

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NOT TO BE PUBLISHED

**MODIFIED: MAY 21, 2010; 10:00 A.M.**

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-001305-MR

JOHNNY WILLHITE

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT  
HONORABLE TYLER L. GILL, JUDGE  
ACTION NO. 07-CI-00436

THE CHARLES SWEATT ESTATE,  
PATRICIA SWEATT, EXECUTRIX

APPELLEE

OPINION  
AFFIRMING IN PART AND  
REVERSING IN PART

\*\* \*\* \* \*\* \* \*\*

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

---

<sup>1</sup> Senior Judge Joseph E. Lambert 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.

KELLER, JUDGE: Johnny Willhite appeals from the trial court's judgment that the Estate of Charles Sweatt (the Estate) retained a quasi-easement of necessity via a passway known as Sweatt Lane and the court's determination that Sweatt Lane is a public passway. For the reasons set forth below, we affirm in part and reverse in part.

## FACTS

At the outset, we note that the Estate has not filed a brief in this matter. Therefore, pursuant to Kentucky Rule[s] of Civil Procedure (CR) 76.12(8), we could regard the Estate's failure to file a brief "as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c)(iii). However, because we believe the trial court's judgment is in large part correct, we will not do so. The facts are essentially undisputed. Charles Sweatt (Sweatt) owned five contiguous tracts of land (the Sweatt property). The Sweatt property abutted railroad tracks and property belonging to Southern States to the south; abutted property owned by Willhite to the west; and abutted property owned by various others to the north and east. The Sweatt property did not abut any roadway and, but for easements, was landlocked. Primary access to the Sweatt property, dating from sometime in the late 1940s or early 1950s, began on Bowling Green Road, and ran across Southern States' property and onto the Sweatt property. The access road, now known as Sweatt Lane, continued over the southern-most tract (tract one)<sup>2</sup> to the northern-most tract (tract two), where

---

<sup>2</sup> We are using the tract numbering system on Plaintiff's Exhibit 1. We note that there was some testimony that the tract numbering system was incorrect; however, any discrepancy is not

Sweatt's residence is located. Sweatt Lane, from Bowling Green Road to the residence, is approximately 7,500 feet long.

In 1988, Sweatt approached Willhite and asked him if he wanted to purchase tract one and the western-most tract (tract three). We note that both tracts abutted land already owned by Willhite and that tract one contained approximately 2,200 feet of Sweatt Lane running from the edge of the Southern States property to the edge of tract two.

Willhite, who operates a junkyard on his property, testified that he told Sweatt that he was interested in making the purchase, but only if he could obtain control of and access to Sweatt Lane. According to Willhite, people had used Sweatt Lane to gain access to his property and to the Southern States property, stealing from both. Furthermore, Willhite stated that, since the late 1980s, if not earlier, people had used Sweatt Lane to steal anhydrous ammonia from Southern States and manufactured methamphetamine on or near Sweatt Lane.

Willhite testified that, because he believed that Sweatt had agreed to sell him control over Sweatt Lane, he purchased the two tracts in September 1988. The deed from Sweatt to Willhite states that it conveys Sweatt Lane and gives Willhite an easement across other property out to Stevenson Mill Road. From the date of sale until his death in 2006, Sweatt continued to use Sweatt Lane to access his property and assumed sole responsibility for maintenance of most of Sweatt Lane. Willhite testified that he did some maintenance on approximately 300 feet

---

relevant to this appeal.

of Sweatt Lane but admitted that Sweatt performed whatever other maintenance was required.

Following Sweatt's death, his heirs decided to sell the property by auction. Several days before the auction, Willhite placed two disabled vehicles from his junkyard across Sweatt Lane, blocking access to the Sweatt property. The Estate was forced to cancel the auction. It then filed suit against Willhite asking the court to order removal of the vehicles blocking Sweatt Lane and for a judgment that Sweatt Lane is a passway open to the public.

After conducting limited discovery, the parties tried the matter to the court. At trial, a surveyor testified that there was evidence that access to the Sweatt property was available through two old passways. One of the passways ran from Stevenson Mill Road (the Stevenson Mill passway) to the Sweatt property and the other ran from Mudd River Church (the Mudd River passway). However, the surveyor testified that neither of those two had been in use for an extended period of time, and the only viable access to the Sweatt property was via Sweatt Lane.

