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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000842-MR
AND
NO. 2012-CA-000978-MR

DONALD SPROUL

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM GALLATIN CIRCUIT COURT
v. HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 07-CI-00214

KENTUCKY PROPERTIES
HOLDING, LLC

APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: LAMBERT, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Donald Sproul, the appellant and cross-appellee, and Kentucky Properties Holding, LLC, the appellee and cross-appellant, appeal from a judgment of the Gallatin Circuit Court ruling on the status of a passway located in Gallatin County, Kentucky. The passway, called Church Lane, traverses property

owned by Kentucky Properties Holding, LLC, successor in interest to Michael and Mary Jo Hornsby,¹ and provides access to property owned by Sproul. The trial court found the passway to be a private passway, required the Hornsbys to provide Sproul reasonable access to his property, and dismissed the Hornsbys' claim for damages. For the following reasons, we reverse and remand.

In 2006, the Hornsbys purchased a parcel of land situated between the Ohio River and Paint Lick Creek. Sproul² owns a parcel wedged in the fork between the river and the creek. Prior to this action, Sproul accessed his property from Kentucky Highway 1992 via Church Lane. Upon leaving the state highway at the Paint Lick Baptist Church, Church Lane traverses the Hornsby property in a westerly direction towards the Ohio River. Near the River, the Lane turns in a northerly direction and runs parallel to the River. At the northerly end of the Hornsby property, the Lane then passes through a 4.5 acre tract, which is located between the Sproul property and the Hornsby property. This 4.5 acre tract is divided into four parcels. Sproul's right to cross any of these properties is not at issue because he has a deeded right of way. The owners of those parcels, the Hinkles, Stambaughs, Hudepohls and Days, were originally parties to this action,

¹ By order dated January 14, 2013, this Court permitted substitution of Kentucky Properties Holding, LLC, as a party in place of Michael Hornsby and Mary Jo Hornsby. Since the record in the trial court involved the Hornsbys, we will refer to the Hornsbys throughout this opinion.

² Sproul was not a party to the original complaint. On June 7, 2011, the Hornsbys moved to amend the complaint to include Sproul when he purchased the property from members of his family. His family members were subsequently dismissed as parties.

but they agreed to use Church Lane as the Hornsbys wish, and they were dismissed.³

Soon after the Hornsbys' purchase of their farm, and upon encountering problems with trespassers, the Hornsbys erected a gate on Church Lane near the intersection with Highway 1992. The Hornsbys provided Sproul with the gate code, but requested that the gate be locked after entry and exit.⁴ Eventually, the Hornsbys constructed another passway, designated Carolina Road, to provide access to Church Lane from Jackson's Landing Road.⁵ The record is unclear as to when Carolina Road was constructed. In June 2011, the Hornsbys filed an amended complaint, along the lines of the original complaint, centering on issues surrounding the use of Church Lane from the Church gate. The amended complaint does not refer to Carolina Road or Jackson's Landing Road. As a result of the new passway, however, Sproul's property could be accessed by turning from Jackson's Landing Road onto Carolina Road, entering through a gate onto the Hornsby property, continuing until Carolina Road intersects with Church Lane, and then turning onto Church Lane. The Hornsbys requested that Sproul use the Jackson's Landing entrance instead of the Highway 1992 entrance.

³ For the sake of clarity, we will therefore only refer to the Sproul property.

⁴ The gate code was also provided to the local emergency services.

⁵ Jackson's Landing Road and Church Lane are parallel to each other; Carolina Road is perpendicular to each. Sproul asserts that the new road was created in order to settle the claims with the Hornsbys' and Sproul's neighbors. However, nothing in the record indicates that the neighbors ever failed to comply with the Hornsbys' wishes and, instead, were grateful that the gate was in place because it reduced trespassers on their properties. In fact, the Hornsbys indicated in their complaint that these neighbors were parties to the complaint only because of their respective interests, not because they refused to comply with their requests.

