

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000962-MR

EDDIE K. JARVIS

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT  
HONORABLE DOUGLAS M. GEORGE, JUDGE  
ACTION NO. 08-CI-00081

ROBERT KEY; STANLEY KEY;  
MARGARET KEY; ORA MCGILL;  
FRANKIE KEY; HERSHEL KEY;  
LULA MCGILL; CORA KENNEDY;  
AND RUBY GRAVES

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Eddie K. Jarvis appeals the order of the Clinton Circuit Court finding that he had not acquired a prescriptive easement across the appellees' property. After a thorough review of the record, we affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Eddie and his siblings acquired a tract of land via inheritance from their grandfather, James Granvil Jarvis, in the 1970's. Eddie's siblings each transferred their interest in the property to Eddie making him the sole owner of the tract. The appellees own an adjacent tract of land which they acquired via inheritance from their father, Jimmy Lee Key. The parties do not dispute the existence of an unimproved roadway running through the appellees' farm to the Jarvis tract. However, the parties contest Eddie's right to use the roadway to access his property.

Although Eddie does not use his tract for any specific purpose, he asserts that he used the roadway to visit the property approximately once a month since the time he took ownership of the property in 1973. Eddie recalls traveling the roadway with his grandfather as a child and that his grandfather and Jimmy Lee Key were good friends. The roadway traveled by Eddie and his grandfather to access the Jarvis tract passes by the Key home, and Eddie and his grandfather would stop to visit with Jimmy Lee Key after traveling the roadway. Odell Key and Hershel Key still reside in the Jimmy Lee Key home. Eddie said that the roadway had always been used to access the property, and that there was never a gate over any portion of the roadway. Eddie's girlfriend testified that she had traveled the roadway with Eddie once or twice a year and that there was never a gate across the roadway. She also testified that she and Eddie had never asked permission to use the roadway.

The appellees assert there has always been a gate across the property although they did not keep it locked at all times until after their father's death in 2003. The Keys' neighbor, Tommy Phillips, who grew up in the house in front of the Key home and was familiar with the properties in question, also indicated that there had been a gate across the roadway at the barn "for as long as he could remember"; that it remained closed the majority of the time; and that there was also a gate next to where the roadway entered the woods.

The appellees also argue that they were unaware that Eddie used the roadway to access his property. Odell Key, who has lived on the property for forty-five years and farms the Jarvis tract during the day, contended that he has never seen Eddie pass through their property, with the exception of one occasion on which he and his father walked the property lines with Eddie. Likewise, Hershel Key, who has lived in the Key home all of his life, indicated that he had never seen Eddie use the roadway through the farm. Robert Key, who lived on the property from 1965 to 1996 with the exception of serving in the military from 1988 to 1991, had never seen Eddie on the property. Robert did indicate that he had seen Eddie's vehicle on the Key property in 2004 and had left a note on the vehicle informing Eddie that he was trespassing. After the death of Jimmy Lee Key, the appellees kept the gate locked at all times. Consequently, Eddie brought this action to establish that he had obtained an easement by prescription across the roadway.<sup>1</sup>

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<sup>1</sup> Eddie argued at the trial court level that he was entitled to use the roadway under alternate theories. However, those arguments are not before us on review.

Utilizing an advisory jury, which determined that Eddie had failed to prove the elements required to establish an easement by prescription, the trial court accepted the jury's ruling and dismissed Eddie's complaint. Eddie then filed a motion to alter, amend, or vacate the order and requested additional findings of fact and conclusions of law. The trial court granted Eddie's motion in part by setting aside the December 6, 2010 judgment originally entered and entered an order dated May 9, 2011, containing additional findings of fact and conclusions of law. The trial court found, in relevant part, that:

[T]here is a dirt road bed which extends from the end of the blacktopped road through the Key Farm to the general vicinity of the Jarvis property[;]

[T]he evidence presented was that the Jarvis family had sporadically used the roadway in question to access their property for many years. However, Jarvis could not offer any definite testimony as to how often he used the roadway over the years[;]

Further, there had been no harvesting of timber, no agricultural activities, or any other utilization of the Jarvis property for any such continued purpose through the years. Jarvis made no improvements upon the land during his period of ownership. The property in question was simply there. Jarvis testified that he traveled to the property on rare occasions via the roadway in question[;]

The evidence presented by the [appellees] was that for years they did not see Jarvis use or utilize the road in any manner, and in recent years had only seen him there when the controversy between the parties arose in 2003[;]

That there was also substantial testimony that the Key Heirs maintained gates on the property for several years,

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generally locked, and that Jarvis did not possess a key to same[; and]

The evidence presented failed to show continuous use of the roadway by Jarvis.

The trial court therefore concluded that the evidence at trial did not support

a finding of actual, hostile, open and notorious, exclusive, and continuous use of the roadway in question for a period of fifteen (15) years or more by [Eddie] or his predecessors in title. . . . [T]herefore, Eddie K. Jarvis has no right of usage of said road or roadway across the Key Farm to access his adjacent property.

Eddie now appeals.

## II. STANDARD OF REVIEW

A court is not bound by the determination of an advisory jury.