Several of Sweatt's relatives and one neighbor testified that Sweatt Lane had been the primary, if not sole access to the property, since the early 1940s. Furthermore, they testified that Sweatt maintained Sweatt Lane, including a bridge that crossed Mudd River where it runs between tracts two and one. When asked about alternative access to the Sweatt property, none of these witnesses knew of any that did not involve going across neighbors' fields. On the other hand,

Willhite testified that he knew of two passways, one of which consisted of a dirt road and that Sweatt would, on occasion, enter and leave his property by going across fields or through Willhite's property rather than using Sweatt Lane.

During a recess, the court, with permission of counsel and the parties, viewed the property. Following the completion of evidence and a review of proposed judgments from the parties, the court entered judgment in favor of the Estate. In its judgment, the court noted that it had

traveled down two different passways to reach the Sweatt property. One passway was Sweatt Lane, which is graveled all the way to the Sweatt residence. It may be traveled by ordinary automobile and has obviously been used as access within the past few years.

The Mud [sic] River Church passway was gravel most of the way to a field in sight of the Sweatt residence. It was very rough and had obviously not been regularly maintained or used for access on a regular basis for many years. This judge accessed the Sweatt property via this road only on foot because it was blocked at one point by an electric wire and a barbed wire gate. There are no obstructions between the end of this road and the Sweatt residence, albeit, the pathway is across a field which is part of the Sweatt estate.

The Court does not find that there was a specific oral agreement or understanding between Sweatt and Willhite concerning Willhite's [sic] sole control of access of others to the road. This assertion by Mr. Willhite came into evidence without objection and was considered without evaluation under the parol evidence rule.

Willhite's testimony was confusing and convoluted on this point. He said that one reason he insisted on controlling access to the road in 1988 was the rash of thefts of anhydrous ammonia [sic] from Southern States for use in the manufacture of methamphetamine. He said

people were utilizing his property to access the Southern States property. This seems unlikely since the manufacture of methamphetamine and the accompanying rash of anhydrous amonia [sic] thefts related to the manufacture of methamphetamine did not come to Western Kentucky – and specifically not to this area until the latter [sic] 1990's. The circumstantial evidence is also against this assertion in that the use of the road by Sweatt did not change after 1988 and he continued to use it and to maintain it.

As to the Mudd River and Stevenson Road passways, the court stated

that

neither could be used by passenger automobiles without substantial improvement and it is likely that the legal right of access over adjoining lands utilizing these passways no longer exist [sic]. The use of both passways as access to the Sweatt property likely ended more than sixty years ago.

Based on the preceding, the court found that the Estate had a quasi-

easement and

that the roadway known as Sweatt Lane is a legal public passway from the Sweatt residence to Highway 68/80. This right of access shall run with the land in perpetuity. The roadway shall remain open and unobstructed from the public highway to the Sweatt farm.

It is from this judgment that Willhite appeals.

#### STANDARD OF REVIEW

This appeal presents mixed issues of fact and law. The findings of fact by the trial court following a bench trial “shall 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 Rule of Civil Procedure (CR)

52.01; *see also Patmon v. Hobbs*, 280 S.W.3d 589, 593 (Ky. App. 2009). On the other hand, we review the trial court's legal conclusions *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

## ANALYSIS

Initially, Willhite questions the trial court's finding that Sweatt Lane is a "public passway" arguing that the Lane has only been used for private purposes. We note that Willhite has not cited to any legal authority to support this argument; therefore, we are not required to address it. *See CR 76.12 and Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006). Nevertheless, we will do so.

In *Cole v. Gilvin*, 59 S.W.3d 468 (Ky. App. 2001), this Court addressed whether an adjacent property owner had an easement across a neighbor's property. One argument put forth by the party claiming an easement was that the "passway" was public. In making a determination that the passway was not public, the Court noted that "[a] roadway may become a public road upon general public use and control and maintenance by the government for 15 years" or by general and long continued use by the public. Applying this standard, the Court held that the fact that some people used the road to access a creek for fishing and surrounding land for hunting did not constitute sufficient public use to deem the passway public.

In the case at hand, Sweatt Lane was used as a means of access to the Sweatt land and residence. There is no evidence that anyone but Sweatt and his relatives and/or friends used Sweatt Lane for any other purpose. Based on this

evidence, we hold that the trial court erred when it found that Sweatt Lane was a “public passway.”

We next address whether the court erred in determining that Sweatt and the Estate have an easement across tract one via Sweatt Lane.

Willhite argues that the deed is clear and unambiguous in its conveyance of Sweatt Lane to him and in its absence of language specifically creating an easement across tract one via Sweatt Lane. The trial court did not find to the contrary, rather the trial court determined that, despite the language in the deed, an easement by implication exists. Therefore, the language in the deed is essentially irrelevant to our analysis.

