RENDERED: DECEMBER 15, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001831-MR

EARL BEGLEY — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 04-CI-00856

BENNY DALE COLEMAN; TERESA COLEMAN; JOYCE ANN MURPHY; JAMES L. MURPHY; GAYLE LOU GROT; ROBERT A. GROT; CARLO B. COLEMAN; AND DONALD W. PACE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, GUIDUGLI AND VANMETER, JUDGES.

ABRAMSON, JUDGE: In 1974, Earl Begley approached his neighbor, Mrs. Arthur Pace, seeking permission to construct a driveway across her property to his own property. Pace agreed contingent upon Begley demolishing and removing three houses owned by Pace, as well as his cutting down a large tree on her property. After performing the work, Begley subsequently constructed the

driveway which included a bridge over a small stream. For the next 29 years, Begley maintained and used the driveway without incident.

On June 23, 2003, Begley lost his home in a foreclosure sale. Prior to the date of the sale, Benny Dale Coleman, the present owner of the property formerly owned by the Paces, instructed his attorney to send a letter to the attorney for National City Bank stating that the driveway which traversed the Coleman property was not included in any sale of the Begley property. The note further instructed that any buyer of the Begley property wishing to use the driveway would have to seek express permission from the Colemans. In turn, a representative of National City Bank faxed a note to the Harlan Circuit Court Master Commissioner requesting that the Commissioner announce at the sale that use of the driveway was solely by permission of the Colemans, which had been withdrawn.

The property was ultimately sold to National City Bank, who later assigned its winning bid to Federal Home Loan Mortgage. On October 18, 2004, Begley entered into a rent-to-own agreement with CMB Property Ventures, LLC, pursuant to which he contracted to repurchase the property.

On December 1, 2004, Begley filed an action in the Harlan Circuit Court seeking a declaration that he was the owner of an easement by prescription over the driveway traversing the

Coleman's property. Begley also moved for a restraining order prohibiting the Colemans from blocking his use of the driveway. On February 4, 2005, the trial court held a hearing on Begley's motion.

The trial court denied Begley's motion in an order entered on March 24, 2005. In its Findings of Fact and Order, the court specifically found:

> 3. That the Plaintiff, Mr. Earl Begley testified that he had received permission from the prior owners of the property, that being Arthur Pace who was the grandfather of Benny Dale Coleman, to use the driveway going across the Defendant's property;
>
> 4. That after further testimony the Plaintiff testified that he had bought the right to cross the Defendant's property by doing work for Mrs. Arthur Pace;
>
> 5. That there was no written document of (sic) conveyance produced by the Plaintiffs and in fact the Plaintiff testified that there was no written document regarding this easement; that this lack of a writing fails to satisfy the Statu[t]e of Frauds; and
>
> 6. That the Plaintiff's wife for more than twenty (20) years, Thelma Cochran, who is now his ex-wife testified that the Plaintiff used the driveway across the Coleman property by permission from Mrs. Arthur Pace; and Ms. Cochran, further, testified that should Mrs. Arthur Pace have told the Plaintiff to stop using the driveway across the Coleman property, then they would have

> done so pursuant to the request of Mrs. Pace.

The court further held that Begley "failed to establish that this is a prescriptive easement as he has failed to prove that they have had open, notorious, forcible, exclusive and hostile use of this driveway across the [Colemans'] property for a period of at least fifteen (15) years."

Following the court's decision to deny Begley's request for a restraining order, each of the parties briefed the issue raised by Begley's lawsuit before submitting it for a final decision. On July 28, 2005, the court entered a judgment dismissing Begley's complaint. After first incorporating the factual findings from the March 24 order denying Begley's motion for a restraining order, the court noted that because no additional evidence had been presented, the question before it was purely a legal one. Based on the record before it, the court held "[t]hat the facts, when juxtaposed with the law in this case, show that the proof, at best, submitted by the Plaintiff is inconsistent and does not show by a preponderance of the evidence that an easement by grant or prescription ever existed – at most there was a permission of use only". Begley has appealed the judgment to this Court, and because we find no error in it, we affirm.

Begley's first argument is that the circuit court erred by substituting its judgment for that of a jury. Our standard of review of an order granting summary judgment is well-settled.

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." . . . The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. . . . The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." . . . The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." . . . While the Court in *Steelvest[, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991),] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that the word was "used in the practical sense, not in an absolute sense." . . . Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. . . .

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted).

Begley first argues that the language used by the trial court in its judgment is evidence that the court usurped the role of a jury by weighing the parties' opposing evidence rather than merely determining whether Begley had offered any evidence upon which a trier of fact could render judgment in his favor. Specifically, the trial court stated in its Judgment:

> That the facts, when juxtaposed with the law in this case, show that the proof, at best, submitted by the Plaintiff is inconsistent and does not show by a preponderance of the evidence that an easement by grant or prescription ever existed – at most there was a permission of use only . . . .

