

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000991-MR

BETTY FIELDS

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 99-CI-00140

FULTON COUNTY BOARD
OF LEVEE COMMISSIONERS

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

TACKETT, JUDGE: Betty Fields appeals from the judgment of the Fulton Circuit Court finding her liable for illegally cutting timber from property owned by the Fulton County Levee Board, on the Reelfoot Levee in Fulton County, Kentucky, near the town of Hickman. Fields argues on appeal that the jury was not properly instructed on the meaning of the phrase "color of title", that the court improperly rejected her argument that she had title to the property in question by adverse possession, and that the

evidence established that she in fact had title to the property. We affirm.

The evidence at trial showed that Betty Fields' family had owned the tract adjoining the Levee Board's property for quite some time, with the evidence showing ownership dating back to 1914. The 1914 map of Fulton County showed a tract owned by S. S. Stahr, Fields' grandfather, between the levee and the river; however, it is also conceded that the map is not based on surveys but is only representational, depicting the relative positions of one landowner's property to another. In 1977, Fields and her late husband, Ardell Fields, who was also a member of the Levee Board, obtained title to the property adjoining the levee. A survey was performed that established the boundary lines; that survey showed that Fields did not own any property in the northeast corner of section 17 of the township¹, where the timber was cut. It is also admitted that the source deeds for Fields' property contain several errors in the description, including references to invalid calls and inapplicable quarter section lines. It is also not disputed that the tracts in question have been in Fields' family for over 80 years, however the only evidence of ownership of the disputed

¹ Section numbers refer to the system of division of the land in the Jackson Purchase area of Kentucky, which was divided into townships, ranges, and sections following the purchase of the area in the early 1800s during the Presidency of Andrew Jackson.

property was Fields' recollection of having visited the area on many occasions as a child. The evidence also showed that two farmers had raised crops on a portion of the land near the river, with the permission of the Fields. Due to the rising and falling of the river, the land was not able to support a crop continuously. Also, the area that was cropped was not the area from which the timber was removed.

In 1993, Fields' son Tony began to cut timber from the area around the boundary between the levee and the Fields tract. The Levee Board then notified Fields that it asserted a claim of ownership to the property from which timber was being cut, and Fields, acknowledging the lack of clearly established boundary lines between her property and the levee, agreed not to cut more timber until a survey was done and the boundary established. However, in 1995 Fields again began logging on the property, and continued the practice through 1996.

In 1998, a survey was completed by K. Max Billingsley, which established the boundary line between the Levee Board and Fields. The survey further established that the description in Fields' deed was incorrect, and that the property was not in fact in the section in which the deed purported to place it, as the Mississippi River now occupies that area. The result of the survey was substantially the same as the survey performed in 1977 at the behest of Ardell Fields.

This action was filed in the Fulton Circuit Court and at trial, the jury found that Fields did not have title to the property from which the timber was taken, and assessed treble damages for the timber cut in 1995 and 1996, in accordance with Kentucky Revised Statutes (KRS) 364.103. This appeal followed.

Turning first to the question of whether the jury was properly instructed on color of title, we hold that no error occurred. The court instructed the jury as to the definition of "color of title" as follows: "'Color of title' as used in these instructions is defined as follows: Any instrument, however defective or imperfect, and no matter from what cause invalid, purporting to convey the land and showing the extent of the party's claim, may be color of title." The court further instructed the jury that if Fields cut timber without color of title, then she would be liable for treble damages under the statute above. The jury could reasonably conclude, based on the evidence before it, that Fields acted without color of title because she had the benefit of the 1977 survey which should have provided fair warning of her lack of legitimate claim to the property in question, and further had violated an agreement not to cut timber until the property line could be established. The case of Hurst v. Commonwealth, Ky., 125 S.W.2d 772, 276 Ky. 824 (1939), cited by Fields in support of her argument, has no application here because the court did provide a correct

definition of the meaning of the term "color of title." The above statute was enacted in 1994, between the first and second cutting of timber from the disputed property. The court properly instructed the jury and applied the statute in fixing damages.