The Hornsbys allege that Sproul and his invitees⁶ intentionally left the gate unlocked and, in some cases, propped it open. As a result, individuals trespassed onto their property and, among many other things, dumped waste, stole building supplies, and stole artifacts from a Native American mound. The Hornsbys filed a complaint and a motion for a permanent injunction, sought compensatory damages, and asked the court to enter a declaratory judgment regarding what constitutes a “safe use” of Church Lane. The Hornsbys also sought a temporary injunction and restraining order. The trial court issued a temporary injunction and required Sproul to close and lock the gates upon entry and exit until the ultimate issue was resolved.

The trial court conducted a bench trial in February, 2012. The Hornsbys asked the court to deem Church Lane a private passway and to declare that they have the right to alter the road so long as they continue to provide reasonable access to the Sproul property. Sproul asserted that Church Lane is either a county road or a public road and argued that the Hornsbys had no right to build gates, alter the size of the road, or move the road.⁷

The trial court made the following significant findings of fact concerning the historical designations and uses of Church Lane. Prior to the Hornsbys’ erection of the Church gate, no “No Trespassing” signs were located at

⁶ Sproul and his predecessors in interest had negotiated with a builder to subdivide and develop the property. The builder was originally a party to this action, but was dismissed.

⁷ This assertion was in response to the Hornsbys’ request that Sproul use the Jackson’s Landing entrance instead of the Highway 1992 entrance.

the entrance, and Church Lane did not have any gates or barriers that would prevent someone from driving up and down the Lane, which was wide enough to accommodate farm equipment with a sixteen-foot width. No deeded easement through the Hornsbys' property refers to Church Lane,⁸ although a written record exists of a passway through the 4.5 acre parcels that separate the Hornsbys' and Sproul's properties. A 1974 deed for one of the parcels comprising a portion of the 4.5 acre tract mentions access to the property through "the passway from Kentucky Highway 1992, at the Paint Lick Baptist Church." Subsequent deeds to owners within the 4.5 acre tract also included "the right and privileges of the passway from the Kentucky Highway 1992 at the Paint Lick Baptist Church." The court found that Church Lane was not the county road depicted in an 1883 Gallatin County Atlas, and that Gallatin County never formally adopted Church Lane as a county road, and is not on the county's current list of maintained roads.⁹ The court noted historic farming use by Hornsbys' predecessors in title, including as a dairy through the mid-1970's, and that two tenant houses were located on the farm. Significantly, the trial court found that Gallatin County

graded and provided gravel for the portion of Church Lane to the intersection with Carolina Road for a school bus to be able to pick up school children through the early 1990's. Gallatin County also performed culvert

⁸ The trial court found that Church Lane has been variously designated as Church Lane, Hance Road, Hance Lane, and Jackson Lane.

⁹ The trial court noted recent attempts to designate Church Lane as a county road, including action by the Gallatin Fiscal Court to include the Lane on the county road maintenance list in March, 2010. The Fiscal Court removed the Lane from the list until this action established the Lane's legal status.

repair . . . in the late 1970s or early 1980s on the section between the church parking lot and the Church Lane/Carolina Road intersection.

The trial court, however, found “that the public has not used and Gallatin County has not maintained any portion of Church Lane for at least fifteen (15) years prior to the Hornsby[s’] purchase of their property in 2005.”¹⁰

Based on its findings of fact, the trial court concluded: (1) Church Lane was never formally adopted as a county road; (2) the portion of Church Lane from Highway 1992 to the intersection with Carolina Road was formally maintained by the county and sufficiently used by the public to establish a public road rather than a private passway, citing *Sarver v. Allen County*, 582 S.W.2d 40 (Ky. 1979) and *Watson v. Crittenden County Fiscal Court*, 771 S.W.2d 47 (Ky. App. 1989); and (3) Church Lane continuing from Carolina Road to the properties beyond is a private passway and use of this portion of the Lane by Sproul and other property owners has been permissive, citing *Cole v. Gilvin*, 59 S.W.3d 468 (Ky. App. 2001). The trial court further concluded that since county maintenance and public use have discontinued and the provisions of KRS¹¹ 178.116(1) do not apply, the entirety of Church Lane has reverted to a private passway. The court declined

