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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000648-MR

CHARLES YONTS and
JENNY LYNN YONTS — APPELLANTS

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAM WRIGHT, JUDGE
ACTION NO. 07-CI-00148

REED KISER; THE ESTATE OF
CHRISTINE KISER; RICHIE KISER;
and MEDRA KISER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: Charles and Jenny Lynn Yonts appeal from a judgment of the Letcher Circuit Court determining that .27 acres of their property boundary belongs to their neighbors, Richie and Medra Kiser, based upon adverse possession. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In 1984, Charles and Jenny Lynn Yonts purchased an approximately 100-acre tract of surface land in rural Letcher County, Kentucky. Only part of the southern boundary of the Yontses' tract is at issue in this matter, and the relevant part of that boundary is described in one of their predecessors' deeds.[1]

> Beginning at a stake in Bill Moore Branch 424' below the mouth of Cross Branch on line of Vincent Boreing land, corner to Parcel No. 8, Consolidation Coal Company to Mineral Development Company (station 22415 of the Elk Horn Coal Corporation surveys), thence S 59 22 E 432.78 feet to a stake, corner to Parcel #7, Consolidation Coal Company to Mineral Development Company, and on outcrop, Elkhorn [sic] seam of coal; thence with lines of Parcel #7 and outcrop, reversed, S 3 36 ½ W 138.21 feet to a stake; thence S 55 04 ½ W 183.33 feet to a stake, witness S 39 45 W 5.10 feet to a maple; thence S 54 35 W 42.52 feet to a stake; S 38 55 W 49.45 feet to a stake; S 25 12 ½ W 176.45 feet to a stake; S 22 01 ½ W 159.60 feet to a stake; S 18 32 W 74.01 feet to a stake; S 00 15 W 87.82 feet to a stake, witness N 44 55 E. 3.70 feet to a chestnut; thence S 2 08 W 54.38 feet to a stake; S 14 36 E 52.32 feet to a stake; S 49 E 46.36 feet to a stake; N 46 13 ½ E 155.19 feet to a stake; N 35 40 E 179.96 feet to a stake; Witness N 22 20 W 1.43 feet to a dogwood; thence N 49 32 E 149.14 feet to a stake; **S 54 21 E 34.76 feet to a stake; S 28 40 E 141.73 feet to a stake**; S 15 47 ½ E 157.93 feet to a stake; S 10 20 E 49.05 feet to a stake; S 48 22 E 68.50 feet to a stake; witness S 6 45 E 4.35 feet to a black oak; **thence leaving the cola outcrop N 16 25 E 126.75 feet to a tack in the root of a large beech witness V on same**; thence N 15 25' E 183.78 feet to a tack in a small oak stump [. . .]

(Emphasis added.)

[1] In is undisputed that Charles and Jenny Yonts produced a valid chain of title. Their deed, which is filed in Deed Book 269, Page 515 in the Letcher County Court Clerk's office, does not describe the portion of their southern boundary at issue, but instead incorporates by reference a description given in one of their predecessor deeds appearing in Deed Book 105, Page 103.

Part of the southern boundary of the Yontses' tract borders a tract owned by the Kisers, and their respective tracts share a common grantor. With that said, a survey commissioned by Charles and Jenny Yonts, entered into evidence, depicts the extent of the Yontses' boundaries along with a fence line erected by the Kisers which cuts into part of the Yontses' boundaries. The Kisers' fence line encompasses .27 acres of the Yontses' tract and appears to incorporate that acreage into the Kisers' tract. Specifically, it begins at a point located about midway between the two stakes described in the calls (boldfaced above) of "S 54 21 E 34.76 feet to a stake; S 28 40 E 141.73 feet to a stake[.]" From that point, the fence line goes in a south-easterly direction through the Yontses' tract until it intersects (approximately) with the second of the points boldfaced above (*i.e*, the "tack in the root of a large beech"), continuing on in a more easterly direction away from the Yontses' boundaries.

On May 7, 2007, the Yontses filed a quiet title action in Letcher Circuit Court against the Kisers regarding the above-referenced .27 acres. The Kisers responded with a counterclaim of adverse possession regarding this acreage, and also asserted that it was incorporated within the boundaries described in their own deed. Thereafter, following a period of discovery and a bench trial, the circuit court entered a judgment in favor of the Kisers making the following relevant findings of fact and conclusions of law:

FINDINGS OF FACT

. . .

