

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000591-MR

MUHLENBERG COUNTY, KENTUCKY

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 01-CI-00454

MASUREN FARMS, LLC

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: BARBER, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Muhlenberg County (the County) appeals from a February 17, 2003, Judgment of the Muhlenberg Circuit Court. The appeal involves the status of a road in Muhlenberg County. The trial court found that the road in question was once a public road but ceased to exist as such no later than 1970, and currently is neither a county road, nor a public road. We disagree and, thus, reverse and remand.

This case arises from a dispute between Masuren Farms, LLC (Masuren Farms) and the County, over whether a road adjacent

to the Masuren Farms' property is a private road, a county road, or a public road. Masuren Farms owns an approximate 4,800-acre parcel of property in Muhlenberg County, Kentucky, which it acquired between 1996 and 2000. The only access to the property is by a road called "Mud River Mine Road" (MRMR), which is off of Kentucky State Highway 949 in Muhlenberg County. MRMR first crosses the Jack Porter property, and the remainder of the road is across the Masuren Farms' property. The road terminates within the Masuren Farms' property, where a small cemetery is located. Sometime in the late 1990s, Masuren Farms erected a gate where the road enters by its property, which the County subsequently removed.

Masuren Farms filed this declaratory judgment action in October of 2001, asking the trial court to declare that MRMR was neither a county road nor a public road, and that the County and the public no longer possessed any rights in and to the road. The rights of persons visiting the cemetery were not adjudicated by this lawsuit. Ultimately, by stipulation of the parties, the case was submitted to the trial court for a decision based on the record. Ky. R. Civ. P. (CR) 52.01. The trial court also viewed the road. The trial court made the following findings of fact:

1. [Masuren Farms] is a Kentucky Limited Liability Company that owns fee simple title to a tract of real estate located in

Muhlenberg County, Kentucky, consisting of approximately 4,800 acres. A roadway known as the Mud River Mine Road ("MRMR") runs in a northerly direction from Kentucky State Highway 949 into the property owned by [Masuren Farms] and terminates therein. MRMR is the only road that provides access to [Masuren Farms'] property.

2. There is a cemetery located on the property owned by [Masuren Farms] near the point where MRMR terminates, which is approximately two miles from the beginning of [Masuren Farms'] property. There are sixty-four graves located thereon. Three persons were buried in this cemetery between 1950 and 1975, and two persons have been buried in this cemetery since 1975. The last burial was in 1999. There is no organization, association, or business entity that owns, operates or manages this cemetery.

3. At one time, there were several houses and a school located on MRMR. The school closed no later than the mid-1950's. By 1963, no one lived on MRMR.

4. In 1969 or 1970, MRMR was in such poor condition that a car could not travel on it. Sometime in the 1970's or 1980's, a timber cutter used the road to cut timber on the surrounding property.

5. Beginning sometime in the mid-1970's, [the County] began regularly and routinely maintaining MRMR. [The County] graded and graveled MRMR and removed and/or trimmed trees as necessary. During the summer of 1997, the road was repaired using approximately fifty loads of gravel and an expenditure of one hundred man hours.

6. [The County], by formal vote of the Fiscal Court, adopted a State Department of Transportation map prepared for the County as the official system of County roads.

This map includes MRMR. The Fiscal Court did not provide notice to the public that it was taking this action. The minutes of said meeting do not specifically mention MRMR and there is no formal order of the Fiscal Court specifically mentioning MRMR.

7. For the last forty years, the only legitimate reason to travel on MRMR, other than by its owners, was to visit the cemetery. Other people are currently using MRMR for illegitimate purposes, such as to consume alcohol, dump garbage or to trespass upon [Masuren Farms'] property to hunt.

8. [Masuren Farms] does not dispute the rights of the relatives of deceased persons buried in the cemetery to have reasonable access to the cemetery using MRMR.

9. Neither [Masuren Farms], nor its predecessors in title, dedicated MRMR as a public way.

10. The deeds of record in [Masuren Farms'] chain of title expressly provide for an easement for purposes of ingress and egress over that part of MRMR located on property situated between [Masuren Farms'] property and Kentucky State Highway #949.

