

RENDERED: January 21, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001862-MR

SHARON COLLINS and
VON COLLINS, her husband;
FAYE WHITE and
BURL WHITE, her husband;
VIVIAN PINKEPANK and
KURT PINKEPANK, her husband;
JANICE STANDIFER and
CHARLES STANDIFER, her husband

APPELLANTS

v. APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, JUDGE
ACTION NO. 97-CI-00170

MISSOURI WIREMAN,
WILEY WIREMAN and
TERESA WIREMAN, his wife;
MARVIN WIREMAN and
LINDA WIREMAN, his wife;
BARBARA COMBS and
VERLIN COMBS, her husband

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BUCKINGHAM, JUDGE: The issue involved in this case concerns
whether a cotenant who had made improvements on real property

prior to acquiring any ownership in it may later recover the value of those improvements from the sale proceeds in a partition suit instituted by other cotenants. The circuit court allowed the recovery on the ground of adverse possession. We conclude that the circuit court erred, and we thus reverse and remand.

Wile and Missouri Wireman were married and owned real property in Magoffin County as tenants in common. During the time the Wiremans owned the property, they allowed one of their children, Wiley Wireman, to build a residence and other outbuildings on a portion of it.¹

Wile died intestate in 1982, and he was survived by Missouri and their seven children. The effect of his death as it related to the subject property was that Missouri owned three-fourths of the property, representing her one-half undivided interest and one-half of Wile's one-half undivided interest. The other one-half of Wile's one-half interest went to his seven children. Thus, each of the seven children, including Wiley, owned one-seventh of a one-fourth interest.

¹ Although Wiley states in his brief that the record is unclear as to exactly when the improvements were constructed on the property, the circuit court determined in its approval of the commissioner's report that the structures "were constructed while the property was occupied by Missouri Wireman and her late husband[.]" Thus, we must conclude that Wiley had no ownership interest in the property when he made the improvements.

In 1993, Missouri deeded her three-fourths interest in the property to Wiley. Thus, as of that time, Wiley owned twenty-two twenty-eighths of the property, and his six siblings each owned a one twenty-eighth interest.

On July 2, 1997, several of Wiley's siblings who had ownership interests in the property filed a partition suit in the Magoffin Circuit Court seeking a sale of the property.² A sale was held, and Wiley purchased the property at public auction for \$85,000.

Wiley had asserted a claim against the proceeds for the value of the improvements upon the property, and he was awarded \$35,000 for such improvements. The amount was based on the testimony of a certified appraiser who had testified in 1998 that the fair market value of the property with the improvements was \$80,000 and that the fair market value of the property without the improvements was \$45,000. The court based its decision on adverse possession. This appeal by the other Wireman heirs followed.

The Wireman heirs argue on appeal that the circuit court erred in awarding Wiley \$35,000 based on the improvements he made to the property. They assert that Wireman did not claim or prove adverse possession and that "[t]his finding by the court does not make sense, because not only was adverse

² Not all Wireman heirs joined in the partition suit as plaintiffs.

possession not a part of the case, but if it had been and was proven, by Appellee, Wiley Wireman, he would have acquired title to the land and improvements."

The five elements which must be proved before adverse possession will bar record title are that the possession was hostile and under a claim of right and was actual, exclusive, continuous, and open and notorious. See Appalachian Reg. Healthcare., Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878, 880 (Ky. 1992). "The 'open and notorious' element requires that the possessor openly evince a purpose to hold dominion over the property with such hostility that will give the nonpossessor owner notice of the adverse claim." Id., citing Sweeten v. Sartin, 256 S.W.2d 524, 526 (Ky. 1953). The court also stated that "[i]t is the legal owner's knowledge, either actual or imputable, of another's possession of lands that affects the ownership." Id., citing 3 Am. Jur. 2d Adverse Possession § 71 (1986).

The circuit court based its holding of adverse possession on its finding that the improvements were constructed with the "knowledge, permission, and acquiescence" of Wile and Missouri. However, "possession by permission cannot ripen into title no matter how long it continues." Phillips v. Akers, 103 S.W.3d 705, 708 (Ky. App. 2002). Furthermore, "[s]tronger evidence of hostile possession with a clear, positive assertion

of an adverse right is required where there is a family relationship between the parties than where there is no such relationship." Id. at 710.

The standard of review for determining whether the court in this case erred is whether the court was clearly erroneous or abused its discretion. Id. at 709. We may not substitute our opinion for that of the circuit court absent clear error. Id. We conclude there was clear error in this case.

