

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001457-MR

BRENDA KAY DIALS AND  
LUCILLE DIALS

APPELLANTS

v.

APPEAL FROM MARTIN CIRCUIT COURT  
HONORABLE DANIEL SPARKS, JUDGE  
ACTION NO. 93-CI-00138

MILTON DAVIS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal from a decision of the Martin Circuit

Court finding in favor of the appellee, Martin Davis. The appellants, Brenda Kay

and Lucille Dials, argued that they owned the property to which Davis claimed title

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

under the theory of adverse possession. We agree with the decision of the trial court that they did not.

### BACKGROUND INFORMATION

Lucille was married to Clay Dials (now deceased). In August of 1972, the two purchased approximately three acres of property from Jess Coleman upon which was located a cinder block house. Davis owned adjoining property and the Dials used a driveway passing through his property to gain access to their home. Davis had acquired 90 percent of his property from Hobart Evans in February of 1971. The remaining 10 percent Davis acquired in April of 1996.

In 1974/1975, Lucille traded the property with her sister who occupied the property for a couple of years. Sometime during 1974, Lucille hired Rufus Reed Survey to perform a survey of her property. While the deed to Lucille's property contained a description of three acres "more or less," the Reed survey showed ten and a half acres. Thereafter, the house located on the three or more acres was rented until the structure was destroyed by fire around 1978/1979. Davis testified at trial that Brenda Kay came onto his property and planted a vegetable garden during the time she lived on the property. He filed a lawsuit in May of 1974 as a result of her actions but the lawsuit was subsequently dismissed without prejudice due to lack of prosecution in July of 1977.

Between 1985 and 1986, Lucille's son moved a mobile home onto the approximate three acres and began to occupy it for the next two years at which time it, too, was destroyed by fire. In 1989, Lucille and her son began construction

on a house on the property. Lucille's son originally moved into the new home and Lucille moved in several years later.

In 1993, Brenda Kay came onto the property the appellants claimed title to it under adverse possession and Davis then brought suit in Martin Circuit Court. The appellants contended that they were the owners through adverse possession of the additional 7.5 acres set forth in the Reed survey.

The appellants hired Justice Land Surveying to survey the property and this survey set forth 2.77 acres as belonging to the appellants. Davis had Bocook Engineering perform a survey upon the property which indicated 1.93 acres was that of the appellants.

After a hearing, the trial court concluded that:

1. The [appellants] have failed to establish actual possession of the claimed property. They admitted that they did not fence the boundaries of the property and any use of the property was merely intermittent cultivation of the property for a garden and pasturing a horse for a brief period of time, both of small portions of the property claimed.

The [appellants], at the hearing, alleged that the Rufus Reed Survey established a well defined boundary to which they were claiming. Under the doctrine of color of title, actual possession of one part of a tract of property held under a deed that is valid on its face and extends to the entire tract described in the deed [sic]. However, the Rufus Reed Survey is not the type of instrument by which color of title can be established because it does not convey any property to the [appellants].

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2. The [appellants] have failed to establish that they held the property claimed by adverse possession continuously for a period of fifteen (15) years. The house located on the property conveyed to the [appellants] by deed burned during 1978 or 1979. It was not until 1985 when a mobile home was located in the same general location as the house. The mobile home burned two (2) months later according to the testimony of [Davis], or two (2) years later according to the [appellants]. A second house was constructed on the purchase property which was not inhabited until 1990. This lawsuit was filed during 1993, which interrupted any possession of the disputed property.

3. The [appellants'] use of the property claimed by adverse possession was not exclusive. [Davis] testified that he had cut roads, removed and sold topsoil and cut timber on a regular basis from the property claimed by the [appellants].

Based upon the above conclusions of law, the trial court entered a judgment accepting the Justice Land Survey as the accurate reflection of the extent and boundaries of the property owned by Lucille and Brenda Kay Dials. The appellants now appeal that judgment.

#### STANDARD OF REVIEW

Pursuant to Kentucky Rules of Civil Procedure (CR) 52.01, “[f]indings 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.” In appeals of property title issues, the appropriate standard is whether the trial court was clearly erroneous or abused its discretion. *Church and Mullins Corp. v.*

*Bethlehem Minerals Co.*, 887 S.W.2d 321, 323 (Ky. 1992), *cert. denied*, 514 U.S. 1110, 115 S.Ct. 1962, 131 L.Ed.2d 853 (1995). With this standard in mind, we turn to the issue of whether the trial court erred in finding there was no adverse possession of the property.

## DISCUSSION

In determining whether title through adverse possession is appropriate we must examine whether the following elements are met:

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 413.010. “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 is [sic] 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. (Citations omitted.).

*Phillips v. Akers*, 103 S.W.3d 705, 708 (Ky. App. 2002). See also *Heinrichs v. Polking*, 185 Ky. 433, 215 S.W. 179 (Ky. App. 1919); *Johnson v. Kirk*, 648 S.W.2d 878 (Ky. App. 1983).

As set forth above, the trial court found that there had been no actual, continuous or exclusive possession of the property to which there was made an adverse claim. We agree with the trial court.

The “actual possession” requirement of adverse possession claims means that the claimant must physically possess or occupy the land. *Stephens v. Kidd*, 298 Ky. 38, 181 S.W.2d 688 (Ky. 1944). The appellants assert that pursuant to the holding in *Appalachian Regional Healthcare*, 824 S.W.2d 878, their possession may be constructive if the claim is under color of title. They argue that theirs was due to the Rufus Reed survey. The trial court found, and we agree, that a survey does not purport to convey property and is not sufficient to establish actual possession. The deed under which the appellants claimed title set forth that the property was approximately three acres. A survey which claimed ten acres would not suffice to give color of title to the property owners for the remaining seven acres.

Continuity in possession is also required when making a claim under adverse possession. This requires that the occupier of the premises remain continuously and uninterrupted for the fifteen-year statutory period. *Frazier v. Banks*, 294 Ky. 61, 170 S.W.2d 900 (Ky. App. 1943). In the present case, testimony from all parties indicated that there had been two instances where the dwellings on the property had been burned and uninhabitable. As a result, there were periods of years when the appellants were not occupying the premises. Thus,

we agree with the trial court that the appellants failed to prove this prong of the adverse possession standard as well.

Finally, the trial court found that there was no exclusive possession of the property for the fifteen-year statutory period. Davis's testimony was that he had performed various tasks on the property which indicated he was the owner of the property. He testified that he had cut roads on the property, removed and sold topsoil from the property and cut timber from the property on a regular basis. All these acts interfered with any exclusive claim to the property made by the appellants and their claim under adverse possession would fail as a result. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul D. Deaton  
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Don A. Bailey  
Louisa, Kentucky