¹⁰ Sproul argues the trial court ignored Julie Sullivan’s “unimpeached testimony” that he spread gravel on the entire length of Church Lane to the 4.5 acre tract. Sullivan, a former Gallatin County road worker, only worked for Gallatin County for a two-year period of employment ending, at latest, in the mid-1970s. By contrast, Kenneth Stambaugh, an owner of a parcel in the 4.5 acre tract, testified that, in twenty-six years that he has been an owner, he had never seen the county maintain Church Lane and that the neighbors were responsible for the costs of its maintenance. Stambaugh’s testimony is not inconsistent with Sullivan’s. And, if the trial court ignored Sullivan’s testimony, undoubtedly it did so because it believed that maintenance, having occurred in the 1970s at the latest, was irrelevant to its decision.

¹¹ Kentucky Revised Statutes.

to award the Hornsbys damages, but ordered that the Hornsbys provide Sproul with reasonable access to his property. Sproul filed a motion to alter, amend, or vacate the order, which the court denied. However, the court granted his request to dissolve the temporary injunction.¹²

We begin our analysis with the proper standard of appellate review. Since the trial court conducted a bench trial and made findings of fact, the court's factual findings may not be set aside unless clearly erroneous. *See* CR¹³ 52.01; *Cole*, 59 S.W.3d at 472. A factual finding made by the trial court is not clearly erroneous if the finding is supported by substantial evidence. *Id.* at 472-73. Substantial evidence means “evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Id.* at 473. Legal determinations, including those regarding the construction and application of statutes, are reviewed *de novo*. *Wheeler & Clevenger Oil Co. v. Washburn*, 127 S.W.3d 609, 612 (Ky. 2004). We reverse the trial court’s conclusion that Church Lane is a private passway, and hold that as a matter of law, Church Lane is a public road. To the extent the record is inconclusive on the width of the road, we remand for further proceedings.

Although often used interchangeably in Kentucky jurisprudence, the terms “county road” and “public road” are distinguishable. *Porter v. Johnson County Judge Executive*, 357 S.W.3d 500, 503 (Ky. App. 2010). The distinction

¹² Sproul contends that the temporary injunction was improperly extended to him, however, the injunction was dissolved and the issue is moot.

¹³ Kentucky Rules of Civil Procedure.

lies in the manner in which the roads are adopted and discontinued. “County roads are public roads which have been accepted by the fiscal court of the county as a part of the county road system after July 1, 1914, or private roads, streets, or highways which have been acquired by the county pursuant to KRS 178.405 to 178.425.” KRS 178.010(1)(b) (internal quotations omitted). In other words, “county roads” must be adopted by formal decree. *Porter*, 357 S.W.3d at 503. On the other hand, no formal county action is required to establish a “public road” and a roadway can become a public road either by dedication, KRS 178.025(1), or by “general public use and control and maintenance by the government for 15 years.” *Cole*, 59 S.W.3d at 473.

As noted by the Kentucky Supreme Court in *Bailey v. Preserve Rural Roads of Madison County, Inc.*, 394 S.W.3d 350, 359 (Ky. 2011), the General Assembly modified the common law surrounding the discontinuance of a road by enacting KRS 178.116. This statute addresses discontinuance of a road and provides the following:

- (1) Any county road, or road formerly maintained by the county or state, shall be deemed discontinued and possession shall revert to the owner or owners of the tract of land to which it originally belonged unless at least one (1) of the following conditions exists:
 - (a) A public need is served by the road;
 - (b) The road provides a necessary access for a private person;

(c) The road has been maintained and policed by the county or state within a three (3) year period.

(2) If the only condition which exists is for a necessary access for a private person, by a joint petition of all parties entitled to such access, the road shall be deemed discontinued and possession shall revert to the owner or owners of the tract of land to which it originally belonged.

(3) If the only condition which exists is for a necessary access for a private person, by joint petition of all parties entitled to such access, the road shall be closed to public use but remain open in accordance with its condition and use for the access of the private parties involved.