The trial court concluded that:

1. There has been no owner dedication and therefore, KRS 178.025 does not apply.

2. MRMR is not a County road because the [County] has not satisfied the requirements of KRS 178.010(1)(b).

3. MRMR was once a public road, but ceased to exist as such no later than 1970. The public's non-use has been for a period of more than 15 years. The use of MRMR by persons visiting the cemetery is not use by the general public.

4. The acts of Muhlenberg County in grading and graveling MRMR do not convert this road into a public road.

5. Neither the public nor the County has any interest in or rights to MRMR.

The trial court subsequently entered judgment in favor of Masuren Farms, declaring that the part of MRMR located adjacent to the Masuren Farms' property was neither a county road nor a public road, and that neither the County nor the general public have any rights in and to that part of the road. This appeal by the County follows.

We begin our analysis with the proper standard of appellate review. Since the parties stipulated that this matter would be submitted to the trial court for a decision based upon the record presented, the court's factual findings may not be set aside unless clearly erroneous. See CR 52.01; Weiland v. Bd. of Trustees of Ky. Ret. Sys., Ky., 25 S.W.3d 88 (2000). A factual finding made by the trial court is not clearly erroneous if the finding is supported by substantial evidence. Cole v. Gilvin, Ky. App., 59 S.W.3d 468 (2001). Substantial evidence means "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." Id. at 473.

On appeal, the County contends the trial court erred in finding that the disputed portion of road was neither a

county road, nor a public road. The distinction between county roads and public roads was explained by our Supreme Court in Sarver v. Allen County, Ky., 582 S.W.2d 40, 41 (1979)(citations omitted):

Prior to 1914 it was recognized that an "acceptance" by the county could be accomplished informally, e.g., by maintenance of the road at county expense. Since the enactment of Ch. 80, Acts of 1914, however, a formal order of the fiscal court has been necessary to establish a county road. Otherwise, though a road may be "public," it is not necessarily a "county road." The obvious reason for this particular distinction is, of course, a public policy against holding counties responsible for the upkeep of any and all highways and biways [sic] that chance to become "public" through processes of dedication or prescription over which the counties have no choice or control.

The trial court found that the road was not a county road because the County had not satisfied the requirements of Kentucky Revised Statutes (KRS) 178.010(1)(b). KRS 178.010(1)(b) provides, in relevant part, that "'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 . . . ." The County did submit county road maps which were prepared by the Kentucky Department of Transportation for Muhlenberg County in 1954, 1970, 1984, and in 1996. Only the 1996 map was adopted by the fiscal court. However, adoption of a county road must follow the formalities of KRS Chapter 178,

which require more than merely including it on the county road map.

The County argues that even if MRMR is not a county road, it is, nevertheless, a public road within the meaning of KRS 178.025(1), which provides that “[a]ny road, street, highway or parcel of ground dedicated and laid off as a public way and used without restrictions by the general public for five (5) consecutive years, shall conclusively be presumed to be a public road.”<sup>1</sup> The County contends that the evidence established there was a dedication of MRMR as a public road by prescription and/or estoppel. We first note that KRS 178.025(1) applies only to “formally” dedicated roadways. Watson v. Crittenden County Fiscal Court, Ky. App., 771 S.W.2d 47, 49 (1989). It is undisputed that the road in question was not formally dedicated, therefore, the trial court correctly found that KRS 178.025 does not apply. See id.; see also Henry Fischer Builder, Inc. v. Magee, Ky. App., 957 S.W.2d 303 (1997).

The County also contends that MRMR is a public road established under the theory of dedication by prescription or estoppel. We agree with both arguments. The trial court made a finding that at one time, MRMR was a public road, but that it

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<sup>1</sup>This is how the statute read at the time of the circuit court’s ruling. The statute was amended effective July 13, 2004, to require public use without restrictions on a continuous basis for fifteen (15) years. Additionally, effective July 13, 2004, Kentucky Revised Statutes 178.155, which addressed the effect of lack of maintenance of a road by the county, was repealed.

had ceased to be used by the public as a public road no later than 1970. The evidence of record supports the County's position that MRMR was a public road by prescriptive use since at least the mid-1970s. We view the case of Louisville & N.R. Co. v. Engle, 278 Ky. 576, 129 S.W.2d 133 (1939) as controlling.

