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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000735-MR

WILLIAM EARL CORBIN
AND BILLIE JEAN CORBIN — APPELLANTS

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-CI-00855

GARY W. FREY AND
PATRICIA C. FREY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

LAMBERT, JUDGE: In this property dispute regarding the status of a portion of an easement, William Earl Corbin and Billy Jean Corbin (the Corbins) have appealed from the Bullitt Circuit Court's January 25, 2011, findings of fact, conclusions of law, and judgment extinguishing a portion of the easement, as well

as from the order denying their motion to alter, amend, or vacate that ruling. We have reviewed the parties' arguments as well as the record on appeal, and we hold that the circuit court did not commit any error in its ruling.

Gary W. Frey and Patricia C. Frey (the Freys) purchased 8.23 acres of real estate located at 400 Dennis Road in Lebanon Junction, Kentucky by deed dated May 31, 2005. The Freys purchased this property from former owners Vincent Leo Hutchins and Charlotte Hutchins, who had purchased the property on March 8, 2002, from Provident Bank. The Corbins purchased the adjoining tract to the south of the Freys' property from Jerry Plato Corbin and Judy Corbin by deed dated July 17, 1993.[1] Both properties were encumbered with a 259.91 foot long easement to be used as a private road for ingress and egress beginning on Dennis Road and running east on either side of the common property line. The width of the fifty-foot-wide private road was split equally between the two properties.

On July 1, 2008, the Freys filed a complaint against the Corbins seeking to quiet title to a portion of the easement on their own property due to abandonment by the Corbins. The Freys asserted that the Corbins had failed to use any portion of the private road on their (the Freys') property to access their own real property for more than fifteen years. The Corbins filed a counterclaim against the Freys, seeking damages for their unlawful interference with their use of the easement.

[1] The Corbins had previously owned the same property, having conveyed the real estate by deed to Jerry Plato Corbin in 1989.

The matter proceeded to a bench trial on October 23, 2009. That day, the court heard testimony from the plaintiff, Gary Frey. Mr. Frey testified that he and his wife purchased their property by deed dated May 31, 2005. At the time of the purchase, there was a fence around the property, a house on the hill, a pole barn, and a workshop by the barn. The 30-foot-wide gravel driveway (the front portion of the easement) began at Dennis Road, and continued for about 40 feet until it split into separate driveways leading to his and the Corbins' respective properties. After the split, a fence separated the two halves of the easement between the properties. Mr. Frey used the area on his side of the fence for recreation purposes, and he and his wife did not have any access to the Corbins' property from their side, in part because of the red barn the Corbins placed on their side of the fence. He explained that there had been a barn at the end of the easement as long as he had owned the property and that he had never had any conversation with the Corbins regarding his use of the easement on the Corbins' side of the fence. In May 2008, the Corbins took down a portion of the fence and an elm tree on the Freys' side of the fence. The Freys were both away from home at this time, and Mr. Frey notified the sheriff's department when he discovered what had happened. The Freys then filed the instant lawsuit.

The trial recessed in order for the Freys to take the deposition of Vincent Leo Hutchins, the prior owner of their property. Mr. Hutchins purchased the property at 400 Dennis Road through a bank sale in March 2002. He later sold the property to the Freys in 2005. Although he did not purchase the property until

2002, Mr. Hutchins had been a regular visitor since becoming friends with the prior owner, Frederick Rousch, in the late 1970s or early 1980s. Mr. Hutchins visited Mr. Rousch every weekend until Mr. Rousch moved to Florida in the 1990s. He recalled that the fence running between the properties along the middle of the easement had been erected by Mr. Corbin prior to the 1980s to protect his pets. When Mr. Hutchins purchased the property, he knew there was a shared easement between his property and the Corbins' property. Mr. Hutchins testified that he fixed the fence when it fell down by putting a pole into the ground to hold it up. He also recalled the red barn on the Corbins' side of the fence, which had been there for fifteen to twenty years, and seeing Mr. Rousch plant the tree close to the easement line on his side of the property when he owned the land. Mr. Hutchins also testified that he planted many trees, noting the swampy condition of the land in the easement, and that he had no way through the fence to the Corbins' property. Mr. Hutchins cut the grass on his side of the fence and never placed any gravel or spread for a driveway.

