

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000469-MR
AND
NO. 2005-CA-000523-MR

JESSAMINE COUNTY FISCAL COURT;
THOMAS EDWARD CLEMENTS;
SUSAN LEE GRIER-CLEMENTS; CLIFFORD ZUPP;
JANE ZUPP AND THOMAS CROWN

APPELLANTS

v. APPEALS FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 03-CI-00532

ESKER L. HENRY; SONYA G. HENRY;
BRADFORD WALTON;
ELIZABETH LOIS BARNES;
DANNY JOE BARNES; MARTY D. MADDUX
AND CATHERINE MADDUX

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER, SPECIAL JUDGE.¹

SCHRODER, JUDGE: These consolidated appeals involve two
declaratory judgment actions (which were consolidated) to

¹ Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

determine whether that part of Henry Lane that crosses the Henry property is an easement or a public road. The trial court ruled the passway running through the Henry farm is not a public road, and that the Henrys had the right to replace a gate across the road with a cattle guard. We affirm in all respects.

Esker L. Henry and Sonya G. Henry (the Henrys) purchased a 113½ acre farm in Jessamine County in April of 1976. A one-lane passway (now known as Henry Lane) cut across the farm which provided the only access to property at the end of Henry Lane. Bradford Walton, Lois Elizabeth Barnes, Danny Joe Barnes, Thomas Edward Clements, Susan Lee Grier-Clements, Clifford Zupp, and Jane Zupp (the Adjacent Owners), are owners of real properties which either adjoin or are located within close proximity to the farm owned by the Henrys. From the time of purchase until around March of 2003, the Henrys had maintained closed gates and a cattle crossing along the dirt and gravel passway running through their property to use their farm for agricultural purposes. The Fiscal Court paved the passway in November of 2000.

On March 21, 2003, the Jessamine County Attorney, on behalf of the Jessamine County Fiscal Court, notified the Henrys that the passway running through their farm was a "public road and part of the Jessamine County road system"; that the Henrys no longer had the right to maintain gates along the passway; and

that the Henrys had no right to utilize their farm land adjacent to the passway for grazing of their livestock.

The Henrys filed a petition for a declaration of rights against the Fiscal Court² and joined the Adjacent Owners to determine the status of the passway. The Fiscal Court subsequently filed its own declaratory judgment action³ against the Henrys, the Adjacent Owners, and Thomas Crown, Marty D. Maddux, and Catherine Maddux, additional property owners bordering or adjacent to Henry Lane. The cases were consolidated.

On October 27, 2004, the trial court conducted a bench trial and found, that, from time to time, the Henrys, at their expense, and the Jessamine County Road Department, gratuitously placed and graded gravel on the passway while the Adjacent Owners did nothing to maintain or improve the passway. The trial court also found that the Henrys never solicited or requested assistance from the County in maintaining the road, that the Jessamine County Road Map indicates Henry Lane stops at the Henry's property line, although the Department of Transportation Highway Map appears to indicate Henry Lane is a public passway, which goes through the Henrys' farm. The passway was never used for mail service, garbage pickup or by

² 2003-CI-00532

³ 2003-CI-00550

school buses, and the Henrys never intended for the passway to become a public or county road. In September of 2000, the Jessamine County Road Department installed a new cattle guard at the entrance to the Henrys' property, without notice to the Henrys, and the asphalt paving was done over the Henrys' protest.

The trial court concluded the passway was private and that the Fiscal Court improperly improved the roadway. The paving was causing water damage and the Fiscal Court was also ordered to take remedial action to prevent water damage to the Henrys' land.

The Jessamine County Fiscal Court filed an appeal⁴ on February 24, 2005. Some of the Adjacent Owners filed their own appeal⁵ on March 4, 2005, and the appeals were consolidated by this Court. The appellants' first argument is that the trial court's finding that Henry Lane was not a county road was clearly erroneous. This argument overlaps with the second argument, that KRS 178.010(1)(b) mandates that Henry Lane be determined to be a county road. We disagree with both arguments.

The trial court heard the evidence and made numerous findings of fact. The appellants do not question the findings

⁴ 2005-CA-000469-MR

⁵ 2005-CA-000523-MR

as much as the court's conclusions from those findings - thus the overlapping of arguments one and two. The court's factual findings may not be set aside unless clearly erroneous. See CR 52.01; Weiand v. Bd. of Trustees of Kentucky Retirement Systems, 25 S.W.3d 88 (Ky. 2000). A factual finding made by the trial court is not clearly erroneous if the finding is supported by substantial evidence. Cole v. Gilvin, 59 S.W.3d 468 (Ky.App. 2001). Substantial evidence means "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." Id. at 473.

