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IN THE
COURT OF APPEALS OF INDIANA

LARRY D. COOK and BACHLY COOK,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 19A01-0603-CV-101
	)	
JOYCE B. COLLINS,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE DUBOIS CIRCUIT COURT
The Honorable William E. Weikert, Judge
Cause No. 19C01-0307-PL-297

November 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Larry Cook and Bachly Cook appeal from the trial court's order entering judgment in favor of Joyce Collins on the Cooks' complaint seeking to quiet title in certain real property. The Cooks present the following issues for our review:

1. Whether the trial court erred when it concluded that the Cooks did not prove their entitlement to an easement through Collins' real estate.

2. Whether the trial court erred when it did not resolve the ownership dispute regarding a strip of land located between the Cooks' and Collins' parcels of land.

We affirm.

FACTS AND PROCEDURAL HISTORY

The Cooks own nineteen acres of real estate located in Dubois County ("Cook parcel"). The Cook parcel does not abut any roads. Collins owns twenty-one acres of real estate located directly south of the Cook parcel ("Collins parcel") and abutting a county road. The two parcels were originally part of a single forty-acre parcel. In 1913, the original owners deeded the Collins parcel to Larry Cook's great grandmother Susan McIver. In 1922, McIver, who also eventually owned the Cook parcel, deeded "19 acres more or less" to Leona Dotson, Larry Cook's grandmother, and Dotson's children. As is common with real estate surveyed in the early 1800s, the original forty-acre parcel is not precisely forty-acres, but slightly more than that. Since the 1960s, on occasion, Larry Cook and his parents have used an old, overgrown wagon trail across the Collins parcel to access the Cook parcel, although there is a "one-rod-wide"[1] easement ("one-rod

[1] "One rod" is approximately sixteen and one-half feet.

easement") along the east side of the Collins parcel "for road purposes" that provides access from the county road to the Cook parcel. Appellee's App. at 2. Neither the wagon trail nor the one-rod easement is suitable for vehicular traffic; the Cooks access their parcel on foot.

A 2003 survey conducted by Ken Brosmer, a registered land surveyor, reveals that the Cook parcel and the Collins parcel do not meet, but are separated by a gap approximately thirteen feet wide ("the gap"). There is a spring running through the gap. From 1968 until 1981, Collins and her family used the spring to water cattle kept on the Collins parcel.

In 2002, Collins first became aware that the Cooks were accessing the Cook parcel by walking along the old wagon trail across the Collins parcel. On December 9, 2002, Collins wrote Cook a letter stating:

> It has come to my attention that you are illegally trespassing across my property. You are to stop immediately.
>
> On the east side of my farm there is a sixteen foot easement that goes from the public road to your property. In the future you must use it or face prosecution.
>
> I do not allow anyone to cross my property without written permission.

Defendant's Exhibit A. Cook disregarded that letter and continued to cross the Collins parcel along the old wagon trail. Accordingly, on February 5, 2003, Michael Fritch, Prosecuting Attorney for Dubois County, wrote Cook the following letter:

> Please be advised that I have been contacted by Joyce B. Collins, who ha[s] requested that I give you statutory notice that you are no longer welcome nor allowed on her property at 10990 E 625 N, French Lick, Indiana; and, if you do go onto those premises, you may be committing the offense of

> Trespass. She has also requested that I give you notice that you not have any contact with her, either in person or by phone; and if you do have any contact with her by phone, you may be committing the offense of Harassment.

Defendant's Exhibit B.

On July 11, 2003, the Cooks filed a complaint seeking to quiet title regarding the gap and to establish entitlement to an easement over the Collins parcel. Following a bench trial, the trial court concluded that the Cooks had not proven ownership of the gap or entitlement to an easement along the old wagon trail. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

The trial court entered a general judgment in favor of Collins on the Cooks' complaint. In reviewing general judgments issued in a civil bench trial, we ask only whether there is substantial evidence of probative value supporting the judgment on any legal theory, and we do not reweigh the evidence or judge the credibility of witnesses. See Foman v. Moss, 681 N.E.2d 1113, 1116 (Ind. Ct. App. 1997). In examining the record, we consider only the evidence most favorable to the prevailing party along with all reasonable inferences to be drawn from it. Id. Moreover, as the Cooks are appealing from a negative judgment, we will reverse the judgment only if it is contrary to law. See Fitch v. Maesch, 690 N.E.2d 350, 352 (Ind. Ct. App. 1998), trans. denied.

Issue One: Easement

The Cooks first contend that the trial court erred when it concluded that they had not proven entitlement to an easement along the old wagon trail across the Collins parcel

("alleged easement"). In particular, the Cooks maintain that they proved entitlement to a prescriptive easement and, in the alternative, an implied easement. We cannot agree.

Prescriptive easements generally "'are not favored in the law.'" Wilfong v. Cessna Corp., 838 N.E.2d 403, 405 (Ind. 2005) (quoting Carnahan v. Moriah Prop. Owners Ass'n, Inc., 716 N.E.2d 437, 441 (Ind. 1999)). For that reason, the party claiming a prescriptive easement must meet stringent requirements. See id. A party claiming the existence of a prescriptive easement must provide evidence showing an actual, hostile, open, notorious, continuous, uninterrupted adverse use for twenty years under a claim of right. Id. Furthermore, each element must be established as a necessary, independent, ultimate fact, the burden of showing which is on the party asserting the prescriptive title, and the failure to find any one such element is fatal, for such failure to find is construed as a finding against it. See id.

