RENDERED: NOVEMBER 1, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000958-MR
AND
NO. 2011-CA-001009-MR

NEIL OWEN ABNEY; DONNA JEAN ABNEY; FRANCIS RONALD BLANDFORD; DEBORAH LEE BLANDFORD; DAMIAN CECIL BLANDFORD; AND LISA RENEE BLANDFORD — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 08-CI-00142

WILLIAM LEE MILES; MARIA MILES; BILLY C. GARDNER, JR.; AND MARLA GARDNER — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; NICKELL AND STUMBO, JUDGES.

NICKELL, JUDGE: The primary issue in this appeal and cross-appeal is whether there was substantial evidence supporting the conclusion of the trial court that an easement provides access to property owned by appellees/cross-appellants (collectively "Miles") across property owned by appellants/cross-appellees (collectively "Blandford"). Having examined the record in light of the arguments presented, we affirm.

There appears to be no dispute as to many of the facts precipitating this appeal. In 2008, Blandford instituted a quiet title action to preclude Miles from using the portion of a passway often referred to as "Possum Hollow Road" which traverses Blandford's forty-acre tract located in Hart County, Kentucky. In response to this action, Miles asserted an easement entitled them to use the passway in question to access their 100-acre tract which abuts the Blandford property. The alleged easement is a thirty-foot-wide passway traversing the entire length and center of the Blandford property, connecting the public portion of Possum Hollow Road at the north and the Miles property at the south. Thus, Miles alleges the Blandford property is the servient estate and the Miles property is the dominant estate.

The pivotal point in the history of the Blandford and Miles tracts appears to be a period of approximately ten months in 1999 when both properties were owned by a third party, Chris McGehee. While McGehee owned both parcels in fee, any prior easement merged into the servient estate and terminated. *Meade v. Ginn*, 159 SW3d 314, 323 (Ky. 2004). Significant to the matter before us,

McGehee transferred the 100-acre tract to Joseph Mann on October 18, 1999, by deed specifically including the following language concerning access:

> Party of the first part (Seller) retained a 30' egress-engress (sic) from adjoining 40 acres (sic) tract through existing roadway (Possum Hollow Road) for the purpose of entering this 100 acre tract.

The deed also created an easement replacing all previous access easements through the property of Lawrence Waddell. It is undisputed that identical easement language was stated in subsequent deeds to the 100-acre tract including the December 27, 2007, deed from J.C. and Laurel Yeager to Miles.

On November 17, 2004, McGehee deeded to Blandford the forty-acre tract referred to in the Miles' deed. While the deed's legal description mentions an "open road," it is undisputed that Blandford's deed does not mention the easement McGehee included in the deed to the 100-acre tract. Thus, it appears the easement language was included in the deed to the dominant estate (100-acre tract), but not included in the deed to the servient estate (forty-acre tract). As noted by the trial court, this "sad state of affairs" can be traced to that omission.

The trial court heard evidence that Possum Hollow Road extends beyond its county-maintained portion providing ingress and egress for other landowners on the road. In 1999, Frank Blandford, father of some of the Blandford appellants, acquired a sixty-three-acre tract along Possum Hollow Road at the point where county maintenance ends. Sometime in 2002, Frank Blandford erected a gate about fifteen feet from the end of county maintenance. Frank Blandford testified

the purpose of the gate was to stop people from dumping junk and trash on his property. Although Frank Blandford stated he never gave a key to the owners of the Miles tract, he acknowledged giving gate keys to three other adjoining property owners who used the passway to access their property (including the prior owners of the Blandford tract) and admitted he did so because he did not believe that he had the right to control the road or deny them access to their property. Frank Blandford subsequently deeded his sixty-three-acre tract to his children who later acquired the forty-acre tract at issue in this appeal.

The primary factual disputes centered upon the extent and character of Possum Hollow Road beyond the county-maintained section and the extent of Blandford's knowledge of an alleged easement/right-of-way benefitting the 100-acre tract. After conducting a bench trial and personally inspecting the two tracts and purported easement, the trial judge entered findings of fact and conclusions of law holding that the passway constituted an easement by necessity. This appeal and cross-appeal followed.

