

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002066-MR

RINEHART S. SHEPHERD
AND ROBERT RILEY

APPELLANTS

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, SPECIAL JUDGE
ACTION NO. 93-CI-00472

CLYDE POTTER AND
WILMA FAYE POTTER, HIS WIFE

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Rinehart S. Shepherd and Robert Riley appeal from a summary judgment of the Greenup Circuit Court rejecting their claim of adverse possession of disputed real property owned by Clyde and Wilma Potter. We affirm.

Clyde and Wilma Potter own land adjacent to land formerly owned by Rinehart Shepherd and now owned by Robert Riley. As a result of a dispute concerning the location of the boundary line between the two tracts of property, Shepherd and Riley filed an action in the Greenup Circuit Court to quiet

title to the disputed property. They alleged both superior title and, in the alternative, title by adverse possession.

The trial court bifurcated the proceedings, and it tried the issue of superior title first. Initially, the trial court entered a judgment in favor of the Potters. No appeal was taken from that judgment. Later, however, Shepherd and Riley filed a motion to vacate the judgment pursuant to CR¹ 60.02. The trial court concluded it had made a mistake in the initial judgment, and it granted the motion. However, a panel of this court reversed the trial court and held that the mistake, if any, was not correctable pursuant to CR 60.02.

The case then proceeded before the trial court on the issue of whether Shepherd and Riley could prove ownership of the disputed property by adverse possession. The parties made motions for summary judgment, and oral arguments were scheduled to be heard by the trial court. On the date scheduled for oral arguments, the trial judge recused himself at the request of the Potters. A special judge was subsequently appointed, and the special judge rendered a summary judgment in favor of the Potters without first having heard oral arguments on the motions. This appeal by Shepherd and Riley followed, and we granted oral arguments before this court at their request.

¹ Kentucky Rules of Civil Procedure.

Shepherd and Riley argue that the trial court erred in granting summary judgment in favor of the Potters because there were genuine issues of material fact to be determined. Kentucky law defining the requirements which must be met before a summary judgment is rendered are well established and will not be extensively discussed herein. CR 56.03 states that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See also Steelvest, Inc. v. Scansteel Serv. Ctr. Inc., Ky., 807 S.W.2d 476 (1991).

There are five elements which must be satisfied before adverse possession will bar record title. Those elements are that the possession must be hostile and under claim of right, must be actual, exclusive, and continuous, and must be open and notorious. Appalachian Reg'l Healthcare, Inc. v. Royal Crown Bottling Co., Inc., Ky., 824 S.W.2d 878, 880 (1992). If any one of these elements is missing, the claim of adverse possession will fail. Tartar v. Tucker, Ky., 280 S.W.2d 150, 152 (1955).

There was testimony during the discovery proceedings that a tornado touched down and uprooted a number of trees on the disputed property in 1968. Shepherd, who owned the property

adjacent to the Potters at the time, hired a tree cutter to remove the trees. After the tree cutter began to cut and remove the fallen trees, Potter told Shepherd that he believed the trees were on his property. Shepherd, on the other hand, contended that he owned the property to a fence. This property included the area where the trees had fallen.

Although Potter testified that Shepherd told him to have the property surveyed and that he would pay for the timber if it proved to be Potter's property, the property was not surveyed and the person employed by Shepherd to cut the trees continued to do so. Thereafter, when Riley acquired the property from Shepherd in 1993, Potter blocked access to the disputed property after Riley attempted to harvest timber from it. Riley and Shepherd then filed a civil action in the Greenup Circuit Court so that the ownership to the disputed property could be determined.

In its summary judgment in favor of the Potters, the trial court stated as follows:

The most the Plaintiffs can show in this case is that there is an old fence line where they claim the boundary should be which is down in many spots, that the Plaintiffs cut timber on the property in question once in the late 60's and were confronted by the Defendants, the timber was cut again in 1993, and then again when Defendants challenged the right to cut on the property in question, but the Plaintiffs have ridden horses on occasion on the property, and that they have hunted for

greens on the property. This evidence is not legally sufficient to establish a claim for adverse possession.

Shepherd owned the property from 1950 until he sold it to Riley in 1993. Shepherd conceded in his deposition that he had not farmed the disputed property, had not regularly harvested timber from it, had not enclosed it with a fence, had not built structures upon it, and had not mined any minerals from it. However, he testified that he sometimes rode horses across the land and also hunted for greens on it. When asked upon what actions he was relying to support the adverse possession claim, he responded that "we thought we knew what the deed called for, where we were using, and accepting it as our property."

We agree with the trial court that summary judgment for the Potters was appropriate. We agree that evidence Shepherd sometimes rode horses and occasionally hunted for greens on the property was insufficient to establish a claim for adverse possession.

The main argument raised by Shepherd and Riley is that Shepherd told Potter in 1968 that he owned the land to the fence, that Potter did not contest the ownership, and that Shepherd continued at that time to have the timber cut from the property after he advised Potter he owned it. In essence, while Shepherd acknowledges that he did not specifically take actions

which would indicate an adverse possession of the land, he argues that he and his predecessors in title "knew the line was the fence and no one disputed that and everyone treated it as the line."

The argument raised by Shepherd and Riley is flawed. They assert ownership to the property because they were under the impression that they owned to the fence. This argument relates to the legal title to the property and not to its ownership by adverse possession. The minimal and sporadic use of the property by Shepherd is not enough to establish adverse possession. The occasional riding of horses and hunting for greens on the disputed property did not meet the elements of actual or continuous use of the property. Further, "a mere occasional entry upon land to cut timber does not constitute sufficient possession to establish title by adverse possession, even though such cutting of trees took place over a period of many years." Burchfield v. Ping, Ky., 284 S.W.2d 818, 820 (1955).

The judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANTS:

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BRIEF AND ORAL ARGUMENT FOR
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