IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Submitted on Briefs December 1, 2022

GILBERT LOPEZ ET AL. v. DEIDRA L. SHARP

Appeal from the Chancery Court for Lewis County
No. 2021-CV-80 Michael E. Spitzer, Judge

No. M2022-00679-COA-R3-CV

This appeal invoves a claim for adverse possession. Gilbert Lopez and his wife Wendy Lopez claimed ownership of a 1.25 acre parcel of land ("Lot 39") adjacent to their property under the theory of common law adverse possession. Deidra Sharp, owner of a tract also adjacent to Lot 39, presented evidence of her unencumbered title to Lot 39. Ms. Sharp established that she and her predecessors in title had paid taxes on Lot 39 and argued that the Lopezes did not prove their possession was uninterrupted, continuous, exclusive, or adverse for the requisite twenty year period. After a bench trial, the trial court found that the Lopezes did not "indicate ownership of [Lot 39] nor did [they] do anything that would rise to the level of more than a trespass." The trial court resolved the conflicting testimony by making explicit credibility determinations in favor of Ms. Sharp and her witnesses. The trial court also held that Tenn. Code Ann. § 28-2-110(a), which generally bars a claim to real estate when the claimant has failed to pay taxes on the claimed property, applies to bar the adverse possession claim. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and W. NEAL MCBRAYER, J., joined.

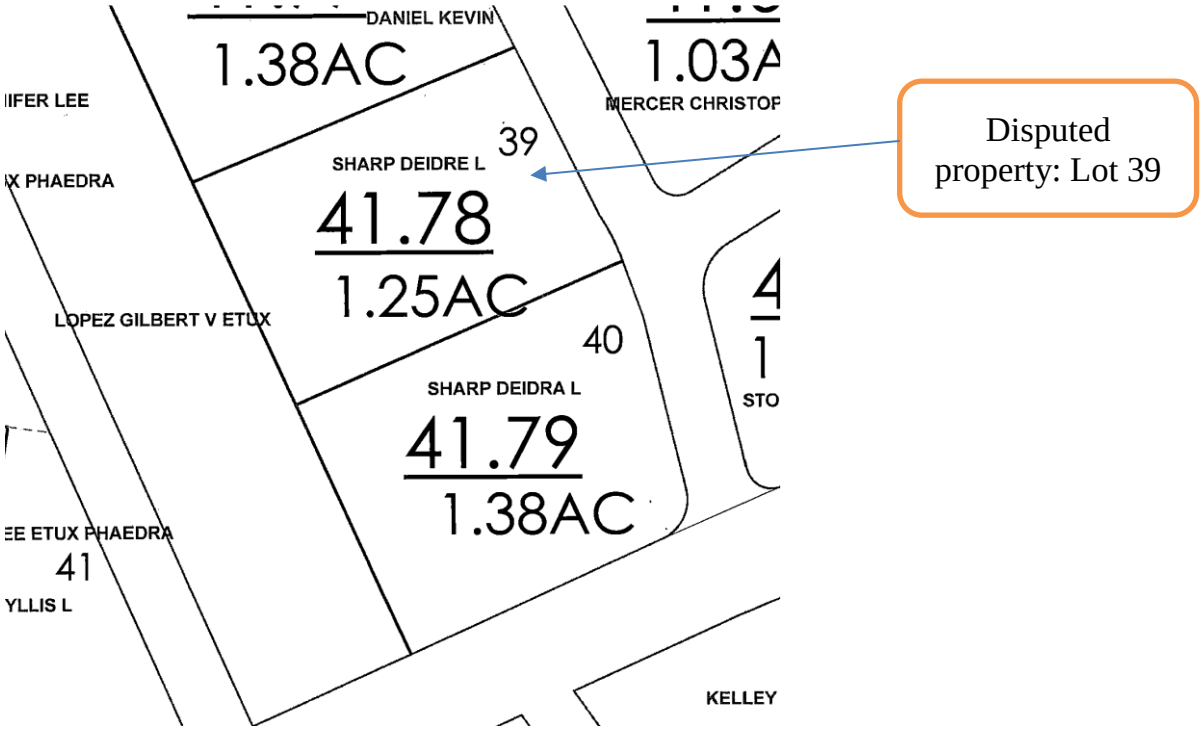
Michael E. Hinson, Hohenwald, Tennessee, for the appellants, Gilbert Lopez and Wendy Lopez.

