RENDERED: NOVEMBER 9, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

SUPREME COURT ORDERED OPINION NOT PUBLISHED:
FEBRUARY 11, 2009
(FILE NO. 2008-SC-0359-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000072-MR

LEONARD MICHAEL JAMEISON
AND PAULINE JAMEISON

APPELLANTS

v.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 04-CI-00072

EAGLE ROD & GUN CLUB, LLC

APPELLEE

OPINION
AFFIRMING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

ACREE, JUDGE: Leonard Michael Jameison and Pauline Jameison appeal a judgment of the Owen Circuit Court permanently enjoining them from obstructing the use of a road traversing their property because the road is a public road. We affirm on alternate

[1] Senior 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.

grounds and remand the case for modification and entry of a judgment consistent with this opinion.

The Eagle Rod & Gun Club, LLC (the Club), purchased a one-hundred (100) acre farm adjoining the Jameison property. There is no direct access to the Club's property from any road maintained by the state or county; it is essentially landlocked. Before the purchase, Club members viewed the property with a real estate agent, gaining access to the property by traversing the Jameison property over an unpaved route approximately one mile long.

Soon after the Club purchased the farm, the Jameisons erected a locked gate on their property where the subject road intersects the county-maintained Eagle Valley Campground Road. They later placed other barriers on the road.

The Club brought suit, originally claiming: (1) the traverse across the Jameisons' property is a "public road" which the Jameisons are prohibited from blocking; (2) a prescriptive easement across the Jameison property; and (3) an easement by necessity. By the time of trial, the only claim the Club pursued was that the road was a "public road" which Kentucky Revised Statute (KRS) 525.140 prohibits the Jameisons from blocking.

After a bench trial, the circuit judge found as fact that the road in question was "a remnant of an old public road" that it had not been abandoned as a public road, and that the Jameisons had blocked the road in violation of KRS 525.140. The judge entered a permanent injunction ordering the Jameisons to remove the obstructions and permanently enjoining them from obstructing the public road in the future.

Because the case was tried before the court without benefit of a jury, the court's findings of fact will "not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01.

Before we consider the Jameisons' substantive grounds for reversal, we will first address their objections to the admissibility of certain evidence.

Both parties offered into evidence, and the trial court considered and relied upon, various maps. The Jameisons claim the maps offered into evidence by the Club were not properly authenticated and therefore were improperly admitted into evidence. We disagree.

We first note that "[t]he proponent's burden of authentication is slight, which requires only a *prima facie* showing of authenticity to the trial court." *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004). Even the authority upon which the Jameisons rely indicates that authentication merely requires testimony that a map is "a fair and accurate representation of what it purports to depict[.]" Robert G. Lawson, *Kentucky Evidence Law Handbook*, § 11.10[1][b], at 866 (4th ed. 2003). Authentication of a map need not be accomplished by testimony of its maker, *Bates v. Bates,* 399 S.W.2d 716, 718-19 (Ky. 1966); *see also Stephens v. Horn,* 314 Ky. 752, 236 S.W.2d 953, 954-55 (1951), and the possibility that it incorporates inaccuracies will not prevent its authentication or admissibility. *Severance v. Sohan,* 347 S.W.2d 498, 502 (Ky. 1961). On appellate review, the trial court's finding of authentication and admissibility of a map is reviewed for abuse of discretion. *Johnson*, 134 S.W.3d at 566. We do not find that the

trial court abused its considerable discretion in this bench trial by admitting these maps into evidence. *Alexander v. Commonwealth*, 220 S.W.3d 704, 710 (Ky.App. 2007).

The Jameisons also argue that the trial court erred when it allowed the rebuttal testimony of Mathew Grimes, a member of the Club. They assert the dual grounds that Grimes was not identified as a witness prior to trial and, despite application of the rule excluding witnesses from hearing prior testimony, Kentucky Rules of Evidence (KRE) 615, Grimes was in the gallery during all of the prior testimony. We believe that any error the trial court may have committed in permitting Grimes to testify was harmless.