The basic facts are uncontroverted. The Henrys purchased their farm in 1976, and at that time a single lane dirt and gravel passway existed to the houses in back. There was a cattle crossing in front and one or two gates. The Henrys raised cattle which roamed freely on the passway. The Henrys did all the maintenance until the county started to add gravel. It was not until the county replaced the cattle crossing, and then in November of 2000, paved the passway with asphalt (which the Henrys protested), that an issue arose as to the legal status of the passway. The County Road Map shows Henry Lane is a private road, while the Department of Transportation Map shows it is a county road. On March 21, 2003, the Jessamine County Attorney, on the Fiscal Court's behalf, notified the Henrys that it was now a county road.

On appeal, the appellants' argument is not with those findings, but the court's conclusion that the disputed portion of Henry Lane is 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, By and Through Its Fiscal Court, 582 S.W.2d 40 (Ky. 1979). 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.

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.

Id. at 41 (citations omitted). The trial court found the passway was not a county road. The County Map did not show the disputed part of Henry Lane even though the State Highway Department Map showed it as a county road. The trial court found the county's map was more accurate.

The trial court found there was not sufficient control or maintenance of the passway by the Fiscal Court for the statutory required period of time to ripen into a dedication by prescription to be a public road. A few loads of gravel over the years, the recent replacement of the cattle crossing, and even the asphalt do not automatically ripen into a dedication. In Louisville & N.R. Co. v. Engle, 278 Ky. 576, 129 S.W.2d 133, 134 (1939) (citations omitted), 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.

See also Watson v. Crittenden County Fiscal Court, 771 S.W.2d 47 (Ky.App. 1989). Also, "acts of county officials in improving or maintaining a road, standing alone, do not constitute a public user capable of ripening into a prescriptive title" Sarver, 582 S.W.2d at 43 (citation omitted). Accordingly, the trial court was correct in concluding that the acts of Jessamine County in graveling and paving Henry Lane did not convert it into a public road.

Appellants' final contention is that even if the trial court was correct in concluding Henry Lane was a private

passway, the court erred in granting the Henrys the right to construct a new and additional cattle guard at the rear boundary line of their property because the Henrys did not ask for it in their pleadings.

Once the trial court determined the passway was private, the Henrys did not need permission to construct a cattle guard. We can assume the passway is an easement for access to the Adjacent Owners. The Adjacent Owners' property would be the dominant estate and the Henrys' property would be the servient estate. The evidence was that the Henrys used their property for agricultural purposes, including the grazing of cattle. There were gates and a cattle guard in the past in lieu of extensive fencing. As to the law of easements, "[i]t will further be assumed that the possessor of the servient tenement has all the privileges of use of that tenement which are not inconsistent with a reasonable exercise by the owner of the easement of his particular privileges." 2 American Law Of Property, Easements §8.66, (A.J. Casner ed. 1952.) In Flener v. Lawrence, 187 Ky. 384, 220 S.W. 1041, 1044 (1920), the Court recognized that the owners of the dominant estate could not require the servient estate to construct fences and gates along the passway, nor could the dominant estate prohibit the servient estate from constructing gates across the passway, "if the location and construction of the gates do not unreasonably

interfere with passage over the way." Id. The cattle guard appears to be less of an interference than the gate (which has to be opened and closed with each passing). When the interference is unreasonable, the courts have the power to correct it. Wynn v. Powell, 286 S.W.2d 367, 369 (Ky. 1956). Therefore, the trial court did not err in allowing the construction of the second cattle guard.

For the foregoing reasons, the judgment of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

COMBINED BRIEF FOR APPELLANTS: BRIEF FOR APPELLEES ESKER L.
HENRY AND SONYA G. HENRY:

Dwight Hobart Hitch
Wilmore, Kentucky

David Russell Marshall
Nicholasville, Kentucky

Randall Edward Norris
Nicholasville, Kentucky

NO BRIEF FOR APPELLEES
BRADFORD WALTON, ELIZABETH
LOIS BARNES, DANNY JOE BARNES,
MARTY D. MADDUX AND CATHERINE
MADDUX