Deidra L. Sharp, pro se appellee; no appellate brief filed.

OPINION

I. BACKGROUND

The following is a copy of a portion of a tax map entered into evidence at trial that visually depicts the property in dispute.



Ms. Sharp resides in a house built on Lot 40, which lies adjacent to the southeast of Lot 39. The Lopezes own and live on a long, narrow 5.4-acre strip of adjacent land to the west of Ms. Sharp's property.

The Lopezes bought their property around 1992, before the surrounding property had been subdivided into what is now the Heritage Hills subdivision. At trial, they presented the testimony of Mr. Lopez, his daughter Shay Grinder, and son-in-law Brian Grinder. These witnesses generally testified that the Lopez family had used Lot 39 in various ways and for various purposes since 1992. Their uses included drawing water from the well there, sporadic gardening and raising livestock, and recreational activities such as picnics, bonfires, and riding motorcycles. In later years, the Lopezes also parked several vehicles on Lot 39.

Ms. Sharp presented her own testimony and that of her fiancé Javen Hall, prior owner and builder Coy Norris, and his son Michael Norris and daughter-in-law Britni Norris. Coy Norris purchased lots 39 and 40 around 2012. He built the house on Lot 40, starting construction in 2019. Mr. Norris testified that he extended the field lines

supporting the septic system for the house onto Lot 39. Michael and Britni Norris lived directly adjacent to the disputed property, on the other side of Heritage Hills Lane, from around 2009 until 2020. The Norrises testified generally that they did not see the alleged uses of Lot 39 by the Lopezes; that there was never any indication that the Lopezes claimed ownership or possession of the disputed property; and that Brian Grinder had in fact made an offer to purchase Lot 39 from Coy Norris on several occasions.

There was almost no evidence presented of a misunderstanding or mistake regarding where the actual boundary line between the Lopez property and Lot 39 was. As found by the trial court, Mr. Lopez

> commissioned a survey in 1995 which conclusively revealed that he did not own this tract [39] and that his brown, wooden fence represented his eastern boundary line. Further, Mr. Lopez testified that he put the brown, wooden fence directly along the property line, and that is where it remained from the date of purchase.

The trial court, in a thorough and detailed final order granting judgment to Ms. Sharp, found and held in pertinent part as follows:

> Between 1992 and 1998, Gilbert and Wendy Lopez continued to clean up, clear, and use the adjoining property which became Lot 39 of Heritage Hills, and enjoyed that expanded use. Gilbert Lopez was inconsistent in his testimony concerning Lot 39[,] stating at times, "I thought I owned it," and at other times stating, "I knew that I did not own that property."
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> * * *
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> [T]he son-in-law of Mr. Lopez testified that Mr. Lopez told him and the family that the line was in a ditch, well into Lot 39. In addition, Mr. Lopez indicated that no one had ever questioned his use of the property, but the proof bore out that once the development of housing began which included the disputed lot, the sheriff had been called to stop his family from using the acreage and other portions of it as early as 2010. These inconsistent statements, along with his demeanor, reflection in responding to questions, and failure to openly fence or show significant indication of ownership caused this Court to both question or give credibility to his testimony.
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> * * *
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> The Lopez family and particularly the son-in-law, Brian Grinder, did not openly claim Lot 39, and the proof was clear and convincing that this family

had, on at least three occasions, if not more, sought to purchase the land from either Coy Norris, a predecessor in title, or his daughter in law, or from [Javen] Hall.