Grimes has been a member of Eagle Rod & Gun Club, LLC, during its entire existence. Though he was not identified as a witness expected to testify, the Jameisons could hardly suggest he was a surprise witness. A trial court is vested with reasonable discretion in controlling the examination of witnesses. *Rodgers v. Cheshire*, 421 S.W.2d 599, 601 (Ky. 1967). Furthermore, the admission of rebuttal evidence is largely a matter of judicial discretion. *Stopher v. Commonwealth*, 57 S.W.3d 787, 799 (Ky. 2001). The trial court has "very broad discretion in controlling the examination of witnesses [and] exercise of such discretion will not be supervised by us, unless it is manifestly abused." *Hollis v. Fisk,* 242 S.W.2d 1012, 1013 (Ky. 1951). This is particularly so when the trial court is sitting without a jury. We see no manifest abuse of the trial court's discretion in allowing him to testify.

The foregoing reasoning applies also to the assertion that Grimes' testimony violates the separation of witnesses rule, KRE 615. The purpose of the rule is "to insure the integrity of the trial by denying a witness the opportunity to alter his testimony."

Reams v. Stutler, 642 S.W.2d 586, 589 (Ky. 1982). While in many cases where the rule is violated, perhaps even most, exclusion of the testimony would seem the appropriate remedy. However, "[a] mechanical exclusion or admission of the testimony of such a witness (reflecting failure to exercise any discretion at all) is offensive to this approach and likely to produce a reversal on appeal." *Smith v. Miller*, 127 S.W.3d 644, 647 (Ky. 2004), *quoting* Lawson, *Kentucky Evidence Law Handbook* § 11.30[4], p. 892 (4th ed. 2003). Thus, a violation without prejudice would not entitle a party to any relief. *Id.* We are convinced that the Jameisons were not prejudiced by the trial court's admission of Grimes' testimony.

CR 61.01 expresses a similar concept. That rule requires us to disregard errors that do not bear upon the substantial rights of the parties. The test for harmless error is whether there is any reasonable possibility that, absent the error, the result of the trial would have been different. *See Taylor v. Commonwealth,* 995 S.W.2d 355, 361 (Ky. 1999)(applying the similarly worded Kentucky Rule of Criminal Procedure (RCr) 9.24). Review of Grimes' testimony shows that the primary purpose for calling him was to compare the Jameisons' map with a map offered into evidence by the Club. With regard to that comparison, the trial court sustained the Jameisons' objection to Grimes' testimony, but stated "I would have done this regardless of what he says. I'm going to do the same thing anyway."[2] We cannot conclude that the exclusion of Grimes' testimony, which lasted only a matter of minutes and takes up only 14 pages of a 280-page transcript, would have changed the result of the trial.

[2] The Jameisons find significance in the judgment's misattribution of Grimes' testimony to Chris Walsh. We interpret that mistake as support for our conclusion that Grimes' testimony was irrelevant and that this finding was the product of the trial court's independent comparison of the 1883 and 1977 maps admitted into evidence.

Having dispensed with the Jameisons' objections to the admissibility of the evidence, we turn to their first substantive argument – that the proof did not establish that the road in question was a "public road."

"[A] public road can . . . be established by general and long continued use of a passway by the public." *Whilden v. Compton,* 555 S.W.2d 272, 274 (Ky.App. 1977). In *Whilden*, the court noted that "the circuit court relied upon a number of different facts in the testimony [including] that the . . . Road had been used by the public for 60 years [and a] 1938 aerial photograph introduced into the evidence[.]" *Id.* Similarly, in the case before us, the trial court relied upon the testimony of numerous witnesses, an aerial photograph, and the maps referred to, *supra*, as well as references to the road in various deeds. The maps, including one from an 1883 atlas, and the aerial photo, all show the subject road.

It appears that the subject road once connected two other thoroughfares. We can easily see that the maps indicate a southern terminus at Buck Run Road, formerly Buck Run Turnpike. We particularly note the testimony of Mr. W. A. Hamilton whose property also adjoins the subject road. He said that the Club's property, owned in 1951 by William Kemper, was at one time accessed via the road in question from Buck Run Road past the farm of Logan Huggins whose property touched upon both the subject road and Buck Run Road. This, combined with other evidence, demonstrates that the road in question was once a thoroughfare traversing or adjoining the properties owned by many of the parties who testified.

