

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002331-MR

CHESTER D. HUDSON AND BRENDA HUDSON

APPELLANTS

v.

APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 00-CI-00034

GENE¹ S. AYARS

APPELLEE

OPINION REVERSING

** **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Chester D. Hudson and Brenda Hudson appeal from an opinion and order of the Trimble Circuit Court deciding that Jean S. Ayars retained a private right-of-way easement over an abandoned portion of a public road known as Perkinson Lane across property owned by the Hudsons for the purpose of reasonable ingress and egress. We reverse.

¹We note that appellants' notice of appeal contains a misspelling of the appellee's first name, who hereinafter shall be referred to by her correct name, Jean S. Ayars.

The parties each own property along a path or roadway known as Perkinson Lane in Trimble County that intersects with and runs between Highway 42 to the east and Barebone Road to the west. A portion extending from Highway 42 to the residential area of the Hudsons' property is paved blacktop maintained by the county. The remaining portion has some gravel and vegetation and has not been maintained. This latter portion is generally passable with a vehicle except for a portion near Barebone Road and a section on the Hudsons' property.

The unpaved portion passes through the Hudsons' property a distance of approximately 1,400 feet, then traverses property owned by the Horton family, then through Ayars's property, and finally through property owned by Lewis Smith, where it connects with Barebone Road. There are two gates along the unpaved portion: one at the Ayars-Horton property line and one at the Horton-Hudson property line. The Hudsons have placed obstructions on and prevented unapproved use of the unpaved portion of Perkinson Lane through their property for access to Highway 42 since purchasing it.

On March 10, 2000, Ayars filed a petition for declaration of rights pursuant to KRS² 418.040 against the Hudsons and the Hortons seeking a declaratory judgment recognizing Perkinson Lane as a public roadway and enjoining the Hudsons from interfering with the free use of Perkinson Lane for ingress and egress to the property along it. On November 27, 2000, the trial court conducted a bench trial at which six

² Kentucky Revised Statutes.

witnesses testified, including Jean Ayars, Chester Hudson, D.L. Collett, and Jerry Horton. D.L. Collett testified that he purchased a parcel of property in 1971 that adjoined property owned by the Horton family and bordered Barebone Road to the north. In 1976, Collett contracted to sell an 87-acre portion of his property to Jean (Lanter) Ayars and her former husband, with an actual deed of conveyance being executed in 1987. This parcel consisted of the back section of Collett's property and had no direct access to a public roadway. Thus, the Lanter's utilized a private roadway on the northern section of the Collett property for access between their section and Barebone Road. Collett testified that he attempted to prevent general use of the roadway on his property without permission.

In 1986, Collett sold the remainder or northern section of his property to Lewis Smith, who voiced some objections to the use of his property for access to the Ayars section. Ayars testified that before her divorce in 1993, she and her former husband had only occasionally used the property but had never lived there. She further testified that, after Smith voiced his objections, she and her former husband then used Perkinson Lane and Highway 42 approximately ten times to access their parcel but on three or four occasions had asked Chester Hudson for permission to traverse that portion of Perkinson Lane that was on his property. She also testified that she had not been to her property in seven years and had not accessed it by driving past the Hudsons' house in about ten years. She acknowledged that a segment of the Perkinson Lane roadbed on the Hudson property was

not currently passable, so she had to go onto part of the Hudsons' field before connecting with the paved portion of Perkinson Lane. In 1999, Ayars and Smith settled a lawsuit concerning legal ownership of her 87-acre parcel, but she did not specifically reserve an easement over the Smith property for access to her property under the belief that Perkinson Lane was a public road which she could use to access her land via Highway 42.

The Hudsons purchased their property in 1979 from Dow and Marilyn Dunlap. Chester Hudson testified that he had always prevented passage through his property by way of Perkinson Lane except on rare occasions when he gave permission such as the few instances with Ayars and her husband. Hudson stated there was a fence and gate across the Perkinson Lane roadway at his property line next to the Horton property line. Jerry Horton testified that Chester Hudson had prevented his family from using Perkinson Lane for access to other Horton family tracts, but that they had some access to Highway 42 from Harley Lane, which went to the northern portion of their land.