* * *

It is apparent from the proof . . . that the [Lopez family's] use was not continuous nor was it exclusive, but rather sporadic, and generally pre-dated the development of the lands adjoining Mr. Lopez beginning in 1998. For example, Mr. Lopez stated that the well has a submersible pump and that use could not be detected, and further, they quit using it for consumption in 1994. Concerning the use of the property for a garden, the proof from both Mr. Lopez and his daughter reflected that they put a garden in for only a few years around 1998. . . . He did not build any permanent structures on the property nor did he run electric or utility lines to the tract for improvements.

As for livestock, the testimony indicated that numerous types of animals were on the property but only for a short period of time. In fact, all of the use of this tract pre-dates the 1998 sale of the land . . . when previously unimproved pasture land began to be developed.

* * *

The Court specifically finds that Mr. Lopez did not have open and exclusive possession of Lot 39 for a sustained period of time. In contrast to the claims of adverse possession by Gilbert Lopez, the proof was clear and convincing that Mr. Lopez did not fence the property, put up any no trespassing signs, or any other signs indicating to the world that he claimed the property as his own. He never cleared the entire tract that became Lot 39 to indicate ownership of that tract nor did he build any permanent structures on the site or do anything that would rise to the level of anything more than a trespass.

The Court specifically finds that Mr. Lopez did not have exclusive, actual, adverse, or open and notorious possession of Lot 39 for twenty (20) years.

* * *

[T]he Court does not find Lopez's claims of adverse possession to be credible. The Court listened to the testimony of the Norris family, Javen Hall, and Deidra Sharp and recognized the consistency of their testimony,

> their demeanor and reflection when questioned, and deems their testimony to be credible and detailed.
> . . . Deidra Sharp affirmatively set forth title ownership via a chain of title, a survey plat, and claim of ownership. In addition, she established that she and her predecessors in title, and not Mr. Lopez, had paid taxes on Lot 39 for twenty years or more, as a defense to the claims of Lopez.

(Numbering of paragraphs in original omitted).

II. ISSUE

The Lopezes have timely appealed and raise the following issue, as quoted from their brief: "whether the trial court erred in finding the land in dispute was not conveyed by adverse possession."

III. STANDARD OF REVIEW

As stated by this Court in *Logan v. Cannon*, 602 S.W.3d 363, 378 (Tenn. Ct. App. 2019),

> Our review of the trial court's judgment following a non-jury trial is *de novo* upon the record, with a presumption of correctness as to the trial court's findings of fact unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Rogers v. Louisville Land Co*., 367 S.W.3d 196, 204 (Tenn. 2012). "In order for the evidence to preponderate against the trial court's findings of fact, the evidence must support another finding of fact with greater convincing effect." *Wood v. Starko*, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006) (citing *Rawlings v. John Hancock Mut. Life Ins. Co*., 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001)). The trial court's determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *See Morrison v. Allen*, 338 S.W.3d 417, 426 (Tenn. 2011); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). We review the trial court's conclusions of law de novo with no presumption of correctness. *Hughes v. Metro. Gov't of Nashville & Davidson Cnty.*, 340 S.W.3d 352, 360 (Tenn. 2011).

IV. ANALYSIS

In *Cumulus Broadcasting, Inc. v. Shim*, 226 S.W.3d 366 (Tenn. 2007), our Supreme Court discussed the doctrine of common law adverse possession at length, setting forth the applicable legal principles as follows:

> The doctrine of adverse possession is often described as a limitation on the recovery of real property; the limitation period may operate not only as a bar to recover adversely possessed property but it may also vest the adverse holder with title. Generally, acquisition by adverse possession for the requisite period of time, whether statutory or under common law, must be (a) actual and exclusive; (b) open, visible, and notorious; (c) continuous and peaceable; and (d) hostile and adverse. *Id.* The adverse possession of real estate is not only inconsistent with the right of the title holder but may, when all elements of the doctrine are present, create an actual ownership interest.
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> * * *
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> In our state, common law adverse possession rests upon the proposition "that, where one has remained in uninterrupted and continuous possession of land for 20 years, a grant or deed will be presumed." Color (or assurance) of title is not required. In order to establish adverse possession under this theory, or in any statutorily based claim, the possession must have been exclusive, actual, adverse, continuous, open, and notorious for the requisite period of time. Adverse possession is, of course, a question of fact. The burden of proof is on the individual claiming ownership by adverse possession and the quality of the evidence must be clear and convincing. The actual owner must either have knowledge of the adverse possession, or the possession must be so open and notorious to imply a presumption of that fact. When an adverse possessor holds the land for a period of twenty years, even absent any assurance or color of title, the title vests in that possessor.

