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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001149-MR

ROE CREEK DEVELOPMENT, INC. APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 09-CI-00020

SAMUEL J. TILDEN ARNETT APPELLEE

OPINION
AFFIRMING IN PART AND VACATING IN PART

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,[1] SENIOR JUDGE.

ACREE, JUDGE: The issue before us is whether the Lawrence Circuit Court erred in concluding that appellee, Samuel J. Tilden Arnett, acquired an easement by prescription and estoppel across property owned by appellant, Roe Creek

[1] 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 Statute (KRS) 21.580.

Development, Inc. (Roe Creek). For the following reasons, we affirm in part and vacate in part.

Facts and Procedure

Roe Creek is a Kentucky corporation currently wholly owned by Lyonel Joffre, a Georgia resident. Roe Creek, and in turn Joffre, possess approximately 250 acres located on Roe Creek Road in Lawrence County, Kentucky (the "landfill property").

The landfill property was previously owned by Bill and Lou Davis. The Davises obtained the landfill property in 1976 and started the landfill. At that time, an unpaved driveway existed on the land. The driveway started at Roe Creek Road and extended southwest onto the landfill property for about a quarter mile. The Davises later extended the driveway south, deeper into the landfill property, creating the road currently in dispute. Shortly after opening the landfill, the Davises place a locked gate at the landfill property's entrance from Roe Creek Road to control access to the disputed road and the property.

Arnett is the owner of real property located on Blaine Creek in a rural area of Lawrence County, Kentucky (the "Arnett property"). The Arnett property lies to the south of and partially adjoins the landfill property. Arnett's parents, Jack and Betty Arnett, first acquired the Arnett property in 1988 and subsequently granted Arnett a life estate. The Arnett property is unimproved and contains no buildings or structures.

When Arnett's father acquired the Arnett property, the Davises provided him with a key to the landfill property's gate and granted him oral permission to hunt on the landfill property. Thereafter, Arnett's parents frequently used the disputed road to access the Arnett property, sometimes several times a week. Additionally, Arnett himself claimed that, from 1989 until 2008, he often used the disputed road to access the Arnett property. Arnett explained he used the Arnett property for a variety of outdoor activities, including hunting, riding all-terrain vehicles (ATVs), and socializing. Both Arnett and his father hunted on the landfill property.

In 1989, the Davises formed Roe Creek and conveyed all the landfill property to Roe Creek except for approximately ten acres known as the H-Coal. The Davises retained sole ownership of Roe Creek for about a year. They then sold Roe Creek, and its assets including the landfill property, to Bruce Davis. Davis operated the landfill until the early 1990s when the landfill closed. In 2008, Davis sold Roe Creek and its assets to Joffre, the current owner. Joffre immediately changed the lock on the gate to the landfill property, denying Arnett access to that property and, in turn, denying Arnett access to the Arnett property as well.[2] Arnett subsequently brought suit claiming he obtained an easement by

[2] The Arnett property's deed indicates the property has access to a county road on the Blaine Creek side of the property (opposite from where the Arnett property adjoins the landfill property). However, the circuit court expressly found the county road referenced had not been used for approximately thirty years. Additionally, the trial judge along with counsel visited the Arnett property the day before trial. The trial judge stated in his findings of fact that it would be a significant overstatement to state there is actually a road to the Arnett property from the Blaine Creek side. The circuit court concluded the only access to the Arnett property was over the landfill property. Roe Creek does not challenge the circuit court's factual finding.

necessity, implication, and/or prescription across the landfill property in order to gain access to the Arnett property.

The Lawrence Circuit Court held a bench trial in this matter on March 31, 2010. On April 8, 2010, the circuit court entered findings of fact, conclusions of law and judgment finding that, while Arnett did not establish an easement by necessity or implication, he did obtain an easement by both estoppel and prescription. On April 19, 2010, Roe Creek filed a motion to alter, amend, or vacate the judgment; the circuit court denied Roe Creek's motion. On the same date, Roe Creek filed a motion for additional findings. The circuit court granted Roe Creek's motion in part by clarifying the exact location and size of the easement. This appeal followed.

Standard of Review

Because this matter "was tried before the court without a jury, its factual findings '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[.]'" *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001) (quoting Kentucky Rules of Civil Procedure (CR) 52.01). "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Carroll*, 59 S.W.3d at 489. Substantial evidence is evidence "when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Gosney v. Glen*, 163 S.W.3d 894, 898 (Ky. App. 2005).

