

RENDERED: DECEMBER 12, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001215-MR

HAROLD LYKINS

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOANN SPINKS COLEMAN, JUDGE
ACTION NO. 05-CI-00084

RICKY J. TACKETT, ELIZABETH TACKETT,
DAVID MINIX AND TINA MINIX

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, TAYLOR, AND WINE, JUDGES.

CAPERTON, JUDGE: The appellant, Harold Lykins (Lykins), appeals the January 4, 2007, Bench Trial Order of the Magoffin Circuit Court denying Lykins' claim of a prescriptive easement over the land of David Minix (Minix) and his

sister, Elizabeth Tackett (Tackett). Lykins asserts that this decision was clearly erroneous, not supported by substantial evidence, and should be reversed.

Tackett and Minix, and their respective spouses, filed a trespass action against Lykins because of his construction of a roadway from his bridge over the Middle Fork Creek, across their property, and across a portion of property belonging to Della Arnett (Arnett), to the main black top road called Middle Fork Road. Lykins apparently constructed the road from the bridge to the main road and across the Tackett-Minix property by filling in portions of that property with dirt to a depth of 10 to 12 feet.

Tackett and Minix inherited their tract of property from their mother, Sharon Minix. Sharon Minix's will was probated in Magoffin District Court on September 10, 1997. Sharon had previously inherited an interest in that property from her father, Corbett Arnett, and purchased the remaining interest from her mother, Ruth Arnett, by deed dated July 27, 1988. Tackett testified that her family had owned this particular tract of property for over 100 years prior to this court action.

Lykins purchased his property from the heirs of Claude Gose on April 28, 1988. Prior to purchasing that property, Lykins purchased an adjoining tract of property, previously known as the Watt Patrick Farm, in 1973. Lykins asserts that the prior owners of these tracts of land accessed their property by crossing the Middle Fork Creek at a ford, and then travelling the road in question to the

blacktop road. Lykins asserts that he constructed the concrete bridge at the location of the old ford.

On April 18, 2005, Tackett and Minix filed suit against Lykins and his sister, who was mistakenly assumed to be his wife, and ultimately did not participate in this suit. The complaint filed by Tackett and Minix alleged trespass by Lykins in the construction of the roadway over their property. Lykins filed an answer and counterclaim, alleging that the roadway in question was either a county roadway or, alternatively, that Lykins and his predecessors in title had acquired a prescriptive easement for the roadway.

Elizabeth Tackett was called to testify in this matter, and stated that she and her parents lived in the Dixie Addition of Salyersville, Kentucky, but raised gardens on their farm, and also rented out a house on that land. Tackett testified that during her childhood, her mother would travel to the farm at least once per day in the summer, and once or twice a week during the remainder of the year. Tackett further testified that as a child she swam in Middle Fork Creek in the area where the bridge was constructed by Lykins. Tackett testified that some parts of the creek were over her head, and some parts were shallow. Tackett testified that in all the years her family has owned the property, she has never seen anyone drive a motor vehicle through the creek, and that the texture of the creek bottom would make that impossible.

Tackett testified that there was an old walk bridge across Middle Fork Creek which spanned from Arnett's property to Harold Lykins' property. That

bridge was approximately 300 to 500 feet from both the location of the concrete bridge constructed by Lykins and the roadway that he built across the Tackett property. Tackett testified that there was a wire fence surrounding her property, which was constructed in the 1980's, and which spanned from Middle Fork Road to the property of Della Arnett.

Tackett and Minix apparently discovered Lykins' intention to construct a bridge across Middle Fork Creek and the accompanying road over their property when neighbors called to inform her that someone was bulldozing on her property. Tackett testified that she sent a letter to the Army Corps of Engineers protesting the construction of the bridge, and that she also called Lykins at his Ohio residence to inform him that he was on her property, and to request that he immediately cease construction of the connecting road.

Arnett testified in this matter by deposition. She testified that she had given easement to Lykins to construct a bridge across Middle Fork Creek from his property onto her property. Arnett testified that although there used to be a swinging bridge used to cross Middle Fork Creek from her property, the concrete bridge constructed by Lykins was not in this location. Arnett viewed photos of remnants of the swinging bridge, and identified those remnants as the bridge that Claude Gose, one of Lykins' predecessors in title, used to cross the creek. Arnett testified that the two ways for Gose to access the property were either to utilize the swinging bridge or to travel a back way. Arnett testified that in the past 87 years, she has never seen anybody take horses or cattle across Middle Fork Creek in the

area where Lykins built the bridge, nor has she ever seen anybody drive a motor vehicle through the creek at that point. Arnett further testified on cross-examination that there was never a low water ford in the area where Lykins constructed the concrete bridge.

Minix, who owns the property at issue jointly with Tackett, testified that in 1978, an oil well company bulldozed some trees and drilled an oil well on their property, and in the process constructed a well road from the blacktop road to the well site. Minix testified that the well road did not extend past the oil well, as the creek bottom was lower than the well and swampy. Minix also testified that he had never seen anyone drive a motor vehicle through Middle Fork Creek in the area where Lykins constructed the bridge.