Id. at 375, 376-77 (internal citations omitted).

The Lopezes, as claimants of land under the common law doctrine of adverse possession, bore the burden of proving their claim by clear and convincing evidence. In Tennessee,

> [t]he "clear and convincing" standard falls somewhere between the "preponderance of the evidence" in civil cases and the "beyond a reasonable doubt" standard in criminal proceedings. To be "clear and convincing," the

> evidence must "produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence."

Logan, 602 S.W.3d at 379-80 (Tenn. Ct. App. 2019) (quoting *Walton v. Young*, 950 S.W.2d 956, 960 (Tenn. 1997); internal citations omitted).

In this case, Mr. Lopez testified that he cleared and cleaned up some of Lot 39 after he bought his adjacent tract in 1992. He put up a wooden picket fence which, by all indications, was quite close to if not on the actual boundary line; it does not appear to encroach on Lot 39. He said that the Lopez family for a short time used the water from a well on Lot 39 for drinking but that it was contaminated and made them sick. After that, they only used the water for gardening and livestock. Mr. Lopez testified that they used the disputed property for recreational activities such as motorcycle riding, sledding, picnics, and the like. When asked about the time frame for their gardening, he stated, "Back in, I'm wanting to say '98 and we did it for a few years. I'd say '98. We had a few gardens there."

Mr. Lopez testified that his son-in-law Brian Grinder stored cars, boats and farm equipment on Lot 39 with his permission over the years. His mother was cremated and her ashes spread across certain parts of the property, including, according to Mr. Lopez, on Lot 39. Mr. Grinder generally agreed with and corroborated Mr. Lopez's testimony. Shay Grinder, the Lopezes' daughter, testified that they used Lot 39 for raising animals in the mid-1990s, for "probably three to five years."

As already stated, Coy Norris bought Lots 39 and 40 in 1992. He testified that at that time, "there was nothing there. Just straight lots" no buildings, vehicles, equipment, or signs, just an old fence that he said was consistent with his understanding of the marked boundary lines. Mr. Norris said that he and his son Michael bushhogged and then mowed the property, maintaining it until about 2016 or 2017, when "everybody got so busy and then we just let it grow up." He began building the house on Lot 40 in 2019. The septic system installer used a backhoe to dig on both lots, putting the tank on Lot 40 and the field lines on Lot 39. Mr. Norris testified that during this time, Mr. Lopez did not approach him to say anything about the ownership or possession of either lot. He also said that he did not see any of the alleged activity or use of Lot 39 by the Lopez family, except for motorcycle riding by the children, which he told them to stop and called the sheriff's office to report.

Michael Norris agreed with his father's testimony and stated as follows:

A. I lived at 108 Heritage Hills which was directly adjacent to it on the opposite side of the road of Heritage Hills.
Q. So, you could see the two lots [39 and 40]?
A. Yes, sir.
Q. And then, and how long did you live adjacent to those lots?
A. I lived there from 2010 until 2020.
Q. Did you ever see outside the cars that occurred that started getting placed on around 2019, did you ever see the Lopez family on those two lots?
A. Their kids would occasionally like walk across them but, you know, of course, prior to that, we had to call the law and have them not to ride on it anymore.
Q. And after ya'll called the law, did they, did you ever see them riding over there?
A. No, sir.
Q. Did you ever see them over there having any kind of family reunions?
A. No, sir.
Q. Did you ever see them over there having bon fires?
A. No, sir.
Q. Did you ever see them over there cutting trees?
A. No, sir.
Q. Did you ever see any livestock over there?
A. No, sir.
Q. Any fowl being penned, like pigs or anything like that?
A. No, sir.
Q. Did you ever see a garden over there?
A. No, sir.

