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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002302-MR

TIM COOPER and
MITZIE COOPER

APPELLANTS

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, SPECIAL JUDGE
ACTION NO. 03-CI-00052

HEIDI JOHNS WEATHERLY and
TOMMIE WEATHERLY

APPELLEES

AND

NO. 2005-CA-002306-MR

BOYCE DEAN FOSTER

APPELLANT

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, SPECIAL JUDGE
ACTION NO. 03-CI-00052

HEIDI JOHNS WEATHERLY and
TOMMIE WEATHERLY

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: ABRAMSON AND TAYLOR JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: These appeals involve a dispute over the right to use a private passway and the location of a boundary line between adjoining landowners. We affirm.

Appellant, Boyce Dean Foster, purchased a tract of land in Wayne County, Kentucky, in 1971. He has resided continuously at that property since 1983. In 1997, appellee, Heidi Johns Weatherly², obtained title to a tract of land that adjoined Foster's property after her divorce from James Weston. Foster made an off-conveyance of 1.55 acres to Carl Gray and Hilda Gray, who constructed a residence on the property in 1997. In 2001, the Grays sold their property to appellants, Tim Cooper and Mitzie Cooper. At issue in this appeal is the use of a passway that is encompassed entirely within the Weatherlys' property. The passway commences where a county road known as the "Hurt Cemetery Road" terminates. Foster had utilized the passway for several years with the permission of the Weatherlys and their predecessors-in-title for the purpose of accessing timber and blackberries. A dispute developed between the Weatherlys and Foster which culminated with Foster widening and extending the passway. The Weatherlys then blocked the passway until the county sheriff removed the barricade. The Weatherlys brought suit against Foster, the Grays, and the Coopers seeking damages for trespass and the establishment of the correct boundary line between their property and Foster's land.

¹ 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 KRS 21.580.

² Heidi Johns Weatherly married the other appellee, Tommie Weatherly, in 1999. We will refer to them collectively as "the Weatherlys."

A bench trial was held where the trial court found that none of the appellants had established an easement of any kind and made findings as to the correct boundary line. These appeals follow. Additional facts will be developed as necessary.

The Coopers and Foster, respectively, argue that the judgment was not supported by the evidence. Specifically, they challenge the trial court's reliance on the survey of Gary Girdler to locate the correct boundary line between the adjoining properties.

In an action tried without a jury, the trial court's findings of fact will not be set aside unless they are clearly erroneous. CR 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W. 2d 409 (Ky. 1998). Substantial evidence has been defined as evidence that, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002). The standard of review regarding property title issues 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.” *Wells v. Sanor*, 151 S.W.3d 819, 822 (Ky.App. 2004). It is well established that the determination of witness credibility and the weight of the evidence is within the province of the fact-finder. *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991). Further, “[a] fact-finder may choose between the conflicting opinions of surveyors as long as the opinion relied upon is not based upon erroneous assumptions or

fails to take into account established factors.” *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)).

The Coopers argue that the trial court mischaracterized and failed to take into account the testimony and survey of James West. However, as stated above, the credibility of witnesses and the weight to be given to evidence is solely within the province of the fact-finder. The Coopers do not challenge Girdler's testimony or argue that his survey relied upon incorrect assumptions. Foster argues that West's survey was more accurate because it was based on natural monuments while Girdler's was based on artificial monuments. However, both Girdler and West himself testified that the original natural markers of three walnut trees were no longer in existence. Based upon our review of the record, we cannot conclude that the trial court erred by relying on Girdler's survey because it was supported by substantial evidence.

Next, both the Coopers and Foster, respectively, argue that the trial court erred by finding that they had not established a prescriptive easement as to the passway. The law of prescriptive easements is generally derived from the principles of adverse possession. *Cole v. Gilvin*, 59 S.W.3d 468, 475 (Ky.App. 2001). In order to obtain a right to a prescriptive easement, the party seeking to establish the right must demonstrate adverse use that is “actual, open, notorious, forcible, exclusive, and hostile, and must continue in full force... for at least fifteen years.” *Id.* This Court stated the differing

standards for obtaining fee simple title to land by adverse possession and for obtaining a prescriptive easement as follows:

A private passway may be acquired by prescriptive use although a right of way is not strictly a subject of continuous, exclusive, and adverse possession. It is sufficient if the use exercised by the owner of the dominant tenement is unobstructed, open, peaceable, continuous, and as of right for the prescribed statutory period.

