

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001143-MR

PAUL KIDD AND ARVETTA ADKINS KIDD

APPELLANTS

v. APPEAL FROM ELLIOTT CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
ACTION NO. 94-CI-00026

SONNY NEAL CONN AND CLARA CONN;  
SHERMAN TONY CONN AND SANDY CONN;  
AND PEGGY ANN CONN NOWLIN AND  
DONALD NOWLIN

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE, TAYLOR, JUDGE, AND KNOPF, SENIOR  
JUDGE. <sup>1</sup>

KNOPF, SENIOR JUDGE: Paul Kidd and Arvetta Adkins Kidd (the  
Kidds) appeal from findings of fact, conclusions of law and a  
judgment awarding damages to the Conns in a case involving a  
boundary dispute and the Kidds' removal of timber from a

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<sup>1</sup> Senior Judge William L. Knopf 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.

disputed area. The Kidds argue that the Conns failed to meet their burden of proving title to the disputed area, that the trial court erred by failing to find that the Kidds adversely possessed the disputed area, and that the trial court improperly calculated damages. Because the trial court's findings regarding the first two issues are not clearly erroneous and because the Kidds failed to preserve their objection to the trial court's calculation of damages, we affirm the trial court's judgment.

The Kidds and the Conns own adjacent tracts of real property in the Laurel Gorge area of Laurel County, Kentucky. Both owners trace their tracts to a common tract of land containing 125 acres and owned by John and Nora Skaggs. In January 1944, the Skaggs sold off a 75-acre tract to Rosetta Caudill. The Kidds eventually acquired that tract. The Skaggs sold the remaining 50-acre tract to Lyman Brown in March 1946. The Conns currently own that tract.

The dispute in this case concerns the boundary between the two tracts. The descriptions in both chains of title call for the boundary to run with a line of cliffs. The Conns assert that the boundary is a line of cliffs on the north side of Laurel Creek. The Kidds claim that the boundary is the line of cliffs on the south side of Laurel Creek. The disputed area lies in the bottom of the gorge between the cliffs.

At some time prior to 1994, the Kidds cut trees and removed timber from the area in the gorge. The Conns brought this action for a declaration of rights seeking to quiet the Kidds' claim of title to the land in the gorge. They also sought damages based on the Kidds' trespass and wrongful removal of timber. In response, the Kidds asserted that their deed included the land in the gorge. In the alternative, the Kidds claimed that they are entitled to the disputed area by adverse possession.

The parties submitted the matter to the court for trial on the depositions and other evidence. On December 14, 2004, the trial court issued findings of fact, conclusions of law and a judgment in favor of the Conns. The trial court concluded that the boundary runs along the cliffs on the north side of Laurel Creek. The trial court also found that the Kidds had failed to prove that they had adversely possessed the disputed area for the requisite period. Finally, the court found that the Kidds had wrongfully removed timber from the disputed area, and awarded the Conns damages in the amount of \$11,116.29, together with court costs, attorney fees, surveyor's fees and appraiser's fees, for a total of \$15,330.34.

Thereafter, the trial court denied the Kidds' motion to alter, amend, or vacate,<sup>2</sup> and this appeal followed.

The Kidds first argue that the Conns failed to present substantial evidence supporting their claim that the boundary ran along the cliffs on the north side of Laurel Creek. The trial court relied heavily on the testimony of John Charles, a licensed surveyor, who testified for the Conns. He reviewed the deeds in both the Conns' and the Kidds' respective claims to title. Based on those descriptions in the deeds, Charles conducted a survey of the Conns' tract and prepared a plat based on that survey. Charles was of the opinion that the line of cliffs on the north side of Laurel Creek more closely matched the other boundary lines described in the parties' deeds and in the deeds of the adjoining landowners. Charles thus concluded that the Kidds' tract was entirely above the cliffs and they owned none of the land in the gorge.

The Kidds correctly note that, where boundary descriptions are overlapping, the description in the senior title is controlling.<sup>3</sup> The Kidds contend that the Charles survey is deficient because he only conducted a survey of the Conns' junior tract. Charles agreed that the Kidds' tract has the

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<sup>2</sup> CR 59.05.

