

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001202-MR

JAMES STANIFORD and
His wife, MARCELLA STANIFORD

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 00-CI-00107

PATSY K. HENSLEY and
her husband, RALPH HENSLEY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

HENRY, JUDGE: James and Marcella Staniford own real property adjoining that owned by Patsy K. Hensley and Ralph Hensley. The Hensleys filed this action after a dispute arose concerning the boundary line between the parties' property. The Hensleys also sought removal of a sewage pipe that transports raw sewage from the Staniford's residence, across the Hensley's property, and into a nearby creek. The Stanifords responded by asserting that the boundary line between the parties' property is improperly identified in a survey conducted at the Hensley's request and

that they acquired the property on which the sewage pipe is located by adverse possession. A trial was held before a Master Commissioner who disagreed with the Stanifords as to the location of the boundary line and their right to run the pipe across the Hensley's property, and further expressed concern about the Stanifords dumping raw sewage into a public waterway. The court ordered that the pipeline be removed and that the Stanifords incur the cost for replacing boundary markers placed by the surveyor hired by the Hensleys and removed by the Stanifords.

The property in dispute was part of a larger tract owned by Patsy Hensley's grandfather, Nelson Sturgill, who in 1961 conveyed the property now owned by the Stanifords to Nelson's daughter, Ada Jo Hay, and her husband, Egel. It was conveyed three more times before being conveyed in 1988 to the Stanifords. The Stanifords stipulated that the property was the same conveyed to the Hays in 1961 and the deed description remained unchanged throughout the various conveyances. The remainder of the tract was the subject of a partition suit filed after Nelson's death. A survey of the property was conducted by Laban E. Wallace, Jr. and the property was divided into five parcels. The survey set out the boundaries between the partitioned property and the property then owned by the Stanifords.

In 1999, Patsy testified that after she noticed debris and personal property on the backside of her property and that the Stanifords had cut a tree, she confronted the Stanifords and became aware that they were disputing the location of the boundary line. The Stanifords refused to share the cost of a survey so the Hensleys hired a surveyor, Quentin Spradlin, who surveyed the property and set permanent boundary markers. After the Stanifords removed the markers, the Hensleys filed the present action seeking to establish the correct boundary lines and to remove the sewer pipe.

The Stanifords allege that Spradlin's retracement of the Wallace survey is inaccurate because the Wallace survey shows the common boundary line of the western side of the Staniford property to be 170 feet from a state owned roadway, but Spradlin found it to be only 140 feet. However, Spradlin explained the discrepancy by pointing out that Nelson Sturgill had conveyed a 60-foot right of way lying 30 feet on either side of Route 469 to the county. This right of way was later conveyed to the state. The Stanifords offered no expert testimony to contradict Spradlin's survey.

The standard for review is set forth in Croley v. Alsip, 602 S.W.2d 418 (Ky. 1980):

The law is clear that "findings of fact (of the trial judge) shall not be set aside unless clearly erroneous." This court has

applied this rule in boundary disputes. "It is the rule that, where this Court cannot say on an appeal from the decree in an action involving a boundary dispute that the Chancellor's adjudication is against the weight of the evidence, the decree will not be disturbed. Id. at 419 (citations omitted).

The boundary lines at issue in this case were established in the partition action to which Ada Hay, the Stanifords' predecessor in title, was a party. The doctrine of res judicata prevents the Stanifords from challenging the Wallace survey. Creech v. Jackson, 375 S.W.2d 679 (Ky. 1964). There is no evidence to contradict Spradlin's testimony that a 60-foot right of way is owned by the state. In this case, the evidence is more than sufficient to support the finding that the boundary is as set forth in the Spradlin survey.

As an alternative argument to their claim by deed, the Stanifords claim title by adverse possession to a portion of the Hensley's property. They claim that they and their predecessors in title possessed the property under a claim of right that they allege has been hostile, actual, open, notorious, exclusive and continuous for a period of fifteen years. Phillips v. Akers, 103 S.W.3d 705 (Ky.App. 2002). Since the acquisition of title by adverse possession deprives the actual titleholder of his interest without compensation, the person claiming such title

must establish the elements by clear and convincing evidence. Barnett v. Barnett, 283 Ky. 710, 142 S.W.2d 975 (1940).

Our task of reviewing the record for error has been encumbered by the Stanifords' failure to cite this court to facts supporting the elements of adverse possession. Our appellate rules require that all briefs contain supportive citations to the record pertinent to each issue raised. CR 76.12(4)(c)(v). An appellate court is not required to search the record for testimony when a litigant fails to properly observe the rule. Young v. Newsome, 462 S.W.2d 908 (Ky. 1971). With some reluctance, we have reviewed the testimony and conclude that there is ample evidence to support the circuit court's finding that the evidence falls below the standard necessary to prove adverse possession. There is testimony that prior to the Stanifords' purchase of the property, their predecessors used a portion of the Hensley property as a garden and that it was mowed. However, generally a garden and lawn maintenance are considered to be seasonal uses and insufficient to establish adverse possession. Kentucky Women's Christian Temperance Union v. Thomas, 412 S.W.2d 869 (Ky. 1967). Although there is testimony that a pipe was laid by the Stanifords' predecessor in title, it is not clear when the pipe was installed or if it is the same pipe now used to dump raw sewage into a nearby creek. Moreover, there is testimony that the

garden and the installation of the pipeline as it was originally located were by permission from the prior owners of the Hensley tract. The circuit court's finding that the use of the Hensleys property was neither hostile nor under a claim of right is well supported by the evidence.

The order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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