(4) If a county road has been discontinued under the provisions of KRS 178.070, then by a joint petition of all private parties entitled to necessary access the road shall be closed to public use but remain open in accordance with its condition and use for the access of the private parties involved, or by a joint petition of all parties entitled to necessary access the road shall revert to the owner or owners of the tract or tracts of land to which it originally belonged.

(5) For the purposes of this chapter “necessary access” shall be construed to include access to any farm, tract of land, or dwelling, or to any portions of such farm, tract of land, or dwelling.

The Kentucky Supreme Court held in *Bailey* that the statute sets forth three scenarios when a county decides to discontinue maintenance.

Under the first scenario, if none of the circumstances in KRS 178.116(1) exist or the road was not discontinued pursuant to KRS 178.070, the roadbed automatically reverts to the original owners of the land or their predecessors. Under this scenario, no formal action is required by the landowners because the statute operates

by law and not by fiscal court action. *See* Ky. OAG 84-358.

The second scenario provides that if one of the conditions listed in KRS 178.116(1) exists and that the road was not discontinued pursuant to KRS 178.070 the statutory intent is that the road in question ceases to be a county road, but continues to serve as an open “public road.” *See Sarver v. Allen County*, 582 S.W.2d 40, 41 (Ky.1979) (stating that a public road is one which is generally used by the public “through processes of dedication or prescription over which the counties have no choice or control.”) If the condition met in KRS 178.116(1) was that either “[a] public need is served by the road” or “[t]he road has been maintained and policed by the county or state within a three (3) year period” there appears to be no recourse for the property owners along the road to obtain reversion of ownership or eliminate the public easement. However, if the condition in KRS 178.116(1) that was met is that the road “provides necessary access for a private person” to access their property, KRS 178.116 (2 & 3) gives those landowners (with the agreement of the private parties needing access) the opportunity to petition the Fiscal Court to either have the land revert back to the original owners or their successors, or remain open, but for their private use.

KRS 178.116(4) provides a third scenario. When a county road is discontinued under the provisions of KRS 178.070, all of the landowners along the road who use that road for “necessary access,” may petition the fiscal court to either keep the road open for their private use only, or have the land under the roadbed revert back to the original owners. Implicit in this subsection is that if the landowners do not file a petition in accordance with KRS 178.116(4), the road remains open as a public road. *See Sarver*, 582 S.W.2d at 41.

Bailey, 394 S.W.3d at 359-60.

In light of the foregoing, we are unable to say that the trial court abused its discretion in determining that Church Lane is not a “county road” because the evidence does not show that it was ever formally adopted as such.¹⁴ As to the trial court’s finding that Church Lane was a “public road,” this conclusion is mandated by the language of the statute, as well as the court’s decision in *Bailey*. The language in the statute must be given its plain and unambiguous meaning. KRS 446.080(4). The General Assembly used broad language in KRS 178.116(1), applying its provisions to “[a]ny county road, or road formerly maintained by the county” It further placed no limitations on the duration of the maintenance or on when, in the past, the county maintenance may have been performed. The Kentucky Supreme Court further stated that “if one of the conditions listed in KRS 178.116(1) exists[,] and . . . the road was not discontinued pursuant to KRS 178.070[,] **the statutory intent is that the road in question ceases to be a county road, but continues to serve as an open ‘public road.’**” *Bailey*, 394 S.W.3d at 359 (emphasis added) (citing *Sarver*, 582 S.W.2d at 41).