The bench trial resumed March 3, 2010. The parties specifically described the area of the easement in dispute as the portion that runs from the split of the shared driveway to the end of the easement where the barn sits. The Corbins indicated that they needed to use the easement as a private drive to have enough room for tractor trailers to pull onto the property. The Corbins' son, Kevin Corbin, was the sole witness to testify that day. Kevin testified that he had worked on the property over the years, and that in July 1979, he put the fence up between the two

properties at his father's request to deter thieves. He recalled that they initially used the whole easement, but no longer used it once they installed the fence. Kevin also testified that a barn was placed into the curved area of the easement. As to the Corbins' present need to use the easement, Kevin testified that they were developing the property, which was zoned as light industrial, and needed space for tractor trailers to enter in order to do so. He stated that they never meant to shut off the easement.

The circuit court issued its findings of fact, conclusions of law, and judgment on January 25, 2011. The court found as follows:

> Based on the testimony of the parties and the exhibits introduced the Court finds the easement was created by grant as a result of conveyance by deed. Kentucky law provides that mere non use [sic] of an easement created by deed does not, however, create abandonment. There must be more than nonuse. . . .
>
> In this case Defendant's [sic] maintain that their nonuse is insufficient to establish adverse possession. However, nonuse is a factor to be considered in establishing abandonment. . . .
>
> This Court finds in this action that Plaintiff's [sic] and their successors in title have shown possession of the disputed property for a period in excess of 15 years. The Court further finds that planting of trees, regular mowing of real estate, and Defendant's placement of the fence where it is located documents that Plaintiff's claim is actual, open and notorious, exclusive and continuance [sic]. The Court further finds that these facts, along with placing the barn in the curve where the easement area would be located, are evidence that the Defendant's [sic] intended to abandon the easement and are further evidence of the open and notorious claim of Plaintiffs.

> So much so that the court finds the Plaintiffs are entitled to the area in dispute by adverse possession.
>
> The Court therefore finds Plaintiff's [sic] have established the requisite components of adverse possession for a period in excess of 15 years. In particular the Court finds that Plaintiffs, and their successors in title, have evidenced that their intention to hold dominion over the property by the planting of trees thereby giving Defendant's [sic] notice of their adverse claim. The Court also finds that Defendant's [sic] have recognized the adverse nature of the claim by Kevin Corbin's testimony that the fence was placed on the south side of the existing drive and by placement of a barn in the area where the curve would take the road onto Defendant's property. These facts clearly evidence an intention that the area not be used for roadway purposes.

Based upon these findings, the court extinguished the private road easement on the Freys' property and voided all rights of the Corbins and their successors to use the extinguished easement. The court also denied the Corbins' counterclaim.

The Corbins timely moved to alter, amend, or vacate the judgment, arguing that because they were the dominant tenants in an appurtenant easement situation, the easement could not be terminated by an act of the parties. They asserted that sporadic acts by the Freys were not enough to establish adverse possession, and that the fence was only intended to keep out trespassers. In response, the Freys contended that the Corbins created impossibility of use through their actions. By order entered March 28, 2011, the circuit court denied the Corbins' motion. In so ruling, the court concluded that the Corbins' actions, along with its other findings, were "sufficient to justify an affirmative action as opposed to mere nonuse." This appeal now follows.

On appeal, the Corbins continue to argue that the circuit court erred in its ruling, contending that the Freys did not establish that they adversely possessed the easement or that any of the parties' actions worked to extinguish the easement as to the dominant estate. The Freys, on the other hand, contend that the circuit court properly found that the Corbins had abandoned the easement located on their (the Freys') property and that they had adversely possessed the portion of the easement at issue.

Because this matter was tried before the court without a jury, our standard of review is as follows: An appellate court may set aside a lower court's findings made pursuant to Kentucky Rules of Civil Procedure (CR) 52.01 "only if those findings are clearly erroneous." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). To determine whether findings of fact are clearly erroneous, we must decide whether the findings are supported by substantial evidence:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (footnotes omitted). "With respect to property title issues, the appropriate standard of review is whether or not 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." *Phillips v. Akers*, 103 S.W.3d 705, 709 (Ky. App. 2002), citing *Church and Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 323 (Ky. 1992), cert. denied, 514 U.S. 1110, 115 S.Ct. 1962, 131 L.Ed.2d 853 (1995).