Britni Norris also testified that she did not see any of the activities or uses alleged by the Lopezes, and she told the story of what happened with the motorcycle riding as follows:

A. The first time we had problems with them, they were riding actually in my backyard. We owned 108 Heritage Hills and 112 Heritage Hills. They have rode across the property in question onto our property and riding donuts in my backyard. I went outside to confront the boys and told them they needed to get off my property. They asked what I was going to do about it, and I said, I'm going to have to call the law. They left. The law came and then since they did not witness them, seeing them riding on the property, there wasn't anything they could do at that time.

> They came back another time and were riding on the property in question and that's whenever they caught them that time. And then the Sheriff's department actually had them come back out and fix the ruts on that property.
> Q. And the ruts that they fixed w[ere] actually on lots 39 and 40?
> A. Yes.

Both Brian and Britni Norris testified that three separate times Mr. Lopez approached them about buying Lot 39 and made offers, which they rejected.

Ms. Sharp and her fiancé Mr. Hall, who lived with her, each testified briefly. They had little knowledge about the alleged past uses of the land because Ms. Sharp had not owned it for very long. Ms. Sharp said that there had been a recent increase in the number of vehicles that were being parked on her side of the property line. Mr. Hall stated that Mr. Grinder approached him and wanted to buy both lots, and after he said no, asked if he could just buy the part of Lot 39 that he was parking vehicles on.

The evidence does not preponderate against the trial court's findings that the Lopezes did not establish that they had possessed Lot 39 in a manner that was "exclusive, actual, adverse, continuous, open, and notorious for the requisite period of time." *Cumulus*, 226 S.W.3d at 377. Even if their proof were to be credited and accepted, which the trial court plainly did not do, it would only establish that the use by the Lopez family of Lot 39 was sporadic, not continuous. The only fencing that was on or around Lot 39 at the time of trial was a fence erected by Mr. Lopez that did not encroach on the disputed property and appeared to accurately mark the actual boundary line. *See Cumulus*, 226 S.W.3d at 377 (stating "[t]ypically, fencing is an indicia of ownership"). Neither Mr. Lopez nor Mr. Grinder acted in a manner consistent with an assertion of ownership when the Norrises "called the law" on them and they were compelled to stop riding motorcycles on Lot 39 and fix the damage they had caused. Further, the trial court credited the testimony that Mr. Grinder had unsuccessfully tried to purchase Lot 39 several times.

Significantly, the trial court had the opportunity to view and assess the credibility of the witnesses and specifically found among other things that "the Court does not find Lopez's claims of adverse possession to be credible" and "[t]he Court listened to the testimony of the Norris family, [Javen] Hall, and Deidra Sharp and recognized the consistency of their testimony, their demeanor and reflection when questioned, and deems their testimony to be credible and detailed." This Court will not disturb the credibility findings of a trial court absent unusual circumstances, which are not present here.

Finally, the trial court also correctly ruled that Tenn. Code Ann. § 28-2-110(a) bars the Lopezes' common law adverse possession claim. That statute provides in pertinent part:

> Any person having any claim to real estate or land of any kind, or to any legal or equitable interest therein, the same having been subject to assessment for state and county taxes, who and those through whom such person claims have failed to have the same assessed and to pay any state and county taxes thereon for a period of more than twenty (20) years, shall be forever barred from bringing any action in law or in equity to recover the same[.]

In *Cumulus*, the Court construed section 28-2-110 and stated in pertinent part,

> Because tax maps are for the purpose of showing the plats upon which parties have paid taxes rather than establishing boundaries, a "slight overlap" would rarely have any effect on an evaluation for tax purposes. The burden of proof requires any party who relies upon the invocation of Tennessee Code Annotated section 28-2-110 to clearly establish the failure to pay taxes by the other party. . . . [S]ection 28-2-110 should not serve as a bar to a claim of adverse possession when the tracts are contiguous, a relatively small area is at issue, and the adjacent owners making claims of ownership have paid their respective real estate taxes. To hold otherwise would effectively eliminate the adverse possession of any part of an adjoining tract.

