

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001982-MR

JAMES HALE AND
JOANN HALE

APPELLANTS

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 10-CI-00011

BILLY HALE, JEREMY HALE,
CHRIS HALE, ERIC HALE, VANESSA HALE,
MICHELLE HALE, BESSIE HALE AND
GWENDOLYN HALE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, MAZE AND THOMPSON, JUDGES.

MAZE, JUDGE: Appellants, James and Joanna Hale, appeal from an order of the Breathitt Circuit Court granting a motion for directed verdict in favor of Billy, Jeremy, Chris, Eric, Vanessa, Michelle, Bessie and Gwendolyn Hale (collectively,

“Appellees”) in an action for adverse possession. James and Joanna also appeal from the jury’s verdict for the Appellees on their remaining claims. After thorough review of the record in this case, we find no error on the part of the trial court or the jury in their respective determinations. Therefore, we affirm.

Background

On January 11, 2010, James and Joanna filed the present suit seeking their adjudication as owners of four contiguous tracts of land near Jackson, Kentucky, identified as Tracts I, II, III and IV. Tract I came into Appellees’ possession through the last will and testament of their father, Beckham Hale in 1991. This tract is located across a highway from the other three tracts. Tracts II and III lie immediately across the highway from Tract I. Tract II came to the Appellees through the same instrument which conveyed Tract I, while Victor Hale conveyed Tract III exclusively to Billy Hale in 1974. Tract IV is an expansive tract of mostly hillside land adjacent across Quicksand Creek from Tracts II and III. Tract IV also came to Appellees through the will of Beckham Hale. A jury trial on James and Joanna’s adverse possession claim regarding these tracts occurred on September 29, 2011, at which the following facts were revealed.

At some time prior to 1993, James moved in with his grandfather, Victor Hale, who resided on Tract III. James testified that, while living on Tract III with his grandfather, he raised a garden on that tract, as well as part of Tract II, which was also owned by Appellees. James testified that he also cut firewood from trees located on Tract IV and cleared foliage from Tract I. Around 1993,

Victor Hale entered a nursing home, leaving James living on the land. Shortly thereafter, James cleared an area and placed a mobile home on Tract II in which he and his wife then lived. James continued tending a garden and raising chickens on this property, as well as clearing brush and foliage on Tracts II and III.

James's adult sons, James II and Spence, testified at trial that they joined their father on Tract II in 1993 and 1995, respectively. Following their arrival, the boys assisted James with various projects, including demolition of Victor's former residence on Tract III and expansion of the mobile home. The boys further testified to using Tract IV primarily for recreational purposes, such as hunting until 1998 when, along with other tracts, it was fenced to permit cattle to graze freely. Other projects on the property including the construction of a tool shed, a hog lot, feed shed and cattle barn.

In 2003, James and Joanna purchased a new mobile home and placed it in a location where it straddled the boundary between Tracts II and III. The old mobile home on Tract II was left empty until James's eldest son occupied it, which he continued to do so at the time of trial. James testified that, throughout the time during which he lived and worked upon these tracts, he never provided written notice to the title owners (other than Victor) that he and his family were on or using the four tracts of land. James further testified that he was also never granted express permission. James assumed responsibility for current and unpaid tax bills on the properties. Appellees testified that several family members lived on Tract I throughout the years, including while James lived on Tract III and tended to Tract

I. Two of the Appellees, Jeremy and Christopher, further testified that they were aware of James's occupancy of the property and that the rest of the family assumed James could and would remain on the property; and a third, Billy, testified that he was aware of the various activities and improvements James had undertaken on the properties. No evidence presented at trial indicated that James and Joanna did anything to prevent the title owners of any of the four tracts from entering upon the land.

At trial, during cross examination, James's sons addressed various conversations they had with Appellees regarding reimbursement for tax bills they had paid and possible purchase of the tracts in question. These conversations included emails between Appellees and James's youngest son, Spence. The emails, entered as exhibits, were cordial in nature and discussed the removal of liens James had placed on the property following his payment of delinquent and current tax bills, and also spoke of possible negotiation for purchase, or division, of the various tracts. One email, dated July 17, 2007, from Jeremy Hale to Spence, stated, in part, "I can't say enough how we appreciate what [James] and you have done for us after our dad died. My dad really appreciated James . . . living on the land and taking care of it for these many years."

