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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000955-MR
AND
NO. 2008-CA-001033-MR

JOHN G. WAGNER, REVOCABLE LIVING TRUST — APPELLANT/CROSS-APPELLEE

ON REMAND FROM THE KENTUCKY SUPREME COURT
2009-SC-000529-D

APPEAL AND CROSS-APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 05-CI-00070

EDWARD A. WILSON; THERESA T. WILSON; STEVEN J. BROWNING; NANCY L. BROWNING; AND SPRINGFIELD STATE BANK — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

BUCKINGHAM, SENIOR JUDGE: This Court had previously rendered an Opinion affirming in this case. *See Wagner v. Wilson*, 2009 WL 2192673 (Ky. App.)(rendered July 24, 2009). The case is now before us after the Kentucky Supreme Court granted discretionary review and remanded it to us for our reconsideration in light of *Moore v. Stills*, 307 S.W.3d 71 (Ky. 2010). Having reconsidered our first opinion, we again affirm.

The case involves a boundary dispute over a 22.3-acre tract of land in Marion County that is within the boundary of property described in each deed to adjacent farms. One of the farms is referred to as the "Jacobs farm," owned by the John G. Wagner Revocable Living Trust (Wagner), and the other farm is referred to as the "Wilson/Browning farm," owned by Edward A. Wilson, Theresa T. Wilson, Steven J. Browning, and Nancy L. Browning (Wilson/Browning).

The Jacobs farm and the Wilson/Browning farm were originally part of a larger tract. When the two farms were separated many years ago, the 22.3-acre tract in dispute became part of the Jacobs farm. Alfred and Pearl Jacobs acquired that farm in 1970, and the Wilson/Browning owners acquired their farm in 1988. When the Wilson/Browning owners acquired their farm, a registered surveyor surveyed the property prior to the closing of the sale. The survey and recorded plat incorrectly showed the 22.3-acre tract as a part of that farm. Thus, the Wilson/Browning owners' deed also included the disputed property.

Jacobs had his farm surveyed in 2000 and sold it in three tracts. Although the 22.3-acre tract was part of the Jacobs farm, it was not included as

such in the survey. Rather, that survey also showed the tract as part of the Wilson/Browning farm. Thus, although Jacobs thought he had sold the entire farm, he had not sold the 22.3-acre tract.

Wagner bought one of the tracts sold by Jacobs and soon thereafter suspected that the 22.3-acre tract was within the property deeded to Jacobs in 1970. After purchasing one of the tracts, Wagner states that he obtained an option to purchase the 22.3-acre tract from Jacobs. He further states that he exercised the option in 2003 and purchased the tract from Jacobs at that time. There is also evidence that in January 2005 Wagner purchased an assignment of interest to prosecute a claim to quiet title to the tract from Jacobs.

In February 2005, Wagner filed a Petition for Declaratory Judgment in the Marion Circuit Court. Therein, he asserted ownership to the property and sought to quiet title. Wilson/Browning filed an answer denying that Wagner owned the property, asserting their ownership under their deed, and raising the defenses of adverse possession and champerty.

A jury trial was held in February 2008, and the jury returned a verdict determining that the 22.3-acre tract was within the boundary of the property described in the deed to the Jacobs farm but also determining that Wilson/Browning owned the tract by adverse possession. Wagner appealed, and Wilson/Browning cross-appealed. We affirmed, but as noted above, the Kentucky Supreme Court granted discretionary review and remanded the case for our

reconsideration in light of the *Moore* case, which was decided subsequent to the rendering of our opinion.

In our opinion we noted the conflicting evidence presented at the trial, some of which related to a fence. Alfred Jacobs testified that he had built a fence shortly after purchasing his farm for the purpose of containing his cattle. Jacobs stated that the fence was not intended to represent a boundary fence. On the other hand, Lloyd "Butch" Hiestand, who along with his brother had been a tenant farmer for prior owners of the Wilson/Browning farm, testified that he and others had built the fence in 1955 or 1956 for the purpose of marking the boundary between the two farms. Hiestand also testified that when Jacobs purchased the farm in 1970, he (Hiestand) had taken Jacobs to the fence and told him that the fence represented the boundary between the farms. He stated that he told Jacobs this pursuant to instructions from the owner of the Wilson/Browning farm.