Tackett's husband, David, also testified in this matter, stating that the depth of the fill dirt placed by Lykins on the Tackett-Minix property was over 12 feet in some areas, and was approximately seven or eight feet near the bridge. David further testified that near the remnants of the swinging bridge on the Arnett property, approximately 300 feet from the concrete bridge built by Lykins, there was evidence of a low water ford. David testified that there was no evidence of a low water ford where Lykins constructed the concrete bridge.

Magoffin County Judge Executive Bill May also testified in this matter. He stated that he was approached by Tackett when Lykins published plans to construct his bridge across Middle Fork Creek. Judge May testified that as County Judge Executive, it was his duty to keep a map of all of the county and

public roads in Magoffin County. Judge May testified that the roadway which Lykins claims existed over the Tackett-Minix property does not appear on any portion of the county road map for Magoffin County.

Harold Minix is the father of Elizabeth Tackett and David Minix. He testified that he and his wife, Sharon, married in 1965 and that he was familiar with the property on Middle Fork Creek because they rented out the house on the property and raised gardens there. Harold testified that he has never seen anyone drive a motor vehicle through Middle Fork Creek to their property, and that the area in which Lykins built the bridge was too swampy and silty to be traversed by motor vehicles. Harold testified that upon discovering that Lykins was going to build the bridge and attempt to construct a road across his son and daughter's property, he informed Lykins that he did not have a right to put fill dirt or build a road across the property, as no roadway or pathway had ever existed there previously.

Homer May, a second cousin to Tackett and Minix, testified that he was familiar with the Middle Fork property, and the area in which Lykins built the bridge and roadway. May testified that there was never a low water ford or any way for people to cross the creek in the area where Lykins built the bridge. Further, May testified that he had never seen anyone cross the creek at that location by motor vehicle.

John David Bailey, son-in-law of Arnett, also testified in this matter, and was familiar with Arnett's property on Middle Fork Creek. Bailey testified

that he has never seen anyone cross the creek in a motor vehicle at the location where Lykins constructed the concrete bridge. Bailey also testified that an old creek ford was located by the swinging bridge approximately 400 to 500 feet from where Lykins constructed his concrete bridge.

Lykins himself also testified in this matter, stating that he had been raised one mile from the road in question, and had traveled over the road for as long as he could remember, both on horses and in wagons, and later in vehicles. Lykins testified that he never requested anyone's permission to travel the roadway, and that he had used the roadway for more than fifteen continuous years. Lykins asserts that the location in which he built his bridge is the same as where the ford went into and out of the creek.

James Gasparac, a witness called on behalf of Lykins, testified that he had lived on Gose Branch until 1964, at which time he moved to an area nearby. Gasparac testified that he and the Risner family had travelled the road in excess of fifteen continuous years, which apparently occurred from the 1960s until sometime in the 1970s. Gasparac testified that he never drove a car or truck across the creek, but had driven a big dozer across the creek when the water was really low. Gasparac testified that other people had driven across the creek and that people used the swinging bridge much more often than they used the creek ford.

Paul Gasparac, James Gasparac's brother, testified that the Gasparacs lived on Gose Branch until 1964, and that on one occasion, he had traveled across the low water ford with Watt Patrick and Frank Risner. However, Paul Gasparac

could not testify as to whether or not the low water ford had been used for 15 continuous years for vehicle traffic. Gasparac testified that the ford was located just below the swinging bridge.

Lykins also called his brother, J.T. Lykins, as a witness in this matter. J.T. testified that he is eighty years old, and had, on one occasion, forded Middle Fork Creek in a motor vehicle sometime in the 1970s. J.T. testified that he had only done this on one occasion, and had never seen anyone else drive across the creek in a motor vehicle.

Lykins also called Paul Bussey to testify in this matter. Bussey testified that he used the roadway almost every day for a year in direct examination. However, on cross-examination, Bussey acknowledged that at times, he could not use the ford when the water was too high due to the amount of rain. Bussey also testified that in the 1970s, a wooden bridge was constructed on Middle Fork and most people utilized it. Bussey testified that the roadway was used for fifteen or more continuous years by people who lived in the area.

Harold Rowe also testified in this matter. Rowe testified that he has lived in the Middle Fork area of Magoffin County for the past forty years, and that he lives approximately one-fourth of a mile from Lykins' property. Rowe testified that he was employed as a grader operator in the past for Magoffin County under two different administrations. Rowe testified that he never operated a grader or any county equipment in the area of the gravel road constructed by Lykins from the concrete bridge up to Middle Fork Road. Rowe further testified that he was

familiar with the ford in the Middle Fork Creek, that he had seen the Gose family take a wagon and pair of horses across the creek, and that this was near the location of the previous swinging bridge, and not where Lykins later built the concrete bridge. Rowe testified that he never saw anyone cross the creek at the location of the Lykins' bridge in a truck or car.

