

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000098-MR

FOLMER STARR AND HIS WIFE,
NAOMI STARR

APPELLANTS

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR. JUDGE
ACTION NO. 94-CI-00716

WILLIAM EAVES AND HIS WIFE,
BRENDA EAVES; RAY MICHAELS
AND HIS WIFE, JANE MICHAELS;
LUCIAN K. RATLIFF; RON
JOHNSTON AND HIS WIFE,
SHARON JOHNSTON; MR. AND MRS.
PASCAL DUNHAM BOX; RICHARD MELTON;
MS. ROLANDE HOLT; AND MR. JOHN HOLT

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, JOHNSON, AND MILLER, JUDGES.

BUCKINGHAM, JUDGE: Folmer and Naomi Starr (hereinafter appellants) again appeal from a judgment of the Hopkins Circuit Court rendered in favor of William and Brenda Eaves, Ray and Jane Michaels, Lucian K. Ratliff, John Holt, Richard Melton, Rolande Holt, Mr. and Mrs. Pascal Dunham Box, and Ronald and Sharon Johnston (hereinafter appellees). The main issue involves whether the trial court erred in determining that there was not a

common-law dedication of an old roadbed. We conclude the findings of the trial court were not clearly erroneous and thus affirm.

The appellants are owners of a tract of property in Hopkins County which is "landlocked." After contracting for the sale of timber rights on their property, they attempted to improve an old roadbed which traversed the appellees' properties. Their attempts consisted of having a bulldozer clear trees and underbrush and fill in gullies and washes in the roadbed. When the appellees denied the appellants the use of the roadbed, the appellants filed an action in the Hopkins Circuit Court.

On March 27, 1997, the trial court entered its initial judgment in favor of the appellees, from which the appellants made their first appeal. Therein, the trial court determined that the roadbed was not a county road, that the public had not acquired a prescriptive easement since the roadbed had been abandoned, that the appellants' predecessor in title had never acquired an easement but had only a license to use the road, and that the appellants were not entitled to an easement by necessity. On appeal, this court affirmed the trial court's determination that the roadbed was not a county road and that the appellants were not entitled to an easement by necessity. However, this court vacated the trial court's ruling that any prescriptive easement obtained had been abandoned and remanded the matter to the trial court "to determine whether the doctrine of dedication applies to cause a public use of the roadbed in question, and whether any such use created has been

discontinued." See Starr v. Eaves, 1997-CA-000948-MR, rendered November 6, 1998. In remanding the matter, this court found that the trial court had neither addressed the issue of dedication nor made any findings in that regard.

On remand, the trial court held as follows:

In an analysis as to whether the application of the doctrine of dedication results in a public use of the roadbed, the Court relies on the language of Freeman v. Dugger, Ky., 286 S.W.2d 894 (1956). In Freeman, the Court of Appeals stated that the main question in a dedication case is whether there was a general and continued use so as to create an estoppel and acceptance. In the present situation, the Court does not believe that the evidence is sufficient to prove there was a general and continued use. No witness could testify to public use of the roadbed since the 1940's or 1950's. The roadbed was grown up with weeds and trees and was virtually impassable to the general public. Furthermore, the roadbed was considered abandoned in deed books and was not on survey maps. While some witnesses have testified to horseback and four wheel drive vehicle traffic, the Court does not believe that such random, limited, and episodic use is sufficient to establish a general and continued use. According to the case of Commonwealth of Kentucky, Department of Highways v. W[y]nn, Ky., 396 S.W.2d 798 (1965), the sufficiency of the use to show dedication is a jury question. The Court, as the finder of fact, does not believe that the evidence presented is sufficient to find a dedication. The proof simply does not establish the general and continued use that would give the public an interest in the land, as envisioned by cases such as Freeman.

Because the court determined that there was no public dedication of the roadbed, it held that the remaining issue concerning discontinuance of such public use was moot. This appeal followed.

The court in the Freeman case held that:

"It is settled in this state that a general and long-continued use of a passway by the public as a right will create the right to continue the use and the owner of the land traversed by the passway who allows the public to use it as a highway for a long period of years under a claim of right will be estopped from denying a dedication to the public. Long-continued user by the public will constitute an implied acceptance of the dedication."

Freeman, 286 S.W.2d at 896, quoting Gardner v. Hope, 248 Ky. 270, 58 S.W.2d 353, 354 (1933). "Both the intention of the owner to dedicate and the acceptance by the public may be inferred from use by the public for a substantial number of years." Wynn, 396 S.W.2d at 800. "If it can be shown that there has been a continual use for such a length of time as to create an estoppel and an acceptance, then the dedication is complete." Freeman, supra.

The appellants first argue that the trial court clearly erred in its determination that there was not a public dedication of the roadbed. The evidence from witnesses indicates that at one time the roadbed was used a means of ingress and egress by the people who farmed and lived on the adjoining tracts of property. There was no testimony that the roadbed had been used by the public to any extent since at least the 1940's or early 1950's. The roadbed was described in some deeds as an abandoned roadway, and it was grown up with weeds and trees and was virtually impassable, a condition indicating a long period of nonuse by anyone.

The appellants contend that the trial court confused the doctrine of prescriptive easement and the doctrine of public

dedication. Regardless of whether the trial court did so in its initial judgment, it clearly did not do so when it addressed the case on remand from this court. The language employed by the trial court in its order was clear.

This case was tried by the court without a jury, and the trial court's findings of fact shall not be set aside unless they are clearly erroneous. See CR¹ 52.01. Having examined the record and the specific findings of the trial court, we conclude that those findings were not clearly erroneous.

The appellants' second argument is that the trial court's findings pertaining to abandonment were clearly erroneous. The trial court declined to address the issue of abandonment in its last order because the issue was moot. Because abandonment was no longer an issue, the appellants' argument is likewise moot.

The last argument raised by the appellants in their brief is that the trial court erred in its conclusions regarding their continued right to use an easement originally established by public dedication. Because we have determined that the trial court did not err in its ruling that there was no public dedication of the roadbed, that argument is likewise moot.

The judgment of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

James C. Brantley
Dawson Springs, Kentucky

BRIEF FOR APPELLEES EAVES,
MICHAELS AND RATLIFF:

William R. Thomas
Madisonville, Kentucky

¹ Kentucky Rules of Civil Procedure.

