RENDERED: MAY 21, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000362-MR

MARION MIHALEK; AND
MAUREEN SHANNON — APPELLANTS

v. — APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 06-CI-00387

RUSSELL KOGER; AND
VIRGINIA KOGER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

WINE, JUDGE: Marion Mihalek and Maureen Shannon appeal from a judgment of the Wayne Circuit Court resolving their dispute over an easement with Russell and Virginia Koger. They contend that the trial court clearly erred in determining the location of an access easement and dismissing their claim for damages. Since

the trial court's findings were supported by substantial evidence, we find no clear error. Hence, we affirm.

All of the property at issue is located in Wayne County, Kentucky, adjacent to Kentucky Highway 90 ("KY 90"), near Frazer. On June 2, 1983, Russell Koger and his wife, Virginia Koger, ("the Kogers") sold two parcels of land to Delbert L. Nevels and Karen A. Nevels ("the Nevels"). The Kogers retained much of the adjoining property, including the tract behind the Nevels's property. However, the property which the Kogers conveyed to the Nevels did not have frontage or access to KY 90. Consequently, the deed contained the following language reserving an access easement for the Nevels's property:

> Also conveyed herewith an easement to the buyers to cross the land of Russell and Virginia Koger for access to the above-described property running from Kentucky Highway 90 to the rear corner of the above described property on the South side being 38 feet in width.
>
> IT IS EXPRESSLY UNDERSTOOD that the easement granted to the buyers herein is subject to the continuing use of same by the sellers for access to property owned by the sellers adjacent to and immediately behind the property purchased herein by the buyers.

On April 17, 1997, Marion Mihalek, and her husband, Karl Mihalek, acquired the two tracts from the Nevels's successor. The deed also conveyed the easement which the Kogers originally conveyed to the Nevels. On March 23, 1999, the Mihaleks conveyed the tracts to their daughter, Maureen L. Shannon, but retained a life estate for themselves. Karl Mihalek died on July 7, 1999, and

Marion Mihalek (hereinafter "Mihalek") has remained in sole possession of the property since that time.

Pursuant to the 1983 deed, Mihalek has used the easement to access her home on the northern of the two tracts ("Lot 1"), and the Kogers have also used the easement for access to their tract behind Lot 1. There is also a road leading from the easement to the southern of the two tracts ("Lot 2"). In 2006, Mihalek claimed that the Kogers had built a shed on the easement. She also objected to the Kogers' prior placement of items in the area. When the Kogers refused to remove the shed and other items, Mihalek brought this action seeking damages for the Kogers' interference with the easement.

The matter was submitted to the trial court for a bench trial on November 13, 2008. After considering the evidence and arguments of counsel, the trial court entered its findings of fact, conclusions of law and judgment on January 16, 2009. The trial court found that the easement described in the deed runs from KY 90 north to the eastern boundary of Mihalek's tracts. Mihalek claims that the easement continues along the entire length of Lots 2 and 1, to the northeast corner of Lot 1 and the edge of the Kogers' property. Thus, she contends that the shed built by the Kogers is located on the easement. The Kogers maintain that the thirty-eight foot easement only runs to the southeast corner of Lot 2. The parties agree that the description in the deed is susceptible to either interpretation.

The trial court agreed with the Kogers that the easement described in the deed ends at the southeast corner of Lot 2. The court further found that

Mihalek has acquired a prescriptive easement to use the gravel drive which extends from the southeast corner of Lot 2 to her residence. But since the shed is not located on any deeded easement or the prescriptive easement, the trial court found that the Kogers have not interfered with Mihalek's use of the easement. Mihalek now appeals from this judgment.

The only question on appeal is whether the trial court clearly erred in its findings regarding the location of the deeded easement and the prescriptive easement. Since the parties agree that the language in the deed describing the easement was ambiguous, the trial court properly considered parol evidence as an aid to the proper construction of the language used. *Caudill v. Citizens Bank*, 383 S.W.2d 350, 352 (Ky. 1964). When interpreting an ambiguous deed, the court may consider the nature of the instrument, the situation of the parties executing it, and the objects which they had in view. *Sword v. Sword*, 252 S.W.2d 869, 870 (Ky. 1952). Furthermore, the subsequent acts of the parties, showing the construction they have put upon the agreement, may be looked to, and are entitled to great weight in determining what the parties intended. *Id.*

Here, the trial court focused on Russell Koger's testimony that he recalled a conversation he had with Delbert Nevels prior to the 1983 conveyance. Russell Koger stated that he discussed the easement with Delbert Nevels while standing at the south rear corner of Lot 2, which is the corner nearest to KY 90. Russell Koger further testified that the thirty-eight foot easement was created

because there was an eighteen foot drainage ditch easement on behalf of the Commonwealth and he wanted to give the Nevels a twenty foot right-of-way.

