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In re Marina Martin

1999 February

Calhoun v. Woods

Franklin Supreme Court (1993)

This is an appeal in a suit to quiet title to certain parcels of unimproved mountain land. The claimants seek to acquire title by adverse possession. In 1988, claimants Henry W. Calhoun and Katharine J. Calhoun, his wife, filed a complaint against Theodore Kennedy Woods, Jr. and others, asserting title to three parcels of land in Albemarle County. The claimants are the owners of property adjacent to the land in issue.

The claimants allege that they, and their predecessors in title, "have always thought their property to include" the parcels in dispute in this litigation. The claimants acknowledge in their complaint that the disputed parcels are owned of record by the defendants. The claimants assert that they have acquired title to the defendants' property by adverse possession.

To establish title to real property by adverse possession, a claimant must prove actual, hostile, exclusive, visible, and continuous possession, under a claim of right, for the statutory period of 15 years. Franklin Civil Code § 244. The burden is upon the claimant to prove all the foregoing elements by clear and convincing evidence.

Proof of *actual* possession may be by use and occupation of the property; a person is in *hostile* possession if the possession is non-permissive, is under a claim of right, and is adverse to the right of the true owner; and possession is *exclusive* when it is not in common with others. Possession is *visible* when the use is so obvious that the true owner is presumed to know of it. Possession is *continuous* only if it exists without interruption for the statutory period.

A *claim of right,* in the context of adverse possession, means a possessor's intention to appropriate and use the property as the possessor's own to the exclusion of all others. A claimant's actual occupation, use, and improvement of the land, as if the claimant were in fact the owner, is conduct that can prove a claim of right. Wild and uncultivated land cannot be made the subject of adverse possession while it remains completely in a state of nature; some change in its condition is essential to establish a claim of right.

The land in question is located on Apple- berry Mountain, in the eastern foothills of the Red Ridge Mountains, about 20 miles southwest of Lottesville. According to the record, the 1,880-foot mountain is named for William Appleberry, an Englishman who acquired in 1735 a grant of 5,000 acres in the area. He offered 25 acres to any Hessian who would build a home on the land.

During the Civil War, a descendant of Appleberry and a group of Hessians mined lead there for use by the Confederate Army.

After the turn of the present century, an orchard industry developed in the area and the Albemarle Pippin apple grown there became popular. This industry declined during World

War II because of labor and gasoline shortages, and because of modern packaging methods developed in the orchards of the western states. According to the record, descendants of the original Hessians continue to reside in the area.

The claimants sought to establish that their period of adverse possession began in 1931 when Philip M. Jones, Mrs. Calhoun's father, acquired title to some of the parcels adjoining the disputed parcels. The claimants assert that adverse possession continued until the institution of this proceeding. They acquired title to their property in 1966 from Jones and his wife and seek to tack their possession onto the Joneses' possessory period. The claimants sought to prove that the use and possession of the disputed property included the following activities: sawmill operations, logging, firewood gathering, construction and maintenance of gates, construction and use of buildings, installation and use of water and electricity, hunting, property posting, erection and maintenance of fencing, husbandry, orchardry, recreational activities, conservation activities, occupation and leasing, and construction and maintenance of roads.

The trial court concluded that the Calhouns had not sufficiently established by clear and convincing evidence that they had continuously possessed the land. We agree.

When Jones acquired the undisputed parcels from 1931 to 1939, he mistakenly believed that he had obtained title to the disputed land. Consequently, Jones, and later the claimants, engaged in activitiesboth on their land and on the defendants' land. But the evidence is unclear where many of these activities took place and whether the acts were connected with use of the disputed or undisputed parcels. Moreover, many of the uses of the disputed parcels during the period in question were intermittent and sporadic. A few examples will illustrate the overall insufficiency of the claimants' case.

Jones built narrow roads through the disputed parcels beginning in 1933. Later, Calhoun maintained those roads. But it can be inferred from the record that the purpose of the construction and maintenance of the several ways was to provide access to the undisputed parcels, as opposed to the disputed land.

Jones permitted one Fitzgerald to conduct a sawmill operation in 1949 or 1950. Fitzgerald built a small, frame "shanty" as well as two other frame structures on that parcel for use of his workers. But the sawmill operated for only two years, after which it and the cabins were abandoned. A college professor lived alone in one of the cabins that had electrical service for four summers during the early 1950s with Jones' permission.