226 S.W.3d at 381 (internal citations and footnote omitted).

In *Holtsclaw v. Johnson*, No. E2015-00081-COA-R3-CV, 2015 WL 5684257 (Tenn. Ct. App. Sept. 28, 2015), this Court surveyed the caselaw applying *Cumulus*, stating in relevant part:

> Since *Cumulus* was decided in 2007, this Court has had several occasions to consider the applicability of the exception. In *Quarles v. Smith*, No. W2009-00514-COA-R3-CV, 2010 WL 653011, at *6 (Tenn. Ct. App. W.S., filed Feb. 24, 2010), we found that the adverse possessor established the three elements of the exception, (1) contiguous tracts, (2) "relatively small" disputed area, and (3) payment of taxes by the contestants on their respective tracts, stating that "we find that the fourteen-acre disputed property is 'relatively small' as compared to the over 150 acres of undisputed property owned by the parties." In *Sweeney v. Koehler*, No. E2009-02306-COA-R3-CV, 2010 WL 4962888, at *4 (Tenn. Ct. App. E.S., filed Dec. 10, 2010), we stated: . . . "[t]he 4.26 acres disputed by the Sweeneys and Koehlers represents about 9.2 percent of their collective acreage. We therefore find that the evidence presented at trial does not preponderate against the trial court's finding that the disputed land at issue is relatively small."

> This Court has also held the *Cumulus* exception inapplicable under certain circumstances, most often when we have concluded that the disputed area was not "relatively small." *See Gault v. Janoyan*, No. E2014-00218-COA-R3-CV, 2014 WL 5492747, at *4 (Tenn. Ct. App. E.S., filed Oct. 30, 2014) (finding disputed area not "relatively small" where the total acreage owned by both parties was "less than 2 acres in all—in a platted residential neighborhood"); *Dye* [*v. Waldo*, No. E2012-01433-COA-R3-CV], 2013 WL 718780, at *5 [(Tenn. Ct. App. Feb. 26, 2013)] (holding not a "slight overlap" where plaintiff asserting adverse possession "is claiming double the acreage assessed to her for tax purposes and contained in her deed"); *Cass Rye & Assoc. v. Coleman*, No. M2011-01738-COA-R3-CV, 2012 WL 4044862, at *8 (Tenn. Ct. App. M.S., filed Sept. 13, 2012) ("Unlike the dispute in *Cumulus Broadcasting*, the fifteen acre tract at issue in this case is not an area which overlaps two adjoining properties; it is a separately conveyed parcel distinctly assessed for tax purposes"); *Heaton* [*v. Steffen*, No. E2008-01564-COA-R3-CV], 2009 WL 2633050, at *7 [(Tenn. Ct. App. Aug. 27, 2009)] (distinguishing *Cumulus* where "[t]he [d]isputed area constitutes approximately ½ of the property the defendant claimed and a significant portion of the land the plaintiff claimed").

Holtsclaw, 2015 WL 5684257, at *6-7.

In this case, the disputed property is not a relatively small, slight overlap between properties. Neither is there any serious dispute or mistake about where the true boundary lines are here. Similar to the disputed property in the *Cass Rye* case, Lot 39 "is a separately conveyed parcel distinctly assessed for tax purposes." 2012 WL 4044862, at *8. Consequently, the *Cumulus* exception to Tenn. Code Ann. § 28-2-110 does not apply. It is undisputed that Ms. Sharp or her predecessors in title paid the property taxes on Lot 39. The trial court correctly held that the statute bars this common law adverse possession action.

V. CONCLUSION

The judgment of the trial court is affirmed. Costs on appeal are assessed to the appellants, Gilbert Lopez and Wendy Lopez, for which execution may enter, if necessary.

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KRISTI M. DAVIS, JUDGE