What is relevant to our analysis is whether the trial court correctly determined that the Estate has a quasi-easement by implication. As noted by the trial court, “[g]enerally, an easement may be created by express written grant, implication, prescription or estoppel.” *Gosney v. Glenn*, 163 S.W.3d 894, 899 (Ky. App. 2005). In order to prove an easement by implication of law, a party must show:

(1) that there was a separation of title from common ownership; (2) that before the separation occurred the use which gave rise to the easement was so long continued, obvious, and manifest that it must have been intended to be permanent; and, (3) that the use of the claimed easement was highly convenient and beneficial to the land conveyed.

*Cole* at 476.



Factors relevant to establishing a quasi-easement include: “(1) whether the claimant is the grantor or the grantee of the dominant tract; (2) the extent of necessity of the easement to the claimant; (3) whether reciprocal benefits accrue to both the grantor and grantee; (4) the manner in which the land was used prior to conveyance; and (5) whether the prior use was or might have been known to the parties to the present litigation.”

*Id.* at 477, quoting *Bob’s Ready to Wear, Inc. v. Weaver*, 569 S.W.2d 715, 719 (Ky. App. 1978).

It is undisputed that the portion of Sweatt Lane running through tract one was separated from common ownership when Sweatt deeded tracts one and three to Willhite. Furthermore, it is undisputed that Sweatt and others used Sweatt Lane for ingress and egress to the Sweatt property from at least the late 1940s and that Sweatt and/or his relatives maintained Sweatt Lane from sometime in the 1940s until Sweatt’s death. It is also undisputed that Sweatt and/or his relatives built, replaced, and maintained a bridge where Sweatt Lane crossed the Mudd River. The trial court visited the Sweatt property and traversed Sweatt Lane and the Mudd River and Stevenson Mill passways. After doing so, the court found that

[t]he evidence supports the notion that Sweatt Lane is highly convenient and beneficial to the tract upon which the Sweatt residence sits. First, Sweatt Lane connects with Highway 68/80, which is a four-lane highway allowing travelers passage to destinations such as Bowling Green, Russellville, and Hopkinsville. Second, the alternate routes proposed by the Defendant are less convenient than Sweatt Lane. The Stevenson Mill passway is a dirt road along side [sic] a field and the Mudd River Church passway ends before reaching the Sweatt Residence. Neither could be used by passenger automobiles without substantial improvement and it is

likely that the legal right of access over adjoining lands utilizing these passways no longer exist [sic]. The use of both passways as access to the Sweatt property likely ended more than sixty years ago. The Court concludes that ‘the use of the claimed easement was [and continues to be] highly convenient and beneficial to the land conveyed.’

Based on the preceding, and the uncontested facts, it is clear that the trial court correctly concluded that the Estate met the three criteria necessary to establish an easement by implication.

As to the factors necessary to establish a quasi-easement, the trial court determined that the Estate, through Sweatt, was (1) the grantor and could have specifically reserved an easement in the deed; (2) the only other two access routes were not practical alternatives to Sweatt Lane, making Sweatt Lane “reasonably necessary for the use and enjoyment of the Sweatt property and residence;” (3) there is no reciprocal benefit to Willhite; (4) Sweatt Lane was used as the primary means of ingress and egress for more than fifty years; and (5) “Willhite had actual knowledge of the continued use of Sweatt Lane and of the purpose it served.” Although the *Cole* Court stated that necessity is the most important of the above factors, the trial court determined that “[t]he best evidence of the intent of the parties was their conduct in the years between the conveyance and Sweatt’s death. Little or nothing changed about the parties [sic] conduct or about Sweatt Lane after the conveyance to Willhite.” Although not strictly in keeping with *Cole*, based on the facts in this case, we cannot disagree with the trial court that the parties’ conduct following the sale and preceding Sweatt’s death is

the primary evidence of their intent to create a quasi-easement by implication. We cannot say that the trial court “was clearly erroneous or abused its discretion,” and, absent clear error, we may “not substitute [our] opinion for that of the trial court.” *Cole*, 59 S.W.3d at 473. Therefore, we affirm the trial court’s judgment that the Estate has a quasi-easement by implication and that said easement runs with the land.

### CONCLUSION

For the foregoing reasons, the trial court’s judgment that Sweatt Lane is a public passway is reversed. However, the court’s judgment that the Estate has a quasi-easement by implication is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth W. Humphries  
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Fred G. Greene  
Russellville, Kentucky