties. Therefore, Peters traced the title back farther in order to ascertain the correct location of the boundary within the fuller context. The trial court's determination of the boundary is supported by substantial evidence in the record.

Next, the Bruners argue that there was insufficient evidence to support the trial court's finding that the Sizemores acquired a portion of the disputed property by adverse possession. The Bruners argue that possession by the Sizemores was not wholly exclusive and that the trial court impermissibly allowed the Sizemores to tack the period of possession onto the previous owner's period of adverse possession.

In *Philips v. Akers*, 103 S.W.3d 705, 708 (Ky.App. 2002), this Court set forth the elements of adverse possession as follows:

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 owners interest. Further, the possession must be shown to be actual, open and notorious, exclusive, and continuous for a period of fifteen years. “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.” 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. 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.

(Internal citations omitted). Further, “the adverse possession of a grantee may be tacked on to that of his grantor to complete the statutory period.” *Cole v. Gilvin*, 59 S.W.3d 468, 475 (Ky.App. 2001)(quoting *Martin v. Kaine*, 245 S.W.2d 177, 178 (Ky. 1951)).

The evidence demonstrated that the Sizemores’ predecessor in title, Paul Muster, constructed a stock fence upon a portion of the disputed property. Between 1979 and 1994, Muster utilized the area west of the stock fence for livestock grazing. Also during this period, Muster ejected individuals from this land who were clearing timber on behalf of an adjoining landowner. After the Sizemores obtained the property from Muster in 1994, they removed the stock fence and cleared the area of trees and undergrowth in order to construct a

residence and otherwise landscape the property. The Sizemores also constructed a driveway and installed a heating and cooling system on the disputed property. No persons objected to the activities the Sizemores undertook upon this land. The improvements were completed prior to the Bruners' acquisition of their property in 2000. The Bruners did not locate the boundaries of their property or ascertain the extent of the Sizemores' claim prior to the purchase of their property. The trial court's findings are supported by substantial evidence. Further, we cannot conclude that the trial court's determination that the Sizemores acquired the area west of the stock fence by adverse possession was clearly erroneous.

On cross-appeal, the Sizemores argue that the champerty statute bars the Bruners from claiming the property that lies to the east of the stock fence. KRS 372.070(1) states:

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 words ‘adverse possession’ as used in the statute, mean that the possession must be shown to be of that character and dignity as would in the statutory period ripen into title by adverse possession.” *Tankersley v. Sell*, 311 Ky. 832, 226 S.W.2d 17, 20 (1950).

The trial court found that the activities of Muster and the Sizemores upon the land east of the stock fence were insufficient to constitute adverse

possession. The Sizemores first cleared the land in 1996 and only continued to maintain the land on approximately a yearly basis thereafter. There was no evidence that Muster undertook any activity to the east of the stock fence. The trial court found that the activities upon the property were of such a sporadic and insubstantial nature that possession was not open and continuous. Based on the substantial evidence in the record, we cannot conclude that the trial court committed clear error.

Accordingly, the judgment of the Laurel Circuit Court is affirmed in all respects.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

Tommie L. Weatherly
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BRIEF FOR APPELLEE/CROSS-APPELLANT:

John T. Aubrey
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