While Wagner and Jacobs testified that they never saw anyone use the property, David and Jerry Jacobs, sons of Alfred Jacobs, testified that they had hunted on the disputed property while it was owned by their father. Edward Wilson, his two sons, and Steven Browning testified that they had used the property for hunting, four-wheeling, horseback riding, and logging multiple times from 1988 until the present time. They also stated that they had placed a tree stand on the property for hunting purposes. Additionally, their testimony indicated that the fence in question was connected to other fences bordering the Wilson/Browning property. Furthermore, Wilson/Browning paid property taxes on

property that included the tract and posted a no trespassing sign on the property, and their cattle occasionally wandered onto the tract.

In his appeal to this Court, Wagner asserted that the trial court erred by not granting him a judgment notwithstanding the verdict on the ground that the verdict was palpably against the evidence. Wagner argued that there was insufficient evidence that Wilson/Browning's possession of the disputed property was continuous, open, notorious, and exclusive for the required 15-year period prior to the filing of the declaratory judgment action.

In our opinion affirming the trial court's judgment, we noted that a question of fact is to be considered by the jury where there is conflicting evidence. *See Dunn v. Jones*, 330 S.W.2d 932, 933 (Ky. 1960). We also cited *Lewis v, Bledsoe Min. Co.*, 798 S.W.2d 459, 461 (Ky. 1990), wherein the Kentucky Supreme Court held that a reviewing court is not "at liberty to determine credibility or the weight which should be given to the evidence, these functions being reserved to the jury."

In *Radioshack Corp. v. ComSmart, Inc*., 222 S.W.3d 256 (Ky. App. 2007), we set forth the standard of review of the denial of a motion for a judgment notwithstanding the verdict:

> When this Court reviews a trial court's decision to deny a motion for judgment notwithstanding the verdict, we apply the same standard of review that we use when reviewing a lower court's decision to deny a motion for a directed verdict. *Prichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky.App. 1987). When a trial court considers a motion for judgment notwithstanding the

> verdict, it must view the evidence in a light that is most favorable to the opposing party and give every fair and reasonable inference that can be drawn from the evidence. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985). Furthermore, the trial court may only grant judgment notwithstanding the verdict where "there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Id*.

Radioshack Corp. at 261.

Ultimately, we concluded that there was sufficient evidence for the jury to conclude that the property was adversely possessed by Wilson/Browning for the requisite 15-year period and that the trial court properly denied Wagner's motion for a judgment notwithstanding the verdict. We now review our opinion in light of the *Moore* case.

In the *Moore* case the petitioners filed a petition to quiet title based on their alleged adverse possession of a tract of wild, unimproved land. The petitioners presented evidence that they had used the property for the requisite 15-year period by hunting, fishing, biking, and riding four-wheelers on the property, as well as by building deer and turkey blinds, occasionally clearing undergrowth that obstructed shooting, and expelling uninvited hunters from the property. *Id*. at 76. The petitioners also testified that they had marked the eastern boundary line of the property by tying engineering tape to trees that grew along it and had posted "no trespassing" signs on some of those trees. *Id*. at 75.

The jury in the *Moore* case found that the petitioners had adversely possessed the property for the required period of time and awarded it to them. The

trial court, however, overturned the verdict by granting the respondents a judgment notwithstanding the verdict. The trial court reasoned that the petitioners had failed to prove that they had marked any boundary lines except the eastern one and also noted that there was no adverse possession by the mere marking of a boundary line without actual possession of the land in question. The Court of Appeals reversed the trial court and held that the petitioners had sufficiently proved that they had well-defined boundary lines and had also proved that they had reduced the disputed property to actual possession. In connection with its ruling that the petitioners had proved actual possession, the Court of Appeals also held that the Recreational Use Statute (KRS 410.190) did not operate retroactively and, therefore, was not applicable to the facts of the case.

On discretionary review to the Kentucky Supreme Court, however, the Court in *Moore* reversed the Court of Appeals and reinstated the trial court's award of a judgment notwithstanding the verdict. *Id*. at 83. The Court began by describing the elements of adverse possession through the language of the Court in *Young v. Pace*, 145 Ky. 405, 140 S.W. 555 (1911). In the *Young* case the Court held

> In order to support a title by adverse holding, three facts must be established: First, the possession must have been continuous, actual, open, notorious and peaceable for at least fifteen years; second, the exterior boundary lines of the land must be well defined, i.e., either actually enclosed or so marked that the land is susceptible of being identified by its description; and third, the possession must have been of such a character and extent

as to exclude the idea that the right to possession was in anyone else.

Id.

