RENDERED: FEBRUARY 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001069-MR

LAZELLE WILLIAMS; GLADYS WILLIAMS;
MARSHA WILLIAMS; AND JAMES WILLIAMS APPELLANTS

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 05-CI-00387

HAYES LEASING COMPANY; AND
FLOYD COUNTY, KENTUCKY, FISCAL COURT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Lazelle Williams, Gladys Williams, Marsha Williams, and James Williams (collectively "the Appellants") appeal from the April 2, 2009,

[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 the Kentucky Revised Statutes (KRS) 21.580.

findings of fact, conclusions of law, and judgment of the Floyd Circuit Court in which the court found that a disputed roadway was a public road pursuant to KRS 178.025. The Appellants assert that the trial court erred in its judgment. Finding no error, we affirm.

At issue in this case is the location and use of a roadway across Appellants' property. Members of the Hayes family and the Hayes Leasing Company own property above the Appellants' property and use the road to access their property, including use of the road to transport coal mined from their property. The roadway in question[2] has been the subject of multiple litigations spanning thirty years between the parties. In *Forrest E. Williams and Lazelle Williams v. Hayes Leasing Company, et al*, Civil Action No. 81-CI-860, the Floyd Circuit Court found that the Hayes Leasing Company and the Hayes family were entitled to use an access road fourteen-feet in width.[3]

The current litigation began in 2005 when the Appellants alleged that the Floyd County Fiscal Court failed and/or refused to follow the mandatory requirements of KRS 178.115 which requires that a roadway be a county road before being incorporated into the county road system. The Appellants sought to have the trial court declare that the roadway was a private drive. The complaint

[2] This road is known as Williams Drive and/or Williams Road and/or Johnson's Fork of Cecil Branch.

[3] In that judgment the court also found that the boundary line between the Hayes and the Williams was established by the United States District Court for the Eastern District of Kentucky in *CSX Minerals, Inc. v. Sylvia Hall, et al,* judgment filed on March 5, 1986. This was not included in the record.

over the status of the road was initiated by the Appellants after the Hayes Leasing Company began to mine coal in the area above the Williams' property and transported the coal over the road in question. On March 9, 2006, the Floyd Circuit Court issued its order in which it determined that the Floyd County Fiscal Court failed to prove that the roadway in question was a county road under KRS 178.115 but specifically reserved the issue as to whether the road was a public road under KRS 178.025 and ordered that the parties had sixty days to present proof concerning the remaining issue.

On March 27, 2009, this case came before the court on a motion to dismiss for lack of prosecution pursuant to Kentucky Rules of Civil Procedure (CR) 77.02. The Appellants' requested that the case be kept on the court's active docket for the sole purpose of making the prior March 9, 2006, order "final and appealable" as it pertained to the findings of the court that the road in question was not a county road. The court entered its order on April 2, 2009, in which it overruled the motion to dismiss for lack of prosecution and determined that Appellants' motion would be treated as a motion for final adjudication on all issues before the court.

On April 2, 2009, the court also entered its findings of fact, conclusions of law and judgment. Wherein the trial court found that the road in question met the statutory definition of a public road as defined in KRS 178.025. Specifically, the court found that the Appellants' interest in the roadway was acquired through their predecessor-in-title, Lazelle Williams. Williams obtained

the property by deed dated March 24, 1978, which provided for a roadway easement across the property for the purpose of ingress and egress by the public. The court further found that the Floyd Fiscal Court had maintained the road for more than five years.[4] Relying on the depositions within the record, the court concluded that the general public used the road to access a ball field, and that multiple surface tract owners, mineral tract owners, and energy companies also used the road. Moreover, evidence was presented to the court that the Floyd County Fiscal Court had maintained the road for more than two decades which largely consisted of grading, graveling, and snow removal. Additionally, during the term of Magistrate James Alan Williams,[5] part of the roadway was paved. The court found after reviewing the entire record, that the road was a public road as defined by KRS 178.025 and not a private drive. It is from this judgment that the Appellants now appeal.

On appeal, the Appellants present two arguments: (1) the trial court committed reversible error by finding that the road across the Appellant's property met the statutory requirement for a public roadway pursuant to KRS 178.025[6]; and

[4] We note that at the time this suit was initiated, KRS 178.025 stated "Any road, street, highway or parcel of ground dedicated and laid off as a public way and used without restrictions by the general public for five (5) consecutive years, shall conclusively be presumed to be a public road." This was later amended in 2004 to "Any road, street, highway or parcel of ground dedicated and laid off as a public way and used without restrictions on a continuous basis by the general public for fifteen (15) consecutive years, shall conclusively be presumed to be a public road."

[5] The court noted that James Alan Williams was both a plaintiff and a defendant in the current litigation.

[6] The Appellants additionally argue that the issues reviewed involved mixed questions of law and fact and the judgment of the court was not supported by sufficient evidence; we decline to address this argument separately as it relates to our standard of review and more appropriately

(2) the trial court exceeded its authority by ruling on a motion not before the court for consideration. The Appellees disagree with the arguments presented by the Appellants and instead contend that the roadway was dedicated and laid off as a public way and use without restrictions by the general public; that the Floyd Fiscal Court maintained the road for more than five (5) consecutive years; and that the findings of fact and conclusions of law by the court were not erroneous. With these arguments in mind we turn to our applicable standard of review.