A reviewing court is not bound, however, by the trial court's conclusions of law. *Carroll*, 59 S.W.3d at 489. Consequently, the trial court's application of the law to the facts is subject to an "independent *de novo* appellate" review. *Gosney*, 163 S.W.3d at 898.

Analysis

We begin by noting that no written agreement exists between Arnett and Roe Creek (or its predecessor) establishing an express easement across the landfill property. Nevertheless, an easement may still be created by "implication, prescription, or estoppel." *Gosney*, 163 S.W.3d at 899; *Loid v. Kell*, 844 S.W.2d 428, 429 (Ky. App. 1992). It is well-settled that easements are not favored in this Commonwealth and, as a result, the person asserting the right to an easement bears the heavy burden of proving all the requisites necessary to obtain an easement. *Gosney*, 163 S.W.3d at 899.

Roe Creek first asserts the trial court erred by concluding as a matter of law that Arnett established an easement by estoppel over the landfill property. We agree.

An easement by estoppel is premised upon general principles of equity and estoppel. *Gosney*, 163 S.W.3d at 899; *Smith v. Howard*, 407 S.W.2d 139, 143 (Ky. 1996). It is an "equitable principle utilized to prevent one who has failed to act when he should have acted from reaping a profit to the detriment of his adversary." *Loid*, 844 S.W.2d at 430. In determining whether an easement by

estoppel exists, it is necessary to consider the fundamental principles underlying the equitable estoppel doctrine, including:

> (1) conduct which amounts to a false representation or concealment of material facts which a party subsequently attempts to assert; (2) intention, or at least the expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of real facts. As related to the party claiming the estoppel, [the essential estoppel elements include]: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Smith v. Howard, 407 S.W.2d 139, 143 (Ky. 1966); *Jones v. Sparks*, 297 S.W.3d 73, 77 (Ky. App. 2009). More simply, to establish an easement by estoppel, the party claiming its existence must prove: (1) the promisor conveyed a false promise or representation to the promisee; (2) the promisor intended or expected the promisee to rely on the false representation; (3) the promisee believed and relied on the representation; and (4) action based thereon of such a character as to change the promisee's position prejudicially. *See Jones,* 297 S.W.3d at 77; 25 Am.Jur.2d *Easements and Licenses in Real Property* § 14 (2004).

It is well-settled in this Commonwealth, however, that an easement by estoppel is not "appurtenant to the land." *Cole v. Gilvin*, 59 S.W.3d 468, 478 (Ky. App. 2001). "Estoppel is an equitable principle invoked against a [particular person] . . . . An easement by estoppel cannot run with the land. An easement by estoppel must pass based upon equitable principles to the subsequent party or it is extinguished." *Loid*, 844 S.W.2d at 430.

Arnett failed to establish an easement by estoppel. There is nothing in the record indicating Roe Creek made any representation, false or otherwise, to Arnett that he could use the road to access the Arnett property. While the Davises gave Arnett permission to use the road, any such easement by estoppel which may have resulted from this representation was extinguished when Davis transferred the landfill property to Roe Creek in 1989. *See Loid*, 844 S.W.2d at 430 ("An easement by estoppel [does not] run with the land."). Accordingly, to determine if Arnett successfully established an easement by estoppel, we must focus on Roe Creek's actions and words. Arnett contends that Roe Creek's failure to object to Arnett's use of the road resulted in an easement by estoppel. However, simply failing to object is not enough. Arnett must produce evidence that Roe Creek made a false promise or representation that he could continue to use the road to access the Arnett property. Arnett failed to do so. *See Jones v. Sparks,* 297 S.W.3d 73, 77 (Ky. App. 2009). More significantly, Arnett did not put forth any evidence that he detrimentally relied on, or prejudicially changed his position based on, any representation conveyed to him by Roe Creek. The Arnett property is unimproved and contains no buildings or structures. Additionally, Davis testified that her husband, not Arnett, had kept the road in good repair. There is simply no evidence that Arnett prejudicially changed his position in reliance on a false representation from Roe Creek. *See Holbrook v. Taylor*, 532 S.W.2d 763 (Ky. 1976) (finding an easement by estoppel when, in reliance on the defendant's representation that

plaintiff could use a roadway over defendant's land to access plaintiff's property, the plaintiff built a $25,000 house and spent money to maintain the road).