7. There was testimony that the Defendants began to fence the property in question in 1980 and in 1985 or 1986, an electric fence was installed by the Defendants. During this period of time and to present date, the Defendants have used and continue to use the property in question to pasture animals. Therefore, the Court finds that there was fencing that held livestock since at least the mid 1980's and in order to hold livestock, the area must be fenced in totally.

8. There was testimony from the Defendants' side that the fence as it now is, is where they had it for the years since the early 1980's.

9. There was testimony from the Plaintiffs' side that a number of people have been out hunting and doing other things and had not seen the fence. However, the Court finds that this is not that unusual for an individual to not see a fence especially if one is not looking for a fence.

CONCLUSIONS OF LAW

The evidence in this matter is that there was fencing that held livestock since at least the mid 1980's and this seems to be undisputed. If the livestock is not fenced in totally then one can't hold them. The question becomes where the fence runs. According to the maps prepared by both land surveyors, the physical location of the fence appears to be identical. Although there was testimony from the Plaintiff's side that there were people on the property doing things who had not seen the fence, the Court does not find that such evidence outweighs the testimony of the Defendants as to where the fence line ran.

Adverse possession requires possession of land that is: (1) hostile and under claim of right; (2) actual; (3) exclusive; (4) continuous; and (5) open and notorious and that the elements of adverse possession must be maintained for [sic] statutory period of 15 years.[2] This

[2] This is an accurate summary of the elements of an adverse possession claim in Kentucky. *See Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky.1955).

> Court finds that the boundary as surveyed by the Plaintiffs' surveyor is that as described in the deeds referred to above[3] but this Court concludes that there has been adverse possession as the fence crosses the point and that because of that, that would mean a new property line.
>
> **JUDGMENT**
>
> IT IS THEREFORE ORDERED AND ADJUDGED that the property line between the Plaintiffs and Defendants shall be the fence as depicted on Plaintiffs' map previously identified as Plaintiffs' Exhibit 2. A portion of the aforesaid map showing the fence line is attached hereto and incorporated herein by reference. Judgment on the ¼ acre goes in favor of the Defendants, Richie Kiser and Medra Kiser,[4] based on adverse possession.

The Yontses now appeal the circuit court's finding of adverse possession. Additional facts will be discussed as they become relevant within the context of our analysis.

STANDARD OF REVIEW

This matter was tried without a jury and the trial court made specific findings of fact and conclusions of law, pursuant to Civil Rule (CR) 52.01. 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. *Id*. A factual finding is not clearly erroneous if it is supported by

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[3] The "deeds referred to above" is a reference to the Yontses' and Kisers' respective deeds.

[4] Richie Kiser is the son of Reed and Christine Kiser, and Medra Kiser is Richie's wife. As noted *infra*, Reed and Christine began the period of adverse possession in the mid-1980's, but deeded their interest in the .27 acres at issue to Richie and Medra on March 7, 2006. Therefore, at the time of this judgment (March 7, 2012), Richie and Medra held any interest in the .27 acres that Reed and Christine might have acquired.

substantial evidence. *Owens Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Id*. "It is within the province of the fact-finding to determine the credibility of the witnesses and the weight to be given the evidence." *Uninsured Employers Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991).

ANALYSIS

Before we delve into the substantive arguments raised by the Yontses, we pause to address a procedural argument the Yontses have raised regarding the quality of the circuit court's judgment. The Yontses point out in their brief that "No findings were specifically made that the [Kisers'] possession was hostile, continuous, open and notorious."

Sufficient findings in this regard are implicit in the fact that the circuit court determined that the Kisers were the owners of the .27 acres by virtue of adverse possession. And while we prefer that trial courts include findings of fact and conclusions of law in their rulings—they certainly make review by an appellate court much easier and more meaningful—failure to include those findings and conclusions is not automatically indicative of arbitrariness, unreasonableness, unfairness, or application of the wrong legal standard. Such a failure, absent a motion at trial requesting findings of fact, is not grounds for reversal. CR 52.04. No such request was made of the circuit court. The proper appellate approach when the trial court fails to make express findings of fact is to

engage in a clear error review by looking at the record to see if the trial court's ruling is supported by substantial evidence. *See Miller v. Eldridge*, 146 S.W.3d 909, 921-22 (Ky. 2004).