It is the well-established law in this Commonwealth that in all actions tried upon the facts without a jury, that the findings of fact made by the trial court 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. *See* CR 52.01.

Accordingly, in the matter *sub judice*, we are bound to accept the findings of fact made by the circuit court, unless those findings are clearly erroneous. A court's findings of fact are not clearly erroneous if those findings are supported by substantial evidence of probative value, which is evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men. *See Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

To that end, we note that when conflicting evidence exists, it is for the trial court and not the appellate court to resolve the conflict. *See Wells v. Wells*,

---

supports Appellants' first argument.

412 S.W.2d 568, 571 (Ky. 1967); *see also Bickel v. Bickel,* 95 S.W.3d 925, 928 (Ky.App. 2002), and *Cole, infra* at 473 (It has long been the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence).

Additionally, in *Cole v. Gilvin*, 59 S.W.3d 468, 473 (Ky.App. 2001) this Court stated "With respect 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." Abuse of discretion is that which is arbitrary or capricious, or at least an unreasonable and unfair decision. *See Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). With these standards in mind we now turn to the arguments of the parties.

Appellants first argue that the trial court committed reversible error by finding that the road across the Appellant's property met the statutory requirement for a public roadway pursuant to KRS 178.025. We note that at the time this suit was initiated, KRS 178.025 stated "Any road, street, highway or parcel of ground dedicated and laid off as a public way and used without restrictions by the general public for five (5) consecutive years, shall conclusively be presumed to be a public road."[7] Appellants argue that the trial court erred when it found that the deed of Lazelle Williams provided for a roadway easement across the property for the

[7] This was later amended in 2004 to "Any road, street, highway or parcel of ground dedicated and laid off as a public way and used without restrictions on a continuous basis by the general public for fifteen (15) consecutive years, shall conclusively be presumed to be a public road."

purpose of ingress and egress by the public because the deed's language did not contain "by the public" and instead stated "The roadway now existing on said property shall remain open for the purpose of ingress and egress."

The interpretation of a deed is a question of law to be decided by the court. *See Melton v. Melton*, 221 S.W.3d 391, 393 (Ky.App. 2007). When an ambiguity arises within the language of the deed, extrinsic evidence may be admitted to interpret the deed. *See Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000) ("Extrinsic evidence cannot be admitted to vary the terms of a written instrument in the absence of an ambiguous deed."). 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, demonstrating evidence of their agreement, may be looked to, and are entitled to great weight in determining what the parties intended. *Id*.

Given that the language contained in the deed does not specify whether the road in question was to be held open for the public, the trial court was presented an ambiguous provision in the deed. The trial court then considered extrinsic evidence, more particularly that the public had used the road for years, that the general public had not been stopped from using the road, that the road was used to access a ball field, that multiple energy companies used the road, and that the county had maintained the road and even paved a portion of it. Clearly, the

evidence supported the trial court's finding that the public had used the road in question for more than five years.

The Appellants additionally argue that the Hayes family had posted a sign that forbids trespassing, hunting, and fishing on the property,[8] that gates were located on the road but were kept open,[9] and that the trial court was presented with depositions from witnesses with a vested interest in the case. As previously noted, when a trial court is presented with conflicting evidence it is for the trial court and not the appellate court to resolve the conflict and to judge the credibility of the witnesses and the weight to be given the evidence. *Wells*, *supra* at 571 and *Cole, supra* at 473. Accordingly, we find no error in the trial court's determination that the road in question was a public road as defined in KRS 178.025.

Turning now to Appellants' last argument, namely, that the trial court exceeded its authority by ruling on a motion not before the court for consideration, we note that the March 9, 2006, order (in which the court specifically reserved the issue as to whether the road was a public road under KRS 178.025 and ordered that the parties had sixty days to present proof concerning the remaining issue) was interlocutory in nature. As such, when Appellants moved the court to revisit its order by requesting that the order be changed to a "final and appealable" order, the court could properly modify its order. *See* CR 54.02 and *Wilson v. Russell*, 162

[8] We note that the sign does not address the road and its usage.
[9] We note that there is not a citation to the record concerning this fact. Under CR 76.12(4)(iv) we decline to address this alleged fact without proper citation. *See Horn v. Horn*, 430 S.W.2d 342 (Ky. 1968).

S.W.3d 911, 913 (Ky. 2005). Accordingly, the trial court did not err when it addressed the remaining issue pending before the court.

In light of the aforementioned, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Larry D. Brown
Prestonsburg, Kentucky

BRIEF FOR APPELLEE, HAYES LEASING COMPANY:

Donald H. Combs
Pikeville, Kentucky

BRIEF FOR APPELLEE, FLOYD FISCAL COURT:

Keith Bartley
Prestonsburg, Kentucky