Arville Howard testified in this matter as well, stating that from 1970 through 1977 or 1978, he used the ford only during the summer months when the creek was low enough to "get in it." Howard testified that the ford was at the same location as the new bridge, and that the roadway had been used continuously for over fifteen years. Howard further testified that in the mid-1970s, a wooden bridge was constructed on his property across the creek which provided everyone with another way to cross the creek aside from the low water ford.

Finally, Pat Montgomery, a former sheriff of Magoffin County, testified that he lived on the property now owned by Lykins from 1968 until 1978. Montgomery was uncertain as to the location of the ford in respect to the new bridge, but did remember the roadway being used since 1953. Further, Montgomery stated he had seen the County grade the road in dispute, and that the roadway had been used for vehicular travel for over fifteen years. M.J. Spurlock, who worked for the Magoffin County Road Department for twenty-six years, testified that he had graded the road in question.

A bench trial was held in this matter before the Magoffin Circuit Court on May 1, 2006. After hearing evidence from both parties, the case was left

open for the taking of additional witness testimony by deposition. Lykins asserts that though additional witnesses testified and their depositions were filed with the court clerk, they were not initially considered by the Special Judge, who was not provided with the additional testimony.

On January 4, 2007, the circuit court issued a decision in favor of Tackett and Minix, finding that Lykins had not obtained a right to travel the roadway by prescriptive easement. Lykins filed a motion to alter, amend, or vacate the judgment pursuant to Kentucky Rules of Civil Procedure (CR) 59, arguing that the court did not consider the testimony of the additional witnesses taken by deposition. This motion was overruled on May 31, 2007, and this appeal followed.

On appeal to this Court, Lykins asserts that the trial court erred in ruling that Lykins had not acquired a prescriptive easement over the Tackett-Minix property. We note first that this matter was tried before the court below without a jury. Accordingly, the factual findings of the court shall not be set aside unless clearly erroneous. *See* CR 52.01. Further, due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *See Lewis, infra.*

Factual findings are not clearly erroneous if supported by substantial evidence, which is evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men. *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Judgment of the weight and credibility of the evidence is the sole province of the fact-finder. *Lewis*

v. Bledsoe Surface Mining Co., 798 S.W.2d 459 (Ky. 1990). With respect to property title issues, the appropriate standard of review is whether the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for that of the trial court absent clear error. *Cole v. Gilvin*, 59 S.W.3d 468, 473 (Ky. App. 2001), citing *Church & Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 323 (Ky. 1992). We review this matter with these standards in mind.

A prescriptive easement is a property right in one landowner, the dominant tenement, representing a privilege to use the land of another, the servient tenement, based upon a presumed grant arising from the adverse, uninterrupted, and continued use of such land for a fifteen-year period. *Cole v. Gilvin*, 59 S.W.3d 468, 473 (Ky. App. 2001), citing *Illinois Central R.R. Co. v. Roberts*, 928 S.W.2d 822, 827 (Ky. App.1996).

As our Supreme Court stated in *Columbia Gas Transmission Corporation v. Consol of Kentucky, Inc.*, 15 S.W.3d 727, 730 (Ky. 2000), the law of prescriptive easements is derived from the principles underlying adverse possession of property interests generally. As with adverse possession of a fee simple estate, a prescriptive easement can be acquired by actual, hostile, open and notorious, exclusive, and continuous possession of the property for the statutory period of 15 years. See KRS 413.010, *Riley v. Jones*, 174 S.W.2d 530, 531 (Ky. 1943), and *Pickel v. Cornett*, 147 S.W.2d 381, 382 (Ky. 1941).

In his brief to this Court, Lykins asserts that the evidence establishes that he met the aforementioned standards to obtain a prescriptive easement, and that the court's finding of occasional and insufficient use was not supported by substantial evidence. Having reviewed the record in detail, including the testimony of the witnesses, the trial transcript, and the briefs of the parties, we cannot agree.

As noted, it was for the trial court, and solely the trial court, to judge the weight and the credibility of the evidence in this matter. It was the trial court who directly observed the witnesses in this matter and reviewed their testimony, and it was the trial court that had the opportunity to judge the credibility of those witnesses first-hand. It is our function to overturn those findings *only* when they appear clearly erroneous, that is, not supported by substantial evidence. In this case, we cannot so find.

Having reviewed the January 4, 2007, order of the trial court, we find that it is clear that the court thoroughly considered the testimony and evidence provided, and after doing so, found that Lykins failed to produce evidence sufficient to support each of the elements set forth in *Cole, supra*. It was the trial court's finding that in rural areas, occasional crossings of another's land can be tolerated and accepted without granting unto the user any right of continuous use.

Further, and we believe correctly, the court interpreted *Cole* to stand for the proposition that in order to gain a prescriptive easement, the affected landowner must clearly be put on notice that the user intends to create for themselves an ongoing right of use. It was for the trial court to determine if Lykins

met this burden; it determined that he did not. Having reviewed the evidence presented by Lykins, we cannot find it to be so overwhelming as to warrant a determination that the trial court committed clear error in finding for Tackett and Minix.

Accordingly, we hereby affirm the January 4, 2007, Order of the Magoffin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Gordon B. Long
Salyersville, Kentucky

BRIEF FOR APPELLEES:

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