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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000704-MR

ROY E. STILLS; SHIRLEY STILLS, WIFE; CLEVELAND WINSTEAD; JAMES DEMENT; CURTIS DEMENT; PAT VANDIVER; EMMA LOU YARES; MARGARET SUE JONES; GEORGE FLENER; AND JERRY FLENER — APPELLANTS

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 02-CI-00857

LYNDA L. MCAFEE, DAVID M. RAMSEY; LINDA L. RAMSEY, WIFE; DARRELL H. MOORE; WANDA JUNE MOORE, WIFE; AND ALL UNKNOWN PERSONS WHO CLAIM ANY INTEREST IN THE SUBJECT MATTER OF THIS ACTION — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, LAMBERT, AND HOWARD.

LAMBERT JUDGE. This action is a dispute over a rural tract of land is between the legal title holders and the equitable claimants, which assert ownership under the theory of adverse possession. Below, the jury returned a verdict in favor of the equitable

claimants. But the trial court then granted a judgment notwithstanding the verdict ("JNOV") to the title holders. Now, the equitable claimants appeal seeking reinstatement of the jury's verdict in their favor. For the reason stated herein, we reverse the trial court's grant of a JNOV to the title holders thereby reinstating the jury's verdict in favor of the equitable claimants.

Issues

The parties have joined four issues on appeal: (1) Whether the evidence of adverse possession is sufficient to support the jury's verdict; (2) Whether KRS 411.190(8)'s recreational-use limitation on adverse-possession claims applies retroactively to defeat any equitable claim to the disputed land; (3) Whether the equitable claimants have conceded that their use of the disputed property was permissive rather than adverse; and (4) Whether an alleged jury-instruction error is a sufficient basis for upholding the trial court's grant of a JNOV. We address each issue in turn.

JNOV

A motion for a JNOV shall not be granted unless "there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). We review a decision granting JNOV for clear error. *Moore v. Environmental Const. Corp.*, 147 S.W.3d 13, 16 (Ky. 2004). This means that we must review the all the evidence presented to the jury, drawing all reasonable inferences most favorable to the

verdict winner, and that we must uphold the trial court's decision if a reasonable person could not have found as the jury did. *Id.*

A person may obtain a perfect title to real property by adverse possession over the statutory proscribed period of time of 15 years. *See* KRS 413.010. But, five additional elements all must be satisfied before adverse possession will bar record title: (1) possession 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. *E.g.*, *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky. 1955) (citations and quotations omitted.) The open-and-notorious element requires proof that the possessor openly evinced a purpose to hold dominion over the property with such hostility that will give the title holder notice of the adverse claim.

An adverse possessor's intent to exercise dominion over land may be evidenced by the erection of physical improvements on the property. But, ultimately the character of the property, its physical nature, and the use to which it has been put, determine what acts are necessary to put the title holder on notice of a hostile claim. *See, e.g., Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878 (Ky. 1992). Here, the trial court found that the equitable claimants did not establish a clear and definite boundary such as to give public notice of their exclusive claim to the land. In its opinion, the trial court relied on the facts (1) that the equitable claimants only produced proof that they marked one border of the disputed land; and (2)

that, even then, the markings were not sufficiently definitive to give the title holders notice of their adverse claim.

Having reviewed the proof in the light most favorable to the equitable claimants, who prevailed before the jury below, and having drawn all inferences favorable to them, we find that the trial court's view of the proof in this case is simply incorrect. Indeed, the record shows that the equitable claimants called nine witnesses whose cumulative testimony plainly indicates that (1) the land in question is suitable only for hunting, fishing, and other recreational uses; (2) that the equitable claimants and their guests continuously hunted and fished the land for more than 15 years, ejecting the odd trespasser; (3) that equitable claimants or their agents continuously maintained markers on all sides of the disputed property; and (4) that the markers comprised (a) signs indicating that no trespassing, hunting or fishing was allowed interspersed by (b) brightly colored flags spaced within view of one another between the signs so as to give a clear indication of the borders of their claimed property.

The court below stated that the equitable claimants failed to prove that they marked the entire perimeter boundary of the disputed property, but only marked one side. To the contrary, several witness so testified using language such as “we flagged the entire farm” or “we didn't just do one side, we did the whole farm.” In any event, this testimony undermines one prong of the trial court's decision to grant a JNOV, as the equitable claimants did in fact adduce proof that they marked, and continuously maintained, the entire boundary of the dispute land for more than 15 years.

