

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001220-MR

MARY ANN TRAYLOR
ARMELIA JANE TRAYLOR

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 05-CI-00372

JERRY POTTER AND KIMBERLY POTTER

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * **

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Mary Ann Traylor and Armelia Jane Traylor appeal from an order requiring them to move a shed that is allegedly blocking access to Jerry and Kimberly Potters' property. For the reasons set forth herein, we vacate and remand.

Mary Ann Traylor has lived at 266 Carol Street since 1971. The property is owned by Armelia Traylor. Jerry and Kimberly Potter have lived across the street from

¹Senior Judge Paul W. Rosenblum sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Mary Ann for over ten years. In 2000, Mary Ann placed a shed at the end of Carol Street.

After trying to resolve these issues out of court, the Potters filed an action in Greenup Circuit Court requesting removal of the shed. Findings of fact and conclusions of law were initially entered May 8, 2006, but an order setting aside said findings of fact and conclusions of law was entered May 12, 2006, in light of the court's notification that the findings had been entered prior to the Potters' attorneys having opportunity to submit their proposed findings of fact and conclusions of law.

The Traylors argued that the storage building was on land they acquired either by adverse possession or otherwise. The Potters asserted that the road was a county road and that the Traylors' shed improperly blocked their access to the road.

On May 15, 2006, the court issued its final decision, which stated that Mary Ann was required to move her shed due to the shed blocking access to the Potters' property from Carol Street, but it failed to make findings as to whether Carol Street was a county road and how long the shed was located on the road. The court denied the Traylors' motion to alter, amend, or vacate the court's findings of fact and conclusions of law, and this appeal followed.

Pursuant to Kentucky Rule of Civil Procedure 52.01, “the trial court is required to make specific findings of fact and conclusions of law before rendering a judgment in a bench trial.” *Brown v. Shelton*, 156 S.W.3d 329 (Ky.App. 2004). The trial court erred when it concluded that it did not need to determine whether the road in question is a public road, and when it relied instead on *Three Rivers Rock Company v. Reed Crushed Stone Company*, 530 S.W.2d 202 (Ky. 1975).

The ownership status of the land upon which the subject shed is located is unavoidably the first factual determination that must be made. If the shed is on the Traylor's land, whether title to the land was acquired by deed or otherwise, then the shed must be allowed to stay. If it is on the Potters' land, it must be removed. If it is not situated on either parties' land, but instead upon a public road, then the court must determine whether the public use of the road, particularly that portion of the public road upon which the shed sits, has been abandoned by nonuse. *See Whilden v. Compton*, 555 S.W.2d 272, 274 (Ky.App. 1977)(“public road can ... be established by general and long continued use of a passway by the public[.]”); *Sarver v. Allen County, By and Through Its Fiscal Court*, 582 S.W.2d 40, 43 (Ky. 1979)(“a public user ripens into a prescriptive easement in 15 years, [and] it would seem reasonable to apply the same criterion to a reversal of the process, that is, an abandonment through nonuse by the general public [for 15 years].”); *see also Blankenship v. Acton*, 159 S.W.3d 330 (Ky.App. 2004); *Cummings v. Fleming County Sportsmen's Club, Inc.*, 477 S.W.2d 163 (Ky. 1972).

Furthermore, we see no analogy between the case before this Court and the case the trial court concluded governs this case, *Three Rivers Rock Company v. Reed Crushed Stone Company*, 530 S.W.2d 202 (Ky. 1975). In fact, the trial court attributes a quote to the *Three Rivers* opinion that never appears in that case but appears instead in *Com. ex rel. Dept. for Natural Resources and Environmental Protection v. Stephens*, 539 S.W.2d 303, 305 (Ky. 1976)(“that the privilege of a landowner to the use and enjoyment of his property in any way he sees fit, so long as he does not infringe upon the rights of others, is an inviolate incident to total ownership.”). Neither case has any meaningful applicability to the case before us.

Three Rivers, as Appellant correctly indicates, addresses how the “common-law rule against perpetuities found its way into the statutes as KRS 381.220.” *Three Rivers*, at 205. The case enforces an option to purchase land. Neither the word “use” nor the word “enjoyment” appears in the case at all, and the closest *Three Rivers* comes to establishing the right to use and enjoy one’s own property is when it holds that an owner has the right of alienation of his property. *Id.*

Dept. for Natural Resources and Environmental Protection v. Stephens, the case actually containing the language attributed by the trial court to *Three Rivers*, balances the rights of landowners with the eminent domain authority of the state. Again, we see nothing in that case that can be meaningfully applied to the facts of the case before us.

The trial court’s findings of fact do not set forth its actual findings but merely relate what testimony was offered. Accordingly, we remand the case to the circuit court for specific findings to determine: (1) on whose property (whether acquired by deed supported by survey or by adverse possession) the shed and vehicles are located; (2) whether the thoroughfare referred to as Carol Street or Ison Street is a public road and, if so; (3) whether the portion of the public road in dispute has been abandoned.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey D. Hensley
Flatwoods, Kentucky

BRIEF FOR APPELLEE:

Matthew J. Warnock
Greenup, Kentucky