The claimants offered evidence that the Jones family spent "every summer, all summer" on Appleberry Mountain from 1933 until 1952, and that both the Joneses and the Calhouns made regular trips there in later years. But the record does not reveal whether they stayed on the disputed or undisputed property. The claimants submitted evidence that they allowed friends to use the property for recreational purposes such as hiking and hunting. But the record is unclear precisely to what extent and

during what period of time the disputed property actually was used. Also, evidence that the entire area was posted by the claimants against hunting and trespassing was imprecise as it related to posting of the disputed land.

Finally, even though there was abundant evidence of some use of the disputed property during the period in question, the evidence was in sharp conflict as to whether the use was sufficient to change its natural condition so as to notify the defendants of any hostile claim. Woods, a retired naval officer and attorney living in Barlington, learned in 1986 that the claimants "were laying claim to certain of our property up in Appleberry by adverse possession." Woods had visited the property, which had been in his family since 1900, for the first time in 1984.

A consulting forester, testifying for the defendants, had made a timber examination of the Appleberry area at the request of the Woods family in 1975 when he was the Albemarle County Forester with the Franklin Division of Forestry. At the time, he found no "disturbance" on the disputed parcels or anything to indicate "control by a third party.

Accordingly, we hold that the record supports the conclusions of the trial court and the judgment is affirmed.

In this appeal, we consider whether the evidence is sufficient to support the trial court's ruling that a prescriptive easement had been established. The dispositive issue is whether the plaintiffs proved an adverse use.

In 1944, J.M. Garnett purchased a five-acre tract, which he later subdivided. By deed, Garnett granted all lot purchasers the right to use the strip of land 10 feet wide over and along the northern boundary of this tract for access to their lots and the York River, which runs along the eastern boundary of the tract.

Casper B. Haynes, Jr., Josephine Erwin, and the other plaintiffs are all successors in interest to the original purchasers of the Garnett lots. The plaintiffs and their predecessors have used land adjacent to the northern boundary of the tract to gain access to the York River. This adjacent lot, formerly owned by Frances Sutton, is now owned by Rachel P. Chaney.

The plaintiffs alleged that, at the time Chaney purchased the adjacent lot in 1991, she placed a fence across a portion of her lot, thus preventing access to the river. The plaintiffs filed a petition for declaratory judgment asserting that they had established a prescriptive easement, 10 feet wide, over Chaney's land.

All the plaintiffs who testified stated that, until the present suit was filed, they believed their easement ran over Chaney's property between a group of cedar trees to the north and a stand of bushes to the south. That area is approximately 40 to 50 feet wide. These plaintiffs further stated that they used this way to get to the river because they understood that their easement was located there. One plaintiff, Michael S. Duvall, testified that he used the way with knowledge that his easement was only 10 feet wide. Duvall stated that, when he used the way, he drove his vehicle straight down the middle of the area between the trees and the shrubs, apparently in an attempt to comply with the terms of his easement. The other plaintiffs testified that they used the whole area between the trees and the shrubs because they thought it was included in their easement.

The trial court received other evidence indicating that the plaintiffs' use of the way was exclusive, continuous, uninterrupted, and with the acquiescence of the Suttons, and that such use had continued for a period of over 20 years. The trial court concluded that the plaintiffs had acquired a prescriptive easement over Chaney's property, and stated that they had established an adverse use by their use of the entire area between the trees and the shrubs.

In determining whether the plaintiffs established a prescriptive easement over Chaney's land, the plaintiffs must prove, by clear and convincing evidence, that the use of the roadway was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owners whose land over which it passes, and that the use has continued for at least 20 years. However, when the user of

a way over another's land clearly demonstrates that his use has been open, visible, continuous, and exclusive for more than 20 years, his use is presumed to be under a claim of right.

Chaney argues that any such presumption in the plaintiffs favor is rebutted, as a matter of law, by the undisputed evidence that all the plaintiffs used the way under the mistaken belief that their express easement designated that location, and that they did not intend to use any land not included in the grant. We agree.

The essence of an adverse use is the intentional assertion of a claim hostile to the ownership right of another. With respect to claims of title by adverse possession, such title can be acquired even if there is a mistaken belief of recorded title. *Mellish* v. *Cooney* (Franklin Supreme Court, 1922). This court has consistently held when speaking of prescriptive easements that, unlike adverse possession, use of property under the mistaken belief of a recorded right cannot be adverse as long as such mistake continues. The present record shows that the plaintiffs based their use of Chaney's land solely on their mistaken belief that it was the land described in their express easement. Thus, the plaintiffs have failed to prove that a prescriptive easement was established.