

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001528-MR

ROBERT E. COLLINS, TRUSTEE

APPELLANT

v. APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 87-CI-00067

L. PAUL VENARD; and
PAMELA VENARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from an order entered by the Trimble Circuit Court regarding an easement across the property of appellees L. Paul Venard and Pamela Venard. For the reasons stated hereafter, we affirm.

Twice before in this matter the parties appealed to this court from the circuit court's orders regarding appellant Robert E. Collins' right to an easement across the Venards'

property. The underlying facts were well stated in an unpublished opinion rendered on March 19, 1999, in Appeal and Cross-Appeal Nos. 1997-CA-002840-MR and 1997-CA-003048-MR, wherein a panel of this court stated in pertinent part as follows:

The properties at issue are located in Trimble County, Kentucky and are bounded on the west by the Ohio River. At the beginning of this century, the properties now owned by the Venards and by Collins were part of a larger tract referred to jointly as the "Preston Plantation" and the "Norfolk Farm, Trimble County, Kentucky," tract. In 1902, the Commissioners of the Trimble Circuit Court partitioned the property into lots. The 1902 report of the Commissioners and the deeds drawn up from their survey contain the following language: "[t]he road where it now runs from Wycliffe Landing up the river through Lot Nos. 2, 3, 4 and 5 is hereby reserved for the benefit of said lots and Nos. 6, 7, and 8."

In 1987, the Venards inherited Lots 4 and 5. They had lived on those lots prior to that time. Also in 1987, Collins purchased Lot 3, which is adjacent to and north of the tracts owned by the Venards. Collins sought access to Lot 3 by means of a road which passed through the Venards' property. The Venards refused, claiming that Collins had sufficient access to his lot over a dirt road along the Ohio River (the river road).

Collins then brought a declaration of rights action, asking the trial court to declare that the road across the Venards' tract was a county road prior to 1914, and that it was the access road mentioned in the deed. Collins further sought injunctive relief against the Venards and damages.

In 1991, the trial court granted summary judgment to Collins. In a prior appeal this Court reversed on the basis of Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). On remand, a bench trial was conducted, and the parties submitted the case to the trial court on the evidence and briefs. Collins contended that the passway across the Venards' property was the same road described in the Trimble County Road Order books from the late 1800's as the roadway running from "Rakestraw Ford to Sugar Tree Springs." Those road books show that the county maintained the road prior to 1914. Collins also introduced evidence that certain places along the old road were known by those names.

The trial court agreed with Collins, and found:

That the roadway described above did, in fact, run across the property owned by the Defendant Venards. Following the testimony of C.A. Hollowell, this Court finds that the Sugar Tree Springs area was located on the Collins property down the hill from the Preston Plantation, and that there was no substantive evidence submitted to place Sugar Tree Springs at any other point. In addition, the Court heard the testimony of Robert Batts, a registered land surveyor, and considers the survey prepared by him which locates the old road bed. Using the 1914 Corp of Engineers map to overlay the existing property, Mr. Batts was able to exhibit to the Court the current location of the road, which was on the Defendants' property.

The trial court further found that the lack of maintenance by the county had not affected the roadway's status as a county

road. The court noted that the Venards removed the old road and have constructed a new road. Nonetheless, the trial court held that the Venards are estopped from objecting to the use of the new road by Collins. The trial court also determined that the availability of the river road easement was not relevant because the deed specifically reserved the county road for access. However, the trial court concluded that Collins was not entitled to damages, "given the confusing nature of the case at bar as well as the great time and effort necessary to designate a location for the roadway" This appeal and cross appeal followed.

This court reversed and remanded after finding that the road across the Venards' property was in fact abandoned as a county road before the parties acquired their respective tracts of land in 1987. The trial court was directed to find whether the old county road

has been used to access Lot 3 for fifteen (15) years prior to 1987. If the easement has not been used during this time, then it has been abandoned. Sarver, 582 S.W.2d at 43. However, given the express reservation of an easement in the 1902 deed, the trial court must next determine the location and existence of any existing easement, and whether it provides Collins with sufficient access to Lot 3. If the trial court determines that Collins lacks access to Lot 3, then it must determine the location and existence of an easement by necessity.

On remand, a special commissioner conducted a hearing and made recommendations which were adopted by the circuit court. The court found that the old county road across the

Venards' property was the easement reserved in the 1902 deed, but that such easement had been abandoned due to lack of use for more than fifteen years prior to 1987. Hence, the court was required to locate an easement by necessity across the Venards' property. The court considered three possible options before locating the easement along the riverside edge of the property, with the provision that the old county road may be used whenever the river road is impassable due to high water. This appeal followed.

Collins contends that the trial court erred on remand by failing to apply the "law of the case" doctrine when addressing the questions identified by this court. We disagree.

First, Collins asserts that the issue of abandonment of the old county road easement was previously addressed by the trial court in a 1991 order. Although Collins' brief described the issue on remand as being "[w]hether the 'county road' had been abandoned by lack of maintenance," and he "stipulates and concedes that even if the Venard road had been a county road it had been abandoned through lack of maintenance," those were not the issues before the trial court on remand. Instead, the question properly addressed by the trial court was whether the original easement was abandoned by virtue of its nonuse by Collins' predecessor in title for at least fifteen years prior to Collins' 1987 purchase of his property. It is undisputed

that the dedicated easement established in 1902 was along the old county road, and that the trial court found in 1991 that the Venards' voluntary blockage of Collins' access to the old county road could not amount to an abandonment by Collins of that easement. Contrary to Collins' assertion, however, that 1991 finding regarding the Venards' blockage of the road did not address the same issues as the trial court's recent determination that the old county road easement was abandoned at least fifteen years before 1987. Moreover, although the 1991 determination evidently was based on an assumption that the old county road easement still existed, the issue of prior abandonment of the easement through nonuse by the previous owner simply was not addressed at that time, and it cannot be assumed that the issue was somehow addressed by implication. Hence, there is no merit to the assertion that the trial court ignored the law of the case when it recently determined that the old county road easement was abandoned through nonuse prior to 1987.

Collins also seems to assert that the trial court erroneously concluded that the river road constitutes the dedicated easement which was established across the Venards' tract in 1902. However, our reading of the trial court's order does not show that the court reached such a conclusion. Instead, the court simply determined that the river road must serve as an easement by necessity in place of the old county

road, thereby permitting access to Collins' tract for "Collins, his personal guests and invitees." Although Collins contends that this order conflicts with a 1988 agreed order which referred to the instability and safety of the river road, the record shows that the 1988 order was prompted by, and addressed, Collins' desire to transport logs by truck from his tract across the Venards' property. That order, addressing a particular fact circumstance not now before us, cannot be said to constitute the law of the case regarding access to Collins' property by Collins, by his guests, and by his invitees.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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