

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000267-MR

JOHNNY LITTLE AND MARY LITTLE, HIS WIFE

APPELLANTS

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOANN SPINKS COLEMAN, JUDGE
ACTION NO. 01-CI-00285

RUTH HALL, PATTY ANN DECOURSEY,
FOREST DEAN HALL, MIONI HALL,
HIS WIFE, ANDREA LYNN CARTER,
RUBY SHEPHERD, RUTH STURGILL,
JANIE SLONE AND JUDY HALL
WOOSLEY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

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

ACREE, JUDGE: Johnny and Mary Little (Appellants) appeal from an order of the Knott Circuit Court granting Ruth Hall, Patty Ann Decoursey, Forest Dean Hall, Mioni Hall, Andrea Lynn Carter, Ruby Sheperd, Ruth Sturgill, Janie Slone, and Judy Hall Woosley (Appellees) a permanent injunction and recognizing a

¹ Senior 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.

prescriptive easement across Appellants' property to a mountainside family cemetery. Concluding the trial court failed to make the necessary findings to establish a prescriptive easement, we reverse and remand.

Appellees' family cemetery was established and has been in continuous use since 1949. The roadway in question has been used since that time for burials, visitations and memorial services, and to clean and maintain the gravesites. It has been traveled by cars, trucks, a hearse, and a bulldozer. Burials took place in 1949, 1950, 1951, 1955, 1957, 1970, 1979, 1980, 1982, and 1996.

Appellants acquired the roadway property in 1965. Appellees continued to maintain the road and use it in a manner consistent with travel to and from a cemetery until it was blocked in 1997.

In 2001, Appellees sued Appellants to reopen the road. On May 29, 2003, a temporary injunction was entered against the Appellants ordering them to remove all obstacles placed in the roadway. In November 2004, Appellants were found in contempt for not clearing the roadway and ordered to do so by December 8, 2004. In May 2006, this Court affirmed the contempt order. Following an August 10, 2006, hearing, the Knott Circuit Court found Appellees to have acquired a prescriptive easement to use and maintain the roadway to access their family cemetery and granted them a permanent injunction allowing them to use the roadway for such purposes. Appellants were ordered to remove

all obstructions within 45 days or pay \$200.00 per day until roadway was cleared. This appeal followed.

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 made the following findings in concluding the Appellees had obtained a prescriptive easement:

The roadway in question leading to the Hall family cemetery has been in continuous use

since the interring of David Hall in 1949. The road has been used since 1949 for burials, visitations and memorial services, and to clean and maintain the gravesites. The roadway has been traveled by the hearse, trucks to deliver the headstones, cars, trucks and a bulldozer on occasions.

This pattern of use continued through and until May 10, 1965 when the property was acquired by the Defendants, and then continued through and until the Defendant blocked the road in 1997. Throughout this entire time, the road was used with a frequency consistent with that to be expected of a road to a family cemetery. Such a road would not be expected to be used on a daily basis, but rather would be used as needed for funeral processions, visitations and maintenance. The Court finds that during this time the Plaintiffs [sic] family maintained the road and kept it clear for travel.

There was testimony offered regarding dogs running loose in the roadway, and game chickens kept in the roadway. The Court finds that the Plaintiffs nevertheless continued to use the roadway to get to the cemetery, and therefore the dogs and chickens in the roadway did not alter the character or use of the roadway. A prescriptive easement does not change the ownership of the land, rather [it] provides the right to the easement holder to pass over the land. Therefore, the fact that the Defendants [sic] dogs and chickens were in the roadway did not mean that [the] Plaintiffs has [sic] abandoned their easement as long as Plaintiffs continued to use the roadway to access the cemetery, and the Court specifically finds that the Plaintiffs did continue to use the roadway in a manner consistent with travel to and from a cemetery.

The Court finds that the first time that the Defendants objected to the Plaintiff use of the roadway was when the trailer was placed on the roadway in 1997. The Court therefore finds that the Plaintiffs used the easement

in an unobstructed, open, peaceable and continuous manner beginning in 1949 until 1997. The Court therefore finds that the Plaintiffs obtained a prescriptive easement by the end of 1965, and have continued to use the roadway and therefore maintain the right to a prescriptive easement through and including 1997. By filing this action in a timely manner, the Plaintiffs have rightfully asserted their legal title to a prescriptive easement to use the roadway to access the private cemetery.

While the trial court makes ample findings to conclude that the Appellees' use of the roadway was unobstructed, open, peaceable, and continuous for the fifteen plus years, it does not, as Appellants contend, make findings that establish the Appellees used the road under a claim of right. We therefore conclude that it is necessary to remand this case to the trial court to make additional findings of fact and conclusions of law concerning the nature of the roadway's use.

For the foregoing reasons, the judgment of the Knott Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James W. Craft, II
Whitesburg, Kentucky

BRIEF FOR APPELLEES:

William Lewis Collins
Whitesburg, Kentucky