The familiar standard by which we review cases tried before the court without a jury is clearly set out in *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001):

> Since this case was tried before the court without a jury, its factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses...." A factual finding is not clearly erroneous if it is supported by substantial evidence. However, a reviewing court is not bound by the trial

> court's decision on questions of law. An appellate court reviews the application of the law to the facts and the appropriate legal standard *de novo.*

(Footnotes omitted). In the instant case, the trial court specifically rejected the contention that an express or prescriptive easement had been created in favor of the 100-acre tract, but, citing the rationale of *Carroll,* concluded the facts presented satisfied the three elements essential to creation of an easement by implication.

This Court's opinion in *Carroll* clearly outlines the context in which we review the trial court's conclusion that an easement by implication exists over the forty-acre tract.

> Generally, an easement may be created by express written grant, implication, prescription or estoppel. Easement by implication includes two legal theories: (1) quasi-easement and (2) easement or way by necessity. A quasi-easement arises from a prior existing use of land; whereas, an easement by necessity is based on public policy and an implied intent of the parties favoring the use and development of land as opposed to rendering it useless. Easements are not favored and the party claiming the right to an easement bears the burden of establishing all the requirements for recognizing the easement.
>
> **A quasi-easement is based on the rule that "where the owner of an entire tract of land or of two or more adjoining parcels employs one part so that another derives from it a benefit of continuous, permanent and apparent nature, and reasonably necessary to the enjoyment of the quasi-dominant portion, then upon a severance of the ownership a grant or reservation of the right to continue such use arises by implication of law." Generally, in order to prove a quasi-easement by implication of law, a party must show: (1) that there was a separation of title from common ownership; (2) that before the separation occurred the**

> **use which gave rise to the easement was so long continued, obvious, and manifest that it must have been intended to be permanent; and, (3) that the use of the claimed easement was highly convenient and beneficial to the land conveyed.** Because a quasi-easement involves the intentions of the parties, the date the unity of ownership ceases by severance is the point of reference in ascertaining whether an easement has been imposed upon adjoining land.
>
> **Factors relevant to establishing a quasi-easement include: "(1) whether the claimant is the grantor or the grantee of the dominant tract; (2) the extent of necessity of the easement to the claimant; (3) whether reciprocal benefits accrue to both the grantor and grantee; (4) the manner in which the land was used prior to conveyance; and (5) whether the prior use was or might have been known to the parties to the present litigation."** The courts imply an easement more readily in favor of a grantee than a grantor because a grantor has the ability to control the language in the deed to express the intentions of the parties. **Whether the prior use was known, involves not absolute direct knowledge, but "susceptibility of ascertainment on careful inspection by persons ordinarily conversant with the subject."** Also, the use must be "reasonably necessary" meaning more than merely convenient to the dominant owner, but less than a total inability to enjoy the property absent the use.

Id. at 489-90 (footnotes omitted; emphasis added).

As previously noted, the trial court evaluated the *Carroll* factors and stated:

> [t]his Court conducted a visual inspection of the property on June 19, 2009 and noted there is indeed a "passway," albeit in great disrepair, traversing the Blandford property and reaching the Miles property. After inspecting the property and considering the parties' arguments, **the Court is satisfied the Defendants [Miles] have sufficiently demonstrated that while there is no question that the facts bear out the prior owners' use of the easement over the years before the**

> **sale of the property such that one could consider this a quasi-easement, they have also shown more certainly that this is a case of easement by necessity.**

(Emphasis added). Thus the trial court determined its factual findings *could* support an easement by implication under either the easement by necessity theory —which it favored—or under the quasi-easement theory.

While the trial court found there was no express or implied easement, it concluded there was an easement by necessity based on the following facts: 1) unity of ownership of the dominant and servient estates existed when both were owned by Mr. McGehee; 2) unity of titles was severed when the property was sold in separate parcels; and 3) necessity of the use of the servient estate existed at the time ownership was divided to provide access to the dominant estate. The trial court clarified the third factor, stating there was evidence of access to the Miles property from the adjoining Waddell property, but it was impassable, impractical, and impossible to traverse because of the terrain. Thus, the trial court concluded, on the basis of the evidence presented, an easement by necessity had been created.