At the close of James and Joanna's proof, Appellees moved for directed verdicts on all counts. The trial court granted Appellees' motion as to Tracts I and IV only. In doing so, the trial court specifically referenced the emails between Appellees and Spence. Regarding these emails, the trial court indicated

that James and Joanna's possession of the land could not be hostile if they had been permitted to be on the land and were, at one time, in negotiation with the owners of the tracts regarding payment of tax bills and purchase of the property. The court also expressed its belief that cleaning a cemetery and clearing brush on Tracts I and IV was insufficient to prove the elements of adverse possession, mainly because it does not indicate any hostility or claim of right by James and Joanna.

Following the entry of the trial court's partial directed verdict, the matter proceeded to the jury regarding Tracts II and III. The jury returned a verdict in favor of the Appellees. Appellants' appeal of both results now follows.

Analysis

On appeal, Appellants' argument is two-fold: 1) The trial court improperly granted a directed verdict in favor of Appellees pertaining to Tracts I and IV and 2) the jury's verdict went against the weight of the evidence presented at trial. Following a brief discuss of the law relevant to both arguments, we will address these arguments in turn.

To prove a claim of adverse possession, a plaintiff must prove that his possession of the property in question was, for a period of fifteen years, (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous. See *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky. 1955). A plaintiff must prove these elements by clear and convincing evidence. See *Commonwealth, Dep't of Parks v. Stephens*, 407 S.W.2d 711 (Ky. 1966).

“While occupancy of realty represents actual possession, it must be adverse or hostile to the rights of the title owner, and possession by permission cannot ripen into title no matter how long it continues.” *Phillips*, 103 S.W.3d at 708. “Mere intentions or verbal expressions of a claim to property [are] 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.” *Id.* (citing to *Gatliff Coal Co. v. Lawson*, 247 S.W.2d 375, 377 (Ky. 1952); *Warfield Natural Gas Co. v. Ward*, 286 Ky. 73, 149 S.W.2d 705 (1940); *D.B. Frampton & Co. v. Saulsberry*, 268 S.W.2d 25 (Ky. 1954)).

Going even further, there must be proof of substantial, and not sporadic, activity by the possessor. *Phillips*, 103 S.W. at 708 (citing *Kentucky Women's Christian Temperance Union v. Thomas*, 412 S.W.2d 869, 870 (1967)). For instance, the occasional cutting of timber or the mowing of grass even along with payment of taxes has been held insufficient adverse holding to acquire title by adverse possession. *Id.* at 709 (citing to *Noland v. Wise*, 259 S.W.2d 46, 48 (Ky. 1953) (*quotations omitted*); *Vaughan v. Holderer*, 531 S.W.2d 520, 522 (Ky. 1975)). This Court has further held that, “[s]tronger evidence of hostile possession with a clear, positive assertion of an adverse right is required where there is a family relationship between the parties than where there is no such relationship.” *Id.* at 710.

I. Directed Verdict

In *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204 (Ky. App. 2009), this Court stated the appropriate standard of review of a ruling on a motion for a directed verdict. “When a directed verdict is appealed, the standard of review on appeal consists of two prongs. The prongs are: ‘[A] trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ.’”

Daniels, 300 S.W.3d at 215 (citing *Bierman v. Klapheke*, 967 S.W.2d 16, 18–19 (Ky. 1998)). “A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made.” *Id.* (citing *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988)) (internal citations omitted).

If there is conflicting evidence, it is the responsibility of the jury, the trier of fact, to resolve such conflicts. Therefore, when a directed verdict motion is made, the court may not consider the credibility or weight of the proffered evidence because this function is reserved for the trier of fact. *Hornung*, 754 S.W.2d at 860 (citing *Cochran v. Downing*, 247 S.W.2d 228 (Ky. 1952)).

Moreover, “[i]t is well argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict.” *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968). Hence, “a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.” *Bierman*, 967 S.W.2d at 18 (citing *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984)).

