

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001090-MR

STEVE LAYNE and VERNA LAYNE

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 97-CI-00842

BOBBY C. JUSTICE and BARBARA JUSTICE

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, Chief Judge; COMBS and McANULTY, Judges.

COMBS, JUDGE: The appellants, Steve Layne and Verna Layne (the Laynes), appeal from the judgment of the Pike Circuit Court which extinguished an easement across the property of the appellees, Bobby C. Justice and Barbara Justice (the Justices). Having reviewed the record on appeal, we affirm the judgment of the circuit court.

This appeal arises out of an action initiated by the Laynes to determine their right to an easement across the Justices' property. In 1995, Steve Layne inherited property in Pike County, Kentucky, adjacent to land owned by the Justices. The properties of both parties were originally part of a large

tract of land owned by W.A. Thacker (W.A.) lying between Levisa Fork of the Big Sandy River and Rocky Road. In 1934, W.A. sold the portion of his property next to the road to William (Bill) Thacker. That deed conveying the property to Bill Thacker reserved an easement across his property leading to W.A.'s land near the river. Ultimately, Bill Thacker's property was divided into three tracts and was sold by his predecessor in interest; Bobby Justice purchased the tract with the easement. In 1954, W.A. conveyed the property near the river to Phillip Thacker. Steve Layne inherited this land in 1995 from his grandmother, Ida Thacker, who had been married to Phillip Thacker.

After inheriting the property, the Laynes planned to develop the land. Phillip Thacker had lived outside Kentucky, and the property had lain unused for almost three decades. The Laynes wanted to divide their property into five lots, which they could then sell. Their plan, however, was dependant upon their ability to access two of the proposed lots by way of the easement across the Justices' property. The Laynes' property is also accessible by Walnut Street, a public street which was established in 1979.

The Laynes contend that the manner in which they can divide their property will be limited if Walnut Street is the only means of ingress and egress to their property. On May 23, 1997, the Laynes filed an action in Pike Circuit Court, alleging that the Justices had denied them access to the easement and asking the court to determine their right to the easement. The Justices maintained that the easement had been extinguished.

The case proceeded forward, and on February 22, 1999, the circuit court conducted a bench trial. Subsequently, on April 9, 1999, the court entered judgment extinguishing the easement. The court found that Phillip Thacker had intentionally abandoned the easement across the Justices' property. This appeal followed.

The Laynes argue on appeal that the court erred in finding that Phillip Thacker intentionally abandoned the easement. They contend that the court's finding is not supported by substantial evidence. The Laynes assert that the evidence shows only that the easement was not used and that mere non-use is not sufficient to establish abandonment of an easement. We disagree.

In City of Harrodsburg v. Cunningham, Ky., 184 S.W.2d 357 (1944), the Supreme Court addressed whether an easement by grant could be lost by abandonment. The Court held that the right to the use of an easement by grant could not be extinguished by mere disuse. There must be something evidencing an intention to abandon the right: a denial of title, an act by an adverse party, or facts and circumstances that show the owner's intention to abandon the easement.

Nonuser of an easement created by grant does not, of itself, constitute an abandonment thereof. This rule is based upon the principle that such an easement is an interest in land and the only failure to enjoy it which will operate to extinguish the easement is that which is due to adverse occupancy. In order that a nonuser may constitute an abandonment, there must be an intention to abandon. However, nonuser may be continued unexplained for such a length of time as to be inconsistent with any hypothesis other than an intention to abandon the easement.

Id. at 360, quoting 17 Am.Jur. 1029 § 144. Furthermore, while long-continued disuse or suspension of use are not by themselves conclusive evidence of an intent to abandon, they are factors to be considered along with other evidence. Id.

In the case before us, the evidence established that the easement in question had not been used since the early 1960's and that Walnut Street was the primary means of accessing the Laynes' property. Additionally, the easement was overgrown with bushes and undergrowth. Several witnesses testified that for approximately thirty-years, a barbed-wire fence had blocked the easement. This fence ran along the boundary of the Justices' property and was removed by Bobby Justice in 1989. The evidence also showed that Phillip Thacker knew that Bobby Justice had built a garage across the easement and that he did not complain of this structure. There was testimony from witnesses that the easement was partially obstructed by a tree which prohibited vehicles from using it. Based upon all of this evidence, the court found that the actions of Phillip Thacker, coupled with his long disuse of the land, indicated his intention to abandon his right to the easement.

The trial court as the finder of fact has the best opportunity to consider and weigh the evidence presented. We may not disturb the trial court's findings unless they are clearly erroneous. CR 52.01; Janakakis-Kostun v. Janakakis, Ky. App., 6 S.W.3d 843 (1999). A trial court's decision is not clearly erroneous if it is supported by substantial evidence. Black Motor Co. V. Green, Ky., 385 S.W.2d 954 (1965). Substantial

evidence is evidence sufficient to induce conviction in the mind of a reasonable person. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 304 (1972). In this case, we find that the circuit court's decision was supported by substantial evidence.

The Laynes next argue on appeal that the court improperly relied upon evidence that Phillip Thacker had entered into an oral agreement with two other property owners to relocate the easement in question by creating Walnut Street. They assert that an easement by grant cannot be extinguished by an oral agreement and that any evidence of this alleged oral agreement constituted hearsay. However, the court specifically stated in its judgment that this evidence was not the basis of its decision:

The Court rules that it is not necessary in reaching a decision herein for the Court to consider the possible hearsay testimony of Curtis Thacker regarding the verbal agreement among Larry Thacker, Curtis Thacker and Phillip Ferrell Thacker to relocate the easement. In this instance, it is clear from the above facts that the owner of the easement and the servient owner of the land subject to the easement, in fact relocated the easement to what is now Walnut Street.

Without addressing the admissibility or propriety of this evidence, we find that any possible error would have been harmless. The court's decision was clearly supported by evidence other than the alleged oral agreement.

Based upon the foregoing reasons, we affirm the judgment of the Pike Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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