In regard to the use of the land, the Court in *Moore* began its analysis as follows:

> The Virginia courts, whose early exposition of the common law provided the starting point for our own common law tradition, Ky. Const. § 233, have long held that "wild and uncultivated land cannot be made the subject of adverse possession while it remains completely in a state of nature; a change in its condition to some extent is essential." *Calhoun v. Woods*, 246 Va. 41, 431 S.E.2d 285, 287 (1993) (citing *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S.E. 225, 229 (1919). This rule is consistent with our own requirement that adverse possession be evidenced by substantial activity on the land; sporadic uses, such as those indicated above, do not suffice. *Kentucky Women's Christian Temperance Union v. Thomas, supra; Phillips v. Akers*, 103 S.W.3d 705 (Ky.App. 2002). The rule is also consistent with the presumption that the sporadic use of wild lands is permissive. *Bradley v. City of Harrodsburg*, 277 Ky. 254, 126 S.W.2d 141 (1939).

Id. at 79.

The Court further stated

> Petitioner's use of the disputed property for hunting, fishing, and other recreation and their one-time removal of timber are indistinguishable from those other uses which have been held not to establish "actual" possession. Their use has in no way altered the condition of the property. It remains today the wild, unimproved land it has long been. Indeed, with the possible exception of unusual circumstances not present here, the mere recreational use of property has as its aim the enjoyment of the land as it naturally is, and thus by its nature, recreational use will be sporadic and

> insubstantial. Under our law, such use has never sufficed to establish an adverse possession.

Id.

Additionally, the Court stated

> Recreational uses, which do not alter the character of the land and so leave the owner's potential uses undisturbed, do not suffice. Otherwise, if merely posting the land and hiking or hunting on it were enough to establish adverse possession, the law would in effect be putting the trespasser on the same footing with the rightful owner of record.

Id. (citation omitted).

The *Moore* Court summarized its holding by stating that "[m]ere recreational use in sum, does not amount to 'actual' possession for adverse possession purposes, and therefore such use does not set running the KRS 413.010 limitations period." *Id*. at 80.

The Court also addressed the Recreational Use Statute. *Id*. at 80-81. That statute states in part that "[n]o action for the recovery of real property, including establishment of prescriptive easement, right-of-way, or adverse possession, may be brought by any person whose claim is based on use solely for recreational purposes." KRS 411.190(8). The statute further states that "Recreational purpose"

> includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, bicycling, horseback riding, pleasure driving, nature study, water-skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites[.]

KRS 411.190(1)(c). The Court held that although there was no case law specifically addressing the type of use the petitioners made of the disputed property, such use "is an incidental use of land and it is indistinguishable from other specific uses we have held to be incidental." *Id*. at 81. Further, the Court stated that the petitioners' use of the property was within the Recreational Use Statute, which merely codified common law and did not alter common law in any way. *Id*. The Court also held, contrary to the holding of the Court of Appeals, that the Recreational Use Statute "does not implicate the rule against retroactive legislation[.]" *Id*.

Having decided the issue of "actual" possession against the petitioners, the *Moore* Court determined that it would only briefly mention the marked boundary line issue. *Id*. at 76. In doing so, the Court noted that it had already decided the case on other grounds. *Id*. at 81. In addressing whether the petitioners had sufficiently proved a well-defined and marked boundary line, the Court held that proof that the northern and southern boundary lines had been clearly marked for the entire limitations period was lacking. *Id*. at 82.

Applying the principles set forth in the *Moore* case to the facts in this case is not an easy task. Wilson/Browning have testified that they used the property for purposes of hunting, four-wheeling, horseback riding, and logging multiple times from 1988 until the present. Under *Moore* and the Recreational Use Statue, these are mere recreational uses of the property that do not establish the

element of "actual" possession of the property. *Id*. at 79. Also, the ranging of cattle on the disputed property does not constitute actual possession of it. *Id*. at 78. In addition, "[t]he surveying and marking of a boundary, the payment of taxes, and occasional entries for the purpose of cutting timber are not sufficient to constitute adverse possession." *Flinn v. Blakeman*, 254 Ky. 416, 71 S.W.2d 961, 974 (1934) (quoting from *Griffith Lumber Company v. Kirk*, 228 Ky. 310, 14 S.W.2d 1075 (1929) (*overruled on other grounds by Warfield Natural Gas Co. v. Ward*, 286 Ky. 73, 149 S.W.2d 705 (1940)).

While such use of the property by Wilson/Browning does not constitute sufficient evidence to prove the element of actual possession, they maintain that the fact that the property was enclosed by a fence is sufficient evidence and that such fact distinguishes this case from the *Moore* case.

Wagner has questioned Wilson/Browning's assertion that the fence enclosed the disputed property. We have reviewed the trial record, particularly the portions cited to us in Wilson/Browning's reply brief that it filed prior to our initial opinion.

