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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001585-MR

GARY MCCOY AND SUSIE MCCOY

APPELLANTS

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

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

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

ACREE, JUDGE: The appellants, Gary and Susie McCoy, seek reversal of the Lawrence Circuit Court's order finding that appellee, Willie Thompson, acquired a twenty-five-acre parcel of land via adverse possession. We affirm.

In 1979, Thompson acquired a tract of land on Rockhouse Fork of Cherokee Creek in Lawrence County. Thompson's deed describes a 199.24-acre tract and excepts from it a sixty-acre tract. Thompson acquired his land from Oscar May. Oscar May acquired the land from Charles Edward May who acquired it from Thomas May.

Thomas May originally held a deed that contained the 199.24-acre tract acquired by Thompson and the sixty-acre tract that was excepted from Thompson's deed. Thomas May conveyed the sixty-acre tract to his neighbor, Herbert Sturgill. The sixty acres was divided by a ridgeline and twenty-five acres was located south of the ridgeline. On July 2, 1936, Herbert Sturgill conveyed those twenty-five acres back to Thomas May.

In 1999, the McCoys acquired a deed from Laura Sturgill Smith that included a description of the sixty-acre tract excepted from Thompson's deed. However, the McCoys did not acquire legal title to the entire sixty acres. As it turns out, Thomas May never actually conveyed legal title to the twenty-five-acre tract and it passed to his heirs. The twenty-five-acre tract is the subject of this appeal. Because Thompson does not hold legal title to the twenty-five acres, we must determine if he acquired the land through adverse possession.¹

In order to establish adverse possession the possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive;

¹ The procedural posture of this case is long and involves numerous parties not discussed in this appeal. For the purposes of this opinion we will focus only on those facts relevant to the adverse possession of the twenty-five disputed acres.

and (5) continuous for a period of fifteen years. *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky. 1955); KRS 413.010.

The circuit court found that a fence enclosed the twenty-five acres and existed for the statutory period. Further, the court determined that Thompson cut timber and landscaped a portion of the disputed tract. Thompson also stored personal property, hunted, and allowed others to hunt on the tract. The circuit court held that these acts were sufficient to establish adverse possession of the twenty-five acres. These factual findings can only be overturned if they are clearly erroneous. *Phillips v. Akers*, 103 S.W.3d 705, 709 (Ky. App. 2002).

The circuit court held that the well-established boundary line, as well as Thompson's use of the disputed tract, was sufficient to establish adverse possession. However, the McCoys argue that the court incorrectly relied on unpublished precedent when it considered *Dowdell v. Campbell*, 2008 WL 2468719 (Ky. App. 2008)(No. 2006-CA-002126-MR). While the circuit court was not bound by the decision in *Dowdell*, it is nonetheless persuasive and applies the necessary rules of adverse possession to facts very similar to this case.

The appellants also aver that *Ennis v. Billingsly* is applicable and shows that maintaining a fence line is insufficient to establish adverse possession. *See* 264 Ky. 254, 94 S.W.2d 669 (1936). However, *Ennis* is distinguished from this case because in *Ennis* there was no evidence that the fence was ever built or recognized as the dividing line between the properties. *Id.* at 670. In the case before us, it is clear that the fence was considered the boundary line between the Thomas May

tract and the Sturgill tract. Further, when Thompson purchased the property he believed the fence was the boundary and the transacting parties intended that Thompson acquire and possess the twenty-five-acre tract.

When Thompson acquired his land from Oscar May they walked the perimeter, the entirety of which was enclosed by a barbwire fence. Included in the enclosed area was the twenty-five acres in dispute. After purchasing the property, Thompson maintained the fence on a regular basis. Thompson testified that the fence ran along the ridgeline and was respected as the boundary line between his property and that of his neighbor, Laura Smith, prior to the McCoys' purchase. Laura Smith's brother, Millard Sturgill, stated in his deposition that his father, the prior owner, never farmed south of the ridge. Millard also stated that he grew up on the farm and at that time a fence ran along the ridge and divided the property.

The fence that ran across the ridgeline and separated the twenty-five disputed acres from the sixty-acre tract referred to in the McCoys' deed was recognized as the boundary to the Thomas May property since 1936. Although the deeds possessed by McCoy and Thompson do not accurately reflect the final result of the exchange between Thomas May and Herbert Sturgill, it is clear that the twenty-five acres returned to Thomas May. While Thomas May failed to convey legal title to the twenty-five acres, there is no evidence that Charles Edward May or his successor in interest, Oscar May, did not consider the fenced ridgeline to be their property's boundary. Indeed, it appears the Sturgills believed the fenced ridgeline was the boundary as well. This belief was also held by Thompson who

walked the ridgeline with Oscar May prior to his purchase of the farm in 1979.

These expressions of understanding indicate that Thompson's actions, as well as the actions of his predecessors, were sufficient to provide notice that he intended to possess the tract as his own.

The existence of the fence and Thompson's efforts to keep it in good repair coupled with the other uses found by the circuit court support the circuit court's conclusion. Therefore, its finding of adverse possession was not clearly erroneous and we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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