On March 17, 2001, the trial court entered its findings and declaratory judgment recognizing a private easement in favor of Ayars and the Hortons. The court found that Perkinson Lane was a public road that had been abandoned, but that the abutting landowners retained a private easement over the roadway to the extent that it allowed them a reasonable means of ingress and egress. The trial court further held that reasonable use of the easement included use of a motor vehicle but required Ayars

to finance the cost for maintenance of the unpaved road and prohibited use outside the boundaries of the historical roadbed. The Hudsons filed a motion to alter, amend, or vacate the judgment, which the trial court summarily denied. This appeal followed.

The Hudsons raise several issues involving the designation of Perkinson Lane as a public road, the abandonment of any private easement, the reasonable necessity of an easement, and the feasibility of an easement over Perkinson Lane. Since this case was tried before the court without a jury, its factual findings shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness. @ CR 52.01. A factual finding is not clearly erroneous if it is supported by substantial evidence. See Commonwealth v. Harrelson, Ky., 14 S.W.3d 541, 548 (2000). Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Transportation Cabinet, Dep't of Highways v. Poe, Ky., 69 S.W.3d 60, 62 (2001). With respect to property title issues, the appropriate standard of review is whether the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for that of the trial court absent clear error. Cole v. Gilvin, Ky. App., 59 S.W.3d 468, 472 (2001), (citing Church & Mullins Corp. v. Bethlehem Mineral Co., Ky., 887 S.W.2d 321, 323 (1992)).

The trial court concluded that the asphalt portion of Perkinson Lane was a county road. The court also concluded that Perkinson Lane as a county road does not extend beyond the end of the asphalt portion. However, there is no question that Perkinson Lane was not a county road because there was no legislative action by the fiscal court accepting the road as part of the county road system. See generally KRS Chapter 178; Sarver v. County of Allen, Ky., 582 S.W.2d 40 (1979).

A roadway or passway may become a public road giving the public a right to an easement by prescription through adverse use in excess of the statutory 15-year period. See, e.g., Cummings v. Fleming County Sportsmen's Club, Inc., Ky., 477 S.W.2d 163, 167 (1972); Whilden v. Compton, Ky. App., 555 S.W.2d 272, 274 (1977). Long continued uninterrupted adverse use of a passway by the public will create an implied acceptance of a dedication of the passway as a public road. See Freeman v. Dugger, 286 S.W.2d 894, 896 (1956). The adverse use must be of the same character, continuity, and duration as is necessary for creation of a private easement, which in turn requires open, hostile, actual, notorious, and continuous use. See Cummings, supra; Bell v. Smith, 246 Ky. 470, 55 S.W.2d 398 (1932). Easements are not favored and the party claiming the right to an easement bears the burden of establishing all the requirements for recognizing the easement. Carroll v. Meredith, Ky. App., 59 S.W.3d 484, 490 (2001). A right to use a passway as a prescriptive easement does not arise if the use is permissive, but a rebuttable presumption exists if the passway has been used

uninterruptedly for 15 years or more. See Ward v. Stewart, Ky., 435 S.W.2d 73 (1968); Haynes v. Dennis, 308 Ky. 483, 214 S.W.2d 1005 (1948); Lovins v. Denney, 311 Ky. 48, 223 S.W.2d 352, 354 (1949)(involving public passway).

The trial court found that Perkinson Lane was a public road and that, even though it had been abandoned by nonuse, the abutting landowners still retained a private easement over the roadway for reasonable ingress and egress. See Hylton v. Belcher, Ky., 290 S.W.2d 475, 477 (1956). The Hudsons contend the trial court erred in finding that Perkinson Lane was a public road.

In order to establish her claim that Perkinson Lane was a public road, Ayars introduced several maps that included this roadway and her tax bill referencing Perkinson Lane. In addition to this evidence, the trial court also referred to the mention of Perkinson Lane as a reference point in the property description for one of the tracts in a deed to the Horton children. We believe that this evidence was insufficient to support finding that the unpaved portion of Perkinson Lane was a public road for purposes of recognizing a public easement. None of this evidence involves information on the extent, duration, or character of use by the general public and is not necessarily inconsistent with the existence of Perkinson Lane as a private roadway. Ayars testified that there are approximately 16 mailboxes along the paved portion of Perkinson Lane, whereas there are none along the unpaved portion on the Horton, Ayars, and Smith properties. AThe sporadic use of a passway by a few neighbors or members of the

general public does not turn it into a public road. @ Cole, supra at 474. See also Rominger v. City Realty Co., Ky., 324 S.W.2d 806, 808 (1959). Ayars simply failed to present sufficient evidence of continuous, uninterrupted use by the public in excess of 15 years to establish a public easement or right-of-way. The finding that Perkinson Lane was a public road was clearly erroneous as unsupported by substantial evidence. As a result, Ayars acquired no right of reasonable ingress and egress by virtue of being a landowner abutting a legally recognized Apublic road. @