We agree with the Club that on the conflicting evidence, the trial court could have ruled either way. But because we cannot say that the trial court's

determination that this was a public road was clearly erroneous, we cannot and will not set aside the judgment simply because there was conflicting evidence.

Interestingly, both parties cite *Sarver v. Allen County, By and Through Its Fiscal Court*, 582 S.W.2d 40 (Ky. 1979) to support their respective positions regarding whether this was a public road. But we read *Sarver* as "*assum*[*ing*] (but without deciding, of course) that it was a public road." *Sarver* at 42. Whether the road was a public road therefore was not even an issue in *Sarver*. The court presumed it was a public road. In that case, as in ours, "[t]he real issue, then, is what does the evidence prove, or not prove, with respect to its abandonment?" *Id.* And so we address the Jameisons' second argument – that the road was abandoned by the general public as a public road. We find some merit in this argument.

Citing *Blankenship v. Acton,* 159 S.W.3d 330 (Ky.App. 2004), the trial court reached the factual "conclu[sion] that those minimum uses necessary to avoid abandonment exist herein." Clearly the court below was searching for examples of sufficient continued use (the so-called public use of a road) that would prevent an abandonment. The Owen Circuit Court saw continued uses of the road in *Blankenship* that were similar to the continued uses in this case and equated them to non-abandonment by the public. In *Blankenship*, the road continued to be used

> to provide access from the new highway to the Actons' land so that timber and farm crops could be hauled out and fertilizer could be hauled in. There has also been some isolated use of the road by hunters and other persons.

Id. at 332. But we believe the trial court's reliance on *Blankenship* is misplaced because the court missed three more important points made in that case.

First, after the *Blankenship* trial court found that the road had historically been a public thoroughfare, it concluded erroneously that "once [existing as] a public road, [it] is presumed to remain a public road unless discontinued by *formal governmental action*." *Id.* (emphasis supplied). Second, "there was no evidence that the old road had once been a part of Blankenship's land [and therefore] Blankenship had no right to block the old roadbed." *Id.* Third, and most importantly to our case, *Blankenship* reaffirmed "the rule set out in *Sarver* – a public road that is neither a county road nor a road that was previously maintained by the county or state may still be discontinued by abandonment without formal governmental action." *Id.* at 334. As there is no evidence in the case before us that the road in question was a county road or a road that was previously maintained by the county or state, applying *Sarver* will determine if this public road was abandoned.

Sarver holds that once the public acquires the free use of a roadway, "it may abandon that right by a long period of nonuser." *Sarver*, 582 S.W.2d at 42. If "a public user ordinarily ripens into a prescriptive easement in 15 years . . . 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]." *Id.* at 43. The *Sarver* court thus determined that the public must abandon the use of a public road for a period of 15 years for it to lose its status as a public road.

The road in question likely had an original starting point other than at its intersection with the newer Eagle Valley Campground Road, but the evidence indicates it traversed the various properties until it reached Buck Run Road. Therefore, the road appears from the maps and testimony to have been utilized by the public long ago to

travel through the region in which the parties' property is located. But now only a portion of the road remains in use, not by the general public, but by the adjoining property owners, and not for the purpose of traveling through, but only to and from their property.

Testimony on the use made of the subject road since 1945 shows a use identical to that made of the road which was the subject of similar litigation in *Cummings v. Fleming County Sportsmen's Club, Inc.,* 477 S.W.2d 163 (Ky. 1972). That road

> has been freely used by anyone having occasion to do business with or pay social calls on the occupants of the property, but since it did not lead to any place in which the general public would have had an interest in going, there could scarcely have been much if any occasion for the general public to use it.

Cummings, 477 S.W.2d at 165. Such a road's "only possible use was to serve the private convenience of the owners or occupants" of the tracts touching upon the road. *Sarver* at 43.