With this in mind, the substantive arguments presented by the Yontses deal with whether the Kisers offered evidence to support the "continuous," "open and notorious," "exclusive," and "hostile" elements of their claim of adverse possession.

As it relates to the "continuous" element, the Yontses argue that while their survey accurately depicts the location of the Kisers' fence and demonstrates that the Kisers' fence encompasses .27 acres of the Yontses' tract,[5] the Kisers offered no evidence supporting that their fence existed in that location prior to March 7, 2006, the date that Reed and Christine deeded their interest in the .27 acres to Richie and Medra. The Yontses' argument in this vein is based upon the fact that the Kisers' fence is made of paneling, and upon the Kisers' testimony that the paneling in question was installed in 2006.

The problem with this argument, however, is that it ignores other evidence of record—evidence the circuit court found persuasive—indicating the Kisers' fence 1) has existed in the same location since the mid-1980's, and 2) had been constructed out of materials *other than paneling* prior to 2006. To this effect, Dwight Holbrook (the owner of a tract that adjoins both the Yontses' and Kisers'

[5] As previously noted, the Kisers argued that the boundaries described in their own deed incorporated the .27 acres. However, the circuit court held that this acreage was within the Yontses' tract. The Kisers filed no cross-appeal and have raised no argument contesting that holding.

tracts) testified that the Kisers' fence had existed in the same place since 1985; the Kisers had upgraded it; since 1985 to the present it had been upgraded and replaced by the Kisers with barbed wire, woven wire, panels, and that it had even been electrified for seven or eight years during that period of time; and that the Kisers have constantly used the fenced-off area to pasture a variety of animals, including ponies, cattle, goats, and horses, since about 1982. Dwight's son, Glennis Holbrook (who testified that he had grown up near the disputed .27 acres and hunted in the area), gave similar testimony, as did Alan Williams (another of the Yontses' and Kisers' neighbors), and various members of the Kiser family (Reed Kiser and his sons, Hatler and Richie Kiser) who testified to having personal knowledge of the fence and the livestock kept in the area. Substantial evidence therefore supports that the Kisers' possession of the .27 acres was continuous.

As it relates to the "open and notorious" element, the Yontses argue that the Kisers' possession of the .27 acres was "clandestine." In support, they point out that Charles Yonts testified that he never saw the Kisers' fence until March, 2006, and that the Kisers' fence was in an area "grown up with vegetation and trees."

However, whether the Yontses did or did not actually see the Kisers' fence is not dispositive of the circuit court's adverse possession ruling because the elements pertain to the conduct of the claimant in possession, not the non-possessory title holder. Thus, "[i]t is the legal owner's knowledge, either actual or *imputable*, of another's possession of lands that affects the ownership."

Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878, 880 (Ky. 1992) (citing Am.Jur.2d Adverse Possession, § 71 (1986); emphasis added). Moreover, "the character of the property, its physical nature and the use to which it has been put, determine the character of the acts necessary to put the true owner on notice of the hostile claim." *Id*. (citing *Ely v. Fuson*, 297 Ky. 325, 180 S.W.2d 90 (1944)).

Here, Reed Kiser testified that he had placed "no trespassing" signs in the area of the fence beginning in 1985. Dwight Holbrook testified that he never had any problems seeing the Kisers' fence since the time it was erected, that he occasionally observed the Kisers weed-eating the area around the fence when it existed as an electric fence,[6] and that, as he understood it, the Kisers' fence was very close to the boundary between the Kisers' and Yontses' tracts. Likewise, Alan Williams testified that he had no difficulty seeing the Kisers' fence since it was erected in 1985. As noted previously, both Holbrook and Williams observed that the Kisers had been pasturing livestock in the area for over fifteen years beginning in about 1985. And, both testified that they regarded the property inside the Kisers' fence as belonging to the Kisers. Maintaining a fence and the immediate area around it and pasturing livestock within the fence line are, we believe, clear examples of uses accustomed to rural land "grown up with vegetation and trees." Furthermore, we believe that Williams' and Holbrook's

[6] During the course of their testimony, the Kisers each explained that while their fence existed as an electric fence for seven or eight years, it was necessary for them to clear weeds away from it because excessive undergrowth would prevent the electric fence from functioning.

testimony supports that the Kisers' conduct was sufficient to put the Yontses on notice of the Kisers' possession. Accordingly, substantial evidence of record supported that the Kisers' possession was "open and notorious" for the purpose of adverse possession.