The only factual issue raised by the Corbins in their appeal relates to the circuit court's finding that trees had been planted in the easement. Our review of the record confirms this finding; Mr. Hutchins testified in his deposition that he had planted several trees in the area of the easement, and additionally testified that Mr. Rousch planted the elm tree next to the easement line. Therefore, we hold that substantial evidence exists to support this factual finding of the circuit court.

We shall now consider whether the circuit court properly concluded that the easement should be extinguished due to the Corbins' nonuse coupled with the Freys' and their predecessors' in title adverse actions with regard to their use of the property.

We begin our analysis with the definition of an easement. This Court recently addressed the subject of easements in *Dukes v. Link*, 315 S.W.3d 712 (Ky. App. 2010), and provided an excellent introduction to this area of the law:

> Easements are created by express written grant, implication, prescription or estoppel. An express easement is created by a written grant with the

> formalities of a deed. *Loid v. Kell*, 844 S.W.2d 428, 429 (Ky. App. 1992). The nature of an easement is distinguishable from a mere license in that it is an incorporeal right-always separate and distinct from the right to occupy and enjoy the land itself. *Lyle v. Holman*, 238 S.W.2d 157, 159 (Ky. 1951). It is a privilege or an interest in land and invests the owner with "privileges that he cannot be deprived of at the mere will or wish of the proprietor of the servient estate." *Louisville Chair & Furniture Co. v. Otter*, 219 Ky. 757, 294 S.W. 483, 485 (1927). In contrast to a restrictive covenant that restricts the use and enjoyment of property, an easement confers a right upon the dominant tenement to enjoy a right to enter the servient tenement. *See Scott v. Long Valley Farm Kentucky, Inc.*, 804 S.W.2d 15, 16 (Ky. App. 1991).
>
> Easements can be in gross or appurtenant, the distinction being that "in the first there is not, and the second there is, a dominant tenement to which it is attached." *Meade v. Ginn*, 159 S.W.3d 314, 320 (Ky. 2004) (quoting 25 Am.Jur.2d *Easements and Licenses in Real Property* § 11 (1996)). An easement appurtenant inheres in the land and cannot be "terminated by an act of the parties (for example, abandonment, merger, or conveyance) or by operation of law, as in the case of forfeiture or otherwise." *Scott*, 804 S.W.2d at 16.

Dukes v. Link, 315 S.W.3d at 715. The Court stated that "[f]orfeiture of easements is not favored in the law and its mere nonuse without adverse possession is not sufficient to establish abandonment." *Id*. at 718.

The seminal case addressing the abandonment of an easement is *Johnson v. Clark*, 22 Ky. 418, 57 S.W. 474 (1900), in which the former Court of Appeals extensively addressed this issue. The Court began its analysis with a statement of the law in general:

> The law is well settled that mere nonuser of an easement acquired by grant does not destroy the easement; that, to do so, there must be an adverse use by the servient estate for a period sufficient to create a prescriptive right. The right to the use is not extinguished by mere failure to exercise it. There must be some act upon the part of the owner of the servient estate which is wholly inconsistent with the existence of the easement. *See Curran v. City of Louisville*, 83 Ky. 632, and authorities cited there.

