

RENDERED: MAY 26, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000270-MR

GARY MCCOY AND
SUSIE MCCOY

APPELLANTS

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE DANIEL R. SPARKS, JUDGE
ACTION NO. 00-CI-00138

WILLIE C. THOMPSON; MARQUIETTA
THOMPSON; JOHNNIE MAY; BEULAH
MAY; PAUL MAY; AND SHIRLEY MAY

APPELLEES

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Gary McCoy and Susie McCoy (McCoys) bring this appeal from a January 12, 2005, summary judgment of the Lawrence Circuit Court declaring that Willie C. Thompson and Marquetta Thompson (collectively referred to as Thompsons) had adversely possessed a 25-acre tract of property. We reverse and remand.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

The Thompsons acquired 199.24 acres of land in 1979. The Thompsons' deed expressly excluded a 60-acre tract, which included the disputed 25 acres. Willie, however, testified that his grantor, Oscar May, walked the property with him and pointed out the boundaries thereof. By affidavit, Willie stated that May pointed out a fence on the north side of the property and stated that the fence delineated the northern boundary line of the property. Willie claimed that he exercised possession and control over the property up to the fence since 1979.

In 1999, the McCoys acquired title to an adjoining tract of land. The McCoys' property adjoins the Thompsons' property to the north. Believing that their deed included the disputed 25-acre tract, the McCoys erected a fence as a boundary which encompassed the disputed 25 acres. Subsequently, the parties determined that the disputed 25-acre tract was not conveyed by deed to the McCoys. A title search revealed that the disputed 25-acre tract of property was, in fact, conveyed to Thomas May in 1936.²

On July 12, 2000, the Thompsons filed a complaint claiming ownership of the disputed 25-acre tract by adverse possession. Eventually, the Thompsons and McCoys both filed motions for summary judgment. The matter was referred to a special commissioner. On September 16, 2004, the commissioner

² Thomas May died intestate in 1983 and was survived by seven children and three grandchildren.

entered his memorandum, opinion and recommendations. Therein, the commissioner concluded the Thompsons had proved adverse possession to the disputed 25-acre tract of land and granted summary judgment in their favor. The McCoys filed exceptions to the commissioner's report. The circuit court denied the exceptions and adopted the commissioner's report in its entirety. This appeal follows.

The McCoys contend the circuit court erred by granting the Thompsons' motion for summary judgment. Summary judgment is proper if there exist no material issues of fact and movant is entitled to judgment as a matter of law. See Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

To sustain a claim of adverse possession, the claimant must prove by clear and convincing evidence the following five elements:

- 1) [P]ossession must be hostile and under a claim of right, 2) it must be actual, 3) it must be exclusive, 4) it must be continuous, and 5) it must be open and notorious.

Appalachian Reg'l Healthcare, Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878, 880 (Ky. 1992). The McCoys initially contend that the Thompsons did not prove the required elements of adverse possession. Since 1979, the Thompsons' possession of the disputed 25 acres was under the mistaken belief that their property extended to an old fence. The McCoys assert that one

who possessed property under the mistaken belief as to the true boundary line cannot, as a matter of law, have possession that is hostile and under a claim of right. We disagree.

In Appalachian Regional Healthcare, 824 S.W.2d at 879-880, the Kentucky Supreme Court held:

One may obtain a perfect title to real property by adverse possession for the statutory period of time of fifteen years even when there is no intention by the adverse possessor to claim land not belonging to him.

Stated differently, possession is generally deemed adverse when such possession is maintained to a fence line because the fence is recognized as the proper boundary line. 2 C.J.S. Adverse Possession § 83 (2003). In such a case, possession is said to be under a claim of right. We, thus, reject the McCoys' assertion that the Thompsons could not possess the disputed property adversely.

The McCoys also argue that there existed material issues of fact that precluded entry of summary judgment. The McCoys argue that the evidence was conflicting upon whether the Thompsons proved the elements of adverse possession. By affidavit, Willie Thompson specifically claimed:

A. Upon acquiring the property, affiant placed a gate at the entrance to his property, making access to the disputed property impossible without coming through the gate and across affiant's property or climbing over the fence along the ridge. He

also posted "No Trespassing" signs on the boundary.

B. About two weeks after he acquired the property, he cut three roads on the disputed area. One of the roads lies just inside the fence to which affiant is claiming and follows the ridgeline around the northern perimeter of his property. A second road runs around the foot of the hill and a third one goes through the center of the property. Affiant graded these roads every year from the time they were built through 1999. They are used for four-wheeling and hiking by the affiant and his guests. These roads are visible to anyone who goes onto the disputed property.

C. Soon after acquiring the property, he landscaped a portion of the disputed property and has made a formerly steep area into level ground. He dozed brush and trees from this area and pushed them into a pile which still exists, although much of it has rotted away.

D. From the time he acquired the property, affiant has gone onto it on a weekly basis. He has remodeled an old house on his property into a weekend retreat where he raises a garden annually, hunts, entertains guests, rides four-wheelers, and generally engages in other weekend, off-work, recreational activities.

E. In 1980-81, affiant cut timber from the property in dispute and he has done so at various times since.

F. Affiant has stored items of personal property on the disputed property for a period in excess of fifteen years, including farm equipment and a truck bed.

G. Since 1979, with two or three possible exceptions, affiant has never gone for more than one week without coming onto

this property, and he has often been on the property several times in the course of a week. During this period, affiant has observed no one coming onto the disputed property with the exception of an occasional deer hunter who was trespassing on the property.

H. Affiant's use and occupancy of his property, including the disputed property, has been visible to anyone who bothered to look or who ventured on or near the property.

Willie C. Thompson Affidavit at 2-3.

Also, in the record, was the affidavit of Randall Ousley. Ousley was a land surveyor and stated, in relevant part:

5. I have been on the disputed area several times. On the disputed area I saw no "weekend retreat" or other structure, no landscaping, no gardens, no fencing except the very old remnants of fences mentioned above, and no gate on the disputed area that would preclude entry. All I saw besides raw land was a small pile of junk and abandoned car parts near the boundary between the Thompson property and the disputed area. Other than fourwheeler[sic] roads and a few tree stumps there was no visible evidence of this property being used or occupied. I saw nothing on this property to suggest there was any use or occupation which was inconsistent with the use of this property by a tenant.

From the above affidavits, we think the evidence is obviously conflicting upon the extent and character of the Thompsons' possession of the disputed 25-acre tract of land. Accordingly, we conclude that this conflicting evidence precluded entry of

summary judgment upon the issue of adverse possession and the circuit court erred by entering summary judgment in favor of the Thompsons. We, thus, reverse and remand for a trial upon the merits.

For the foregoing reasons, the summary judgment of the Lawrence Circuit Court is reversed and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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