The trial testimony indicated that the fence was a barbed-wire fence consisting of two strands of barbed wire. The fence went through a wooded area the length of the disputed property. Further, the testimony of Butch Heistand was that the fence started at the end of an older woven-wire fence and went "almost all the way around the property." Thomas Heistand, Butch Heistand's brother who was also present when the fence was built in the mid-1950s, testified that the fence

was a mile to a mile and a half in length and that it had no breaks in it. Butch Heistand also testified that some of the property had already been fenced by other adjoining owners and that those portions were not again fenced. We conclude, based on the trial record, that the fence enclosed the property.

In *City of Hartford v. Nall*, 144 Ky. 259, 137 S.W. 1090, 1091 (1911), Kentucky's highest court held that

> While it is true that the character of a person's holding of land may be shown to be amicable, we conclude that, where the person holding has actually inclosed the land, and is using and occupying it as his own, these facts in and of themselves are sufficient, in the absence of evidence tending to show the contrary, to establish an adverse holding on his part.

Wilson/Browning cite *Johnson v. Kirk*, 648 S.W.2d 878 (Ky. App. 1983), and *Newman v. Sharp*, 248 S.W.2d 413 (Ky. 1952), in support of their argument. In the *Johnson* case the court held that the party who had enclosed the disputed property by a fence and had used it as its own for the requisite period of time owned the disputed property by adverse possession even though it had no intention of claiming anyone else's property. *Id*. at 880. The court stated:

> Although the Kirks did not intend to put their fence on someone else's property, they, in fact, did. They put the fence on a line formed by some stakes and held out to all the world that the property so enclosed was theirs. It should have been apparent to the most casual observer, and particularly to the Johnsons and their predecessor in title, that the Kirks were claiming the fenced-in property as their own.

Id. at 879.

In the *Newman* case the court stated:

> Land claimed to a well-defined boundary such as a fence, as in this case, if the possession thereof is open, notorious, adverse, and continuous for a period of 15 years or more, such possession is sufficient to sustain the claim of title by adverse possession.

Id. at 415 (quoting *Lewallen v. Mays*, 265 Ky. 1, 95 S.W.2d 1125, 1129 (1936)). The *Newman* court held that the trial court erred by not ruling as a matter of law that the property enclosed was owned by the appellant by adverse possession up to the fence. *Id*.

Years ago, in the case of *Richie v. Owsley*, 137 Ky. 63, 121 S.W. 1015 (1909), Kentucky's highest court held:

> An actual possession of land in this state may be acquired, either by a physical inclosure of the whole boundary, or by an inclosure of a part of the boundary under a claim of title to the whole, if no one else is asserting title to any part of the boundary upon which he has so entered. If he enters under a paper title, the paper may be looked to as showing the extent of his claim and possession; or, if he enter without a paper, but claiming to a marked boundary, that fact may be shown as indicating the extent of his possession. But there are certain limitations upon the rule just announced. If the entrant goes upon a boundary under a junior patent, which latter is entirely or partly within a senior grant or survey, he will be deemed to be in actual possession of only so much of the land as he actually incloses, if the owner of the senior grant is then in the actual possession of his boundary; or, if the owner of the senior grant be not in actual possession of the boundary in his grant, but enters thereon before the patentee of the junior grant has ripened a title by adverse possession, the latter will ipso facto be restricted to his actual close. Rulings of this court to the above effect are so numerous and consistent that it is not thought necessary to cite the cases here.

Id. at 1016-17.

More recently, in *Phillips v. Akers*, 103 S.W.3d 705 (Ky. App. 2002), this Court held that "(a)bsent 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." *Id*. at 708. And, in *Kentucky Women's Christian Temperance Union v. Thomas*, 412 S.W.2d 869 (Ky. 1967), Kentucky's highest court held:

> Notoriety, exclusiveness and continuity of possession are often evidenced by the erection of physical improvements on the property, such as fences, houses or other structures. We have none of those here. In their absence, substantial activity on the land is required.

Id. at 870.

Based on the above authorities, we conclude that the evidence supported the jury verdict and that the facts in this case are distinguishable from those in the *Moore* case. While there was no evidence of a fence enclosure in *Moore*, there was such evidence here.

The above authorities lead us to conclude that although the activities of the Wilson/Browning owners were insufficient by themselves to support a finding of adverse possession, the fence enclosure was sufficient to satisfy the element of "actual" possession in the adverse possession claim

Therefore, having considered our original opinion in light of *Moore v. Stills*, we again affirm the judgment of the Marion Circuit Court.

ALL CONCUR.

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