Johnson v. Clark, 57 S.W. at 475. The Court then quoted Jones on Easements, § 863 regarding what proof is necessary to extinguish an easement by abandonment, making clear that evidence of nonuse alone is not sufficient:

> "Mere nonuser of an easement created by deed, however long continued, does not create an abandonment. This occurs only where in connection with nonuser there is a denial of title, or some act by an adverse party, or attendant facts and circumstances showing an intention on the part of the owner of the easement to abandon it. It is not the duration of the cesser to use the easement, but the nature of the act done by the owner of the easement, or the adverse act acquiesced in by him, and the intention which the one or the other indicates, that is material." And in section 865 the same author says: "In order to extinguish an easement by grant, there must be some conduct on the part of the owner of the servient estate adverse to and in defiance of the easement, and the nonuse must be the result of it, and must continue for the statutory period of limitation; or, to produce this effect, the nonuse must originate in or be accompanied by some unequivocal acts of the owner inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it, and the owner of the servient estate must have relied or acted upon such manifest intention to abandon the right, so that it would work harm to him if the easement should be thereafter obstructed. Nothing short of an adverse and hostile use of the servient estate, inconsistent with the rights of the owner of the easement, will start the statute of limitations running to defeat his right; and nothing short of a

> continuous adverse use of the period of the statute will establish a right by prescription in the adverse claimant."

Id. The Court followed this rationale in later cases, including *Schade v. Simpson*, 173 S.W.2d 801 (Ky. 1943), *City of Harrodsburg v. Cunningham*, 184 S.W.2d 357 (Ky. 1944), and *Dukes v. Link*, *supra*.

In *Schade v. Simpson*, *supra*, the Court further explained the adverse possession element regarding the termination of an easement:

> Adverse possession and use for the prescriptive period will terminate an easement, but, to be effective, adverse possession of a right of way by the servient owner must be of the same character required to obtain title to real estate and the use must be wholly inconsistent with the right to enjoy the easement and amount to an ouster of the dominant owner.

Schade v. Simpson, 173 S.W.2d at 803, citing *Brookshire v. Harp*, 186 Ky. 217, 216 S.W. 379 (1919); *Morris v. Daniel*, 183 Ky. 780, 210 S.W. 668 (1919). The basic elements required to establish title through adverse possession are well-settled in the Commonwealth:

> [A] claimant must show possession of disputed property under a claim of right that is hostile to the title owners interest. Further, the possession must be shown to be actual, open and notorious, exclusive, and continuous for a period of fifteen years. The 'open and notorious' element requires that the possessor openly evince a purpose to hold dominion over the property with such hostility that will give the non-possessory owner notice of the adverse claim. Absent proof that the possessor made physical improvements to the property, such as fences or buildings, there must be proof of substantial, and not sporadic, activity by the possessor.

Phillips v. Akers, 103 S.W.3d at 708 (internal quotations and citations omitted). "The party claiming title through adverse possession bears the burden of proving each element by clear and convincing evidence." *Id*. at 709.

Turning to the present case, we hold that the circuit court did not commit any error or abuse its discretion in holding that the Freys and their predecessors in title adversely possessed the portion of the easement at issue and that the Corbins abandoned their property interest in the easement. While the private road easement was originally used for its intended purposes of ingress and egress, that use ended when the Corbins erected the fence in the late 1970s and then placed a barn where the easement turned into their property. Because the easement was created by grant, the Corbins' nonuse of the easement on the Freys' side, by itself, would not be sufficient to establish abandonment. However, the adverse actions of the Freys and their predecessors in title, coupled with the Corbins' actions, were enough to establish the Corbins' intent to abandon the easement.

Over the course of more than fifteen years, the owners of the Freys' property were the sole users of the easement on their side of the fence. Mr. Hutchins testified about the trees that had been planted in and near the area of the easement over the years. Mr. Hutchins recalled that he cut the grass on the easement and that there was never any gravel or spread in the area to support a roadway. Mr. Frey testified that he also maintained the area of the easement once he purchased the property. He mowed the grass and used the area for recreation activities and camping. The actions of the Freys and the earlier owners of the property establish

by clear and convincing evidence that their possession of the easement was hostile to the Corbins' interest; actual; open and notorious; and exclusive. Furthermore, this possession was continuous for more than fifteen years, as established by the testimony regarding the erection of the fence thirty years earlier.

Accordingly, we hold that the circuit court did not commit any error in holding that the Freys possessed the easement by adverse possession and that the Corbins' actions in erecting a fence and a barn evidenced their intention to abandon the easement. Therefore, the circuit court properly extinguished the portion of the easement in dispute.

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

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
James R. Miller Shepherdsville, Kentucky	Mark E. Edison Shepherdsville, Kentucky