

RENDERED: DECEMBER 21, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002641-MR
and
NO. 2007-CA-000075-MR

GLEN DALE STEPHENS

APPELLANT/
CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 05-CI-00491

ERNIE CRAFT AND BETH CRAFT

APPELLEES/CROSS-
APPELLANTS

OPINION AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; HOWARD,¹ JUDGE; GUIDUGLI,² SENIOR
JUDGE.

¹Judge James I. Howard concurred in this opinion prior to the expiration of his appointed term of office on December 6, 2007. Release of the opinion was delayed by administrative handling.

²Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

COMBS, CHIEF JUDGE: Glen Dale Stephens appeals from two orders of the Greenup Circuit Court: one granting summary judgment to Ernie Craft and his wife, Beth Craft; and the other denying Stephens's motion to alter, amend, or vacate the judgment. The Crafts have cross-appealed. After reviewing the record, we conclude that the trial court did not err by determining that the Crafts had acquired a prescriptive easement with respect to a passway leading directly to their home. Therefore, we affirm.

In the spring of 1988, Ernie and Beth Craft leased a house from Estill Sizemore near Little White Oak Road in Greenup County, Kentucky. Nearly a year later, Sizemore conveyed the property to them by means of a general warranty deed. At the time of the transaction, Sizemore told the Crafts that an eighteen-foot passway (driveway) leading from Little White Oak Road to the house was included in the conveyance but that it was the subject of a separate instrument and was referenced by a separate deed. The Crafts never saw the separate deed pertaining to the driveway.

The disputed driveway bisects real property owned by Stephens. Stephens's immediate predecessors-in-interest were James and Bethel Stephens, his parents. His parents had granted to Estill Sizemore and his wife, Mayme, authority to use the passway by way of a deed of easement. Recorded in 1974, the instrument granted “said easement and right **unto the grantees for their lifetimes only.**” (Emphasis added). Mayme Sizemore died in 1981; Estill Sizemore is believed to have died in April 2003.

In August 2005, Stephens filed an action against the Crafts in Greenup Circuit Court alleging trespass. Stephens also included the City of Greenup as a party-

defendant in the action. He originally sought money damages and the removal of water lines that had been installed by the City of Greenup along the disputed passway for the benefit of the Crafts.

The Crafts answered Stephens's complaint and filed a counterclaim alleging that they had acquired fee simple title to the disputed driveway through adverse possession. In the alternative, they claimed that continued use of the driveway was necessary as a practical matter for their ingress and egress. As a final alternative, they contended that they had acquired a prescriptive easement consisting of the boundaries of the driveway. The City of Greenup was eventually dismissed from the action.

Following a period of discovery, the parties filed cross-motions for summary judgment. After a hearing, the trial court granted judgment in favor of the Crafts, finding that the Crafts had enjoyed uninterrupted use of the disputed driveway for a period of fifteen years or more. The court discounted evidence that the parties had bickered over the use of the driveway during this period. Despite his discontent over the situation, Stephens had not effectively interfered with the Crafts' use of the passway since the spring of 1988. Consequently, the court concluded that the Crafts had established a prescriptive easement over Stephens's property and that they were entitled to continue using the driveway for ingress and egress. It denied the parties' subsequent and separate motions to alter, amend, or vacate. This appeal and cross-appeal followed.

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03. The parties agree that there are no genuine issues of material fact in this case and that interpretation of the recorded easement is entirely a matter of law. As a result, this matter was appropriate for summary judgment.

Stephens argues that the trial court erred by concluding that the Crafts had established a prescriptive easement entitling them to continuous use of the disputed passway. He contends that the terms of the recorded easement authorized the Crafts to use the driveway only as long as either of the Sizemores was alive. Thus, he argues that the Crafts were expressly permitted to use the driveway until the day that Estill Sizemore died in 2003. Therefore, their use of the driveway was adverse to his (Stephens's) interests for only two years – far less the 15-year period required by statute.

Stephens duly notes that if the right to use a passway arises from **permission** granted by the owner of the servient estate (*i.e.*, the land burdened with an easement), the use will never ripen into a prescriptive easement – regardless of how long the use continues. *See Rominger v. City Realty Co.*, 324 S.W.2d 806 (Ky. 1959). While that statement of the law is correct, nonetheless the contention of the parties with respect to the easement must be examined in applying the law to these particular and unique facts.

The easement granted to the Sizemores an “18 foot right of way for purposes of ingress and egress.” The deed did not reserve an easement for the benefit of

the grantors' land. On the contrary, it burdened the grantors' land for the benefit of the grantees' land. The instrument expressly limited the right of way to be used **only** by the Sizemores and Stephens's predecessors-in-title (his parents) and **only** for the period of the Sizemores' lifetimes. These express provisions clearly defined the intentions of the parties and the nature of the right granted. Although Stephens's predecessors-in-interest owned the servient estate in fee simple and were entitled to grant an easement that would perpetually benefit the Sizemores's property, they did not do so. Instead, they granted an easement for a strictly limited use, for a definite duration, and to named beneficiaries (the Sizemores) only. *See 25 Am.Jur.2d Easements and Licenses in Real Property* §94 (2004).