Further, the statute specifically sets out a method for a person who wishes to cut timber that may be on another's property to avoid treble damages by notifying adjoining landowners who may or may not have a claim upon the timber themselves:

- (2) (a) If a defendant can certify that prior to cutting:
 1. A signed statement was obtained from the person whom the Defendant believed to be the owner of all trees scheduled to be cut that:
 - a. All of the trees to be cut were on his property and that none were on the property of another; and
 - b. He has given his permission, in writing, for the trees on his property to be cut; and
 2. Either:
 - a. A written agreement was made with owners of the land adjacent to the cut that the trees to be cut were not on their property; or
 - b. Owners of the land adjacent to the cut were notified in writing, delivered by certified mail, restricted deliver, and return receipt requested, of

the pending cut and they raised
no objection,

the court may render a judgment for no
more than the reasonable value of the
timber, actual damages caused to the
property, and any legal costs incurred
by the owner of the timber.

At oral argument, the Appellant was asked why she did not comply with the above requirements. The answer given was that Fields already knew that the Board would object. While it was strenuously argued at oral argument that the Appellant acted in good faith, the statute places a specific duty upon a landowner, a duty with which Fields did not comply. The jury was entitled to conclude from Appellant's failure to comply with the statute and from her failure to abide by the agreement made with the Levee Board in 1993 that she did not act in good faith nor under color of title, and properly assessed treble damages under the statute.

Next, with respect to the question of adverse possession, the court properly concluded that the issue was not sufficiently established to submit to the jury. Fields has not satisfied the requirements of adverse possession because the possession was not "open and notorious" under Kentucky law. As the Court of Appeals stated in Combs v. Ezell, 24 S.W.2d 301, 305, 232 Ky. 602 (1930) stated, one claiming adverse possession must "challenge the right of all the world; the claimant must

keep his flag flying and present a hostile front to all adverse pretensions." The court below did not agree that Fields had openly and notoriously possessed the area from which the timber was taken. Instead, Fields produced evidence that some of the land had been farmed by tenant farmers, but not continuously; apart from that, she relied on her memory of having entered the area at various points in her life. However, no acts other than the sporadic removal of timber were taken to assert a claim as required under Kentucky law, and as the Court of Appeals stated in Swift Coal & Timber v. Cornett, Ky., 61 S.W.2d 625 (1933), sporadic removal of timber is not sufficient to establish adverse possession. Some more definite, unequivocal act is required to satisfy the element of "open and notorious" possession. It was, therefore, proper for the court below to deny an instruction on adverse possession.

Even if Fields could otherwise satisfy the requirements of adverse possession, her claim must fail because part of the claimed period of adverse possession begins when Ardell Fields was serving as a member of the Levee Board. We cannot sanction adverse possession by a person with a duty of loyalty to the party against which adverse possession is asserted. In order to do so, Ardell Fields would have to clearly and unequivocally disclaim any responsibility to the Levee Board; in other words he would have had to commit some

act, or make some statement that would serve to give sufficient notice to the Levee Board that he was no longer acting in the Levee Board's interest with respect to this land. Hollowell v. Caldwell County, 155 S.W.2d 481 (1941). We agree with the Levee Board that Fields cannot claim the time period during which Ardell Fields was serving as a member of the Levee Board toward a claim of adverse possession. Since Ardell Fields served until his death in 1992, and the logging began in 1993, her claim of adverse possession must fail.

For the foregoing reasons, the judgment of the Fulton Circuit Court is affirmed.

ALL CONCUR.

BRIEF/ORAL ARGUMENT FOR
APPELLANT:

Tim Stark
Mayfield, Kentucky

BRIEF/ORAL ARGUMENT FOR
APPELLEE:

Timothy A. Langford
Hickman, Kentucky