

RENDERED: June 26, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 97-CA-1653-MR

VICKIE MAYNARD and  
LEWIS MAYNARD

APPELLANTS

v. APPEAL FROM MARTIN CIRCUIT COURT  
HONORABLE STEPHEN FRAZIER, JUDGE  
ACTION NO. 95-CI-000023

CONJEANIA JONES and  
JULIUS JONES

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, GUIDUGLI, AND KNOX, JUDGES.

KNOX, JUDGE: Appellants Vickie and Lewis Maynard take this appeal from the judgment of the Martin Circuit Court fixing a boundary line between adjoining properties owned by appellants and appellees Conjeania and Julius Jones, and further ruling that appellants have no right to a prescriptive easement across the disputed property. This action arose when appellees filed a trespass action, seeking ejectment against appellants. Appellants in turn filed a counterclaim to assert their right to

a prescriptive easement running across a strip of land owned by appellees over which appellants claim access to their property.

Appellees filed this action in January 1995. After appellants filed an amended counterclaim in May 1995, the case proceeded with discovery. Several depositions were taken and placed in the record. In addition, the parties entered into a stipulation with respect to testimony that would be offered by Larry Fitch (Fitch), a land surveyor retained by appellees. On October 16, 1996, counsel for appellants, Dale Phillips, filed a motion to permit him to withdraw from the case. The following day, October 17th, appellees moved the court for an order of submission for final judgment, based upon the record and the depositions therein, and certified the motion as having been served upon counsel for appellants, Mr. Phillips. On October 22, 1996, the trial court signed an order permitting Mr. Phillips to withdraw his representation of appellants.

On October 29, 1996, Mr. Phillips informed appellees' counsel by letter that he would continue representing appellants insofar as further discovery was needed, and that he would shortly schedule other depositions. However, the record reflects no activity at all, including discovery proceedings, for a period of six months, when the trial court entered its judgment of April 22, 1997. On that date, the court rendered its decision fixing the boundary line consistent with appellees' position, and rejected appellants' easement claim. Appellants then moved to alter, amend, or vacate the court's judgment, which motion was

filed by Mr. Phillips, the same counsel who had sought to withdraw and who now represents appellants in this appeal. That motion was denied by the trial court, and this appeal ensued.

First, appellants argue the trial court entered judgment before they had an opportunity to complete their proof, and they were thus denied the opportunity to present all of their evidence. Appellants further argue the trial court did not draft its own findings, but rather improperly adopted findings prepared by appellees.

The record reflects that, at the time Mr. Phillips filed his motion to withdraw (October 16, 1996), this case had been pending for some 19 months. Both parties took several depositions, and entered into stipulations regarding Fitch's testimony. While appellees filed their motion to submit only one day after Mr. Phillips filed his motion to withdraw, the record reflects that Mr. Phillips was served with appellees' motion. Further, while Mr. Phillips informed appellees' counsel by letter dated October 29, 1996, that he intended to complete taking proof on behalf of appellants, and that he would shortly schedule other depositions, the record reflects that no further proof was taken.

To the extent that the question is whether appellants were deprived of their right to complete their proof, we believe the record reflects they were not. Counsel for appellants, Mr. Phillips, was served with appellees' motion to submit. Although Mr. Phillips advised appellees' counsel that he intended to remain in the case and take further proof, no further proof had

been taken by April 22, 1997, some six months later. We believe there was ample opportunity for further discovery to be completed should either of the parties have desired to do so. For that reason, we cannot conclude that appellants were deprived of their right to present additional evidence.

Further, we have compared the trial court's judgment with the proposed judgment submitted to the court by appellees. We believe the differences in the language of the two documents are a sufficient indication that the trial court's judgment is its own product.

Next, appellants complain that the trial court's judgment is not supported by credible evidence. The parties own adjoining tracts. Appellees assert that appellants wrongfully claim an easement across their property, while appellants claim they acquired the right to use the disputed strip of land by way of prescription. The trial court first proceeded to fix the boundary line between the properties. In doing so, it relied upon a plat prepared by Fitch, which the parties had stipulated could be submitted into evidence. Fitch established the boundary line by beginning at a point all parties agreed was a beginning point for fixing the boundary, that point being a 40-inch black oak tree opposite a paved road adjoining both properties, and thence running through a point where a 14-inch box-elder stands above the paved road, but where a mulberry tree once grew, thence to a point in an old creek bed 600 feet from the mouth of a branch. That position was contrary to appellants' position that

the boundary line, though also measured from the black oak tree, angled westward from the line established by Fitch, through a point below the paved road where an old mulberry tree had once existed, thence to the creek bed.