Citing *Carroll,* Blandford first argues an easement by necessity is unavailable where there is access to a portion of the dominant estate even though topography makes access to another part of the tract extremely difficult. Review of that decision clearly supports Blandford's contention:

> A way of necessity generally will not be implied if the claimant has another means of access to a public road from his land however inconvenient. In addition, courts applying the strict necessity standard have rejected the creation of an easement by necessity to a portion of a

> claimant's property where any part of the property abuts or has direct access to a public road. A party seeking an implied easement has the burden of proving the existence of the easement by clear and convincing evidence.

59 S.W.3d at 491-92 (footnotes omitted). In short, mere inconvenience—regardless of the level—does not reach the standard of necessity required to establish an easement.

While we believe the trial court erred in concluding an easement by necessity had been created, we agree with the trial court's finding that a quasi-easement existed. We affirm on that basis.

The evidence supporting existence of a quasi-easement included: 1) separation of title from common ownership; 2) before separation occurred, use giving rise to an easement was so obvious and manifest it must have been intended to be permanent; and, 3) use of claimed easement was highly convenient and beneficial to the land conveyed. Because sufficient evidence supported the trial court's findings as to each of these factors, we may not set those findings aside as clearly erroneous.

Blandford insists, however, the issue of easement by implication, particularly under the quasi-easement theory, was never properly pleaded and thus, the trial court erred in addressing that issue *sua sponte*. We are unpersuaded the trial court overstepped its authority. A similar contention was considered and rejected by our Supreme Court in *Arnold v. Heffner*, 330 S.W.2d 943, 945 (Ky. 1959).

> It is further contended by appellants that defendants could not rely upon title by adverse possession because they failed to plead the statute of limitations as is required by CR[1] 8.03. They submit also that the court was in error in considering depositions of the defendants because the time granted for the taking of depositions had expired when they were taken.
>
> CR 8.03 provides that in pleading to a preceding pleading a party shall set forth affirmatively certain enumerated defenses, among which is 'statute of limitations.' The question is whether this rule mandatorily requires that adverse possession be pleaded in defense of an action in ejectment, which is essentially an action to recover possession of land.
>
> Under the former Code a plea of the statute of limitations as a defense was required unless the fact of a bar was disclosed in the petition. Rule 8.03 seems to be declaratory of settled rules of pleading long in effect, particularly as to the statute of limitations. **It was not necessary under the Code that a party in an ejectment action set up the source or character of his title or that the defendant set up title by answer, it being sufficient for the defendant to deny wrongful possession.** In *Harmon v. Lowe*, 310 Ky. 60, 219 S.W.2d 982, it was held in an action to recover land in possession of the defendant that mere denial of title was sufficient and it was not necessary that the defendant set up title in himself. In *Powell v. Jones*, 294 Ky. 386, 171 S.W.2d 994, it was held adverse possession could be proved where it is available. **We construe Rule 8.03 as not requiring a defendant to plead adverse possession merely to refute by evidence an allegation of his wrongful possession.**

(Emphasis added, citations omitted). This Court has more recently reiterated "notice pleading" does not implicate procedural due process where "the pleadings gave fair notice" of the nature of the proceedings.

[1] Kentucky Rules of Civil Procedure

> Inasmuch as notice pleadings prevail in Kentucky practice, we see no necessity for anything more. The emphasis is on substance over form and discovery over pleading. We construe that substantial justice was done in that the pleadings gave fair notice of what was taking place; therefore, procedural due process was not lacking. *See* CR 8.01, CR 8.05 and CR 8.06.

V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420, 425-26 (Ky. App. 1986).

So it is in this case. Blandford cannot legitimately argue they lacked notice that Miles claimed the right to utilize the passway under a claim of an easement to do so. Neither can Blandford claim a denial of procedural due process. The character and extent of the passway was explored in detail at trial, as was the issue of Blandford's notice of the existence of the passway. On these facts, the trial court did not err in concluding a quasi-easement had been legally established by the facts before it.