In Engle, the Court stated:

It is true that neither dedication nor acceptance need be formal, but both may be presumed from the continual use of the road by the public for 15 years or more, accompanied by acts of control on the part of the county court, such as the appointment of overseers, etc., but such use, without the exercise of any power over the road by the county court, will not make it a public highway.

Id. at 134 (citations omitted).

Under Engle, a public road may be acquired by prescription upon fifteen years of public use and a like number of years in control or maintenance by the county. See also Watson v. Crittenden County Fiscal Court, Ky. App., 771 S.W.2d 47 (1989).

The evidence established that MRMR was a public road that had been regularly maintained by the County on a continuous basis since the mid-1970s. The trial court found that since the mid-1970s, the County had routinely maintained MRMR, including grading and graveling of the road and trimming adjacent trees as necessary. The County had recently unclogged a ditch that was



flooding the road. Deposition testimony disclosed the County had provided drainage ditches for the road in the 1990s. In 1996, the Kentucky Department of Transportation prepared a road map for the County which included MRMR, and was adopted by the Fiscal Court as the official county road system in Muhlenberg County. Even the owners of Masuren Farms testified that the County maintained MRMR after its acquisition of property adjacent to the road in the late 1990s, without any protest or objection thereto. In fact, Michael Miller, a member of the LLC, testified that he believed MRMR was a county road at the time appellee acquired the property in 1996 and 1997.

The trial court's finding that there was not public use of the road for the requisite period of prescriptive use is clearly erroneous. CR 52.01. This Court has been cited to no authority that dictates how much public use is necessary to maintain a road's public status. Public use of private property needs only be enough to show a claim of right to use the land as a road to the exclusion of any right of the owner inconsistent therewith. Cummings v. Fleming County Sportsmen's Club, Inc., Ky. App., 477 S.W.2d 163 (1972). While there is only a cemetery located at the end of MRMR, the evidence was sufficient that there was public use of this road, and it was not limited to just relatives of those buried in the cemetery. Access to the cemetery had been open to the public for over forty years.

Terry Benton, a county magistrate from the district where MRMR is located, testified that he traveled MRMR on a regular basis and he also had many friends buried in the cemetery. There was no testimony that indicated visitation was limited only to relatives. If so, close friends or associates of deceased persons would have no ability to visit graveyards under the circumstances presented by this case. The trial court concluded there was no entity or organization that owned, managed, or operated the cemetery. Thus, the cemetery was clearly open to the public for use and visitation via MRMR.

The trial court's finding that people were using MRMR for illegitimate purposes was also not supported by substantial evidence. The majority owner of Masuren Farms is Ekkehard Siska.<sup>2</sup> Siska, a German citizen who resides in Iceland, admitted he only visits the property three or four weeks each spring and fall of the year. He testified, however, that he had seen "dozens of illegal hunters" on the road. Hunting, though regulated, is still legal in Kentucky. Siska gave no testimony that he had actually observed hunters trespassing on his property from MRMR. There is no direct evidence in the record establishing that MRMR was used for an "illegitimate purpose."

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<sup>2</sup> According to Siska, he gave Michael Miller a 25% interest in the LLC to locate property for him in Muhlenberg County. The property was acquired sight unseen by Siska. The first tract was purchased in 1996. The remaining property adjacent to the road was acquired in 1997. Siska bought Miller out in May of 2000.

In fact, Siska admitted that he traveled MRMR to access property he owned before he purchased other property adjacent to the road. Clearly, this was a public use of the road.

