

RENDERED: JANUARY 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000336-MR

CARLOS GREEN AND HIS MOTHER,
LOIS GREEN, BY THEIR ATTORNEY-IN-
FACT, CARLESIA TAYLOR

APPELLANTS

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 07-CI-00443

PRESTON THOMAS

APPELLEE

OPINION
REVERSING

** ** * ** * ** *

BEFORE: CAPERTON, DIXON AND VANMETER, JUDGES.

CAPERTON, JUDGE: Carlos Green and his mother, Lois Green, by their attorney-in-fact Carlesia Taylor (hereinafter “Green”) appeal the judgment of the Barren Circuit Court, whereby the court determined that the roadway on Green’s land, i.e., Green’s driveway, was a public passway or public prescriptive easement

that allowed Preston Thomas to access his neighboring land. Green disagrees with the trial court and consequently appeals the judgment. Upon a thorough review of the record and the applicable caselaw, we find that the trial court erred in its determination that the road was a public passway or public prescriptive easement and accordingly, we reverse the judgment of the trial court.

The parties own adjoining land. Thomas's land is a thirteen-acre triangular parcel which extends from a state highway, Highway 1297, to the Cumberland Parkway, to the roadway in question on Green's property. Green's roadway used to be part of an old farm road that extended from the state highway, across Green's land, to several residences and the South Fork Road. The construction of the Cumberland Parkway in the 1970s severed the old roadway and the road now ends at the Cumberland Parkway. Green uses the severed road as a driveway.

Thomas purchased the adjoining land in 1977. After purchasing the property, and after the construction of the Cumberland Parkway, Thomas removed the fence along the roadway. Even though the Cumberland Parkway prevents travel from the state highway to the South Fork Road, Thomas uses the roadway to access his property at least once or twice a year.¹

Green filed a petition for an injunction to cease trespass on his roadway against Thomas. In addition, Green claimed that Thomas wrongfully

¹ Thomas claimed that he used the roadway to access his property every time he went to the property and that he mowed the roadway as well. Green claimed that Thomas has never helped to maintain the road and that Thomas can access his property from the state highway.

constructed a fence on Green's property. Thomas counterclaimed that the roadway in question was a public way and sought punitive damages from the Greens.

The trial court held a trial at which several witnesses testified with multiple exhibits offered by the parties. After the conclusion of the trial, the court and counsel for the parties went to the site to understand "the facts on the ground." In a January 18, 2008, judgment, the court found that a public passway or public prescriptive easement had existed, as evidence presented at the trial established that the public had used the old road to travel from the state highway to the South Fork Road from as far back as the 1930s. The court determined that a public use easement established for fifteen years could not be terminated absent compelling evidence that it was abandoned by lack of any public use for fifteen years.

Based on Thomas's use of the roadway and from the court's observations of the road,² the court found that the public use easement had not been abandoned. The trial court then enjoined Thomas from placing a fence within the roadway and denied Thomas's claim for an award of punitive damages as Green did not act in bad faith. It is from the finding of a public use prescriptive easement that Green appeals.

On appeal, Green presents two arguments. One, the circuit court erred when it failed to recognize that the construction of the Cumberland Parkway in 1970 was a *de facto* termination of any prescriptive public way because all prior uses of the roadway ended at that time due to impassibility. Two, that even if the

² These observations included that the upper portion of the road as it nears the parkway has signs of little if any use and that the lower portion beyond the mobile home does have evidence of use.

court was correct when it held that there had been a prescriptive easement in favor of the public and such easement survived the construction of the Cumberland Parkway, it was error to change and enlarge the usage of Green's road to give Thomas access to land that was not part of the original prescriptive easement.

Thomas responds that the court, based on substantial evidence, correctly found that a public road or passway existed between the parties' respective properties to which Thomas has the right of use, as there had not been termination of the easement through abandonment.

As to property title issues, the appropriate standard of review is whether the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for that of the trial court absent clear error. *Cole v. Gilvin*, 59 S.W.3d 468, 473 (Ky.App. 2001) (citing *Church & Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 323 (Ky. 1992)). We review this matter with these standards in mind.

The trial court found that the evidence presented supported a finding that the roadway was a public passway or a public prescriptive easement.³ Further, as noted in 28A *C.J.S. Easements* § 160 (2009), "an easement granted for a particular purpose terminates as soon as such purpose ceases to exist, is abandoned, or becomes impossible of accomplishment." Once the public passway has been established by adverse use, the right of use of the passway by the public

³ We note that in Kentucky, "an easement may be created by express written grant, implication, prescription or estoppel . . . there are no "general" easements. Thus, the easement must be one of four possible types." *Loid v. Kell*, 844 S.W.2d 428, 430-431 (Ky.App. 1992).

can only be defeated by “a prohibition of the public's use thereof for a period of 15 years, or by a voluntary abandonment of its use by the public.” *Bordes v. Leece*, 201 S.W. 4, 5 (Ky. 1918).

In *Cole*, this Court looked to *Whilden v. Compton*, 555 S.W.2d 272 (Ky.App. 1977), for several factors that support the finding of a public road: “use of the roadway by residents along the roadway, use by customers of a resident who ran a blacksmith shop, repair and annual grading of the roadway by the county, and use for mail service to residents.” *Cole* at 473-74. In determining whether the use of a passway has resulted in a public road the Court in *Cole* held that “sporadic use of a passway by a few neighbors or members of the general public does not turn it into a public road.” *Cole* at 474.

Moreover, in *Cole* this Court referred to the decision in *Sarver v. Allen County*, 582 S.W.2d 40 (Ky. 1979) in stating:

[N]on-use of a public road for over 15 years constitutes an abandonment of that status. Additionally, it indicated that travel on the roadway for access to private residences and acts by county officials in improving or maintaining a road do not constitute a continued public use sufficient to negate abandonment.

Cole at 475 (internal citations omitted).

Turning now to the evidence presented in the case *sub judice*, we must conclude, as found by the trial court, that the roadway had become a public passway *prior* to the construction of the Cumberland Parkway. However, post-construction of the Cumberland Parkway, the public ceased general use of the

road, as the Cumberland Parkway had severed the road. Only Thomas, a neighbor, continued his sporadic use of the roadway. Under *Sarver* and *Cole*, this evidence was insufficient to support the finding of a continued public passway or public prescriptive easement.⁴ Thus, the trial court's finding of a public passway or public prescriptive easement was clearly erroneous.

In light of the aforementioned reasons we reverse the judgment of the trial court.

DIXON, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANTS:

Danny J. Basil
Glasgow, Kentucky

BRIEF FOR APPELLEE:

Bobby H. Richardson
Glasgow, Kentucky

⁴ While the easement for public purposes was extinguished, arguably a private prescriptive easement was created, through Thomas's use of the road. An easement is limited to the purpose for which it was created. In the case *sub judice*, it was not argued that a prescriptive easement was created for the limited purpose of occasional use to maintain unimproved property.

Our Court, presented only with the argument that a public easement was created by use of the public for a through road, must agree with Green that the purpose of the public easement was frustrated by the construction of a Cumberland Parkway which forever blocked the public from using the roadway as a through road. Thus, the easement was extinguished.