

RENDERED: FEBRUARY 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001266-MR

NORMA JEAN BALES

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 08-CI-00274

CHARLES E. HUGHES;
AND PATRICIA HUGHES

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,¹ SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Norma Jean Bales brings this appeal from Findings of Fact, Conclusions of Law, and Judgment (judgment) rendered by the Pulaski Circuit Court on May 28, 2009, adjudicating that Charles E. Hughes and Patricia

¹ 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 Kentucky Revised Statutes 21.580.

Hughes had adversely possessed a portion of an adjoining residential lot owned by Bales. We affirm.

Norma Jean Bales is the owner in fee simple of Lots 5 and 6 in the Randy Place Subdivision on Lake Cumberland in Pulaski County. Bales and her late husband acquired the real property by deed dated May 5, 1978. The Bales also constructed a home on the property sometime prior to 1984. Charles and Patricia Hughes purchased the adjoining property, Lots 7 and 8, in 1992. A home and driveway were built upon the property in 1987 by the Hughes' predecessor in title, Leon and Wanda Isaacs. At the time the Hughes purchased Lots 7 and 8, a survey was conducted which did not reveal any discrepancy with the location of the boundary line between the Hughes and the Bales' property.

Later, in 1996, other subdivision property owners caused a survey to be conducted of the subdivision. The 1996 survey revealed that some lots within the subdivision did not comport with the boundary lines as called for in the respective deeds. Relevant to this appeal, the 1996 survey revealed that the Hughes' driveway and a portion of their front lawn were actually part of the Bales' property.

The parties do not agree regarding the events that transpired immediately following the 1996 survey. Charles testified that he knew there were problems with the boundaries of several lots in the subdivision but did not know about any specific problem with the boundary line he shared with the Bales. Charles maintained that he and Norma did not discuss their common boundary line

following the 1996 survey. Conversely, Norma Bales' son, Mike Bales, testified that the boundary line between the properties was discussed immediately following the 1996 survey and that Norma gave Charles permission to encroach upon her property as long as they remained neighbors. Charles disavowed that such a discussion with Norma occurred in 1996.

In October 2005, Norma caused a survey of her property, Lots 5 and 6, to be conducted (2005 survey).² The 2005 survey indicated that the Hughes' driveway and a portion of their front yard encroached upon Norma's property. Charles testified that the first time he and Norma discussed the problem with their common boundary line was in early 2006.

In an attempt to quiet title, the Hughes filed a complaint against Norma in the Pulaski Circuit Court. Following a bench trial, the circuit court found that the Hughes:

[A]dversely and continuously possessed the property from the time of their purchase in 1992, and tacked the time from 1987 to 1992 from the Isaacs, with whom the [Hughes] are in privity, [and] the [Hughes] have possessed the property for the statutory period required by KRS 413.010.

Thus, the circuit court concluded that the Hughes acquired title to the disputed property by adverse possession. This appeal follows.

We begin our analysis by noting that findings of fact made by a circuit court in a bench trial shall not be set aside unless clearly erroneous. Kentucky

² The survey was conducted in October 2005 but the report was not prepared until February 2006. The circuit court referred to the survey as the "2005 survey" and for consistency this Court will as well.

Rules of Civil Procedure (CR) 52.01. This rule is applicable to boundary line dispute litigation. *Croley v. Alsip*, 602 S.W.2d 418 (Ky. 1980).

To sustain a claim under adverse possession, the claimant must prove by clear and convincing evidence that possession of the property is: (1) actual, (2) exclusive, (3) open and notorious, and (4) under a claim of right that is hostile to the owner, and (5) continuous for the requisite statutory period of fifteen years.

Appalachian Reg'l Healthcare, Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878 (Ky. 1992).

Norma contends that the circuit court erred by determining that the Hughes had adversely possessed the disputed property. Norma specifically contends that the Hughes' possession was neither exclusive nor continuous for the statutory period of fifteen years.