Moreover, residents of this Commonwealth are not required to have a "legitimate reason" to travel public roads. In our democracy, citizens may travel public roadways without a stated purpose. Any resident of a county is free to travel public roads maintained by the county without any reason whatsoever. Otherwise, Sunday afternoon drives in the countryside would become illegal or even "illegitimate." There is absolutely no evidence in the record to show MRMR was not continuously available for use and used by the public who desired to do so. County Judge-Executive Rodney Kirtley testified that he had traveled the road and had seen others also using the road. He further testified that he had been contacted by the general public regarding maintenance of the road. The public outcry at a Fiscal Court meeting testified to by Judge-Executive Kirtley, after Masuren Farms wrongfully placed a gate across the road further demonstrated there was sufficient interest in and use of the road to maintain its public status.

We also believe MRMR was dedicated to public use by estoppel. The distinction between a statutory and common-law dedication was explained in Bluegrass Manor v. Mall St. Matthews Ltd. Partnership, Ky. App., 964 S.W.2d 431, 433 (1998):

A statutory dedication is a dedication made pursuant to the terms of a statute, and is almost universally created by the filing and recording of a plat. A common-law dedication requires an intention to dedicate expressed in some form, and an acceptance of the dedication by the proper public authorities, or by general public user. It is distinguishable from a statutory dedication, which is in the nature of a grant, . . . . Generally, a common-law dedication rests upon the doctrine of estoppel.

The public use does not need to be of the duration required to establish adverse possession or prescription. Long-continued use of the road by the public constitutes an implied acceptance of the dedication. Freeman v. Dugger, Ky. App., 286 S.W.2d 894 (1956). For almost 30 years, the adjacent property owners to the roadway have acquiesced to its public use. Given the County's maintenance of the road since the mid-1970s without objection or protest, and the public's use of the road during this time frame until the erection of a gate by Masuren Farms in the late 1990s, MRMR has been dedicated as a public road by estoppel. The fact that Masuren Farms acquired property on both sides of the road is not sufficient to defeat the road's public status.

For the foregoing reasons, the judgment of the Muhlenberg Circuit Court is reversed and the cause is remanded for entry of judgment consistent with this opinion.

BARBER, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING: The trial court found that at one time, Mud River Mine Road was a public road, but that it had ceased to be used by the public for more than fifteen years (the school was closed by the mid-1950's, by 1963, no one lived on Mud River Mine Road), and that it ceased to exist as a public road no later than 1970. The non-use by the general public of a public road for over fifteen years constitutes an abandonment of that status. Cole v. Gilvin, Ky. App., 59 S.W.3d 468, 475 (2001), citing Sarver v. County of Allen, Ky., 582 S.W.2d 40 (1979). The County did not offer evidence to dispute the trial court's finding of abandonment, but looked to subsequent events to prove a public road was reestablished by prescription. "[A] public road may be acquired by prescription only upon (1) fifteen years public use and (2) a like number of years of control and maintenance by the government." Watson v. Crittenden County Fiscal Court, Ky. App., 771 S.W.2d 47, 48 (1989).

"[T]he mere use by a few individuals, from time to time, as distinguished from the public generally, does not constitute such use as creates title in the public by prescription." Rominger v. City Realty Company, Ky., 324 S.W.2d 806, 808 (1959). The use of a road on privately owned property

by the owners, or their guests, invitees, or employees, does not constitute "public use" of the road. Cole, 59 S.W.3d at 474; Sarver, 582 S.W.2d at 43.

There are a number of problems with the Majority's opinion that the trial court's findings were in error. First, that portion of Mud River Mine Road closed by the gates was not "adjacent to" or "by" the Masuren Farms property, as stated by the Majority, but was within, surrounded by, and terminated within the Masuren Farms property.

In the similar case of Cole v. Gilvin, Ky. App., 59 S.W.3d 468 (2001), several families had at one time, lived along the road at issue. By the 1940's, all of these residents had left, and for the next 40 years, the only use of the road was for access to a private farm, occupied by the owners and their tenants. The trial court found that, since the early 1940's, there was no legitimate destination along the road which would benefit the public, i.e. there was no place for the public to "get to" using this road, other than private property. Accordingly, the trial court concluded that, even if the road could have been considered public at one time (prior to the 1940's), it had since been abandoned due to over 15 years of non-use by the general public. This Court affirmed the trial court's finding, citing Sarver for the proposition that travel on a roadway for access to private property does not constitute

a continued "public use" sufficient to negate abandonment. Cole, 59 S.W.3d at 475. Similarly, in the present case, use of the road for access to the Masuren Farms property is not a "public use."

