RENDERED: MARCH 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002774-MR

RAYMOND W. STARR, JR. — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
HONORABLE DANIEL R. SPARKS, JUDGE
ACTION NO. 02-CI-00171

MAGNUM DRILLING OF OHIO, INC.; JAMES H. LARGE; CARLA N. LARGE; THOMAS A. CRISP; AND MARY F. CRISP — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; MILLER, SENIOR JUDGE.[1]

COMBS, CHIEF JUDGE: Raymond W. Starr, Jr., appeals from a final judgment of the Lawrence Circuit Court entered on December 16, 2003, which held that the appellees, James H. Large and his wife, Carla N. Large, and Thomas A. Crisp and his wife, Mary F. Crisp, have a legal right of way to access their real property

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

by means of a passway crossing Starr's property. The trial court concluded alternatively that the disputed passway had been informally dedicated for public use; that it is a public road pursuant to the provisions of KRS[2] 178.025; that the appellees have an easement following the course of the passway; or that the public has acquired an easement over the passway through prescriptive use. After our review of the record, we disagree with the alternative conclusions. Therefore, we vacate and remand.

In May 1994, the Larges and the Crisps together purchased more than 250 acres located on the Brushy Fork of Big Blaine Creek in Lawrence County, Kentucky, for $25,000.00. Two months later, Starr bought an adjoining tract of approximately 96 acres for $12,500.00. The Larges and the Crisps intended to use their property for commercial oil and gas exploration and production.[3] Starr planned to build a retirement home on his smaller tract.

At the time that the parties purchased their respective properties, there was a rough passway leading up a hollow to the appellees' property. The passway linked the appellees' property with a gravel road leading to the nearest

[2] Kentucky Revised Statutes.

[3] Magnum Drilling of Ohio, Inc., wholly-owned by James Large and Thomas Crisp, holds numerous oil and gas leases for various tracts adjacent to the appellees' property at Big Blaine Creek.

county road. Both the gravel road and the rough connector passway are located on Starr's property.

The appellees had used the disputed passway to access and to view their property before they decided to purchase it. However, they did not perform a title examination to confirm any right of way in order to assert any other means of legal access to the property. Starr's title examination revealed no recorded easement or county road where the passway crosses his property. Shortly after purchasing his parcel, Starr blocked access to the passway -- first with a cable and then with a gate.

In the spring of 2002, Thomas Crisp unloaded a bulldozer at the passway. Starr met Crisp at the site, advised him that he was on private property, and denied him access to the passway. Starr told Crisp that the right of way to his (Crisp's) property followed the creek bed up the hollow. Starr then suggested that Crisp use that route instead of the passway.

In July 2002, the appellees filed a complaint in Lawrence Circuit Court and alleged that the passway crossing Starr's property was a public road. They sought to enjoin Starr from interfering with their use of the passway for ingress into and egress from their property.

On December 8, 2002, the trial court conducted a bench trial. Evidence produced at trial indicated the existence of a recorded easement across Starr's property that permitted access

up the hollow and up to the appellees' property. The easement, however, lay in a branch of Brushy Fork.[4] According to the testimony of Clyde Roger Jordan, in the early 1980's the county relocated the passway out of the creek bed up to the bank of the creek, continuing up the hollow to a home occupied by the Tacketts, the predecessors-in-interest of the appellees. Jordan, who was a magistrate for the district at that time, testified that the fiscal court informally arranged with the Wheelers (Starr's predecessors-in-interest) to move the passway out of the creek bed and onto the bank. Jordan indicated that the county provided the equipment necessary to grade a roadbed and then maintained it on an irregular basis until the early 1990's. Jordan explained that the road had been constructed solely for the benefit of the Tacketts, that it led only to their home, and that it had not been in regular use after the house was lost to fire in the 1980's.

Shade Chaffin, road supervisor for the fiscal court, confirmed that the passway had been relocated as an accommodation to the Tacketts and pursuant to their request. Chaffin testified that he did not believe that the road was a county road. He was unaware of any formal action to treat the passway as a county road and did not believe that it was included on any county road map.

[4] This passway is referred to as a "sled road" by several witnesses.

Starr testified that neither he nor the county had attempted to maintain the passway since he purchased the property in 1994. No evidence was presented to indicate that the disputed passway had been formally adopted by the county as a county road. There was no evidence to indicate that the passway had ever been noted on any official map as a public road. No witness indicated that the passway had ever been in general use by the public.

However, in an interlocutory order entered on July 14, 2003, the trial court found in favor of the appellees.[5] The court held that the passway had been informally dedicated to public use by Starr's predecessors-in-interest and that the county had sufficiently accepted the passway. In the alternative, the court concluded that the road was a public road pursuant to statute, that the appellees had acquired an easement following the course of the disputed passway, or that the public in general had acquired a prescriptive easement over the passway. This appeal followed.

As noted earlier, this case was tried upon the facts without a jury. Therefore, upon review, the trial court's findings of fact "shall not be set aside unless clearly erroneous." CR[6] 52.01. Our standard of review also requires

[5] The judgment was made final and appealable by way of an agreed order entered on December 12, 2003.
[6] Kentucky Rules of Civil Procedure.

that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Id. A finding of fact is not clearly erroneous if it is supported by substantial evidence. Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409 (Ky. 1998). Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298 (Ky. 1991).

