

RENDERED: APRIL 14, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000450-MR

DAVID JETT;
MALCOLM MONROE JETT;
AND ELLEN MILLS JETT

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
CIVIL ACTION NO. 02-CI-03462

TERRY PRUITT
AND JONI PRUITT

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; MILLER, SENIOR JUDGE.¹

MINTON, JUDGE: David Jett, Malcolm Monroe Jett, and Ellen Mills Jett, trustees for the estate of David Jett (collectively referred to as "Appellants"), appeal a summary judgment that determined that Appellees, Terry and Joni Pruitt, own a disputed strip of land by adverse possession. Finding no error, we affirm.

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

The facts of this case are relatively straightforward and generally uncontested. The Pruitts bought a house at 3049 Tuscaloosa Lane in Lexington in 1984. At that time, a fence separated the Pruitts' property from the adjoining property at 3029 Tuscaloosa Lane. Appellants purchased the property located at 3029 Tuscaloosa Lane in 1995. Before their purchase, Appellants had a survey performed, which disclosed that the purported boundary fence was not situated on the true boundary line.² And, in 1995, after purchasing the land, David Jett says that he told the Pruitts that the existing fence was not on the actual boundary line and, furthermore, that he planned on moving the fence to the true boundary line in the future. In 2002, David Jett tore down the existing fence and built a new one along what he believed was the true property line. In the process, a strip of land approximately ten feet wide was moved from the Pruitts' side of the fence to the Jetts' side of the fence.

In August 2002, the Pruitts filed an action against Appellants in the Fayette Circuit Court, alleging that they owned the strip of land affected by the new fence by adverse possession. In March 2004, the trial court granted partial summary judgment to the Pruitts, finding that they did own the

² Appellants concede, for purposes of this appeal only, that the fence did not reflect the true boundary line.

disputed strip of land by adverse possession. In January 2005, the trial court ordered the Appellants to pay the cost of moving the fence back to its original position and, furthermore, found that the Pruitts "have the right to return the fence in question to its pre-litigation boundary." Appellants filed this appeal.

Before we may examine the trial court's grant of summary judgment on its merits, however, we must recite the proper scope of our review. The Pruitts contend that the proper standard of review is the clearly erroneous standard we set forth for boundary dispute cases in Phillips v. Akers.³ But we believe that the clearly erroneous standard is not proper in this case because it was resolved by summary judgment, while, on the other hand, Phillips involved a bench trial, meaning that the trial court functioned as a fact-finder.

In assessing the propriety of the trial court's grant of summary judgment to the Pruitts, we are mindful that summary judgment was appropriate only if the Pruitts showed that Appellants "could not prevail under any circumstances."⁴ In ruling on a motion for summary judgment, we must view the evidence in the light most favorable to the non-movant (*i.e.*,

³ 103 S.W.3d 705, 709 (Ky.App. 2002).

⁴ Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citing Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)).

Appellants).⁵ When we review a trial court's decision to grant summary judgment, we must determine whether the trial court correctly found that there were no genuine issues of material fact.⁶ Since findings of fact are not at issue, the trial court's decision is entitled to no deference.⁷

In order to establish a successful claim of adverse possession,

a claimant must show possession of disputed property under a claim of right that is hostile to the title owner[']s interest. Further, the possession must be shown to be actual, open and notorious, exclusive, and continuous for a period of fifteen years. 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 non-possessory owner notice of the adverse claim. Mere intentions or verbal expressions of a claim to property is not sufficient absent physical acts appearing on the land evidencing a purpose to hold the property hostile to the rights of and giving notice to the title holder. Absent proof that the possessor made physical improvements to the property, such as fences or buildings, there must be proof of substantial, and not sporadic, activity by the possessor.⁸

⁵ *Id.*

⁶ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

⁷ *Id.*

⁸ Phillips, 103 S.W.3d at 708 (internal quotation marks and citations omitted).

One claiming ownership of land under adverse possession bears the burden to prove each of these elements by clear and convincing evidence.⁹

"[P]ossession by permission cannot ripen into title no matter how long it continues."¹⁰ Thus, Appellants contend that the Pruitts ceased being hostile possessors of the disputed land when David Jett allegedly told the Pruitts that the fence was not placed on the true boundary line. According to Appellants, that statement converted the Pruitts from hostile to permissive possessors. If we accepted Appellants' argument, the Pruitts' adverse possession claim would fail as a matter of law because they would have possessed the land for only eleven of the requisite fifteen years.

Although Appellants' argument is superficially attractive, it runs afoul of our settled jurisprudence. Under Kentucky law, "[i]f one fences and takes possession of a neighbor's land, the only way that the neighbor can stop the running of the statute of limitations is by retaking possession or instituting suit within the statutory period. Mere words will not be sufficient."¹¹ So David Jett's statement to the

⁹ *Id.* at 709.

¹⁰ *Id.* at 708.

¹¹ Petty v. Petty, 265 Ky. 15, 95 S.W.2d 1122, 1124 (Ky. 1936).

Pruitts that he intended to move the fence had no legal effect on the Pruitts' adverse possession claim.

Appellants also argue that the Pruitts' possession of the disputed strip of land was not open and notorious because they did not pay taxes on the disputed land, nor did they build the original fence. But Appellants cite to no authority, nor have we independently located any, requiring someone with an adverse possession claim to pay property taxes on the adversely possessed land. In fact, even if the Pruitts had paid taxes on the disputed land, which would have been difficult to do since the disputed land represents only a portion of Appellants' lot, such payments would have been largely insignificant.¹² In addition, the Pruitts mowed, mulched, and gardened on the disputed strip of land. Given the disputed land's small size and location in the backyard of a residential neighborhood, we find that such activities are certainly "substantial, and not sporadic,"¹³ uses. In short, we reject Appellants' claim that that the Pruitts failed to openly and notoriously possess the disputed land.

¹² Phillips, 103 S.W.3d at 709 ("[p]ayment of taxes may strengthen the payor's claim that he believed he owned certain property but is not itself sufficient to show possession or an intent to hold the property adversely.").

¹³ *Id.* at 708.

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

ALL CONCUR.

BRIEF FOR APPELLANTS:

Justin R. Morgan
Lexington, Kentucky

BRIEF FOR APPELLEES:

Leslie Rosenbaum
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