Estill Sizemore could not convey more to the Crafts than that which he had been granted by Stephens's predecessors-in-interest, and he carefully referred the Crafts to a separate deed pertaining to their use of the driveway. Nonetheless, the Crafts chose not to review it. If they had inspected the deed, they would have discovered that the easement was not intended to be permanent and that they were not entitled to use it. However, the Crafts did use the passway, and they did so under a claim of right for more than fifteen years. Consequently, the trial court correctly analyzed their claim to the easement under the law of prescription. *See Kentucky Revised Statutes (KRS) 413.010.*

The law of prescriptive easements derives from general principles pertaining to the adverse possession of real property interests. *See Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc.*, 15 S.W.3d 727 (Ky. 2000). In *Pickel v.*

Cornett, 147 S.W.2d 381 (Ky. 1941), the court noted that the elements for acquiring a prescriptive easement are similar to those for acquiring a fee simple title to land by adverse possession. However, a less stringent standard of use pertains to prescriptive easements. A private passway may be acquired by prescriptive use even though a right of way is not strictly the subject of continuous, exclusive, and adverse possession. *Cole v. Gilvin*, 59 S.W.3d 468 (Ky.App. 2001). It is sufficient if the use exercised by the owner of the dominant tenement (*i.e.*, the land enjoying the benefit of the easement) is unobstructed, open, peaceable, continuous, and treated as a matter of right for the prescribed statutory period. *Pickel*, 147 S.W.2d at 382 (citations omitted); *Allen v. Thomas*, 209 S.W.3d 475 (Ky.App. 2007).

In this case, the parties stipulated that Stephens vigorously challenged the Crafts' use of the driveway as soon as they took possession of the house leased to them by Sizemore in 1988. At that time, Stephens advised the Crafts verbally that they were not to use the passway, and he began to construct a barrier to block their access. The Crafts vehemently denied that the passway belonged to Stephens. They claimed that the passway belonged to them, and they forbade Stephens and his guests to use it. Beth Craft immediately removed the several posts that Stephens had erected in the driveway, and Stephens never again attempted to obstruct their passage. Ultimately, in order to create unhindered access to his property, Stephens built a separate driveway located adjacent to the passway claimed by the Crafts. In light of these undisputed facts, the court did not err by concluding that Stephens had acknowledged and acquiesced in the Crafts' claim of

right to use of the passway and that the Crafts had established through clear and convincing evidence all the requirements for a prescriptive easement.

Next, we consider the merits of the Crafts' cross-appeal. Without articulating a precise legal argument to support their position, the Crafts contend that the court erred by failing to conclude that they had adversely possessed the property underlying the easement. We disagree.

One may obtain perfect title to real property by adverse possession for the statutory period of time of fifteen years even where there is no intention by the adverse possessor to claim property not belonging to him. *Tartar v. Tucker*, 280 S.W.2d 150 (Ky. 1955). However, in order to prevail, the party claiming title through adverse possession must establish through clear and convincing evidence all of the following elements as to possession:

1. it must be hostile and asserted under a claim of right;
2. it must be actual;
3. it must be exclusive;
4. it must be continuous; and
5. it must be open and notorious.

Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878 (1992).

The trial court properly rejected the Crafts' assertion of adverse possession in this case. Our review of the record indicates they had failed to establish by clear and convincing evidence all of the elements required to prove their claim.

It is true that the Crafts took actual possession of the driveway. Despite Stephens's hostile protest, their possession was continuous and remained open and notorious. The Crafts regularly used the driveway; undertook its physical improvement; installed a water line along its length; and gave no indication that they ever intended to surrender the disputed area. Their possession was asserted under a claim of right. However, their possession of the passway was never **exclusive**. In his deposition, Stephens indicated that he continued to use the passway despite the Crafts' vigorous objections. According to Stephens, he regularly used the entirety of the 18-foot driveway claimed by the Crafts to load hay from his adjoining field. Possession must amount to an ouster of the record owner of land in order to qualify as sufficiently exclusive to support a claim of adverse possession. If the owner of the legal title continues constructively to possess the disputed property, and if his ouster has not occurred, adverse possession has not been established. A would-be adverse possessor can never share the disputed property with the true owner. 3 Am.Jur.2d *Adverse Possession* §69 (2002).

The Crafts also contend that the trial court erred by failing to conclude that they had established an easement by estoppel with respect to the water line that was installed alongside the length of the passway. We disagree.

One who attempts to establish an easement by estoppel must show that: (1) a representation was communicated to the promisee that an easement exists; (2) the representation was believed; and (3) there was reliance upon the representation. *See* 25 Am.Jur.2d *Easements and Licenses in Real Property* §14 (2004). The Crafts did not

prove the existence of any of these elements. Instead, their claim of estoppel rests upon the theory that they had obtained a right to the disputed property merely by dint of Stephens's failure to prevent their use of it. The Crafts claim that Stephens was negligent by failing to assert his claim to the property **at the time when the line was being installed**. To rise to the level of an estoppel, however, the alleged negligence must be part and parcel of the transaction itself and it must be the proximate cause of the claimant's mistake. *Fitzpatrick v. Baker*, 159 S.W. 675 (Ky. 1913).

Stephens's failure to establish his title to the disputed property was not the proximate cause of the Crafts' misunderstanding of their own property interests. The Crafts were not innocent purchasers who had no notice of the nature of the easement granted to their predecessors-in-interest. All of the relevant deeds continuously remained a matter of record. The Crafts were on notice of the existence of the deed governing the passway. Moreover, Stephens's alleged negligence did not grow out of any dealings or transaction that the Crafts ever had with him.

Easements are not favored in the law, and the party claiming the right to an easement bears the burden of establishing all the requirements for recognizing the easement. *Carroll v. Meredith*, 59 S.W.3d 484 (Ky.App. 2001). The Crafts did not establish an easement by estoppel with respect to the property through which their water line passed, and the trial court committed no error in so concluding.

The judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
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