"Easements are not favored [in the law], and the party claiming the right to an easement bears the burden of establishing all the requirements for recognizing the easement." *Carroll,* 59 S.W.3d at 489-90. Arnett failed to meet his burden of proving an easement by estoppel with respect to the disputed road. The circuit court erred in concluding otherwise. Accordingly, we vacate the relevant portion of the circuit court's judgment. Because we have found that the circuit court erred in finding the existence of an easement by estoppel, it is unnecessary for us to address the issue of whether the trial court abused its discretion in allowing Arnett to amend his complaint at the conclusion of the trial to conform to the evidence to assert a claim of estoppel.

Next, Roe Creek asserts the circuit court erred, as a matter of law, in concluding that Arnett established an easement by prescription over the landfill property. We disagree.

"A prescriptive easement is a property right in one landowner (dominant tenement) representing a privilege to use the land of another (servient tenement) and is based on a presumed grant that arises from the adverse, uninterrupted and continuous use for a 15-year statutory period." *Cole v. Gilvin*, 59 S.W.3d 468, 475 (Ky. App. 2001). An easement obtained by prescription is grounded on the theory "that if one makes use of land without permission being granted, and the owner fails to interfere or to object to such use, such acquiescence

is conclusive evidence that the use is rightful." 3 Robert W. Keats, et al., *Kentucky Practice: Methods of Practice* § 7.26 (3rd ed. 1989); *Riley v. Jones*, 295 Ky. 389, 174 S.W.2d 530 (1943).

The prescriptive easement doctrine is of "ancient origin" and is derived from the common law principles concerning the adverse possession of a parcel of property. *Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc.*, 15 S.W.3d 727, 730 (Ky. 2000); *Cole*, 59 S.W.3d at 475. "As with adverse possession of a fee simple estate, a prescriptive easement can be acquired by actual, hostile, open and notorious, exclusive, and continuous possession of the property for the statutory period of fifteen years." *Allen v. Thomas*, 209 S.W.3d 475, 478 (Ky. App. 2006) (citing *Columbia Gas Transmission Corp.*, 15 S.W.3d at 730). Possession is hostile if it is under a claim of right by the dominant tenement. *See Tarter v. Tucker,* 280 S.W.2d 150, 152-53 (Ky. 1955). Further, though adverse possession and prescriptive easements are sister doctrines, "the estates sought to be established are different and an easement, such as a right of way, cannot in a strict sense be the subject of continuous, exclusive, and adverse possession." *Kentucky Practice: Methods of Practice* § 7.26; *Causey v. Conn*, 451 S.W.2d 846, 847 (Ky. 1970).

A grantee's adverse possession of a passway "may be tacked on to that of his grantor to complete the statutory period." *Cole*, 59 S.W.3d at 475 (citing *Martin v. Kane*, 245 S.W.2d 177, 178 (Ky. 1951)). However, even if a party has maintained such use of a passway for fifteen years or more, he or she

does not acquire a prescriptive easement if the use initiated with the owner of the servient estate's permission. *Cole*, 59 S.W.3d at 475.

The circuit court properly determined that Arnett obtained an easement by prescription. Arnett and his predecessor in title, *i.e.*, his parents, used the disputed road on the landfill property to access the Arnett property for twenty years, from 1988 until 2008, which is clearly in excess of the fifteen-year statutory period. *See* KRS 413.010. Arnett's mother testified that, after she and her husband obtained the Arnett property in 1988, they had used the disputed road to access it several times a week. Additionally, Arnett's brother, Tad Arnett, testified that he also went with his father to the Arnett property via the landfill property's road, and he personally used the road from 1989 until approximately 2002. Arnett also stated that, though he did not use the road every day, he had frequently used the road since October 1989. Arnett testified that he used the road to access the Arnett property to hunt, which he did on weekends and some evenings after work. Arnett also claimed he often road ATVs on the Arnett property, and he and his friends used the passway to access the Arnett property for picnics and cook-outs. Further, Arnett's friend, Brent Jones, testified he accompanied Arnett to the Arnett Property at least fifty to sixty times since 1989, and they had used the disputed road eight to ten times a year to access the Arnett property. Several defense witnesses who lived on Roe Creek Road also testified that Arnett had a key to the landfill property and they saw Arnett access the landfill property. Accordingly, the evidence established that Arnett and his predecessor in title continuously, openly,

and notoriously used the road to access the Arnett Property from 1989 until 2008. *See Cole*, 59 S.W.3d at 475. Additionally, since the late 1980s Arnett had a key to the gate limiting access to the landfill property and excluding the general public. In fact, one defense witness, Terry Wilkes, testified that Arnett was the one who kept the gate locked, indicating Arnett had relatively exclusive control over the disputed road. *See id.* ("A private passway may be acquired by prescriptive use although a right of way is not strictly a subject of continuous, exclusive, and adverse possession.").