Mihalek contends that the trial court's focus on this testimony overlooked more compelling evidence concerning the purpose of the easement. In particular, she notes that that language in the 1983 deed specifies that the Kogers retained a right to use the easement to access their tract behind Lot 2. She contends that the easement would not be sufficient for that purpose if it ended at the southeast corner of Lot 2. Similarly, she contends that such an easement would not have been sufficient to provide access to Lot 1.

In addition, Mihalek points to other conduct supporting her interpretation of the easement. In 1983, the Kogers conveyed the tract of their property containing the easement to Russell Koger's mother, Ollie Mae Koger. She conveyed the property back to the Kogers in 2003. Both deeds contain the following language describing the easement:

> This conveyance is hereby made subject to an easement or right of way in favor of Delbert L. Nevels and a right of way is retained in favor of the grantors herein, the same running from Kentucky Highway 90 to the property of said Nevels and being 38 feet in width. It is expressly understood that said easement is subject to the continuing use of the grantors herein, the said Nevels, their heirs, successors or assigns, and that such easement is to be construed as an easement running with the land.

Under the terms of these deeds, there is a thirty-eight foot easement which runs from KY 90 all the way to the Kogers' parcel behind Mihalek's Lot 1. Furthermore, the language indicates that both the Kogers and the Nevels have a

right to use the entire easement. Consequently, Mihalek maintains that the Kogers understood that the easement continued along the entire length of Lots 1 and 2. Mihalek further argues that the trial court erred by relying on the Russell Koger's testimony in the face of this more compelling evidence.

As this matter was tried before the circuit court without a jury, our review of factual determinations is under the clearly erroneous rule. Kentucky Rules of Civil Procedure ("CR") 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence, which is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). In our review, we are mindful that the trial court is in the best position to determine the credibility of witnesses and the weight to be given the evidence. *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991). Although there clearly was evidence to support Mihalek's interpretation of the easement, we cannot find that the trial court clearly erred by adopting the Kogers' interpretation.

Since the language of the easement was ambiguous, the parties' respective surveyors each had to rely on the same type of extrinsic evidence that was presented to the trial court. The trial court found that Russell Koger's testimony concerning his conversation with Delbert Nevels in 1983 best reflected the intentions of the parties at the time the easement was made. The easement granted to the Nevels provides only access to their lots and does not specify if the

access would be to Lot 2 or to both lots. Furthermore, while the easement recognizes that both the Kogers and the Nevels have a right to use the easement, it does not clearly indicate the extent of either party's rights. Likewise, the 1983 conveyance to Ollie Mae Koger and her 2003 re-conveyance to the Kogers do not set out the extent of the various parties' rights to use the easement.

The evidence in this case clearly would have supported a finding in favor of Mihalek. However, there was evidence supporting the Kogers' position. Given the conflicting evidence, we cannot find the trial court's finding to be clearly erroneous.

Mihalek also contends that the trial court clearly erred in finding that the deeded easement runs in a generally north-south direction from the west from her property line to 38 feet to the east. She contends that the easement should be measured nineteen feet in each direction from the centerline of the gravel drive, as advocated by her surveyor, Anthony Thompson. However, the trial court relied upon Russell Koger's testimony that the thirty-eight foot easement described in the deed includes the eighteen foot drainage easement and an additional twenty foot easement for the gravel drive. Mihalek does not show that the trial court's location of the easement deviates from the location of the existing gravel drive. Consequently, the trial court's finding is not clearly erroneous.

Finally, Mihalek takes issue with the trial court's finding that she has a prescriptive easement only along the 18-foot gravel drive to her residence on Lot 1. 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." *Cole v. Gilvin*, 59 S.W.3d 468, 475 (Ky. App. 2001). Here, the parties agree that Mihalek and her predecessors in title have used the gravel drive for more than fifteen years.

However, Mihalek contends that any prescriptive easement should be construed to include the entire thirty-eight foot area along the length of Lots 1 and 2. Mihalek testified that she has maintained that area during the entire period she has owned the property. In addition, she notes that Russell Koger had asked her permission to place items in that area from 2003 to 2006. Finally, Mihalek points out that that her predecessors in title, the Nevels and Mary Kidd, each testified that they maintained the thirty-eight foot easement along the entire length of the lots. Consequently, Mihalek contends that her prescriptive easement should be construed to include the entire thirty-eight foot area to the boundary with the Kogers' lot.

But where a passway is not enclosed, the extent of the use is necessarily marked by wagon tracks or beaten way, there are no other evidences of continuous use under claim of right thereto, and there is no notice to the owner of the servient estate of either an adverse claim or use outside of the beaten path, the prescriptive easement will not be extended beyond the bounds of the existing path. *Haffner v. Bittell*, 198 Ky. 78, 248 S.W. 223, 223-24 (1923). Although Mihalek does point to evidence supporting her contention that she and her predecessors

exercised control over other portions of the passway immediately to the east of her lots, we cannot find that the trial court clearly erred by finding this evidence insufficient to establish a prescriptive easement over more than the tracks of the existing gravel drive.

Accordingly, the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
John Paul Jones, II Monticello, Kentucky	James M. Frazer Monticello, Kentucky