Even though we hold the trial court did not err in concluding an easement by implication had been established under the quasi-easement theory, Blandford further argues KRS[2] 411.190(8) precluded imposition of such an easement where the claimed use of the dominant estate is solely for recreational purposes. However, Miles counters by arguing that KRS 411.190(8) is inapplicable because the dominant property for which the easement is intended was not solely used for recreational purposes. Miles asserts the dominant property is also suited for the purposes of timbering and farming, and because he intends to sell a portion of the

[2] Kentucky Revised Statutes

property for such activities—in addition to hunting and recreation—it is also being used for the purpose of investment. This assertion by Miles finds support in testimony offered by Blandford's witness, Joe LeBlanc, a neighboring landowner, who stated that a timber company had improved and made use of the passway for timbering activities connected with the dominant property during a two-year period covering approximately 1997-98. Thus, even if we were to adopt the narrow application of KRS 411.190(8) urged by Blandford, there was sufficient proof to establish the dominant property serviced by the easement was suitable for more than a recreational purpose, and had been utilized for such additional purposes in the past. Accordingly, we must conclude KRS 411.190(8) is inapplicable to the case *sub judice*.

Finally, in its cross-appeal, Miles asserts that under established caselaw it has demonstrated existence of an easement appurtenant which could not be extinguished by the failure to include the easement language in the deed to the servient estate. The nature of an easement appurtenant was very clearly explained in this Court's opinion in *Dukes v. Link*, 315 S.W.3d 712, 715 (Ky. App. 2010):

> 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.

Of particular relevance to this appeal and cross-appeal, *Dukes* makes clear that "the general rule applicable to easements in this Commonwealth is that the recording of the instrument that grants an easement by a common grantor binds a subsequent purchaser of the tract burdened by the easement regardless of whether it is included in the purchaser's deed." *Id*., 315 S.W.3d at 717. *Dukes* further explained the rationale underpinning that general rule.

> Moreover, easements exist even when the deeds of the dominant and servient tenements do not mention an easement:
>
> > "The authorities are agreed, and such is the rule in this state, that where the owner of an entire tract of land, or of two or more adjoining parcels, employs a part thereof so that one derives from the other a benefit or advantage of a continuous and apparent nature, and sells the one in favor of which such continuous and apparent quasi-easement exists, such easement, being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication."
>
> *Swinney v. Haynes*, 314 Ky. 600, 603–604, 236 S.W.2d 705, 707 (1951) (quoting *Hedges v. Stucker*, 237 Ky. 351, 35 S.W.2d 539, 540 (1931)).
>
> The legal reasoning of our predecessors was not novel and remains in conformity with the general rule as cited in 25 Am.Jur.2d *Easements and Licenses in Real Property* § 93 (2004):
>
> > A person who purchases land with knowledge or with actual, constructive, or implied notice that it is burdened with an easement in favor of other property ordinarily takes the estate subject to the

> easement. On the other hand, a bona fide purchaser of land without knowledge or actual or constructive notice of the existence of an easement in such land generally takes title free from the burden of the easement. This rule is broad enough to include all easements, whether created by implication, prescription, or express grant. **However, one who purchases land burdened with an open, visible easement is ordinarily charged with notice that he or she is purchasing a servient estate.**
>
> **Under the general rule that a purchaser of land subject to the burden of an easement takes the estate subject to the easement if he or she has notice of its existence at the time of purchase, the proper recordation of the instrument containing the grant of the easement is sufficient notice**.
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> * * *
>
> In the present case, a common grantor first conveyed lot 12 by a recorded deed that created an express easement over the property later conveyed to the Dukes. Thus, at the time the property was conveyed to the Dukes, an ordinary title search back to the common grantor of the larger tract would have revealed that lots 10 and 11 were encumbered by an easement in favor of lot 12.
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> Not only do our recording statutes mandate the result reached in this case, but to hold otherwise would leave the holders of easements subject to the whim of a common grantor who could defeat that interest by conveying the same interest to multiple grantees by omitting the easement from the deeds. **We conclude that the general rule applicable to easements in this Commonwealth is that the recording of the instrument that grants an easement by a common grantor binds a subsequent purchaser of the tract burdened by the easement regardless of whether it is included in the purchaser's deed.**

Dukes, 315 S.W.3d at 716-17 (footnote omitted, emphasis added).

The analysis in *Dukes* is wholly in keeping with the trial court's conclusion that an easement by implication had been established by the determined facts. Thus, the fact that this theory may not have been specifically argued to the trial court is not a bar to its application in the course of this Court's *de novo* review. We are convinced that on the basis of the determined facts, *Dukes* requires the conclusion that Blandford took the forty-acre tract subject to the easement specifically created in Miles' deed from a common grantor.

Accordingly, the judgment of the Hart Circuit Court is affirmed.

ALL CONCUR.

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