In the case *sub judice*, the record indicates that the Hughes purchased Lots 7 and 8 in 1992. The Hughes' predecessor in title, the Isaacs, built the present home and driveway upon Lots 7 and 8 in 1987. Also, Charles testified that he first became aware of a boundary line issue in 2006 as the result of the 2005 survey and that he possessed the disputed property under claim of ownership until that time. Although there was evidence that Norma gave the Hughes permission to use the disputed property after the 1996 survey, the evidence was conflicting, and the circuit court found the contrary evidence more compelling:

The Court makes the finding that, according to the required standard of law, [the Hughes] were not aware of the problems with their common property line with

[Norma]. . . . Further, [the Hughes'] behavior never changed after the Ernst survey and they continued to act as if they owned the property including the driveway and the southern portion of the yard. [Norma]'s son admits he did not start using the driveway for parking cars and stacking wood until after the 2005 Daulton survey. The driveway and southern portion of the yard were treated as belonging to the [Hughes] until the results of the 2005 Daulton survey were received. [Charles] Hughes only recalls a [sic] discussing a problem with the property line in 2006, after the Daulton survey, when he was told [Norma] was not going to make an issue out of it as long as they were neighbors. [Charles] Hughes additionally testified that [Norma] never made any claim to the property prior to the Daulton survey. The behavior of the parties before the Daulton survey is very revealing and persuasive to this Court as it is consistent with the [Hughes] not having actual knowledge of any problems with their property line. (Citations omitted.)

As the circuit court possesses the sole authority as fact finder to assess the weight and credibility of evidence, the evidence is more than sufficient to support the finding that the Hughes exclusively possessed the disputed property for the statutory period of fifteen years. *See Ironton Fire Brick Co. v. Burchett*, 288 S.W.2d 47 (Ky. 1956).

Additionally, Norma contends that the Hughes did not continuously possess the disputed property for the statutory period of fifteen years. Specifically, Norma asserts that the Hughes' continuous possession was interrupted by their annual stays in Florida during the winter months beginning as early as 1987. As explained in *Thompson v. Ratcliff*, 245 S.W.2d 592, 593 (Ky. 1952), the element of continuous possession "does not mean that the disseizor in person need be present on the premises at all times." Rather, the important consideration is whether the

claimant continues to assert “dominion over the property.” *Id.* at 593. The *Thompson* Court further recognized that a claimant’s continuous possession of property may only be broken by “(1) an act of the real owner; (2) intrusion of a stranger; or (3) abandonment by the occupant.” *Id.* at 593.

Upon the issue of continuous possession, the circuit court specifically found:

[T]he Court will deal with the claim that [the Hughes] have not occupied the contested property continuously. [The Hughes] admit to spending their winters in Florida. They would usually leave in December and return in February. However, by 2002, they were leaving by October. (Citations omitted.)

.....

[The Hughes] have lived in their Kentucky home for approximately 8 to 9 months out of each year. The nature of the home, i.e. being on Lake Cumberland, makes it such that seasonal use is common in the area. Nonetheless, [Norma] knew of [the Hughes’] use of the driveway and southern portion of the yard and knew the [Hughes] would return in early [s]pring to begin the next season at their employment with a marina. [The Hughes’] use was sufficiently open and notorious to put [Norma] on notice that the [Hughes] thought the driveway and southern portion of the yard were owned by them. [The Hughes] even took care of the grass on the southern portion of the yard and [Norma], or her son, only mowed just that portion of the lawn after the 2005 Daulton survey. The Court finds the [Hughes] have met the continuous element of achieving title by adverse possession. (Citations omitted.)

Here, the evidence was sufficient to demonstrate that the Hughes continued to assert “dominion over the property” despite their winter stays in

Florida. Furthermore, the Hughes' possession of the disputed property was not broken by an act of the Bales, an intrusion by a stranger, or abandonment by the Hughes. *See Thompson*, 245 S.W.2d 592. Thus, there were sufficient facts to demonstrate that no break in the Hughes' possession of the disputed property occurred from 1987 to 2006 and that their possession was continuous for at least fifteen years.

Upon the whole, we conclude that sufficient evidence exists to support the circuit court's finding that the Hughes exclusively and continuously possessed the disputed property for the statutory period of fifteen years. As such, we do not think the circuit court erred by holding that the Hughes adversely possessed the disputed property and there was otherwise sufficient evidence admitted to support the judgment.

For the foregoing reasons the Findings of Fact, Conclusions of Law, and Judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

D. Bruce Orwin
Somerset, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEES:

John B. Adams
Somerset, Kentucky