First, Wiley did not argue to the circuit court that he was entitled to the value of the improvements due to adverse possession. Second, the court's finding that Wiley constructed the residence and outbuildings with the knowledge, permission, and acquiescence of his parents is inconsistent with adverse possession. There was no evidence that Wiley claimed possession hostile to the rights of his parents as title owners to the property.³ In short, we conclude that the award of the value of the improvements to Wiley based on adverse possession was clear error.

The issue is whether Wiley is nonetheless entitled to recover the value of the improvements to the property. The

³ The only evidence we found in the record was Wiley's deposition. Therein, he testified only briefly concerning the subject property. He made no mention of the circumstances under which he made improvements on the property or when such improvements were made.

right to recover for improvements made upon another's land may be based on the theory of estoppel or the theory of unjust enrichment. Stepp v. Leslie, 263 S.W.2d 122, 123 (Ky. 1953). The test is whether the person who made the improvements acted in good faith. Id.

Wiley cites two cases in support of his argument, neither of which is helpful to his case. In Mullins v. Mullins, 797 S.W.2d 491 (Ky. App. 1990), this court declined to allow a party who had made improvements to property owned by another to recover the value of the improvements under either a theory of unjust enrichment or estoppel. The court denied a recovery under an unjust enrichment theory because the party seeking to recover the value of the improvements knew at the time she made the improvements that she had no title to the property. Id. at 493. Further, the court denied a recovery for improvements under a theory of estoppel because there was no evidence that the owner had made any promises, agreements, or attempts to make the party believe she was getting ownership in the property. Id. Likewise, in this case Wiley knew he had no title to the property when he made improvements on it, and there was no evidence that his parents had made any promises, agreements, or attempts to make him believe that he was getting ownership in the property.

Wiley also relies on Finucane v. Prichard, 811 S.W.2d 348 (Ky. App. 1991). He accurately cites that case for the proposition that a good faith standard applies to one seeking to recover the cost of improvements against the owner of the property. See id. at 350. Wiley's problem in relying on this case is that there was no evidence that he had any good faith belief that he had an ownership interest in the property when he made the improvements.

The Wireman heirs rely on Kelly v. Kelly, 293 Ky. 42, 168 S.W.2d 339 (1943), to support their argument in this case. We believe their reliance on that case is justified. In the Kelly case the court stated as follows:

As a general rule in order that one may recover compensation for improvements made on another's land, even in a court of equity, it is necessary that he shall have made such improvements in good faith while in bona fide adverse possession of the land under color of title. There must be three concurrent essentials: (1) The occupant must have made the improvements in good faith; (2) he must have been in possession adversely to the title of the true owner; and (3) his possession must have been held under color or claim of title.

168 S.W.2d at 341, citing 31 C.J. 319 § 27. The court further stated as follows:

[I]n regard to the first of these essentials, that occupant must have made the improvement in good faith, it is generally held that the occupant is entitled to compensation for his improvements when and

only when he has been a bona fide possessor and has made the improvements in good faith, believing his title to be a legal one.

Id.

Wiley is not entitled to recover the value of the improvements because there was no evidence that he made them in the good faith belief that he held any ownership interest in the property. Further, he did not prove that he possessed the property adversely to his parents, and his possession was not under color or claim of title.⁴ In short, Wiley did not meet any of the three essential elements necessary to support a claim for compensation for improvements made on another's land. See Kelly, 168 S.W.2d at 344.

Wiley argues in his brief that he should be granted the value of his improvements because he owned a small interest in the property beginning in 1982 (after he made the improvements) and a majority interest in it since 1993. He further asserts that "he was a good faith claimant to the property." If Wiley is asserting that he is entitled to the value of the improvements because they have been on the land in excess of the fifteen-year period required for adverse possession, then, as the Wireman heirs noted in their brief, he

⁴ "There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title or to give him the right of possession." Kelly, 168 S.W.2d at 342, citing 27 Am. Jur. § 11.

would be entitled to a 100% interest in the property. Wiley is not claiming ownership by adverse possession, however. As for his statement in his brief that "he was a good faith claimant to the property," he neither gives further explanation nor cites any authority to support his argument. As we have stated, any good faith must go to a good faith belief by the person making the improvements that he or she had legal title to the property when the improvements were made. See Kelly, 168 S.W.2d at 341. There was simply no evidence in the record to support Wiley's claim for the value of the improvements.

The judgment of the Magoffin Circuit Court is reversed, and this case is remanded with directions to the court to enter an order directing the payment of the proceeds without an allowance to Wiley for the value of any improvements.

HENRY, JUDGE, CONCURS.

BARBER, JUDGE, DISSENTS.

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