Appellants produced several witnesses, including a former owner of their property and several neighbors, who testified that a mulberry tree had once existed which stood in the boundary line appellants contend separates the properties. Appellants argue that the court erred in ignoring this testimony and in fixing the boundary line as it did.

In fixing the boundary line, the court relied upon the plat prepared by Fitch and the stipulations entered into by the parties with respect to testimony Fitch would offer. Fitch, in turn, relied upon the description of the boundary line contained in a deed in appellees' chain of title, identified as a deed from John J. Jennings to W. W. Fannin, containing the following description of the line: "[D]own the hill with the Old Mose Damron and James Johnson line to a large flat rock; thence down the hill to Rockcastle Creek, thence up with the meanders of Rockcastle 600 feet to the mouth of a branch. . . ."

If substantial evidence exists to support the trial court's findings, they will not be set aside unless clearly erroneous. Carter v. Carter, Ky., 382 S.W.2d 400 (1964). Here, a factual dispute existed with respect to the former location of a mulberry tree. While witnesses testifying on behalf of appellants stated that a mulberry tree was located below the

paved road in the boundary line, that testimony was contradicted by witnesses who testified that the mulberry tree was located above the road where a box-elder is now located and that the box-elder stands in the boundary line. Considering the survey performed by Fitch, and the testimony of witnesses placing the location of the box-elder/former mulberry tree, we believe the trial judge's findings fixing the boundary are supported by substantial evidence.

Next, appellants argue that the trial court erred in ruling they did not acquire a prescriptive easement over a driveway across appellees' property to their own. The trial court, in ruling that appellants had not established a right by prescription to use the driveway, focused upon the testimony of Joe Fannin (Fannin), appellees' father, that he constructed (i.e. filled) the driveway in 1984, only eleven years prior to appellants' having claimed an easement, and gave permission to appellants' predecessor in title, Vickie Maynard's father, to use the driveway. Appellants argue that the trial court ignored the testimony of other witnesses who testified that the driveway had been in existence for over fifteen years and had been in use by Mrs. Maynard's father, and then appellants, as an access to their property.

While there was considerable testimony from appellants' witnesses, by way of deposition, that the driveway had been in existence for nearly 40 years, we do not believe we can conclude that the trial court abused its discretion in relying upon

Fannin's testimony. Further, the record reflects that appellant Vickie Maynard, who claims the easement, testified she began using the driveway in 1983, when she started construction of the house now located on her property.<sup>1</sup> In light of that testimony, appellants cannot meet the fifteen-year threshold establishing a prescriptive easement:

Recognition is made of the established rule that an easement is created when the owner of a tenement to which the right is claimed to be appurtenant, or those under whom he claims title, have openly, peaceably, continuously, and under a claim of right adverse to the owner of the soil and with his knowledge and acquiescence, used the way for as much as 15 years.

Ben Snyder, Inc. v. Phoenix Amusement Co., 309 Ky. 523, 525, 218 S.W.2d 62, 63 (1949).

Additionally, while appellants contend the driveway was used as access to their property for many years prior to 1983, at a time when appellant Vickie Maynard's father owned it, the record sheds some doubt on appellants' contention. There was testimony from several witnesses, including Vickie's uncle as well as her father, that the driveway, prior to its being filled in 1983 or 1984, was swampy and muddy, and thus seldom passable for the purpose of accessing appellants' property. Finally, even if appellants had been able to meet the fifteen-year threshold, Fannin's testimony, upon which the trial court relied, established that he had given permission to Vickie Maynard's

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<sup>1</sup>She was not married to appellant Lewis Maynard at that time.

family to use the driveway. Such permission is fatal to creation of a prescriptive easement: "Where the claimant has shown such long continued use, it will be presumed the use was under a claim of right, and the burden is upon the owner of the servient estate [upon which the alleged easement is located] to show that the use was merely permissive." Lyle v. Holman, Ky., 238 S.W.2d 157, 160 (1951).

We believe substantial evidence exists to support the trial court's findings. Accordingly, we affirm the judgment of the Martin Circuit Court.

ALL CONCUR.



BRIEF FOR APPELLANTS:

Dale A. Phillips  
Paintsville, Kentucky

BRIEF FOR APPELLEES:

John David Preston  
Paintsville, Kentucky