

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

NO. 2009-CA-001632-MR

TIMOTHY HARTIG

APPELLANT

v. APPEAL FROM PENDLETON CIRCUIT COURT  
HONORABLE ROBERT W. MCGINNIS, JUDGE  
ACTION NO. 07-CI-00137

DAVID HARTIG AND  
BEVERLY HARTIG

APPELLEES

OPINION  
AFFIRMING

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BEFORE: LAMBERT AND STUMBO, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Timothy Hartig appeals from a Pendleton Circuit Court judgment granting Beverly and David Hartig an easement by estoppel across a parcel of land owned by Timothy.<sup>2</sup> On appeal, Timothy claims: (1) the statute of frauds prohibits the enforcement of an oral conveyance of property; and (2) that

<sup>1</sup> Senior Judge Ann O'Malley Shake presiding as Senior Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> We sometimes refer to parties by their first names as a means to avoid confusion in cases involving parties and witnesses with the same last name.

Beverly and David did not rely on the agreement. After a careful review of the record and applicable case law, we affirm the Pendleton Circuit Court judgment.

Timothy and David Hartig are brothers who own property near the AA highway in Pendleton County. David and his wife, Beverly, own parcel A. Timothy Hartig owns parcels B and C, which are divided by the AA Highway. Parcel B is bordered by parcel A to the west and the AA Highway to the east.

Beverly and David testified that they purchased parcel A with the intent to build a residence on the property. Originally, the state maintained a road, known as Jacobs Road, which provided access to parcel A. After the AA Highway was built, however, the road was not used and fell into disrepair. At the time that parcel A was purchased, the property was not accessible except through parcel B.

When Beverly and David secured the option to purchase parcel A, Linda and John Conley owned parcels B and C. Beverly and David were interested in purchasing parcel B for accessibility purposes but could not locate the Conleys. At their attorney's suggestion, Beverly and David purchased the unpaid tax bills for parcels B and C. After purchasing the bills, Beverly and David filed a complaint to foreclose on parcels B and C.

Beverly and David arranged to obtain financing from Beverly's mother, Edna Knapp. However, according to the Appellees, Timothy approached David and offered to purchase the parcels at the foreclosure sale. David testified

that Timothy only wanted the larger parcel C and agreed to transfer parcel B to Beverly and David. Timothy denied the existence of such agreement.<sup>3</sup>

In 2000, Timothy and David completed the construction of a driveway that stretched from parcel A, across parcel B, to the AA highway. For seven years Beverly and David accessed the AA highway by using the driveway.

Timothy admitted that he completed most of the heavy equipment work and grading involved with this project. Beverly and David claimed that the road solely benefitted their property by providing access from the highway. This claim was supported by the testimonies of David Miller, Dave Newberry, and Ted Hartig.<sup>4</sup> Timothy, however, testified that the driveway was not constructed for the benefit of parcel A but for him to use while hunting on parcel A.

Following the driveway's construction, Beverly and David took steps toward building a residence on parcel A. The trial judge enumerated the many improvements made by Appellees:

[Timothy] had complete knowledge of [Beverly and David's] improvements to parcel A, and actually admitted he excavated an area for [them] for the new 30'x 30' barn. [Beverly and David] further relied on [Timothy's] assurance of continued passage through parcel B in making numerous improvements to parcel A. [Beverly and David's] improvements to parcel A included tearing down and disposing of an old barn; building a new 30' x 30' barn; cutting grass every weekend; clearing trees with a loader; cleared and sold cedar trees; planted a garden every year; planted hay;

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<sup>3</sup> Witness testimony indicated that Timothy refused to convey the land because Beverly and David did not repay money that he previously loaned them. Another witness testified that Timothy refused to convey the land based upon his dislike of Beverly.

<sup>4</sup> Ted Hartig is the brother of David and Timothy.

repaired a pond; maintained the driveway by placing new gravel periodically, and installed channel lining and ditch lines along the road; removed old tires, iron, and other junk piles on the property; and excavated an area for a home site, all with the eventual intent of building a home on the property.

In 2007, however, Timothy dug up the driveway following a dispute with Beverly and David. Timothy testified that he revoked their permission to use the driveway because utility poles were going to be placed along the drive to facilitate further development of parcel A.

On June 8, 2007, Beverly and David filed an action in the Pendleton Circuit Court seeking enforcement of the agreement. A counter-claim was filed. The counterclaim was dismissed by the court with no appeal taken.

Following a bench trial, the trial court found that Beverly and David relied on an agreement that allowed them access to parcel A through parcel B and entitling them to an easement by estoppel.

The trial court's findings of fact shall not be set aside unless they are clearly erroneous, or unsupported by substantial evidence. *Goosey v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). Conversely, the trial court's conclusions of law are subject to de novo review. *Id.* at 899.

Timothy claims that the statute of frauds prohibits a conveyance of land and that detrimental reliance did not exist to support the court's designation of an easement by estoppel. He correctly asserts that KRS 371.010, the Statute of Frauds, prohibits property conveyances through oral contracts. However, KRS

371.010 is inapplicable to this appeal because the trial court did not enforce an oral conveyance of real property but instead enforced an easement by estoppel.

An easement may be created by an express grant, implication, prescription, or estoppel. *Loid v. Kell*, 844 S.W.2d 428, 429 (Ky. App. 1992). An easement by estoppel is created when a party that justifiably relies upon his or her ability to use property is denied use of the property. *See Gosney v. Glenn*, 163 S.W.3d 894, 899 (Ky. App. 2005). An easement by estoppel is based upon the principles of equitable estoppel, which are:

(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge to 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 to change his position prejudicially.

*Id.* (citations omitted).

Although the evidence was controverted, the trial court sitting as the finder of fact found an easement by estoppel in the facts of this case. Our review of the record indicates that substantial evidence existed to support that conclusion.

Although Beverly and David took substantial steps to purchase the land, they ended the pursuit when Timothy offered to purchase the property. After Timothy purchased parcel B and the road was constructed, Beverly and David made

substantial improvements to their land, including demolition, building a barn, and removing debris. Based upon the ample evidence that indicates detrimental reliance, the trial court order was not clearly erroneous.

Accordingly, we affirm the Pendleton Circuit Court judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard Woeste  
Alexandria, Kentucky

BRIEF FOR APPELLEES:

Richard Johnson  
Fort Thomas, Kentucky