Roe Creek contends Arnett could not acquire an easement by prescription because Arnett's use of the landfill property's road to access the Arnett property was not hostile and adverse because it initiated with Davis' permission. At trial, Davis testified that when she and her husband established the landfill in 1976 they put up the gate at the entrance to the landfill property to control access. Davis explained that she gave Arnett's father a key to the gate and permission to hunt on the landfill property. Roe Creek asserts that Davis' permission for Arnett and his father to hunt on the landfill property indicates Arnett had permission to use the disputed road to access the Arnett property, thus negating the hostile element.

In its opinion, the circuit court addressed the issue of whether Arnett's use of the landfill property was permissive or adverse. The circuit court concluded that, despite conflicting testimony, based on the evidence as a whole, Arnett's use of the road was not permissive but was exercised because Arnett and his

predecessor in title, *i.e.*, his mother and father, believed they had a right to use the property in question.[3] The circuit court's conclusion that Arnett used the landfill property's road as a matter of right and without Davis' permission is not clearly erroneous. The fact that Davis gave Arnett permission to hunt on the landfill property does not mean she also gave Arnett permission to use the landfill property's road to access his property. In fact, Davis testified that there was no other way for Arnett to reach his property and she believed he had a legal right to use the roadway to access the Arnett property. Davis acquiesced to Arnett's claim of right. *See Allen v. Thomas*, 209 S.W.3d 475, 481 (Ky. App. 2006) (noting that "prescriptive easements – by their nature – are founded on" the servient tenement's acquiescence to the dominant tenement's claim of right to use the passway in dispute). We simply cannot disturb the finding of the trial judge absent clear error; clear error is not present in this case.

Finally, Roe Creek asserts the Recreational Use Statute, KRS 411.190, precludes Arnett's claim to a prescriptive easement, and the circuit court erred in refusing to apply the statute. We disagree.

In 1966, Kentucky adopted the Recreational Use Statute, which encourages "property owners to make land and water areas available to the public for recreational purposes by limiting their duties and liabilities[.]" *Coursey v. Westvaco Corp*., 790 S.W.2d 229, 231 (Ky. 1990). Subsection (8) of the Recreational Use Statute provides:

[3] The court stated in its findings of fact that Arnett's mother testified she and her husband believed they had a legal right to cross the landfill property to access the Arnett property.

> No action for the recovery of real property, including establishment of prescriptive easement, right-of-way, or adverse possession, may be brought by any person whose claim is based on use solely for recreational purposes.[4]

KRS 411.190(8). The Kentucky Supreme Court has indicated however, that for the Recreational Use Statute to apply, the landowner must show "at a minimum that he knew and condoned the *public* making use of his land for a recreational purpose . . . by words, actions, or lack of action" from which *intent to open the land to the general public* for recreational use could be "reasonably inferred." *Coursey v. Westvaco Corp*., 790 S.W.2d at 232 (emphasis supplied).

There is no evidence from which we can reasonably infer that Roe Creek knew and condoned the use of the landfill property by the general public for recreational purposes. In fact, the evidence clearly establishes that, as early as 1976, a gate was placed across the entrance to the landfill property denying access to the general public; the gate is still in place today. While "hunting" is a recreational use as contemplated by KRS 411.190(1)(c), Roe Creek did not automatically invoke the Recreational Use Statute's protection when it granted Arnett and his father permission to hunt on the landfill property. *See Coursey v. Westvaco Corp*., 790 S.W.2d at 232. The record is simply void of any evidence that Roe Creek opened the landfill property to the general public for general

[4] 411.190(1)(c) defines a "recreational purpose" as to include "hunting, fishing, swimming, boating, camping, picnicking, hiking, bicycling, horseback riding, pleasure driving, nature study, water-skiing, winter sports, and viewing or enjoying historical, archaeological, scenic or scientific sites.

recreational use. Consequently, the circuit court properly refused to apply the Recreational Use Statute to this matter.

Conclusion

The circuit court erred in concluding, as a matter of law, that Arnett established an easement by estoppel. However, the circuit court properly determined that Arnett acquired an easement by prescription in order to use the landfill property's road to access the Arnett property. Accordingly, we vacate that portion of the circuit court's judgment establishing an easement by estoppel, but affirm the judgment to the extent it recognizes an easement by prescription to access the Arnett property.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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