As it relates to the "exclusive" element, the Yontses merely offer an assertion that the Kisers' possession of the .27 acres was not exclusive. The Yontses ignore the evidence, discussed above, indicating that the Kisers fenced this area and pastured livestock in it for over fifteen years; furthermore, the Yontses fail to proffer any evidence of the .27 acres being occupied or controlled by anyone other than the Kisers. Therefore, to the extent that the Yontses have argued that the circuit court erred in this respect, their argument is without merit.

Finally, the Yontses argue that the Kisers' fencing of the .27 acres and pasturing of livestock on the property fails to satisfy the "hostile" element of adverse possession. This, they assert, is because: 1) the Kisers testified that they only intended to fence in their own property; 2) the calls in the Kisers' and Yontses' respective deeds demonstrate that the Kisers never received a conveyance of the .27 acres; and 3) the Kisers' fencing of the .27 acres was therefore the result of a mistake, rather than a claim of right.

We would respond, however, by quoting the following rule of law from *Heinrichs v. Polking*, 185 Ky. 433, 215 S.W. 179, 181-182 (1919):

> The intention with which the occupation is made always determines and fixes its character as being adverse or otherwise, and not the fact, that the occupation is based

> upon a mistake or in other words, the fact, that the occupation is based upon a mistake, does not prevent it from being adverse, if the intention is to claim and hold the land, as one's own, up to a mistaken line, if the occupant claims the line to be the true one, and that his deed embraces the land.

An application of this rule is found in *Johnson v. Kirk*, 648 S.W.2d 878 (Ky. App. 1983). There, the claimants asserting adverse possession only intended to fence in property that they owned pursuant to the calls in their deed; thought that they put their fence on their property line; and intended to hold all of the property that was enclosed in the fence as their own. The Court held that the fact that the claimants later discovered their error in putting their fence on someone else's property in no way changed their intention at the time they erected their fence, and that their intention was therefore sufficiently hostile for the purpose of adverse possession. *Id*. at 880.

Likewise, in *Mudwilder v. Claxton*, 301 S.W.2d 5 (Ky. 1957), the claimants asserting adverse possession believed that an old fence was the northern boundary of their own deeded property, and they exclusively used the property enclosed by the fence (which was overgrown with bushes, weeds and trees) as pasture land for cattle. *Id*. at 4. In 1950, approximately thirteen years after acquiring their property, the claimants learned that the old fence was not their true boundary line and that a small strip of the land they had been using was actually within the calls of their neighbors' deed. *Id*. Nevertheless, the former Court of Appeals held that the claimants had effectively asserted a claim of right to the land

in question before 1950 because 1) they had openly used the land in question prior to that date; 2) they testified that they had intended to take possession of "everything inside the fence" when they did so; and 3) there was no evidence to show that the claimants had either read their own deed or had intended to claim to the fence only in the event it proved to be the true boundary. *Id*.

Here, the Kisers testified that when they erected their fence, they believed they had erected it within the boundaries specified in their own chain of title.[7] The testimony and other evidence support that the Kisers intended to hold all of the property that was enclosed in their fence as their own. Nothing of record demonstrates that the Kisers intended to claim to their fence only in the event it proved to be the true boundary. Furthermore, nothing of record demonstrates that when the Kisers erected their fence and pastured their livestock within the .27 acres, they sought any form of permission from the Yontses to do so. In light of the above, the record sufficiently demonstrates that the "hostile" element of the Kisers' claim of adverse possession is also supported by substantial evidence.

CONCLUSION

The Letcher Circuit Court's conclusion that Richie and Medra Kiser own the above-described .27 acres by virtue of adverse possession is not clearly erroneous. CR 52.01. Therefore, we AFFIRM.

ALL CONCUR.

[7] Reed Kiser actually testified that he believed his boundaries extended well beyond the fence. However, the Kisers only asserted a claim of adverse possession regarding the property encompassed by the fence.

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