The County attempts to distinguish the present case from the situation in Cole. The County contends that, unlike the scenario in Cole, there is a place for the public to "get to" on Mud River Mine Road, the cemetery (which is located near the termination of the road, two miles into the Masuren Farms property). The Majority reasons that the use of the road by persons visiting the cemetery amounts to a public use. They are wrong. Sporadic use by a few members of the general public does not ripen into a public use. Cole, 59 S.W.3d at 474. Not only did the trial court find infrequent use of the road by anyone, but "[i]n order to establish that the passway had ripened into a private or a public way, plaintiff must show it was used adversely by him. . . ." Rominger, 324 S.W.2d at 808. Under Kentucky law, a relative has the right to visit the graves of deceased relatives through what has been classified as an easement. Commonwealth, Dept. of Fish and Wildlife Resources v. Garner, Ky., 896 S.W.2d 10 (1995); Haas v. Gahlinger, Ky., 248 S.W.2d 349 (1952). (This easement applies all the way from a public road to the cemetery, even when the cemetery is in a field off the road.) Since the relatives have a right or

easement to visit the cemetery, there is no adverse traveling over the road to create a public use. Therefore, the use of Mud River Mine Road by relatives visiting the (private) cemetery is not a public use and does not create a public road by prescription.

The trial court also found the trespass by the hunters did not constitute a public use, but an illegitimate use, and the Majority calls foul (or should we say "fowl"?), stating the right to hunt, although regulated, is still legal in Kentucky, and that since this foreign owner did not actually see the hunters on his property, he could not assume they were hunting on his property. This private road was two miles long surrounded by the 4,800 acres of the Masuren Farms property. I believe the trial court was correct in concluding the hunters on the private road were hunting on the Masuren Farms property! While I agree with the Majority that hunting in Kentucky is still legal, I would remind the Majority that it is illegal to hunt on private property without permission of the owner. KRS 150.092. Therefore, the hunters had no legitimate destination on the private road. Cole, 59 S.W.3d 468. See also, Cole at 474, wherein the Court stated:

It can be assumed that, as with any rural property, there may have been occasional hunters or fishermen who trespassed without express or implied permission but there is no evidence that this type of incident was



more frequent than as occurs upon any other rural property or was so frequent or pervasive so as to amount to public use.

The Majority's emotional reasoning that in this Commonwealth, citizens can travel on any county road without a purpose is a red herring against a non-resident property owner. They miss the point. Before a person has a right to travel over that portion of Mud River Mine Road, which is wholly within and terminates in the Masuren Farms property, the road had to have been reestablished as a public road. See Watson, 771 S.W.2d at 48.

The County further argued and the Majority agreed that there was a dedication by estoppel. The trial court did find that sometime in the mid-1970's, the County began regularly and routinely maintaining Mud River Mine Road. During the summer of 1997, the road was repaired using approximately fifty loads of gravel. Masuren Farms was aware of the county maintenance and did nothing. The county repairs were made for the benefit of people going to the cemetery.

"[A]cts of county officials in improving or maintaining a road, standing alone, do not constitute a public user capable of ripening into a prescriptive title, nor can they alone amount to such a continued public user as will negate a public abandonment." Sarver, 582 S.W.2d at 43. Accordingly, the trial court was correct in concluding that the acts of

Muhlenberg County in grading and graveling Mud River Mine Road did not convert it into a public road. Further, adopting the county road map, without following the formalities of KRS 178.010, is insufficient to convert a private road into a county road.

This Court is precluded from setting aside the findings of the trial court unless those findings are clearly erroneous. Whilden v. Compton, Ky. App., 555 S.W.2d 272 (1977). In the present case, I strongly opine that the trial court did not err in finding that since the road had been abandoned, there has been no subsequent dedication by prescription or estoppel, nor was there compliance with the statutory formalities to convert Mud River Mine Road into a county road. I would affirm the Muhlenberg Circuit Court.

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