

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003101-MR

DAVID TURNER; and LINDA TURNER

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 97-CI-000201

HOWARD LEE; and LEONA LEE

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, McANULTY AND SCHRODER, JUDGES.

McANULTY, JUDGE. Appellants, David Turner and Linda Turner, appeal from an order of the Marion Circuit Court entered on September 4, 1998, which granted partial summary judgment in favor of the appellees, Howard Lee and Leona Lee, with regard to the joint ownership of a 16-foot roadway located between the parties' properties. After reviewing the record, we affirm.

The appellants and appellees own adjoining tracts of land in Marion County, Kentucky. Originally, their properties were part of a larger tract owned by Milestus Simpson. In 1888, Milestus Simpson's property was divided into 12 tracts as part of the settlement of his estate. The 1888 Commissioner's Report

containing the property division and plat also provided the following:

We also allot to the owners of lots no. 2-3-4-5-6-7-8-9-10-11-12- a passway 16 feet wide as shown on the plat herewith submitted as a part of the report - marked plat. Said road or passway forms the east boundary of lots no. 2-3-4-5-6-7-8- and the west boundary of lots no. 10-11-12-. Said road begins near a white oak - at the northwest corner of no. 9- and runs northwardly - as heretofore described and shown on Plat - terminating at the northeast corner of no. 2. Said Road to be owned jointly by all of said parties and their successors for a Road for their use and benefit as such-

In December 1960, the appellees purchased a majority of the property formerly owned by Milestus Simpson and described in the 1888 Commissioner's Report, with the exception of lot 8 and lot 10. The property described as lot 10 was purchased by the appellants in November 1995, while the appellees subsequently purchased lot 8 from Oliver Garrett in June 1997.

In 1997, the appellees, in anticipation of selling their property, commissioned F.A. Edwards and Associates to survey their land. In addition, the appellees placed gravel along the roadbed that existed between the parties' property. At that time, appellants placed obstacles in the roadway and informed the appellees that they were no longer allowed to use it. On September 23, 1997, the appellees filed a complaint in Marion Circuit Court requesting the court to determine the status of the parties ownership of the roadway between the properties. The appellants answered the complaint and filed a counterclaim asserting ownership to the roadway and seeking damages for conversion.

On February 19, 1998, the appellees filed a motion for partial summary judgment. On September 4, 1998, the circuit court determined that the parties did in fact jointly own the 16-foot roadway, that any improvements thereto could be made at the expense of the party seeking the improvements as long as it did not affect the other joint owners' use of their property, and that the appellants were permanently enjoined from blocking or inhibiting the use of the roadway by the appellees and/or their successors-in-title. The appellants then moved the court to alter, amend or vacate the judgment. The circuit court denied the motion on November 12, 1998. This appeal followed.

The standard of review of a summary judgment on appeal is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. CR 56.03. "The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment is "only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, supra at 480, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

On appeal, appellant argues that summary judgment was not proper because there were factual questions regarding the exact location of the 16-foot roadway and the circuit court failed to consider whether the appellants had acquired title to

the property by deed or adverse possession, or whether appellants had acquired a right to keep the property as it was by prescriptive easement.

The record establishes that both parties chain of title can be traced back to the Commissioner's deed of 1888, which provided for a jointly owned 16-foot passway that formed the eastern boundary of lots 2 through 8 and the western boundary of lots 10 through 12. Mr. Lee testified by deposition that he has utilized the roadway for approximately 44 years to haul hay, hunt, and visit Oliver Garrett. During that time, he stated that no one questioned the use of the road. Oliver Garrett, by affidavit, stated that he used the roadway in dispute as the sole means of ingress and egress to his property from 1976 to 1997. Mr. Garrett also reviewed the survey prepared by F.A. Edwards and opined that it depicted the roadway in approximately the same location as the one he used.

Appellants contend that they have acquired title to the 16-foot passway by adverse possession and/or possess an easement by prescription through the open, continuous, adverse, notorious, and actual possession of said passway for the previous 15 years. Appellants contention is wholly unsupported and without merit. Carl Alan Spalding, the former owner of lot 10 who sold the property to appellants in 1995, stated that he was aware of the existence of the roadbed at the western boundary of the property and that he knew the appellees and Oliver Garrett openly used the road as a necessary means of ingress and egress. He also believed that appellees and Oliver Garrett had an absolute right

to utilize the roadway during the time he owned the property. Appellants have failed to produce any evidence of adverse possession or the possession of an easement.

Finally, appellants argue that the circuit court erred in allowing the appellees to make improvements upon the roadway. Appellants contend that a joint owner of property does not have the right to convert the property into something that primarily benefits one owner over the other. Apparently, the appellants would prefer that the roadway be used as part of their yard rather than a road. However, it is well established that when two or more persons own an undivided interest in property, known as a tenancy in common, each is entitled to the use and possession of the entire property. Sanderson v. Saxon, Ky., 834 S.W.2d 676, 678 (1992). Appellants have not produced any evidence that they have been prevented from using the road or that the placing of gravel has somehow diminished the value of the property.

As for the improvements, the circuit court determined that the appellees could elect to improve the roadway at their own expense. Any maintenance expenses incurred thereafter should be borne by both parties, provided that they do not exceed the normal maintenance required of a farm road. Continued use of the passway as a road is entirely consistent with the original 1888 Commissioner's deed. It also logically follows that improvements and maintenance would be required from time to time to ensure that the roadway is passable by modern modes of transportation.

Rose v. Holbrook, Ky., 287 S.W.2d 914 (1956); Sizemore v. Hurt,
313 Ky. 19, 230 S.W.2d 65 (1950).

For the reasons stated above, the order of the Marion
Circuit Court granting partial summary judgment in favor of
appellees is hereby affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel Todd Spalding
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Joseph H. Mattingly III
Lebanon, Kentucky