The Cooks have not demonstrated that the trial court erred when it concluded that they did not prove a prescriptive easement. The Cooks' entire argument on appeal on this issue is as follows:

> The evidence shows that the Cooks used the 21 acres for access to the 19 acres at least beginning in 1952. They used it for whenever they wanted to use the 19 acres. The character of the Cooks['] use was consistent with a rural wooded parcel of land. Unlike the recent Supreme Court case of Wilfong v. The Cessna Corp., 838 N.E.2d 403 ([Ind.] 2005), there is no issue of permissive or implied permissive use so as to defeat the claimed prescriptive easement.

Brief of Appellants at 9. The Cooks do not cite to any part of the record in support of that argument as required by Indiana Appellate Rule 46(A)(8)(a).

Regardless, Larry Cook testified that he has used the alleged easement over the Collins parcel infrequently since the 1960s. Some years he did not use the easement at all, and some years he used it fewer than six times in a year. Cook also testified that he has crossed the alleged easement by foot all but a few times; he drove a vehicle across it in the 1970s, and he drove a tractor across it on one occasion sometime in the 1980s. He has not driven a vehicle across the Collins parcel since that one time in the 1980s.

Collins presented evidence that neither she nor her neighbors had ever seen either Larry or Bachly Cook use the Collins parcel to access the Cook parcel. In addition, the undisputed evidence shows that the alleged easement is impassible to vehicular traffic. Larry Cook admitted that there is not a "defined roadway" where the alleged easement runs. Transcript at 189-90. We agree with the trial court that the Cooks have not met their burden to show their entitlement to a prescriptive easement.

An easement will be implied where (1) there was common ownership at the time the estate was severed; (2) the common owner's use of part of his land to benefit another part was apparent and continuous; (3) the land was transferred; and (4) at severance it was necessary to continue the preexisting use for the benefit of the dominant estate. Hysell v. Kimmel, 834 N.E.2d 1111, 1114-15 (Ind. Ct. App. 2005), trans. denied. The owner of the dominant estate does not need to show absolute necessity, but there still must be some necessity shown. Id.

Here, the Cooks do not direct us to any evidence to support the second element, namely, that the common owner's use of the Collins parcel to benefit the Cook parcel was "apparent and continuous." See id. In other words, there is no evidence of a

preexisting use of the alleged easement to benefit the dominant estate. And there is evidence that use of the alleged easement was not necessary to access the Cook parcel in light of the one-rod easement along the east side of the Collins parcel.[2] The Cooks' contention on appeal amounts to a request that we reweigh the evidence, which we will not do. The trial court's conclusion that the Cooks have not proven an implied easement along the old wagon trail is not contrary to law.

Issue Two: The Gap

The Cooks next contend that the trial court erred when it did not resolve the issue of who owns the gap. The trial court concluded that neither party had proven ownership of the gap, either by deed or adverse possession. But the trial court also concluded that "both plaintiffs and defendant have acquired the right to use [the] spring [located in the gap] and neither party should interfere with the other party's use of said spring." Appellants' App. at 6. The Cooks maintain that the trial court's decision not to resolve ownership of the gap while granting both parties rights to use the spring is "logically inconsistent." Brief of Appellants at 10. We cannot agree.

At the conclusion of the bench trial, the trial court stated in relevant part as follows:

> [T]his quarter-quarter section [which includes the Cook and Collins parcels together] is not perfect, and in fact, it has probably a half acre more than a

[2] The Cooks' contentions that the one-rod easement is impassable and lies on a third party's land are not well-taken. There is evidence showing that the one-rod easement could be made into a road without great difficulty. See McConnell v. Satterfield, 576 N.E.2d 1300, 1302 (Ind. Ct. App. 1991) (observing that expense and difficulty in making land accessible "insufficient to create a way of necessity"). And the fact that the one-rod easement was also conveyed to a third party in a subsequent deed ("the Crawford deed") does not demonstrate what effect, if any, that conveyance had on the same one-rod easement that was in the Collins' chain of title. The Crawford deed suggests, however, that the subsequent conveyance simply made the easement non-exclusive.

> perfect forty acres. So as a result, one party has always owned that nineteen, and the other has always owned that twenty-one. And there's a gap in there that no one has ever owned. If I rule that way, someone is going to have to file an action to quiet title on this gap of land going back . . . giving notice to all the heirs since 1920. . . .
>
> No one has paid taxes on that gap. [Larry Cook]'s paid taxes on his eighteen point whatever acres, but that doesn't include that gap. I'm not arguing with you, Mr. Cook. I'm just telling you, no one has paid taxes on that gap. Period.

Transcript at 195, 197.

We find the trial court's conclusion on this issue sound and supported by the evidence.[3] At the time Dubois County was originally surveyed in 1805, Thomas Jefferson was President of the United States. According to the 2003 survey of the Cook and Collins parcels, the original survey was inaccurate and resulted in the original forty-acre parcel being "a little large." Transcript at 66. There is no evidence that anyone knew the gap existed until Ken Brosmer conducted the 2003 survey. Thus, on the record before us, there is no definitive proof that either the Cooks or Collins have established ownership of the gap. The Cooks have not demonstrated that the trial court's ruling on this issue is contrary to the evidence.

Affirmed.

BAKER, J., and DARDEN, J., concur.

[3] We agree with the trial court that neither party has paid taxes on the gap. We note, however, that where the parties who own adjacent parcels have paid real estate taxes according to the tax duplicates, the payment of taxes on disputed real estate which lies along the common property line usually cannot be shown. The gap does not appear in the public records of Dubois County. Both parties paid taxes on their respective parcels, but the gap was not included on either party's tax duplicate. Thus, the parties are on equal footing vis-à-vis the payment of taxes on the gap. As our supreme court has observed, legal descriptions of real estate are "usually sketchy and inaccurate." Echterling v. Kalvaitis, 235 Ind. 141, 126 N.E.2d 573, 575 (Ind. 1955). This is especially true with respect to rural real estate.