On appeal, Starr argues that the trial court erred by concluding that the provisions of KRS 178.025(1) govern this controversy. We agree.

At the time of the trial court's ruling, KRS 178.025(1) provided as follows:

> [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."[7]

This provision applies only to **formally dedicated roadways**. Watson v. Crittenden County Fiscal Court, 771 S.W.2d 47 (Ky.App. 1989). Since there was no evidence presented in this case to indicate that the disputed passway was ever formally dedicated to public use, the provisions of the statute are inapplicable to our analysis – regardless of the tangential issues of whether

[7] The statute was amended effective July 13, 2004, to require public use without restrictions on a continuous basis for fifteen (15) years.

substantial evidence would support a finding that the general public used the passway continually for five years or whether use of the passway had (or had not) been effectively abandoned.

We also conclude that the trial court erred by determining that the disputed passway had become a public road through some informal process involving the parties' predecessors-in-interest. The evidence presented at trial indicated that the Wheelers (Starr's predecessors-in-interest) had accommodated the Tacketts (the appellees' predecessors-in-interest) by permitting them to travel to and from their home by way of a rough road alongside the creek. However, there is no indication that either party intended to permit or to dedicate the road for use by the general public. Consequently, the informal, permissive dedication of the road by Starr's predecessor-in-interest for the Tacketts' private use for ingress and egress cannot be characterized as having been intended for the benefit of the public at large. The passway did not become a public road.

We do not agree with the court's alternative conclusion that the public had acquired an easement by prescription. A public road can be established under a theory of dedication by prescription or estoppel. Freeman v. Dugger, 286 S.W.2d 894 (Ky. 1956). "[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, 771 S.W.2d at 48. However, "[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 Co., 324 S.W.2d 806, 808 (Ky. 1959). Additionally, "the acts of county officials in improving or maintaining a road, standing alone, do not constitute a public use capable of ripening into a prescriptive title. . . ." Sarver v. County of Allen, 582 S.W.2d 40 (Ky. 1979).

In this case, there was no evidence of a generalized public use of the disputed passway. Aside from sporadic use by hunters (or perhaps loggers), the evidence indicated consistently that the private passway was used only to accommodate the Tacketts or their guests. The road led only to their house. After the fire destroyed the Tackett home in the 1980's, no general or consistent use was ever again made of the passway. The county did not continue to maintain the road, and it became over-grown and nearly impassable. Therefore, the trial court erred by finding that the use of the disputed passway was of a sufficient magnitude to justify its classification as a public road.

Finally, we conclude that the trial court erred by holding that the appellees had acquired an easement over the

passway. All evidence indicates that use of the passway at its inception was permissive. Therefore, an easement by prescription could not have arisen in favor of the appellees or their predecessors-in-interest absent the occurrence of some distinct and positive act of a claim of right asserted and made apparent to Starr's predecessors-in-interest. "The right to use a passway as a prescriptive easement cannot be acquired no matter how long the use continues if it originated from permission by the owner of the servient tenement." Cole v. Gilvin, 59 S.W.3d 468, 476. There was no evidence presented at trial to suggest that the appellees' predecessors-in-interest ever made such a declaration of right to the passway.

There is no evidence to support the conclusion that the appellees (or their predecessors-in-interest) obtained a right to use the passway as a quasi-easement or an easement by implication. An easement by implication, or quasi-easement, occurs when the original property owner creates a passway to facilitate access to a section of his property. Kreamer v. Harmon, 336 S.W.2d 561 (Ky. 1960). Such an easement arises when: (1) there is a separation of title from common ownership, (2) long and continuous use of the easement existed prior to separation, and (3) the use of the easement is highly convenient and beneficial to the land conveyed. See Bob's Ready to Wear, Inc. v. Weaver, 569 S.W.2d 715 (Ky.App. 1978). There is no

evidence of record in this case to indicate that the parties' respective tracts were derived from a common owner. However, even if we assume common ownership in the distant past, the evidence shows affirmatively that usage of the passway did not commence until after the tracts had already been separated prior to the acquisition by the present property owners, thereby negating one of the necessary elements for an easement by implication.

In summary, we conclude that the trial court erred as a matter of law by concluding that the appellees or the general public had acquired a right of way over Starr's property. Our review of the record indicates that the passway was never dedicated to public use, that it did not become a public road through any statutory provision, and that it was not an easement acquired by prescriptive use.

On the contrary, the evidence indicates only that the passway had been dedicated to the private use of the Tacketts, the predecessors-in-interest of the appellees. The use was discontinued and abandoned by the Tacketts following the loss of their home in the 1980's. Consequently, the passway was in poor condition at the time that Starr purchased the property in 1994; there was no effort made to maintain it after Starr acquired the property. To Starr's knowledge, no one asserted any claim of right until the middle of 2002. Based on all of these factors,

the appellees have failed to show that they possess a legal right to use the passway crossing Starr's property.

The judgment of the Lawrence Circuit Court is vacated and remanded for entry of a judgment consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEES:
James H. Moore, III Ashland, KY	Nelson T. Sparks Louisa, KY