The record in this case is clear that for some time, up through at least the mid-1970s, Gallatin County performed maintenance on the entire length of Church Lane. The statute, thus, applies to the entire length of Church Lane, from Kentucky Highway 1992 to the entrance of the 4.5 acre tract. By applying a

¹⁴ The trial court’s order reflects that the Gallatin Fiscal Court voted to adopt Church Lane as a county road in 2010, but subsequently voted to remove the road pending the outcome of this litigation. Whether the fiscal court complied with the requirements for the adoption and subsequent removal of Church Lane is not an issue raised by the parties.

fifteen-year cessation of maintenance limitation, the trial court imposed a condition which appears nowhere in the statute. The trial court's conclusion that any portion of Church Lane had lost its status as a public road was therefore erroneous. While the Hornsbys created Carolina Road as an alternative entrance to Church Lane from roads that are indisputably county roads, the trial court erroneously determined that the portion of Church Lane from Carolina Road to the 4.5 acre tract was a private passway as to which Sproul and others had a permissive use.¹⁵ The record is clear that this portion of Church Lane was formerly maintained by the county and also "provides a necessary access for a private person[.]" KRS 178.116(1)(b). This portion of Church Lane, therefore, continues to serve as an open public road. *Bailey*, 394 S.W.3d at 359.¹⁶

With respect to the portion of Church Lane from Kentucky Highway 1992 to the Carolina Road, prior to the installation of Carolina Road and by virtue of KRS 178.116, no doubt exists that the entire length of Church Lane would have been an open public road. The Hornsbys should not have been permitted to

¹⁵ Prior to its enactment, however, Kentucky case law long recognized that "a grant of a right of way by prescription will be presumed from an uninterrupted, unexplained, adverse use, of such a nature as to indicate a claim of right, for a period of 15 years or more . . ." *Smith v. Pennington*, 122 Ky. 355, 358, 91 S.W. 730, 731 (1906); *see also Haynes v. Dennis*, 308 Ky. 483, 486, 214 S.W.2d 1005, 1006 (1948). Furthermore, the landowner, that is, the owner of the servient estate over which the passway crosses, bears the burden of proof that the use was merely permissive. *Smith*, 122 Ky. at 358, 91 S.W. at 731. As found by the trial court, no evidence was adduced as to the origin of this passway. Thus, Sproul, as well as the owners of the various parcels in the 4.5 acre tract, as a matter of law, would have a right of way by prescription over the passway designated as Church Lane, not permissive use as concluded by the trial court. We are not, however, required to examine the respective rights, duties and obligation of the parties as to any claim of prescriptive easement, since KRS 178.116 has modified the common law. *Bailey*, 394 S.W.3d at 359.

¹⁶ *Cole v. Gilvin*, *supra*, does not compel a different result since the testimony in that case did not establish that the county had ever maintained the passway in question. 59 S.W.3d at 474.

obstruct the public road. *See Bailey*, 394 S.W.3d at 360 (upholding circuit court’s decision that public road may not be blocked with gates). A reasonable conclusion is that the Hornsbys could not further alter the location of the public road by the construction or installation of a private drive across another portion of their property.¹⁷

As noted by the Kentucky Supreme Court, all persons served by the public road, *i.e.*, the landowners and the private parties needing access, may petition the fiscal court to have the land revert back to the original owners or remain open for private use. *Id.* at 359-60. If all parties fail to agree, then the road must remain an open public road. In this case, Sproul has decidedly disagreed, as is his right, and the entire length of Church Lane from Kentucky Highway 1992 to the 4.5 acre tract must remain an open public road.

In conclusion, the Gallatin Circuit Court’s judgment is reversed, and this matter is remanded to that court for further proceedings consistent with this opinion. Specifically, Sproul has alleged that the Hornsbys have limited his access to his property by the erection of barbed-wire and plank fencing along Church Lane. Under KRS 178.025, the trial court should determine the proper width of the public road since the record seems to indicate that the width previously was able to

¹⁷ In *Wells v. Sanor*, 151 S.W.3d 819, 823 (Ky. App. 2004), this court held that “an easement with a fixed location cannot be relocated without the express or implied consent of the owners of both the servient estate and dominant estate” That rule would seem to apply with equal force to the public road recognized in this case. While we sympathize to some extent with the Hornsbys and their desire to limit public access to their property, they had, and retain, other options, such as fencing the portions of their property abutting the open, public road, within the parameters, of course, of KRS 178.025.

accommodate machinery with a width of sixteen feet, and the Hornsbys' fencing limits that width to thirteen feet.

ALL CONCUR.

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