The Hudsons also argue that even if Perkinson Lane was at one time a public road that had been abandoned by the public, any right or easement Ayars may have acquired was forfeited or abandoned because of their conduct preventing anyone from using it without their permission. It is well-established that an easement acquired by grant or by prescription may be extinguished by nonuse under circumstances indicating an intention to abandon it extending over a 15-year period of time sufficient to create a prescriptive easement. See Childers v. Burger, 231 Ky. 508, 21 S.W.2d 805 (1929); Jones v. Dunn, 305 Ky. 502, 205 S.W.2d 156 (1947). While nonuse alone provides some evidence of an intent to abandon an easement, acts of the servient tenement owner inconsistent with enjoyment of the easement by the dominant tenement owner for a 15-year period will extinguish the easement. AAdverse possession and use for the prescriptive period will terminate an easement, but to be effective, adverse possession of a right of way by the servient owner must be of the same

character required to obtain title to real estate and the use must be wholly inconsistent with the right to enjoy the easement and amount to an ouster of the dominant owner. @ Shade v. Simpson, 295 Ky. 45, 173 S.W.2d 801, 803 (1943). See also City of Harrodsburg v. Cunningham, 299 Ky. 193, 184 S.W.2d 357, 359 (1944); Restatement of the Law of Property § 506 (1944); Funk v. Whitaker, 314 Ky. 204, 234 S.W.2d 675, 676 (1950).

In the current case, the Hudsons adversely possessed that portion of the Perkinson Lane roadway on their property since 1979, a period in excess of 15 years. They gave notice of their adverse possession by preventing others, including the Hortons and Ayars (and her former husband), from using the roadway without their permission. Ayars admitted that she asked Chester Hudson for permission to cross his property whenever he was present. There were two gates across the roadway at the Hudsons' property lines that they periodically kept closed. Chester Hudson also plowed and planted crops on a portion of the roadbed and placed other obstacles on it. The trial court erred by failing to recognize that even if Perkinson Lane had been a public road and Ayars had retained a private easement upon abandonment by the public, her right-of-way easement was extinguished or lost due to adverse possession of the easement by the Hudsons for the requisite time period.

During the trial, Ayars countered the Hudsons' extinguishment by adverse possession argument by referencing KRS 413.050(2), which provides that a statute of limitations will not begin to run in favor of any person in possession of any part of

a public road until written notice of adverse possession is given to the county judge-executive of the county where the road is situated. Chester Hudson admitted that he never gave notice of his adverse claim or possession to the Trimble county judge-executive. This statute, however, applies to public roadways that have been accepted by the county or dedicated to the public, not public roads with a public easement created solely by prescriptive use by the public. See, e.g., Salyers v. Tackett, Ky., 322 S.W.2d 707 (1958); Home Laundry Co. v. City of Louisville, 168 Ky. 499, 182 S.W. 645 (1916); Morrison v. Town of West Point, 219 Ky. 397, 292 S.W. 1095 (1927). Moreover, this statute protects only the rights of the public to the use of the roadway and not the private right of an abutting landowner to ingress and egress from a claim of adverse possession of a public road. See Home Laundry, supra at 650. As a result, this statute does not apply because Perkinson Lane was not formally accepted by the county and there is insufficient evidence that it was dedicated for public use, and any right retained by Ayars upon abandonment of the public prescriptive easement was a private easement based on the property's location abutting Perkinson Lane. Thus, the Hudsons did not have to provide notice to the county judge-executive before their limitations period for purposes of adverse possession began to run as against Ayars's interest in the right-of-way. At any rate, this statute is not applicable since we have held that the road was not proven to be a public road⁴ and the statute applies only to public roads.

For the foregoing reasons, the judgment of the Trimble Circuit Court is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Alan Q. Zaring
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BRIEF FOR APPELLEE:

Harold W. Thomas
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