<sup>3</sup> See Karr v. Ray, 232 Ky. 767, 24 S.W.2d 609, 611 (1930); and Johnson v. Thornsberry, 200 Ky. 665, 255 S.W. 284, 200 Ky. 665 (1923).

senior title. However, he concluded that issue was not controlling because the deed descriptions in both parties' chains of title called for the boundary to follow the line of cliffs.

We agree. In support of their boundary claim, the Kidds primarily rely on the location of an old fence in the gorge. Paul Kidd testified that this fence runs along the south side of Laurel Creek. He also testified that this fence was built by a prior owner of his tract following a boundary dispute with his neighbor. The trial court noted, however, that this fence is not identified in any of the deeds, does not match up to any of the other boundary descriptions, and is located quite some distance away from the cliffs on the south side of Laurel Creek. Consequently, this case does not involve overlapping or conflicting title, or even conflicting boundaries, but only the proper location of a common boundary line described in exactly the same way in both chains of title. Therefore, the issue of who has senior title is not relevant.<sup>4</sup>

Moreover, as this matter was tried before the circuit court without jury, our review of factual determinations is under the clearly erroneous rule.<sup>5</sup> This rule applies with equal force on an appeal from a judgment in an action involving a

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<sup>4</sup> Waddle v. Williams, 294 Ky. 66, 170 S.W.2d 886, 887 (1943).

<sup>5</sup> CR 52.01.

boundary dispute.<sup>6</sup> Furthermore, "[a] fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors".<sup>7</sup>

As the plaintiffs in the action below, the Conns bore the burden of establishing with reasonable certainty the location of the boundary they claim. Where there is confusion, the doubt should be resolved against them.<sup>8</sup> But while the Kidds challenge the methodology which Charles used to conduct the survey, they presented no expert testimony to support their assertions that Charles's survey was based on improper methods or erroneous assumptions. Likewise, the trial court was not bound to accept the Kidds' lay opinion or the reputation evidence concerning the location of the boundary. Because the trial court did not clearly err by accepting the testimony and evidence presented by the Conns, we must affirm the trial court's factual findings concerning the location of the boundary.

The Kidds next argue that the trial court erred by finding that they had failed to meet their burden of proving

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<sup>6</sup> Croley v. Alsip, 602 S.W.2d 418, 419 (Ky. 1980).

<sup>7</sup> Webb v. Compton, 98 S.W.3d 513, 517 (Ky.App. 2002) (*quoting* Howard v. Kingmont Oil Co., 729 S.W.2d 183, 184-85 (Ky.App. 1987)).

<sup>8</sup> Rowe v. Blackburn, 253 S.W.2d 25, 27 (Ky. 1952) (*citing* Green v. Witten, 200 Ky. 725, 255 S.W. 519 (1923)).

adverse possession of the disputed area. To prove the elements of adverse possession, the Kidds' possession must have been hostile, under a claim of right, actual, exclusive, continuous, open, and notorious for a period of at least fifteen years.<sup>9</sup> These elements must be demonstrated by clear and convincing evidence.<sup>10</sup>

Arvetta Kidd testified that her former husband, Brown Adkins, acquired the tract in 1971. She testified that she and Brown made extensive use of the area in the gorge until Brown died in 1988. She stated that her family regularly went to the disputed property to walk, hunt, ride horses, picnic, watch wildlife and ride all-terrain vehicles. She also testified that she and Brown regularly let the cattle run on the land in the gorge. Paul Kidd testified that he also went onto the property for these activities after he married Arvetta.

The trial court accepted this evidence, but noted that the activity was sporadic. The activity sometime occurred once a week, but sometimes no one went on the disputed property for months at a time. The court also found that these activities left no visible evidence on the ground to give notice that anyone was claiming the land. Thus, the trial court concluded

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<sup>9</sup> See Appalachian Regional Healthcare v. Royal Crown, 824 S.W.2d 878, 879-80 (Ky. 1992).

<sup>10</sup> Phillips v. Akers, 103 S.W.3d 705, 709 (Ky.App. 2002).

that the Kidds' and the Browns' activities on the disputed property were insufficient to establish adverse possession.

