

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2006-CA-000040-MR

HORST A. STEINBRENNER and  
ROBERT L. CATLETT, JR.

APPELLANTS

APPEAL FROM HENRY CIRCUIT COURT  
v. HONORABLE ROBERT W. MCGINNIS, SPECIAL JUDGE  
ACTION NO. 04-CI-00308

KENTON A. WILSON and  
ANITA WILSON

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, JUDGE; HUDDLESTON AND KNOPF, SENIOR JUDGES.<sup>1</sup>

KNOPF, SENIOR JUDGE: This is an appeal from an order dismissing the appellants' complaint for damages arising from an alleged trespass to land and the alleged breach of an oral contract concerning the relocation of an easement of ingress and egress. We affirm.

Appellants, Horst A. Steinbrenner and Robert L. Catlett, Jr., each own an undivided one-half (1/2) interest in approximately 185 acres of land known as the "Henry

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<sup>1</sup> Senior Judges Joseph R. Huddleston and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Hawkins Farm” which is located in Henry County, Kentucky. Appellees, Kenton A. Wilson and Anita Wilson, own a contiguous 67 acre tract of land that is known as the “Wilson Farm.” The Wilsons gain access to their farm via a sixteen foot wide easement that is explicitly referenced in the deed to the Henry Hawkins Farm. This dispute arose when the appellants decided to relocate the easement to another site on their farm. The parties began a series of discussions contemplating the extinguishment of the easement and relocating it closer to the appellees’ southern property line. The appellants gave permission to the appellees to begin construction on a new road for their use across the Henry Hawkins Farm. Appellees then hired a bulldozer to cut a new roadway and placed gravel on the property. Negotiations between the parties broke down and the roadway was never completed. The appellants filed a complaint in the Henry Circuit Court alleging a breach of the oral agreement to relocate the easement and trespass. The court dismissed the complaint based on the Statute of Frauds and denied the appellants’ motion to amend their complaint. This appeal follows.

Appellants argue that the partial performance of the oral agreement removes this case from the purview of the Statute of Frauds. We disagree.

KRS 371.010 provides:

No action shall be brought to charge any person: ...

(6) Upon any contract for the sale of real estate, or any lease thereof for longer than one year;

Oral agreements for the exchange or relocation of easements are within the Statute of Frauds. *Jennett v. Sherill*, 205 Ky. 307, 265 S.W. 781 (Ky. 1924). Further, it is well

established that part performance does not take a contract for the sale of land out of the Statute of Frauds. In fact, this rule has been specifically repudiated in Kentucky with the exception of contracts not to be performed within a year. *Head v. Schwartz' Ex'r*, 304 Ky. 798, 202 S.W.2d 623, 624 (Ky. 1947). Appellants' reliance on *Morgan v. Morgan*, 205 Ky. 545, 266 S.W. 35 (Ky. 1924), is misplaced. While oral agreements to use and relocate easements were present in *Morgan*, the agreements were not the basis of the parties' rights in the easement, rather the basis of the rights was adverse possession. *Id.* at 36. There was no error in the dismissal of the oral contract claim.

Appellants next argue that if there was no contract, then the partial construction of the new roadway was a trespass. However, this case does not present the either/or scenario that the appellants maintain. Appellants acknowledge in their complaint that they had given permission to the appellees to begin construction. Trespass requires the intentional invasion of another's land "without any right, lawful authority or invitation, either express or implied, but does not include persons who come within the scope of the 'attractive nuisance' doctrine." KRS 381.231. Further, the dismissal of the complaint because of the Statute of Frauds does not mean there was not a contract, rather the Statute of Frauds only prevents the enforcement of certain types of oral contracts. *Bennett v. Horton*, 592 S.W.2d 460, 463 (Ky.App. 1979).

Appellants next argue that the removal of certain fence posts and the addition of new ones constituted a separate trespass. Appellants argue that this claim was premised on an admission by the appellees that this action was taken without permission. However, we are pointed to no evidence of this in the record outside the appellants' own

assertions and, further, the permission of such action was implicit in the permission to begin construction on the new roadway. There was no error in dismissing the trespass claim.

Finally, appellants argue that the trial court abused its discretion by denying their motion to amend their complaint. CR 15.01 provides:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

In its discretion whether to grant leave to amend, the trial court is permitted to “consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself.” *First National Bank of Cincinnati v. Hartmann*, 747 S.W.2d 614, 616 (Ky.App.1988). The proposed amendment directly conflicted with the allegations made in the original verified complaint. Specifically, the appellants were attempting to allege that there was no permission given to begin construction on the new roadway and thereby have a second bite at the apple. We are convinced that there was no abuse of discretion.

Accordingly, the order of the Henry Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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