We are more sympathetic to the second prong of the trial court's reasoning, namely that the boundary markings were not sufficiently definite to put the title holders on notice. Indeed, the equitable claimants did not use fencing but only no-trespassing and no-hunting signs and brightly colored flags or ribbons to mark their claim. Nevertheless, we hold that, given the nature and location of the disputed property, a reasonable juror could conclude that the equitable claimants marked the property with sufficient definiteness as to have put the title holders on notice of their hostile or adverse claim. Fencing of the land is not required to constitute a clear marking when the nature and character of the land are not suitable to fencing or when fences are not customary in the area. *See Culton v. Simpson*, 265 Ky. 343, 96 S.W.2d 856, 860 (1936); *see also LeMoyne v. Neal*, 168 Ky. 292, 181 S.W. 1119, 1120 (1916); *LeMoyne v. Litton*, 159 Ky. 652, 167 S.W. 912, 913 (1914).

Here, the land in question, as noted by the legal title holders themselves, "is for the most part unoccupied, unimproved, wooded, strip-mined spoil bank . . . best suited for hunting and other recreational activities." Also, testimony on behalf of the equitable claimants indicated that, for more than a 15-year period of hunting and fishing the land, they never encountered the title holders' predecessor in interest or the title-holders on the dispute land. Moreover, they only had to "run off" a few trespassers attempting to hunt the land on a few occasions. Thus, drawing all inferences in favor of the equitable claimants, as we are bound to do, we hold that a reasonable juror could find that, given all the circumstances, the equitable claimants marked the disputed property

with sufficient definiteness to give notice of their claim both to the general public and to the title holders. Thus, contrary to the trial court's opinion, the question whether the equitable claimants maintained sufficient definitive boundary markings was a question of fact for the jury to decide.

KRS 411.190(8)

The title holders next claim that, under KRS 411.190(8), the equitable claimants cannot prevail because they used the disputed land for recreational purposes only. Indeed, subsection (8) provides that no adverse possession claim may rest solely upon an adverse claimant's recreational use of the title holder's property. However, subsection (8) was not enacted until 2002, and we have already held that it does not apply retroactively. *See Allen v. Thomas*, 209 S.W.3d 475, 478-79 (Ky.App. 2006). Hence, subsection (8) has no bearing on this case as the 15-year period for adverse possession ran somewhere between 1982 and 2000, well before subsection(8) was enacted.

Permissive Use

The title holders next argue that the trial court's grant of a JNOV may be alternatively affirmed on the ground that the evidence is uncontroverted that the equitable claimants used the disputed property with the permission of the title holder's predecessor in interest and, therefore, not adversely. Specifically, the title holders contend that the equitable claimants "uncontroverted testimony was that they sought and received permission from Walter Ruby, from whom the [title holders] purchased the land to hunt and fish. . . ." But no citation to the record is given in support of this purported, self-

damning admission by the equitable claimants. In sharp contrast, our review of the record indicates that the lead equitable claimant specifically and clearly testified that he obtained permission to hunt the disputed property from his own ancestor by marriage, a Mr. Winstead, and not from the title holders' predecessor in interest. Mr. Ruby. Thus, the issue whether the equitable claimants' use of the disputed land was permissiveness or adverse would be a disputed question of fact for the jury to decide, not a proper ground for the grant of a JNOV. *See Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky.1998).

Instructional Error

Finally, the title holders content that an alleged error in the jury instructions is another, alternative ground for affirming the trial court's grant of a JNOV. But once again, even assuming that the a jury instruction was erroneously worded, that error would be grounds for a new trial, not a JNOV. Thus, for us to entertain the assignment of jury-instruction error, it has no bearing on the decision of the trial court, which was to grant an outright verdict to the title holders, not a new trial. *See Jones v. Clerk of Oldham Circuit Clerk*, 312 Ky. 818, 229 S.W.2d 982, 983 (1950) ("If he thought himself injured by the jury instruction the remedy was by appeal[.]"); *contrast Carrico v. City of Owensboro*, 511 S.W.2d 677, 678 (Ky. 1974). Thus, regardless of its merits, the title holder's instruction-error claim is immaterial here.

Conclusion

For the foregoing reasons, we hold that the trial court erred in granting a JNOV. Therefore, we reverse the trial court, vacate the JNOV, reinstate the jury's verdict, and remand for any further proceedings in accordance with our judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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