If we conclude, as we must, that the subject road was once a public road, we must also conclude it came to that status through "public user [that] ripen[ed] into a prescriptive easement." *Id.* The trial court erroneously interpreted the various uses of the road since 1945 as a continuation of the public use. We believe *Cummings, supra*, makes it clear that such use cannot be deemed "public." Though it is impossible to ascribe a temporal demarcation of the event of the general public's abandonment, we conclude that it occurred long enough ago to satisfy *Sarver*. We therefore hold that the trial court's finding that the general public has not abandoned the use of this public road is clearly erroneous.

However, while the general public may have abandoned the public use of the road, the parties to this action, and the property owners whose lands adjoin the road,

have not. The prescriptive easement for *public* use necessarily subsumed the *private* prescriptive use of the same road by the owners of the properties adjoining it. The Jameisons did not prove that the private users of the road had abandoned its use for a period of 15 years. To the contrary, the proof showed periodic and somewhat regular use by the owners of the properties adjoining the road, as well as by their invitees. As to those property owners, the prescriptive easement survives.

We turn to another case which, like the one before us, originated in Owen County. In *Cook v. Down*, 124 S.W. 838 (Ky. 1910), despite testimony described as "very conflicting[,]" the court pointed out that Cook could not dispute the fact that "quite a number of witnesses [testified] that the passway [across his property] has been *used as a matter of right*, and not by permission, for a very long time[.]" *Id.* at 839 (emphasis supplied). We can say the same of the testimony in the case *sub judice*. And while the appellate court's review of the record in *Cook* found that the evidence "was not overwhelmingly in favor" of Down, the case included "one physical fact . . . which constrains us to believe that the truth of the question in issue is with him." *Id.* at 840.

> The farm of appellee [Down] would be nearly worthless, or certainly very greatly diminished in value, without the right to the easement in question; and it is hardly believable that any sensible man would have ever purchased the farm without one practical way to get to the public road.

Id. That same fact is present in this case.

We are also persuaded by the holding in *Miller v. Miller,* 182 Ky. 797, 207 S.W. 450 (1919). In *Miller*, "[i]t was conclusively proven that the road or passway in question had been used for more than 30 years by the neighborhood, and that upon occasions the parties living upon and using it had, by consent, worked portions of it[.]"

Id. at 450. While the road in *Miller* was never a public road, the court found that it was "a passway of prescriptive origin, and did not affect defendant's title to the land, and his right to its full use, except that he could not do anything that would unreasonably interfere with the right of plaintiff and others to use it as a passway." *Id.* We believe the road in the case before us has acquired the same status as the road in *Miller*.

We interpret the law applicable to this case to yield but one result. The passway in question is of ancient origin and was once a public road. It became so prescriptively. Its prescriptive use has since been abandoned by the general public, but not by the owners of the property adjoining it. Those owners, current and predecessor, are entitled to use of this road because, as in *Miller*, it is a passway of prescriptive origin. However, it is no longer a public road entitling members of the general public to its benefit. As in *Miller*, the prescriptive easement does not affect the Jameisons' title to the land, nor to their right to its full use, except that they cannot do anything that would unreasonably interfere with the right of the Club, and its members and invitees, to use the road as a passway.

The Jameisons raise a final argument, objecting to the fact that the trial court appears to have adopted much, if not all, of the Club's proposed findings of fact and conclusions of law as its own. Over several years, our appellate courts have thoroughly addressed the practice of adoption by a trial court of a party's proposed findings of fact, though perhaps not as cohesively as practitioners would desire. Our review of the case law makes it clear to us that the Jameisons' objection to that practice is not a basis for reversal in this case.

An early consideration of the question is found in *Callahan v. Callahan,* 579 S.W.2d 385 (Ky.App. 1979), where this Court once proclaimed "[t]he appellate courts of this state have universally condemned the practice of adopting findings of fact prepared by [a party's] counsel . . . because of the problems such findings present upon appellate review." *Id.* at 387. However, a few years later, our Supreme Court corrected us in *Bingham v. Bingham*, 628 S.W.2d 628 (Ky. 1982).

> We *do not* condemn this practice (of permitting attorneys to draft findings of fact and conclusions of law) in instances where the court is utilizing the services of the attorney only in order to complete the physical task of drafting the record. However, . . . [*o*]*ur concern . . . is that the trial court does not abdicate its fact-finding and decision-making responsibility*[.]