While at first glance Begley's concern is understandable given the trial court's particular choice of language, we do not believe that the decision is in error. Our review of the record reveals no evidence that supports Begley's claim for a prescriptive easement, and thus entry of the judgment against him was appropriate.

It is undisputed that Begley's use of the subject driveway began as a result of his receiving permission from the Paces. Begley's own testimony indicates that he both sought the Paces' permission and performed various tasks to receive it. Further, the testimony of Begley's former wife of more than 20 years reveals that, at least during their years together, the

Begleys knew that they would have had to relinquish their use of the driveway had the Paces revoked their permission.

This Court has previously held that a prescriptive right to use a passway cannot be acquired no matter how long the use continues *if* it originated as a permissive use by the owner of the servient estate. *Cole v. Gilvin*, 59 S.W.3d 468 (Ky. App. 2001). *See also Jackey v. Burkhead*, 341 S.W.2d 64 (Ky. 1960) (where use of way is permissive, no prescriptive right to it is acquired, although it may have been used for 15 years or more); *Tapley v. Lee*, 205 S.W.2d 310 (Ky. 1947) (right to a passway cannot be acquired following grant of permissive use given to dominant landowner by servient landowner, however long such use might continue). Rather, when the use begins with permission, in order for it to be transformed into a prescriptive title the claiming party must prove that at some point subsequent to the grant of permission he made a distinct and positive assertion of a claim of right against the servient estate owner. *Newberry v. Hardin*, 161 S.W.2d 369 (Ky. 1942).

Begley contends that he offered proof of such an assertion of right through his long-standing use of the driveway. He further argues that the trial court erred by not accepting his continued use as evidence sufficient to establish a *prima facie* case of a prescriptive easement. Contrary to Begley's argument, however, mere length of use of a passway is

insufficient proof of a "distinct and positive assertion" of a claim of title. As discussed above, if a right of use is acquired by permission, it remains permissive for as long as the use continues. *See Jackey, supra; Tapley, supra; Cole; supra.* Barring some other "distinct and positive assertion" of an adverse claim of right, when use of a passway begins as a permissive right, long-standing use alone simply can not alter the character of its use so as to give rise to a prescriptive claim of right. *McCoy v. Hoffman*, 295 S.W.2d 560 (Ky. 1956); *Lambert v. Huntsman*, 209 S.W.2d 709 (Ky. 1948); *Richardson v. Horn*, 137 S.W.2d 394 (Ky. 1940).

Thus, we agree with the trial court that the only evidence offered by Begley – his three decade use of the driveway – was insufficient to sustain his claim for a prescriptive easement. Aside from his period of use, the record is devoid of any evidence that demonstrates an actual, open, notorious, forcible, exclusive, and hostile claim of right made by Begley in favor of such an easement. *Cole, supra.* Because of this, his right of use that originated as a permissive one never changed its character. Accordingly, the trial court correctly determined that Begley failed in his duty to present "at least some affirmative evidence" demonstrating that there is a question of material fact warranting trial. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

We are aware that our Supreme Court has, on occasion, denied the owner of a servient estate the power to withdraw previously given consent concerning the use of a passway. *See, e.g., Holbrook v. Taylor*, 532 S.W.2d 763 (Ky. 1976); *Akers v. Moore*, 309 S.W.2d 758 (Ky. 1958); *McCoy v. Hoffman*, 295 S.W.2d 560 (Ky. 1956). In these decisions, an "easement by estoppel" was recognized when the owner of the dominant estate, in reliance upon permission to use a passway, had expended considerable funds and efforts to effect improvements on the passway or the dominant estate, or both. Moreover, in addition to the substantial improvements, the owner of the dominant estate also had demonstrated that he would be without any practical means of ingress and egress had the servient estate owner not been estopped from withdrawing permission.

We find neither of these prerequisites in this case. While it is true that Begley constructed a small wooden bridge on the servient estate over a creek or ditch, we do not believe that this improvement is so substantial as to warrant estopping the Colemans from withdrawing their permission regarding Begley's use of the driveway. Further, while the disputed driveway may be a more convenient means for Begley to access his property, he admits that it is not the only means of access

available to him. Under these circumstances, there is simply no basis for finding an easement by estoppel.[1]

Because we agree with the trial court that Begley's right to use the driveway in question was at all times permissive and never rose to the level of a prescriptive easement or an easement by estoppel, we need not address his arguments concerning the loss of that alleged easement through the foreclosure of his property. The July 28, 2005, judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Russell D. Alred
Harlan, Kentucky

BRIEF FOR APPELLEE:

Otis Doan, Jr.
Doan Law Office
Harlan, Kentucky

[1] Even if we were to find that, prior to the foreclosure of Begley's property, the Colemans were estopped from denying Begley permission to use the driveway, the ultimate result herein would be the same. When National City Bank foreclosed on the Begley property and later purchased it at auction, it acquiesced in the Colemans' desire to withdraw permission for use of the driveway. Thus, even though Begley later repurchased his property, his right to use the driveway had been extinguished through National City Bank's agreement with the Colemans.