*Emerson v. Emerson*, 709 S.W.2d 853, 855 (Ky. App. 1986). Accordingly, the court must make its own findings of fact and conclusions of law. *Id.* We review the factual findings of a trial court for clear error and give due regard to the opportunity of the trial judge to consider the credibility of the witnesses. CR<sup>2</sup> 52.01; *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995). Findings of fact are clearly erroneous only if they are not supported by substantial evidence. *Black Motor Company v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). The test for substantiality of evidence is whether the evidence, when taken alone, or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298,

<sup>2</sup> Kentucky Rule of Civil Procedure.

308 (Ky. 1972); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999).

### III. ANALYSIS

On appeal, Eddie argues that the trial court erred by 1) applying the incorrect standard for an easement by prescription, and 2) failing to require that the appellees prove that Eddie's use of the roadway was permissive.

To prevail in an action for an easement by prescription, a party must prove that his possession of the easement was actual, open, notorious, forcible, exclusive, and hostile for a period of fifteen years or more. *Jackey v. Burkhead*, 341 S.W.2d 64, 65 (Ky. 1960). However, the standard for obtaining an easement by prescription is somewhat more lenient than the standard for proving that one has obtained a tract of land by adverse possession. “[A] private passway may be acquired by prescriptive use although the right of way is not strictly a subject of continuous, exclusive, and adverse possession. It is sufficient if the use exercised by the owner of the dominant tenement is unobstructed, open, peaceable, continuous, and as of right for the prescribed statutory period.” *Lyle v. Holman*, 238 S.W.2d 157, 160 (Ky. 1951) (internal quotations omitted). “The acts necessary to acquire an easement by prescription depend on the nature of the interest possessed: [T]he physical nature of the thing possessed must determine the character of the acts necessary to impart notice that the right to use or possess is asserted and exercised without consent . . . .” *Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc.*, 15 S.W.3d 727, 730 (Ky. 2000).

Furthermore, a party cannot acquire a prescriptive easement where the use of a roadway was with permission of the owner of the servient tract. *Jackey*, 341 S.W.2d at 65. If at the onset the use of a roadway is permissive, the use necessary to acquire an easement by prescription must be with the knowledge of the owner of the dominant tract. *Cole v. Gilvin*, 59 S.W.3d 468, 475-76 (Ky. App. 2001). Finally, “where the claimant has shown such long continued use, it will be presumed that the use was under a claim of right, and the burden is upon the owner of the servient estate to show that the use was merely permissive.” *Pickel v. Cornett*, 285 Ky. 189, 147 S.W.2d 381, 381 (1941).

Eddie first asserts that the trial court applied the incorrect standard with respect to the requirement for continuous use. He argues that the trial court erred by applying the stricter standard of use necessary to prove adverse possession of a tract of land, rather than the lesser standard necessary for an easement by prescription, *i.e.*, use exercised in accordance with the nature of the interest being asserted. In other words, Eddie believes that the trial court erred by finding that Eddie had not made sufficient use of the roadway to establish his right to an easement by prescription.

We need not reach Eddie’s argument that the trial court applied an incorrect standard because the trial court’s determination was not based upon any question of law. Rather, the trial court made a determination in its capacity as fact-finder. Although Eddie testified that he had used the roadway in excess of two hundred and fifty times since obtaining ownership of the Jarvis tract, the appellees

presented sufficient evidence to rebut Eddie's testimony that he had made regular use of the roadway. In fact, the appellees' testimony reveals that the appellees had the opportunity to observe parties traveling across their property and had no knowledge that Eddie made use of the roadway at any time after the death of Eddie's grandfather. The trial court found that the appellees' testimony that Eddie has not made use of the road to be more credible. It was within the province of the trial court to do so. Accordingly, we find no error with the trial court's conclusion that the evidence at trial did not support a finding that Eddie made continuous use of the roadway.

We next turn to Eddie's argument that the trial court erred by failing to require the appellees to prove that his use of the roadway was permissive. As mentioned previously, an easement by prescription may not be acquired where it is evident that use of the easement was permissive. *Jackey*, 341 S.W.2d at 65. Even so, "where the claimant has *shown* such long continued use, it will be presumed that the use was under a claim of right, and the burden is upon the owner of the servient estate to show that the use was merely permissive." *Pickel*, 147 S.W.2d at 381 (emphasis added). However, Eddie's argument presupposes that Eddie made a showing of continued use. For the reasons mentioned above, Eddie failed to prove continued use such that the burden would shift to the appellees to prove permissive use.

With respect to Eddie's predecessors in title, very little testimony was presented at trial regarding Eddie's grandfather's use of the roadway. Eddie



testified that his grandfather had always used the roadway to access the Jarvis tract; he recalled traveling the roadway with his grandfather to visit the Jarvis tract; and he and his grandfather would visit with Jimmy Lee Key on these trips. However, Eddie did not present any more specific testimony regarding the frequency or duration of his grandfather's use of the roadway. Accordingly, the evidence was not sufficient to shift the burden to the appellees to prove permissive use.

Accordingly, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

James M. Frazer  
Monticello, Kentucky

BRIEF FOR APPELLEE:

David M. Cross  
Terran Cross Helm  
Albany, Kentucky