

RENDERED: OCTOBER 8, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-001657-MR

TOOHEY REALTY, LLC; AND  
TOOHEY'S AUTO SUPPLY CO.

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE STEVE ALAN WILSON, JUDGE  
ACTION NO. 07-CI-01473

BOWLING GREEN - WARREN  
COUNTY COMMUNITY HOSPITAL  
CORPORATION

APPELLEE

OPINION  
VACATING IN PART AND REMANDING

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BEFORE: THOMPSON, VANMETER, AND WINE, JUDGES.

VANMETER, JUDGE: Toohey Realty, LLC and Toohey's Auto Supply Company (hereinafter collectively referred to as "Toohey") appeal from the Warren Circuit Court judgment granting them two prescriptive easements over real

property owned by Bowling Green-Warren County Community Hospital Corporation (Hospital). For the following reasons, we vacate in part and remand.

Toohey Realty, LLC owns a tract of real property located at 215 US 31-W Bypass in Bowling Green, Kentucky. Toohey's Auto Supply Co. leases the property and has operated an auto parts store on the property since 1963. The Hospital owns parcels of real property bordering Toohey's lot on its eastern, southern and western boundaries. In other words, except for Toohey's access to the Bypass, the Hospital property completely surrounds Toohey's property.

Toohey customers, employees, and vendors frequently entered the auto parts store by an entrance facing the neighboring Hospital property to the east. As a result, Toohey customers, employees, and vendors traveled across and parked on the Hospital property bordering the eastern boundary of the Toohey lot. Toohey also maintained a trash receptacle and a business sign on the same Hospital property.

In 2006, during negotiations to sell this property, the Hospital discovered that the Toohey's business sign was located on the property. The Hospital asked Toohey to remove the sign, but Toohey refused, claiming a right to maintain the sign in its location, as well as a right of ingress and egress over the Hospital property. The Hospital then filed the underlying action to quiet title to the property.

At trial, an advisory jury found Toohey to possess prescriptive easements for ingress and egress to its land over the Hospital's property from the

31-W Bypass and to maintain the sign on the Hospital's property. The court adopted the jury's findings and directed the parties to file memoranda with the court concerning the appropriate width of the easement for ingress and egress to the rear of Toohey's property. The Hospital provided the affidavit of the district manager of Scott Waste Services, LLC, which collects Toohey's garbage, to show a 13-foot wide path was necessary for its garbage trucks to reach the rear of Toohey's property. Toohey requested the court grant an easement over one-half of the Hospital property.

The trial court entered a judgment stating, in part:

2. There is a prescriptive easement for ingress or egress, parking, or to maintain a trash receptacle on the Hospital Property running in favor of Toohey Realty, LLC, Toohey's Automotive Supply Company or the real property located at 215 US 31-W Bypass, in Bowling Green, Kentucky. This easement is limited as follows:

a. The scope and size of the easement will be limited to a 13-foot ingress/egress easement along the left side of the Toohey property, adjacent to the "used car" lot.

b. The Court recognizes that the "Toohey" sign is in the path of the ingress/egress easement. The defendant [Toohey] will have to determine if they wish it to remain in its current location.

...

3. Toohey's Auto Supply Company has an easement by prescription to erect and maintain its business sign as currently situated on the real property owned by the Bowling Green-Warren County Community Hospital Corporation located at 211 US 31-W Bypass in Bowling Green, Warren County, Kentucky.

This appeal followed.

Toohey argues the trial court erred by granting a prescriptive easement that is only thirteen feet wide because ingress and egress along this path is obstructed by the current location of its business sign. We agree.

As an initial matter, an advisory jury's findings are "not binding on the court . . . and may be wholly disregarded by the court." *Poff v. Richardson*, 312 Ky. 237, 227 S.W.2d 175, 176 (Ky. 1950). A trial court's findings of fact are reviewed under a clearly erroneous standard. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005) (citations omitted). Such findings are not clearly erroneous if supported by substantial evidence. *Id.* (citations omitted). Substantial evidence is evidence that "has sufficient probative value to induce conviction in the mind of a reasonable person." *Id.* (citations omitted). The trial court's conclusions of law are reviewed *de novo*. *Id.* (citations omitted).

After adopting the advisory jury's findings, the court held that Toohey is entitled to prescriptive easements to maintain its sign in its current location *and* for ingress and egress, parking, and maintaining a trash receptacle, but fashioned a remedy inconsistent with its findings. The court recognized that the current location of the business sign obstructed the path of ingress and egress granted to Toohey, but required Toohey to decide whether or not to move its sign in order to utilize the easement. Thus, in effect, the easements granted by the court are not consistent with its findings because they do not provide Toohey with the right to maintain its business sign in its current location *and* have a path of ingress and

egress over the Hospital property. Accordingly, the court's judgment granting a 13-foot wide easement is vacated and remanded for the trial court to fashion a remedy that allows Toohey to maintain its sign in its present location and have a way for ingress and egress, parking, and maintain a trash receptacle.

The judgment of the Warren Circuit Court is vacated in part and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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