

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000866-MR

CHRISTOPHER MICHAEL HIBBITTS AND  
JORDAN RYAN HIBBITTS

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE GREGORY A. LAY, JUDGE  
ACTION NO. 11-CI-00392

HUMBERTO ALVARADO AND  
DORA KELLEY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; COMBS AND MAZE, JUDGES.

COMBS, JUDGE: Christopher and Jordan Hibbitts (the Hibbittses) appeal the orders of the Laurel Circuit Court which denied their motions for directed verdict and judgment notwithstanding the verdict (JNOV). After reviewing the record and the law, we affirm.

On April 7, 2011, Humberto Alvarado and Dora Kelley<sup>1</sup> filed a complaint alleging that the Hibbittses had trespassed on their land by removing boundary lines, clearing timber, and beginning construction of a garage. The Hibbittses filed a counterclaim which alleged that Alvarado had trespassed. Both parties claimed ownership through adverse possession.

The parties owned adjoining plots of land. Alvarado's tract is between the Hibbittses' property and a subdivision. Prior to 2010, the boundary line had been confirmed by two surveys. One survey was conducted in 2004 by David Altizer, and the other was performed in 2007 by James Blanton. Altizer undertook his survey in a condemnation action by an electric company that was seeking an easement across the Hibbittses' property. This survey was never disputed by the Hibbittses. Blanton surveyed the property in 2007 shortly before Alvarado purchased his property from Shawn Allen.

The Hibbittses inherited their land when their father passed away in 2009. In 2010, the Hibbittses' cousin, Chris Hubbard, surveyed the property and found a different boundary line which encompassed four acres of Alvarado's property. Additionally, the new survey expanded the Hibbittses' property from thirty-five acres to fifty-eight acres. At that time, the Hibbittses cleared away the tree line which had marked the boundary as set by the original surveys. They erected

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<sup>1</sup> Dora Kelley is a named appellee whose role in this litigation is unclear. She did not testify in the case and was never mentioned in the course of the case. Her name merely appears in all the captions.

markers along what they claimed was the actual boundary line. However, the parties were unable to resolve their differences, and Alvarado filed the lawsuit.

A jury trial was held on March 19-20, 2014. The parties and all three surveyors testified. The surveyors explained the deeds, plats, and physical markers upon which they had relied in setting their boundaries. Altizer and Blanton had utilized several old deeds and plats that were used in the formation of the subdivision. They relied on deeds from all the surrounding properties. However, Hubbard testified that he had only relied upon the current deed for the Hibbittses' property and one preliminary plat from the formation of the subdivision.

There was also much discussion about a mobile home located on the disputed boundary line. It is owned by the Hibbittses, and it encroaches upon several feet of Alvarado's property. It is uninhabitable. Alvarado presented testimony that the Hibbittses had pushed the mobile home over the boundary line.

Both parties made motions for directed verdicts, which the court denied. The jury found that the true boundary is the one claimed by Alvarado and that the Hibbittses had not adversely possessed any of Alvarado's land. The court ordered the Hibbittses to remove their trailer and markers, to permanently cease to interfere with the land, and to pay Alvarado's court costs.

On April 14, 2014, the Hibbittses filed a motion for JNOV, which the court denied on May 21, 2014. The Hibbittses now appeal the denial of their motions for directed verdict and for JNOV.

When presented with a motion for directed verdict, “the trial court must ‘draw all fair and rational inferences from the evidence in favor of the party opposing the motion and a verdict should not be directed unless the evidence is insufficient to sustain the verdict.’” *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 64 (Ky. 1996) (quoting *Spivey v. Sheeler*, 514 S.W.2d 667, 673 (Ky. 1974)).

Our review of a trial court’s denial of both a motion for directed verdict and a motion for JNOV is the same. *Prichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky. App. 1987). The motions should only be granted in “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.” *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 915 (Ky. App. 2006) (quoting *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985)).

The Hibbittses first claim that their motions should have been granted because their expert provided the only correct information regarding the boundary line. We disagree. Our review included watching the video recording of the trial. Alvarado presented several credible witnesses who created disputed issues of fact. The Hibbittses primarily relied upon Hubbard’s testimony. Alvarado presented contradictory proof from his experts, who both testified that Hubbard was wrong and explained why. Alvarado presented three independently performed surveys all showing the same boundary line. Hubbard relied on an old plat with a line marked “PL,” which Hubbard interpreted to be a property line. However, both Altizer and

Blanton testified that the line could not have been a boundary line because it lacked proper designation of courses and distance.

Additionally, Alvarado presented to the jury proof that Hubbard could have been biased. He testified that he is a cousin and close friend of Christopher Hibbitts. Indeed, when asked on cross-examination why the acreage of the Hibbittses' property nearly doubled under his survey, Hubbard answered: "[w]hat it is is what it is." On the other hand, Alvarado's experts testified that the dramatic discrepancy in acreage was an indicator of error.

On appeal, the Hibbittses merely set forth the testimony of Hubbard concerning the basis of his survey. They are asking us to make findings of fact, which we may not do. *See Calhoun v. CSX Transp., Inc.*, 331 S.W.3d 236, 245 (Ky. 2011). It is the sole province of the jury to determine the credibility of evidence. *Mishler v. Commonwealth*, 556 S.W.2d 676, 680 (Ky. 1977). In this case, the proof presented by both parties created issues of fact which were properly considered by the jury. The Hibbittses disagree with the jury's determination of the weight of the evidence. However, it is undisputed that evidence was presented, which precluded the entry of a directed verdict or JNOV. Thus, the trial court did not err in denying the motions for directed verdict and JNOV.

The Hibbittses also argue that they were entitled to a directed verdict because they possessed the property through adverse possession. The five elements of adverse possession are: 1) possession must be hostile and under claim of right; 2) it must be actual; 3) it must be open and notorious; 4) it must be

exclusive; and 5) it must be continuous. *See Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky. 1955). Those five elements must be continuous for fifteen years.

Kentucky Revised Statute[s] (KRS) 413.010.

In this case, the Hibbittses argue that Alvarado has not proven that they did not possess the property adversely. However, the law places the burden of proof on them as the claimants to title by adverse possession. *Phillips v. Akers*, 103 S.W.3d 705, 709 (Ky. App. 2002). (“The party claiming title through adverse possession bears the burden of proving each element by clear and convincing evidence.”)

The Hibbittses have not proven any one of the elements of adverse possession. They argue that two facts are relevant to demonstrate the general aura of disagreement. First, they claim that David Hibbitts and Shawn Allen disagreed over the ownership of some timber. However, the two men agreed to have a survey conducted and ceased to argue following that incident. David Hibbitts did not take any further action to pursue a claim. Regardless, the timber was on a different section of land from the Alvarado property; thus, it is irrelevant to the current dispute.

Second, the Hibbittses cite to the mobile home located on the disputed boundary. However, there was no dispute that the mobile home was uninhabitable, bringing into question whether possession claimed by the Hibbittses was actual. Additionally, a witness testified that David Hibbitts had hired him to move the mobile home several feet across the disputed boundary line in 2006 – only five

years before filing of the lawsuit. That period of time fell far short of the mandatory fifteen-year period for adverse possession to accrue. Therefore, the proof at trial created an issue of fact, properly placing the issue of adverse possession in the hands of the jury. The trial court did not err by withholding the issue from them and not overriding their ultimate decision.

We affirm the Laurel Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John P. Brice  
Lexington, Kentucky

BRIEF FOR APPELLEE:

David Howard  
London, Kentucky