Contrary to James's assertion on appeal that "proof was plentiful" to allow the case regarding Tracts I and IV to go to the jury, very little evidence existed in the record regarding his truly adverse possession of these tracts. James testified that he cleared portions of Tract I with a dozer sometime around 2005 or 2006. James expressed uncertainty as to when he commenced other activities on that tract, and his sons' testimony shed no additional light on the matter. For example, Spence testified that he never did any mowing or clearing on Tract I. Additionally, James testified that the only activity he undertook on Tract IV more than fifteen years prior to suit was the collection of firewood. His sons' testimony regarding Tract IV indicated that prior to 1995, that property was used only for recreational purposes, such as hunting and four-wheeling. James II testified that the property was eventually fenced and used for grazing cattle, but not until around 1998, twelve years before the suit was filed in 2010. Spence's testimony corroborated James II's, stating that the land was fenced and used for cattle somewhere between thirteen and fourteen years prior to trial in 2011.

This being the totality of the evidence presented at trial regarding these tracts, James and Joanna failed to prove at least one essential element of adverse possession, that they possessed Tracts I and IV for at least fifteen years prior to the filing of their suit in January 2010. While there may have been conflicting evidence regarding other elements, such as the hostility of their possession and whether their actions on these tracts constituted actual possession,

James and Joanna's failure to prove that they possessed the land for the requisite period of time prior to suit meant that there was "a complete absence of proof" regarding this very crucial fact. Hence, there remained no issue for a jury to resolve regarding that fact and, though for different reasons than the trial court stated on the record, we find that directed verdict was appropriate.

II. Jury Verdict Regarding Tracts II and III

James and Joanna next argue that, despite testimony and documentation in the record that they undertook numerous activities and improvements upon Tracts II and III, that the jury inexplicably found that he had not adversely possessed those tracts, going against the weight of the evidence presented. We review this issue with the understanding that, where under the evidence as a whole, it was not clearly unreasonable for the jury to find as it did, its verdict must be upheld. *Hargett v. Dodson*, 597 S.W.2d 151, 153 (Ky. App. 1979) (citing to *Columbia Gas of Kentucky v. Maynard*, 532 S.W.2d 3 (Ky. 1976)).

At trial, and on appeal, James and Joanna go to great lengths to prove their numerous and continuous activities upon the tracts over which he now claims adverse possession. However, as the trial court found when it granted directed verdict on Tracts I and IV, James and Joanna presented little, if any, evidence at trial that his possession of Tracts II and III was truly hostile. On appeal, James provides little evidence which would tend to show that his presence on Appellees' land was truly hostile or that he actively prevented the Appellees from entering

upon their own land. On the contrary, exhibits establishing on-going communications between James's son and Appellees regarding use of the land, payment of taxes and possible purchase of the land indicate a permissive and cooperative relationship between the family members.

Given this relationship between the parties, and considering the resulting higher burden of proving the hostility of possession, legitimate questions existed regarding that crucial element of James and Joanna's adverse possession claim. Therefore, it cannot be said that the jury's verdict in the Appellees' favor was "clearly unreasonable." Indeed, the extent of James's and his son's activities on Tracts II and III was greater than Tracts I and IV; hence, the validity of their adverse possession claim was for the jury to decide. However, the testimony at trial failed to address vital issues concerning at least one crucial element of the claim. This being the case, it was not unreasonable for the jury to conclude that the evidence James and Joanna presented in support of their adverse possession claim was less than clear and convincing.

Conclusion

We conclude that the trial court did not err in granting directed verdict in favor of Appellees concerning Tracts I and IV, as there were fatal legal defects in James and Joanna's case which could not be resolved by a finder of fact. We also find that the jury's verdict the remaining tracts did not go against the weight of the evidence, as it was not unreasonable to conclude that this evidence fell short of

being clear and convincing. Accordingly the order of the Breathitt Circuit Court and the jury verdict in this case are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Melissa C. Howard
Jackson, Kentucky

BRIEF FOR APPELLEES:

Darrell A. Herald
Jackson, Kentucky