The trial court correctly held that a party claiming title by adverse possession must show that the possession was so actual and so continuous as to furnish a cause of action every day during the entire period prescribed by the statute.<sup>11</sup>

Adverse possession of land may be said to be founded in trespass; it must be a trespass constantly continued by acts on the premises. It must challenge the right of the entire world; the claimant must keep her flag flying, and present a hostile front to all adverse claims.<sup>12</sup> Sporadic activity is not sufficient to give notice to the record title owner of a continuing hostile claim, and absent the erection of physical improvements to the land, the activity must be substantial.<sup>13</sup> We agree with the trial court that the activities by the Browns and the Kidds in the gorge, while fairly regular, were not sufficiently open, continuous or notorious to ripen into adverse possession.<sup>14</sup>

Finally, the Kidds argue that the trial court incorrectly applied the post-1994 version of KRS 364.130 in

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<sup>11</sup> Noland v. Wise, 259 S.W.2d 46, 48 (Ky. 1953).

<sup>12</sup> Combs v. Ezell, 232 Ky. 602, 24 S.W.2d 301, 305 (1930).

<sup>13</sup> Kentucky Women's Christian Temperance v. Thomas, 412 S.W.2d 869, 870 (Ky. 1967).

<sup>14</sup> Phillips v. Akers, *supra* at 710 (2002).



calculating the Conns' damages. The parties agree that the Kidds went onto the disputed property and cut timber prior to 1994. At the time of the trespass, KRS 364.130 provided that "[a]ny person who unlawfully enters upon and cuts or saws down, or causes to be cut or sawed down, timber growing upon the land of another and without color of title in himself to the timber, or to the land upon which the timber was growing, shall be liable to the rightful owner of the timber in punitive damages". In 1994, the General Assembly amended KRS 364.130 and now requires the fact-finder to assess treble damages, unless the defendant establishes the mitigating circumstances set out in KRS 364.130(2). The amended statute also requires the fact-finder to award any legal costs incurred by the owner of the timber.<sup>15</sup>

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<sup>15</sup> The amended version of KRS 364.130 provides, in relevant part, as follows:  
(1) Except as provided in subsection (2) of this section, any person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon the land of another without legal right or without color of title in himself to the timber or to the land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the rightful owner of the property three (3) times the cost of any damages to the property as well as any legal costs incurred by the owner of the timber.

(2) (a) If a defendant can certify that prior to cutting:

1. A signed statement was obtained from the person whom the defendant believed to be the owner of all trees scheduled to be cut that:

a. All of the trees to be cut were on his property and that none were on the property of another; and

b. He has given his permission, in writing, for the trees on his property to be cut; and

2. Either:

a. A written agreement was made with owners of the land adjacent to the cut that the trees to be cut were not on their property; or

After citing King v. Grecco,<sup>16</sup> which is based on the post-1994 version of the statute, the trial court awarded the Conns three times the value of the cut timber, plus the Conns' attorney fees, surveyor fees and appraiser fees. However, KRS 446.080(3) provides that "no statute shall be construed to be retroactive, unless expressly so declared". The Kidds argue that the trial court improperly gave retroactive effect to the 1994 version of KRS 364.130.

The Conns respond that the Kidds failed to raise this issue before the trial court. In their motion to alter, amend or vacate, the Kidds did not argue that the trial court applied the wrong version of KRS 364.130. Rather, they only argued that treble damages were inappropriate due to mitigating circumstances, and that the court's award of surveyor fees was excessive. Because the Kidds failed to raise this issue before the trial court, they are precluded from raising the issue for the first time on appeal.<sup>17</sup>

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b. Owners of the land adjacent to the cut were notified in writing, delivered by certified mail, restricted delivery, and return receipt requested, of the pending cut and they raised no objection,

the court may render a judgment for no more than the reasonable value of the timber, actual damages caused to the property, and any legal costs incurred by the owner of the timber.

<sup>16</sup> 111 S.W.3d 877 (Ky.App. 2002).

<sup>17</sup> Regional Jail Authority v. Tackett, 770 S.W.2d 225, 228 (Ky. 1989).

Accordingly, the judgment of the Elliott Circuit Court  
is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gary E. Conn  
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

B. R. Salyer  
Morehead, Kentucky