Bingham at 629 (emphasis supplied); *see also Mansfield v. Voedisch,* 672 S.W.2d 678, 681 (Ky.App. 1984). In *Bingham*, the Supreme Court engaged in a "[c]areful scrutiny of the record" and determined that "the [trial] court was thoroughly familiar with the proceedings and facts[,] prudently examined the proposed findings and conclusions and made several additions and corrections *to reflect his decision* in the case." *Id.* (emphasis supplied). Consequently, the Supreme Court determined the trial court had not abdicated its role in the case before it.

But *Bingham* did seem, at least to this Court, to have established a bright line rule for distinguishing between the trial court's impermissible abdication of its fact-finding responsibility and its permissible adoption of persuasive language. Plainly distinguishing *U.S. v. Forness,* 125 F.2d 928 (2nd Cir. 1942) from the case before it, our Supreme Court in *Bingham* pointed to the fact that in *Forness* there was a "verbatim or mechanical adoption of proposed findings of fact[.]" *Bingham* at 629. The *Forness* court seized upon this verbatim adoption and concluded that the trial court did abdicate such

responsibility. *See Forness* at 942 ("[W]e lose the benefit of the judge's own consideration [when] the findings proposed by the defendants [a]re mechanically adopted[.]").

Very quickly taking our cue from *Bingham's* interpretation of *Forness*, this Court decided *Stafford v. Board of Educ. of Casey County,* 642 S.W.2d 596 (Ky.App. 1982). In *Stafford,* the trial court instructed both parties to prepare findings of fact "and then adopted verbatim the set of findings and conclusions which more closely reflected his thoughts[.]" Upon review, this Court cited *Bingham* and said,

> Such a practice is not proper, as the trial court should have either made an oral statement as to his findings and conclusions for the benefit of counsel in completing the physical task of drafting the finding of fact and conclusion of law or in some other manner *retained control of the decision making process.* (*See*, for example, *Bingham v. Bingham*, Ky., 628 S.W.2d 628 (1982) . . . .)

Stafford at 598 (emphasis supplied). We thus articulated, albeit in *dicta*, the rule we believed *Bingham* indicated – that the mechanical or verbatim adoption of findings of fact and conclusions of law, with no other indicia of the trial court's independent assessment of the evidence, evinces an abdication of his fact-finding responsibility. We were wrong.

In *Prater v. Cabinet for Human Resources, Com. of Ky.,* 954 S.W.2d 954 (Ky. 1997), the Supreme Court again disabused this Court of an erroneous belief. This time it was our belief that *Bingham* had given us a bright line rule. The appellant in *Prater* had counted on the existence of such a rule. He claimed "the trial court failed to make independent findings of fact[.]" *Prater* at 956. As proof, he demonstrated that "the trial court adopted the Cabinet's proposed findings of fact without correction or change."

Id. While the Supreme Court agreed the adoption was verbatim, it did not agree that this is proof of the trial judge's abdication of his fact-finding responsibility. Specifically, the Court held that it "is not error for the trial court to adopt findings of fact which were merely drafted by someone else." *Id.*

Given our previous struggles and our review of the case law, we believe Kentucky stands with the United States Supreme Court on this issue. Even where a party's work is "adopted verbatim[, t]hose findings, though not the product of the workings of the [trial] judge's mind, are formally his; they are not to be rejected out-of-hand[.]" *U. S. v. El Paso Natural Gas Co.,* 376 U.S. 651, 656, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964), *quoted in Brunson v. Brunson,* 569 S.W.2d 173, 175 (Ky.App. 1978); *see Bingham* at 630 ("[I]n the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility[, his findings] are not to be easily rejected."). And so it is in this case. By pointing *only* to the trial court's adoption of the Club's proposed judgment, the Jameisons have failed to show any abdication by the trial court of its fact-finding responsibility.

For the foregoing reasons, the Judgment of the Owen Circuit Court is AFFIRMED but REMANDED for modification and entry of a judgment consistent with this opinion.

ALL CONCUR.

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