Id. (quoting *Pickel v. Cornett*, 285 Ky. 189, 147 S.W.2d 381 (1941)). Further, if the right to use a passway is permissive, then the existence of a prescriptive easement “does not arise unless there has been some distinct and positive act of assertion of right made clearly known to the owner of the servient tenement.” *Id.* at 476.

The trial court found that Foster's use of the passway was permissive and that he made no clear assertion of right. Foster argues that he somehow adversely used the passway in addition to his permissive use. However, the law is clear that permissive use precludes the establishment of a prescriptive easement until an assertion of right is made known to the owner of the servient estate. The trial court's findings are supported by substantial evidence including Foster's own admissions as to his permissive use of the passway. Since Foster's use of the property was permissive, no tacking could occur until an assertion of right is made. Therefore, the Coopers, who acquired title to their property in 2001, fall well short of the fifteen year statutory period as their predecessors-in-title, the Grays, only acquired title in 1997. The trial court did not err in finding that neither Foster nor the Coopers had established a prescriptive easement.

Next, both the Coopers and Foster, respectively, argue that they were entitled to an easement by estoppel. Easements by estoppel prohibit a party “from denying the existence of a right to use property, i.e., a license, based on justifiable reliance that the license will continue.” *Gosney v. Glenn*, 163 S.W.3d 894, 899 (Ky.App. 2005).

An easement by estoppel is based on the principles of equitable estoppel. The essential elements of equitable estoppel are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Id. (internal citations omitted.)

Both Foster and the Coopers rely on the case of *Holbrook v. Taylor*, 532 S.W.2d 763, 764 (Ky. 1976), for the proposition that “the right of revocation of the license is subject to the qualification that where the licensee has exercised the privilege given him and erected improvements or made substantial expenditures on the faith or strength of the license, it becomes irrevocable and continues for so long a time as the nature of the license calls for. In effect, under this condition the license becomes in reality a grant through estoppel.” However, *Holbrook* is factually distinguishable from the present case. In *Holbrook*, the party seeking an easement by estoppel relied on the

undisputed acquiescence or tacit approval of the owners of the disputed roadway to the improvements made to land. In this case, there is no evidence that either the Coopers or Foster relied on any assertion tacit or otherwise by the Weatherlys. The trial court found that Heidi Weatherly had no knowledge of the improvements made by Foster or the Coopers until after they had been completed. This finding is supported by substantial evidence. While Foster and the Coopers dispute this testimony and assert that it is unreasonable for the Weatherlys to deny knowledge, we are not pointed to any evidence to support that assertion. Determinations of witness credibility and the weight of the evidence are firmly within the province of the fact-finder. *Uninsured Employers' Fund v. Garland, supra*. Further, the Weatherlys objected to Foster's attempts to improve the road. The Weatherlys also refused the Coopers' request to utilize the roadway for a water-line easement. The trial court did not err by finding that the Coopers and Foster had failed to establish an easement by estoppel.

Finally, the Coopers and Foster, respectively, argue that they are entitled to an easement by necessity and argue that the trial court's finding that there was other access to their properties by means of Criswell Road was clearly erroneous.

There are three requirements to establish an easement by necessity: “(1) unity of ownership of the dominant and servient estates; (2) severance of the unity of title by a conveyance of one of the tracts; and (3) necessity of the use of the servient estate at the time of the division and ownership to provide access to the dominant estate.” *Gosney v. Glenn, supra*, at 900. Kentucky applies the rule of “strict necessity” and mere

convenience will not suffice to establish an easement by necessity. *Id.* The party seeking an easement by necessity has the burden of establishing the existence of the easement by clear and convincing evidence. *Id.* at 901. Neither the Coopers nor Foster was entitled to an easement by necessity because there was no unity of ownership between their properties and the property owned by the Weatherlys. On that basis alone the Coopers and Foster failed to sustain their burden of establishing the right to an easement by clear and convincing evidence.

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

ALL CONCUR.

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